IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN THE MATTER OF THE SEARCH OF UDF 1301 MUNICIPAL WAY GRAPEVINE, TEXAS 76051	Case No. 3:21-mc-284-B

UDF'S REPLY TO GOVERNMENT'S RESPONSE TO
MOVANT'S MOTION FOR RETURN OF PROPERTY

I. INTRODUCTION

The response by the government in opposition to UDF's Rule 41(g) motion for return of privileged and out of scope materials seized from UDF's headquarters more than 5 ½ years ago is a sordid and nonsensical exercise in deflection, misdirection, and obfuscation unworthy of the standards to which the United States should be held. Despite the recent ruling in *Harbor Healthcare System, L.P. v. United States,* 5 F. 4th 593 (5th Cir. 2021), the government unilaterally and categorically refuses to disclose to the court whether and where it ever had a Filter Team in place, or its protocols and durational contours, if any, as well as contemptuously refusing to return vast quantities of UDF's privileged and out-of-scope documents seized during the execution of an, at best, dubious search warrant at UDF, more than a half-decade ago.

Most telling, the government attempts to casually deflect the consequential impact of *Harbor HealthCare*'s "callous disregard" finding in the face of the government's preposterous and unattested claim that they did not know "with certainty" that there would be privileged materials housed at UDF's headquarters. The government makes this unsworn averment despite not contesting the sworn averments in UDF's motion. The weight of the evidence here, similar to that in *Harbor Healthcare*, simply collapses on the government's disingenuous averments.

While utterly failing to explain their initial and continued failures to have in place

appropriate and mandatory protocols to protect UDF's known and extant privileged material while sorting through the seized evidence during their investigation (now in its seventh year), the government, astonishingly, tries to shift ***its*** burden to protect the attorney-client privilege onto UDF. And now, for the first time, the government indicated that it believed that UDF and its target executives have somehow, at some as yet unspecified moment in time, "waived" its right to the privacy of privileged materials. These disingenuous attempts to simply shift its burden and allege waiver deserves no countenance.

The government conspicuously avoids addressing the following abdications of their sacred legal obligations: (1) not subpoenaing UDF for the materials sought as required by the Justice Manual ("JM"); (2) not complying with JM procedures for handling of privileged material both during and after the execution a search warrant; (3) not advising the judge of the likely encounter with privileged material as required by the JM; (4) improperly handling the seized privileged information; (5) failing to have an intact Filter Team in place at all times during the filter review process; (6) failing to advise UDF or the court of the purported parameters of their review process prior to actual review and promotion of the material; (7) refusing to permit UDF an opportunity to contest the protocols prior to promotion of materials to the Prosecution Team; (8) failing to permit a judge to approve any proposed privilege review protocol; (9) refusing to identify materials promoted to the Prosecution Team; (10) seizing "attorney-client privileged" materials; (11) refusing to designate privileged materials as such in their inventories; (12) refusing to return the seized out-of-scope documents; and (13) failing to protect UDF's privileged materials once seized. The law of this Circuit and equity mandate return ***of all*** UDF's seized materials.

II. RELEVANT PROCEDURAL HISTORY

While the government's response to UDF's Rule 41(g) motion regales the Court with a

mishmash of unverified allegations and events designed to falsely portray the appearance of an orderly process of evidence collection, review and sharing, during and after the search, as well as an agreed upon privilege review process and timelines, quite the contrary is actually true.[1] First, knowing that UDF was in the throes of a years-long parallel investigation by the SEC, more than 100 agents, including the Prosecution Team's Lead Agent, Christine Edson, descended upon UDF and rummaged from room-to-room and seized virtually every physical and electronic document--effectively removing UDF's entire business and walked out the door with it. The unwarranted search[2] resulted in the seizure of three categories of electronic data containing volumes of privileged material, including: (1) all of UDF's electronic records stored on UDF's main servers; (2) electronic records stored on personal electronic devices (11 Apple iPhones, 20 external hard drives/thumb drives and 25 laptops/desktops) seized from UDF employees; and (3) physical hard copy materials (over 750 boxes)—in all, more than 40 terabytes of data.[3]

