

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA :
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 v. : No. 3:00CR217(EBB)
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 TRIUMPH CAPITAL GROUP, INC. ET AL. :

RULING ON SUPPLEMENTAL MOTION TO SUPPRESS
AND MOTION TO SUPPRESS INDIVIDUAL DOCUMENTS

Pending before the Court in this public corruption case¹ are two supplemental motions to suppress² filed by defendants Triumph Capital Group, Inc. ("Triumph") and Charles B. Spadoni ("Spadoni"). In the first motion, Triumph and Spadoni seek to suppress two documents entitled CBO2 and CBO3, and the fruits thereof.³ In the second motion, Triumph and Spadoni seek to

¹ The facts of this case have been fully set forth in prior rulings and will not be repeated herein.

² Previously, the Court denied the defendants' motion for blanket suppression of all evidence seized from the laptop computer. See United States v. Triumph Capital Group, Inc., 211 F.R.D. 31 (D. Conn. 2002).

³ CBO2 and CBO3 were not addressed in the initial motion to suppress because the defendants had asserted a privilege claim that was pending before a magistrate judge at the time of the October, 2001, suppression hearing. After the magistrate judge ruled that the crime-fraud exception vitiated the defendants' privilege claim, the defendants moved to supplement their motion to suppress to address these two documents. The Court construed the defendants' motion for leave to file a supplemental memorandum as a supplemental motion to suppress.

suppress two other documents entitled "gomes.doc" and "bonus letter."⁴ All four of these documents were seized from Spadoni's laptop computer.

For the following reasons, the motion to suppress CBO2 and CBO3 [Doc. No. 412] is GRANTED in part and DENIED in part. The motion to suppress gomes.doc and bonus letter [Doc. No. 548] is DENIED.

BACKGROUND

On April 11, 2000, the government obtained a search and seizure warrant to search and seize evidence from a laptop computer owned by Triumph and used exclusively by Spadoni. Because Spadoni was Triumph's general counsel, the search warrant contained procedures to prevent any privileged material from being disclosed to or reviewed by the prosecution team before Triumph could assert a privilege claim. The warrant provided that a supervising Assistant United States Attorney ("AUSA"), who would not be a member of the prosecution team and would not participate in the search, would act as a "taint team" to create a "Chinese Wall" between

⁴ Gomes.doc. and bonus letter were also not addressed in the initial motion to suppress. The Court will consider the defendants' motion to suppress these documents without addressing their claim that they did not waive their right to move to suppress individual documents if their motion for blanket suppression was denied.

the evidence and the prosecution team. Pursuant to the agreed-upon screening procedures, the searching agent, who would also not be a member of the prosecution team, would give any documents and information he seized from the laptop computer to the taint team who would forward it to defendants' counsel for privilege review. If counsel claimed that any document or material was privileged, they would raise the issue before a magistrate judge. No documents would be given to the prosecution team until they cleared this privilege review process.

On May 24, 2000, the searching agent, SA Jeff Rovelli ("SA Rovelli"), gave, inter alia, approximately 1,200 pages of printed material that he had seized from the laptop computer to the taint team, AUSA Mark Califano ("AUSA Califano"). AUSA Califano forwarded the documents and material, which he referred to as "the active and recovered deleted files that the Government has seized," to the defendants' counsel for privilege review. Shortly thereafter, defendants' counsel advised that they would assert a privilege claim for four of the documents. On June 1, 2000, hard copies of all the documents and material that SA Rovelli had seized from the hard drive, with the exception of the four documents for which the defendants had asserted a privilege claim, were turned

over to the prosecution team, AUSA Nora Dannehy ("AUSA Dannehy") and SA Charles Urso ("SA Urso"). The gomes.doc and bonus letter were among the documents that SA Rovelli had seized. They were given to defendants' counsel for privilege review and were among the documents that were turned over to the prosecution team. However, CBO2 and CBO3 were not among the documents that SA Rovelli had seized, nor were they among the seized documents that AUSA Califano produced to the defendants for privilege review, and were not among the documents that AUSA Califano gave to the prosecution team on June 1, 2000.