With respect to the 40+ terabytes of electronic information and data stored on UDF's seized main servers and hard drives, the government duplicated that material, consisting of UDF's entire electronic business platform.[4] Within a week of the search, on February 25, 2016, counsel for UDF provided to the Prosecution Team—not a designated Filter Team-- a list of lawyers and law

[1] It would seem an evidentiary hearing might be appropriate here should the court want to consider any of the government's unsworn assertions of fact.
[2] The government remarks that UDF "complains *ad nauseum* that this search was 'illegal' and 'unconstitutional'" but that "no court has found any defect in the warrant or warrant application." Other than UDF's extant Rule 41(g) motion and the *Bivens* action that was filed in the Eastern District of Texas, we are unaware of any vehicle to challenge or pre-charge, the legality and constitutionality of the government's actions with respect to the government's unlawful conduct in procuring and effectuating the search. Curiously, the government has never factually rebutted UDF's allegations in this regard. Of particular note here, the government has assiduously avoided "investigating" or factually contesting the evidence that a member of the Prosecution Team unlawfully "tipped off" hedge-fund short-seller Kyle Bass as to the date and time of the execution of the search warrant at UDF. See Pelletier Decl, Ex's 5-17. We continue to await a sworn response.
[3] *See* Ty Fowle Declaration. To envision the vast quantity of electronic information seized during the illegal and unconstitutional search by the Prosecution Team, the entire printed collection of the U.S. Library of Congress would consume only10 terabytes of data. The government improperly seized more than four times that amount of electronic data in the UDF search.
[4] It is worth noting that despite the seizure of more than 40 terabytes of electronic data, the government, after more than 5 ½ years, has not fulfilled its constitutional obligation to return to UDF the seized out-of-scope material.

firms to be used as preliminary search terms for Filter Team privilege review purposes. On February 26, 2016, Prosecution Team Lead Case Agent Edson, not a Filter Team Agent, delivered most of the duplicated electronic data to UDF.[5]

Over the next three years UDF was forced to routinely visit the FBI offices to examine the contents of the seized boxes to retrieve information necessary to the operation of UDF's business and their financial reporting obligations. *See* Howell Declaration at ¶¶ 3-9. Reluctantly, in January 2019, UDF filed a sealed motion[6] pursuant to Rule 41(g) demanding return of copies of these seized physical documents.[7] Finally, in January 2019, the Prosecution Team relented and turned over some of the original loan files to UDF, an uncharged company,[8] and *began* to scan copies of the physical documents seized in the search. *Id*. at ¶¶ 15-16.

The government's response also avers, absent oath, that in May 2018 "**UDF's counsel contacted the government** seeking permission to review the evidence seized from Ms. Youngblood's office so that UDF could identify specific items to which UDF was *not* asserting privilege." To the contrary, soon to be former AUSA Nick Bunch, *the lead prosecutor on the Prosecution Team*, specifically reached out to counsel for UDF and requested that UDF review 12 boxes of documents, sequestered by the government utilizing an unknown selection process, for *privileged* material including some documents allegedly seized from in and around attorney Youngblood's office. *Id.* ¶9. Because the seized physical documents had not yet been either Bates-

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[5] On March 1, 2016, Prosecution Team Lead Agent Edson, not a filter team agent, returned the remaining four (4) imaged iPhones to UDF.

[6] UDF was required to file a sealed motion because the government has corruptly refused to unseal both the search warrant affidavit and any motion to seal the search warrant. This practice of sealing white collar search warrant affidavits indefinitely has been harshly criticized. *See* Horan*, Breaking the Seal on White Collar Criminal Search Warrant Materials*, 28 Pepp.. L. Rev. 317 (2001).

[7] The government attempts to manufacture some sort of "relevance" with respect to the government's preliminary Rule 41(g) motion filed under seal in January of 2019. That motion did not seek return of privileged documents and has no relevance here.

[8] While the government agrees that UDF is not a target of their investigation, asserting the attorney-client privilege rights of the target executives remains pertinent here. *See United States v. Neil,* 952 F. Supp. 834, 839 (D.D.C. 1997)("It matters little whether the intrusion occurred prior to the initiation of formal adversary proceedings . . . because the right to a fair trial could be crippled by government interference with the attorney-client privilege long before the commencement of a criminal proceeding.")(citation omitted).

stamped, inventoried or copied, counsel for UDF was required to attempt to conduct its preliminary review at the FBI offices. *Id.* at ¶¶ 10-11. This lack of documentation and itemization made it difficult, if not impossible, to determine the seizure locations of the documents or to effectively process or document the preliminary privilege work. *Id.* at ¶13.[9] After multiple frustrating days of determined effort,[10] UDF counsel preliminarily reviewed 12 boxes of documents and removed and segregated from those boxes approximately 2 boxes that contained readily ascertainable privileged material, *i.e.,* much of which was clearly marked "attorney-client privilege."[11] *Id.* at ¶¶ 10-11.

Because of the government's failure to categorize, mark or designate the individual pages of the seized physical documents, it was virtually impossible for UDF counsel to itemize with any reasonable degree of specificity the privileged nature of the non-segregated materials. *Id*. at ¶13. Through early 2019, the government had not (1) updated UDF counsel as to the status of the government's filter review process or protocols with respect to any of the seized information; (2) returned any out-of-scope material; (3) returned the 2 segregated boxes of privileged material segregated in June 2018; (4) returned the seized files that were plainly marked "attorney-client privileged"; or (5) sought approval of an appropriate privilege review process by the court. *Id.* It wasn't until July 2021 that the third Filter Team AUSA, while steadfast in his refusal to discuss its proposed privilege review and evidence promotion protocols, demanded that, *after 5 ½ years,* ***UDF*** *bear the cost, burden and time* of reviewing approximately 60,000 emails authored by Melissa Youngblood which would be provided to UDF.[12] At no time until the filing of their reply brief has the government asserted

[9] It was not until January of ***2019*** that the Prosecution Team produced a rough diagram where the FBI had depicted the general vicinities from which the documents were alleged to have been seized and an inadequate, but more specific and fulsome, inventory of seized items. *Id*. at ¶16.

[10] One FBI agent assigned to monitor UDF counsel during this preliminary privilege review, confided to UDF counsel that he had been taken aback by the overbroad nature of the search as it made it impossible for the agents to identify with any degree of particularity what was required to be seized — so "the agents took everything!" Howell Decl. ¶12).

[9] Despite finding within these boxes, documents and files plainly and clearly marked as containing "attorney-client privilege," it is at least perplexing that nothing in any FBI seizure inventory even remotely suggests that any seized materials were marked as "privileged," but instead are curiously marked as "miscellaneous."

[12] The government, even in the wake of *Harbor Healthcare*, apparently has declined to seek court approval of any processes, protocols and personnel they would utilize to identify and select these particular emails.

that UDF, by rejecting the government's suggested process, had in fact waived its right to seek return of the privileged material.

III. *HARBOR HEALTHCARE* MANDATES RETURN OF PRIVILEGED MATERIAL

a. *Callous Disregard*[13]

In its reply at page 15 the government concedes, as it must, that *Harbor Healthcare* found that the movants' established satisfaction of the Rule 41(g) *Ritchie* standards where:

> (a) the government did not seek express prior authorization from the issuing magistrate judge for the seizure of attorney-client privileged materials; (b) the government knew that there were privileged documents in the office of Harbor's compliance director; and (c) the government refused to return materials it agreed were privileged after the search.

In their reply, the government tellingly offers no evidence of "authorization from the issuing magistrate judge for the seizure of attorney-client privileged materials" prior to the search. Confounding, and despite admitting earlier in the reply that the "government knew that UDF's Chief Operating Officer Melissa Youngblood was an attorney, and in anticipation of searching her office, employed a heretofore secret team of filter agents to search her office and the surrounding area," (Government Reply at p. 2).[14] Yet, on page 15 the government later states the opposite "here the government did not know with certainty that UDF's offices contained privileged materials." [15] This averment is categorically false and lacks ethical rigor. Any rational prosecutor would know that UDF would naturally generate reams of attorney-client communications. Moreover, the government does not dispute that it knew that UDF, for approximately one year prior, was defending a parallel SEC/USAO investigation regarding accounting issues and that UDF had both hired outside counsel and an independent law firm.

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[13] The government graciously concedes that UDF has no adequate remedy at law for the relief it seeks.