On October 17, 2000, SA Rovelli filed the search warrant return with the Court. The inventory stated that he seized "a mirror image of the hard drive to review for evidence as noted on Attachment B [of the warrant]."

On May 29, 2001, seven months after the warrant was returned and one year after SA Rovelli gave the seized documents to AUSA Califano for delivery to defendants' counsel for privilege review, AUSA Califano gave CBO2 and CBO3 to the defendants' counsel for privilege review. SA Rovelli had given these two documents to AUSA Califano shortly before AUSA Califano gave them to the defendants. Thereafter, the defendants asserted that CBO2 and CBO3 were privileged. In

early January 2002, the magistrate judge ruled that the documents were not protected by the attorney client privilege, and the documents were then turned over to the prosecution team. At that time, the defendants moved to suppress CBO2 and CBO3.

On March 4, 2003, the Court held a supplemental fact-finding hearing. SA Rovelli, SA Urso, and AUSA Califano testified. Oral argument on both motions was held on May 6, 2003.

BURDEN OF PROOF

As a general rule, a criminal defendant who seeks to suppress evidence has the burden of proving that seizure was unlawful. See United States v. Arboleda, 633 F.2d 985, 989 (2d Cir. 1980) (holding that the burden of production and persuasion generally rests on the movant in a suppression hearing); see also United States v. Galante, 547 F.2d 733, 738 (2d Cir. 1976). The burden of proof shifts to the government only in limited situations, such as where a defendant makes a preliminary showing that evidence was obtained without a warrant. See United States v. Sacco, 563 F.2d 552, 558 (2d Cir. 1977); United States v. Levasseur, 618 F. Supp. 1390, 1392 (E.D.N.Y. 1985) (holding that the burden of proof is

generally on a defendant who seeks suppression, but where a defendant establishes some basis for the motion, i.e., by a preliminary showing that the search was conducted without a warrant, the burden shifts to the government to show that the search was lawful).

With respect to CBO2 and CBO3, the defendants have made a sufficient preliminary showing that shifts the burden of proof to the government. The uncontroverted evidence establishes that SA Rovelli did not give CBO2 and CBO3 to AUSA Califano until April or May 2001, and that AUSA Califano did not give them to the defendants for privilege review until May 29, 2001, more than one year after the government produced to defendants, inter alia, all of the active files that SA Rovelli had seized from the laptop computer and seven months after the warrant was returned. The documents were given to the defendants without any explanation as to why they were not included in the May, 2000, production. The government's failure to timely produce CBO2 and CBO3 to defendants as documents seized under the warrant is sufficient to shift the burden to the government to prove that SA Rovelli timely seized the documents before the warrant was returned and before his authority under the warrant to search and seize documents had expired.

DISCUSSION

The defendants maintain that CBO2 and CBO3 were seized after October 17, 2000, the day the warrant return was filed with the Court. They also claim that CBO2 and CBO3 are not within the scope of documents authorized by the warrant or the plain view exception. In addition, they assert that the gomes.doc and bonus letter must be suppressed because they also are not within the scope of documents authorized for seizure by the warrant.

The government contends that SA Rovelli seized CBO2 and CBO3 in the summer of 2000, but that he neglected to turn them over to the taint team until April or May, 2001. With respect to the gomes.doc and the bonus letter, the government maintains that these documents fall within the scope of Paragraph One of Attachment B to the Warrant, as the Court construed that paragraph in the ruling on the defendants' motion for blanket suppression.

A. CBO2 and CBO3

CBO2 and CBO3 are drafts of a private placement memorandum that show a \$150 million investment of Connecticut state pension assets in Triumph-Connecticut II, L.P.⁵ SA

⁵ CBO2 and CBO3 are relevant and probative of the government's allegation that Silvester increased the investment amount from \$150 million to \$200 million in

Rovelli seized these documents from the active files in the SpadoniC:\MyDocuments\FundofFunds directory of Spadoni's laptop computer.

At the March 4, 2003, hearing, SA Rovelli and SA Urso both testified that SA Rovelli met with SA Urso and AUSA Dannehy in the early summer of 2000, shortly after AUSA Califano gave them the documents that SA Rovelli had seized from the laptop computer. The meeting took place at SA Rovelli's office. The purpose of the meeting was to go over the seized evidence and educate SA Urso and AUSA Dannehy on computer technology. During the meeting, SA Urso and AUSA Dannehy discussed the \$200 million CBO investment that the State of Connecticut made with Triumph in exchange for the alleged bribes to Silvester. They discussed the fact that the investment was initially for a lower dollar amount than \$200 million, but was raised or "bumped up" in exchange for consulting contracts that Triumph agreed to give to Thiesfield and Stack. SA Rovelli testified that while SA Urso and AUSA Dannehy were discussing the CBO investment he remembered that during his search of the laptop computer he had seen a prior

exchange for the consulting contracts that Triumph gave to defendant Lisa Thiesfield and cooperating witness Christopher Stack.

version of the CBO contract with different, lower numbers.⁶ According to SA Urso's testimony, SA Rovelli had a very pointed recollection of the documents and appeared very confident that he could locate them rather quickly. SA Urso also said that during the meeting SA Rovelli asked him and AUSA Dannehy if they wanted to see the documents, but they told him not to show them the documents because they had not been through the taint review process. At that point SA Urso said the discussion about the CBOs stopped.

The accounts of SA Rovelli and SA Urso as to what happened after the meeting ended are, however, conflicting and

⁶ SA Rovelli testified that there were numerous reasons why he remembered seeing CBO2 and CBO3 at least once during his search. First, before SA Rovelli began the search, SA Urso gave him a cover sheet for the CBO investment that showed a \$200 million investment and told him that variations in the contract were important. Second, because an important focus of the search was for evidence that documents had been deleted from the hard drive, he noticed during his examination of basic directory structures that CBO2 and CBO3 had been deleted from the C:\MyDocuments\FundofFunds directory, but had not been deleted from the SpadoniC:\MyDocuments\FundofFunds directory. Third, another focus of the search was on the key time frame of November 8-11, 1998, and the last modification date of CBO2 and CBO3 was November 7, 1998. Fourth, the documents responded to the keyword term "ben." Finally, he found file links that showed CBO2 and CBO3 had once been located in the FundofFunds folder in the C:\MyDocuments directory on key dates, but were gone by April 2000. Despite all this, SA Rovelli testified that he decided not to seize the documents at the time of his initial search, but just flagged them in his mind as something he might want to seize.

contradictory in numerous, significant, and material respects. For instance, SA Rovelli testified that, immediately after the meeting, he went to the computer and quickly located CBO2 and CBO3 in the active files of the SpadoniC:\MyDocuments\FundofFunds directory. He said that SA Urso and AUSA Dannehy were still around when he located the documents and that he told them both that he had done so. SA Rovelli also testified that, after he located the documents, he printed them out, put them in a pile with the other seized evidence, and just waited for someone to tell him to turn them over to the taint team. He said he did this because it was not clear to him whether AUSA Dannehy would contact the taint team or the taint team would contact him. He further testified that he did not do anything with the documents until he met with AUSA Dannehy in March or April, 2001, when he mentioned to her that he still had the earlier versions of the CBO contract documents and she told him that he needed to get them turned over for taint review.

In contrast to SA Rovelli's testimony, SA Urso testified that no one told him the day of the meeting that SA Rovelli had seized the documents, but that he was "just under the impression" that SA Rovelli had retrieved them. SA Urso said it was his understanding that, if SA Rovelli was able to

locate the documents, he would follow the established taint review process because that is what he had been told to do at the meeting. SA Urso also testified that, in the days and months after the meeting, he had a number of discussions with AUSA Dannehy about what SA Rovelli was able to find and whether it had been through the taint review process. Each time he asked AUSA Dannehy, she told him that the documents "hadn't cleared yet." SA Urso also testified that he was sure he asked SA Rovelli directly on at least one occasion if he had found the documents and if they had cleared the taint review process.