[14] Again, the government has offered no sworn affirmation of these averments. Should the government persist in maintaining their materiality, an evidentiary hearing would be necessary.

[15] The government continues, to this day (5 1/2 years after the search) to refuse to divulge or seek court approval for its secret protocols (if any) for sorting through Ms. Youngblood's seized electronic data. This is precisely the type of callousness criticized in *Harbor Health*.

The government also does not counter the averments in UDF's motion that Lead Prosecution Team FBI Agent Edson directed the search of the UDF's attorney's office and directed the seizure of files specifically marked "attorney-client privilege" as well as files containing reams of patently privileged material. The government acknowledges that ***no*** privileged materials have been returned to UDF and, they have failed and refused to seek court approval for a process or protocol to review the privileged information it seized and to pass evidence to the Prosecution Team.[16]

b. ***Need for the Seized Material***

Harbor Health makes clear that "need" for the material is defined, not by virtue of a business necessity, but in the need to protect the privileged nature of materials: "[An entity's] need [for return of its privileged materials] does not lie in accessing the government's copies. Rather, it lies in protecting the privacy of privileged materials. . . . The whole point of privilege is privacy," *Harbor Healthcare* at p. 20 (citation omitted). The Court further found as unacceptable that the government held Harbor's privileged material "for over four years." *Id.*

The government does not contest that it knowingly possesses UDF's privileged material. Indeed, they do not deny (1) that they have seized privileged material from in or around attorney Youngblood's office; and (2) that they have seized volumes of documents that are plainly marked as "attorney-client privileged." Here, the government is putting the proverbial cart before the horse in an attempt to blame-shift rather than address the consequences of their action. To be clear, unless and until there is a court sanctioned protocol for reviewing the seized evidence, as *Harbor Healthcare* recognizes, it is simply not UDF's burden to preemptively review the seized material.

[16] The best the government can offer here is that during a preliminary review of physical documents seized from the office space of UDF's attorney, "Mr. Howell flagged certain documents as privileged." The government does not, however, attest to adherence to any post-review court-sanctioned privilege review protocol, as required by *Harbor Health*, after UDF counsel preliminarily "flagged" certain documents as privilege protected. Nor does the government answer why it has refused to return these privileged documents after multiple requests to do so.

c. *Irreparable Injury*

As set forth in our motion, *Harbor Healthcare* plainly links the "irreparable injury" *Ritchie* factor to the government's unlawful possession of seized privileged material: "Harbor remains injured as long as the government retains it privileged documents. That injury can only be made whole by the government returning and destroying its copies of the privileged material." The government, while failing to acknowledge or deny its possession of massive quantities of privileged information, again blames the government for not scouring a pre-court approved protocol, the more than 40 terabytes of information seized by the government. Neither *Harbor Healthcare* nor *Ritchie* place that burden on the entity deprived of its' privileged material.

IV. UDF HAS NOT WAIVED ITS RIGHT TO PRIVATE PRIVILEGED MATERIAL

The government's entire argument here seems to be premised on the novel proposition that ***5 ½ years after*** the execution of the bogus search warrant, UDF was somehow mandated, absent court intervention, to review the remaining hundreds of boxes of seized documents and the more than 40 terabytes of electronic data and prepare a privilege log which should be then delivered to the government. The government also appears to be taking the position that when UDF refused to review the 60,000 Youngblood emails under the terms dictated by the government (more than 5 years after the search and without sanctioned protocols), that they may then unilaterally (without notifying either UDF or the court) deem the attorney-client privilege waived.

Notwithstanding their refusal to divulge its unapproved privilege and promotion protocols, if any, the government improperly attempts to shift onto UDF its legal burdens with respect to the handling of private attorney-client privileged material the government seized during the execution of a troubled search warrant. Moreover, the government, rather than seek relief from the court with respect to UDF's July 2021 refusal to abide by the government's unlawful demands, now

maintains that UDF's refusal to acquiesce in these demands has somehow waived its privacy rights in the materials, in perpetuity, to ***all*** of UDF's seized privileged documents.[17]

V. THE RESPONSIBILITY TO PROTECT THE PRIVILEGE OF SEIZED DOCUMENTS RESTS SOLELY WITH THE GOVERNMENT

Seeking to avoid the dictates of the recent *Harbor Healthcare* ruling, the government baldly avers that "UDF has waived *any privilege* by failing to assert it on a document-by-document basis despite having ample opportunity to do, and despite a specific (though unnecessary) invitation by the government to do so." The government knows better.[18]

In this case, as in *Harbor Healthcare*, the government seized privileged material via search warrants. In *Harbor Healthcare*, like here, the Court was concerned that the government had not notified the search warrant-authorizing magistrate judge of the government's likely encounter with a large quantity of privileged material. Also, subsequent to the search, Harbor, like UDF here, provided a list of law firms and lawyers for the government's use in preliminarily screening the seized documents for privilege. Unlike here, in *Harbor Healthcare* the government provided to Harbor a list of items that had been turned over to the Prosecution Team. Because that list contained numerous privileged items, Harbor requested that the government "return all seized documents to Harbor." The *Harbor Healthcare* court admonished the prosecutors as they "made

[17] In Section I heading of its reply the government makes the odd statement "UDF's Counsel Initially Agreed, but the [sic] Refused to Assert Privilege Over Specific Documents." Nowhere in Section I, however, does the government cite to any such agreement or subsequent refusal with respect to the improperly seized materials.

[18] When the government seizes potentially privileged material, through the execution of a search warrant, the burden of protecting the sanctity of privileged material must vest solely with the government. *See In re: Search Warrant Issued on June 13,2019,* 942 F. 3d 159, 183 (4th Cir. 2019), as amended (Oct. 31, 2019)("We simply observe that prosecutors have a responsibility to not only see that justice is done, but to also ensure that justice appears to be done. Federal agents and prosecutors rummaging through law firm materials that are protected by the attorney-client privilege and the work-product doctrine, is at odds with the appearance of justice."); *United States v. Pedersen*, No. 3:12-CR-00431-HA, 2014 WL 3871197, at *29 (D. Or. Aug. 6, 2014)("The paramount purpose of a taint team is to prevent the disclosure of privileged information to the government and to protect the attorney client privilege."); *United States v. Sullivan,* No. CR-17-00104-JMS-KJM, 2020 WL 1815220, at *8 (D. Haw. Apr. 9. 2020)(As the United States was certainly aware, the responsibility to protect these privileges is particularly important when using a taint team in a criminal proceeding."). The rulings in the cases cited by the government as "support" for foisting the burden on the government to protect the attorney client privilege after seizure through a search warrant are inapposite and none of them so hold.

no attempt to respect Harbor's right to attorney-client privilege in the initial search" and "by its treatment of Harbor's privileged materials after the search, further disregarded Harbor's rights."

In this case, the government, despite repeated requests, refused to inform UDF, the target executives ***or even the court,*** as to the status of the filter review procedures, if any, they intended to utilize or whether any seized documents or materials previously had been promoted to the prosecution team. Moreover, beginning in March 2020, counsel for UDF and the target executives had detailed communications with a series of Filter Team prosecutors objecting to their suggested processes for reviewing privileged material and attempting to resolve any disagreement as to an appropriate review protocol. UDF's concerns were largely dismissed. *See* Stephens Exhs 1-3; Pelletier Dec. Ex. 20. As such, the government is disentitled to assert some form of waiver here. *See In re Search Warrant Issued June 13, 2019,* 944 F. 3d at 182 ("We do not fault the Law Firm for seeking a negotiated resolution of these important disputes before requesting court intervention. And we will not reward the government for ignoring those efforts.").

VI. CONCLUSION

The government's actions here, both the conduct of the unconstitutionally broad search and the withholding of UDF's private privileged material, violated and continues to flaunt both DOJ policy and the black letter law of this Circuit. The callousness of their conduct and treatment of UDF's and UDF's target executives' privileged and out-of-scope materials, cannot be explained rationally. Indeed, there is a demonstrable illicit motive for such brazen misconduct.[19] Therefore, the government must turn over forthwith all originals and copies of the electronic and physical material seized from UDF on February 18, 2016.

[19] *See* Second Pelletier Declaration ¶¶2-6, Exs. 21-25; Howell Declaration ¶12.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Sept. 29, 2021, I filed this document with the Clerk's Office. I further provided an electronic copy of this document on counsel, as listed below, *via* electronic mail:

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