The government has not provided a satisfactory explanation for the inconsistencies in SA Urso's and SA Rovelli's testimony and the Court is unable to postulate a logical scenario to reconcile the conflicts. It is especially difficult to do so in light of the government's failure to provide adequate answers to the obvious questions that arise from the agents' differing accounts.

Specifically, the Court is troubled by the absence of answers to these questions: Why was it so unclear to SA Rovelli about what he should do with the documents after he seized them, especially since, as SA Urso testified, SA Rovelli was instructed during the meeting to follow the

established taint review process, and also because SA Rovelli had only weeks earlier been through the taint review process with the other evidence he seized?⁷ Why did SA Rovelli wait ten months to turn over the documents to the taint team if, as SA Urso testified, he asked SA Rovelli directly at some unspecified time whether he had located the documents and whether they had cleared the taint review? If SA Rovelli told SA Urso and AUSA Dannehy after the meeting that he had located the documents, why didn't they tell him at that time to give them to the taint team? Why, in light of the numerous events that could have triggered his memory,⁸ did SA Rovelli forget about the documents for ten months, especially if he

⁷ According to SA Rovelli's testimony at the first suppression hearing, he was very familiar with the taint review process. See Suppression Hearing, Oct. 18, 2001, Tr. at 25 ("[AUSA Califano] was the clean team [O]nce I printed and selected all the documents to be seized pursuant to the warrant, I brought them to AUSA Califano for review.").

⁸ Specifically, SA Rovelli had numerous meetings with AUSA Dannehy in the ten months after he allegedly seized the documents, yet he did not remember to ask her what he should do with them until March or April, 2001. Also, SA Rovelli reviewed and analyzed the seized evidence on December 14, 2000, when he ran Norton Disk Editor and printed out the directory structures for the SpadoniC:\MyDocuments\FundofFunds directory that contained CBO2 and CBO3 as active files and highlighted them as documents that were still in that directory, but not in the parallel C:\MyDocuments\FundofFunds directory. In addition, SA Rovelli ran the Microsoft Link Dump program in late 2000, "to look at the internal contents of links to documents that were of significance to the case."

considered them important to the government's case? Why didn't the prosecution team ask AUSA Califano why the taint review process was apparently taking so long, especially if, as SA Urso testified, he repeatedly asked AUSA Dannehy if the documents had cleared?

Moreover, contrary to the government's contention, SA Urso and SA Rovelli did not both unequivocally testify that the documents were seized in the summer of 2000. Rather, SA Urso testified only that it was his "understanding" that SA Rovelli had retrieved the documents. SA Urso also testified that, on numerous occasions after the meeting, he asked AUSA Dannehy if SA Rovelli had been able to locate the documents, and was sure he asked SA Rovelli at least once if he had found the documents. But SA Urso did not testify as to what AUSA Dannehy or SA Rovelli told him in response to his inquiries.

Again, contrary to the government's contention, the Court considers that the timing of the disclosure is highly relevant to the timing of the seizure. In light of the apparent importance of these documents, the Court cannot accept the government's proffered reason that SA Rovelli just forgot about them for ten months. Indeed, the timing of the disclosure would only be irrelevant if there had not been such a lengthy delay between the time the documents were allegedly

seized and the time they were disclosed.

The government's failure to provide a satisfactory explanation for the inconsistencies in the agents' testimony or posit convincing answers to the questions pertaining to the delay in the documents' disclosure leaves the Court with no alternative but to find that the government has failed to meet its burden of proving that CBO2 and CBO3 were seized before the warrant was returned in October, 2000. Because the only logical conclusion is that the documents were not timely seized,⁹ CBO2 and CBO3 (Gov. Exs. 150 and 204) will be suppressed.

The defendants have not, however, presented any grounds to suppress what they contend are the fruits of the unlawful seizure of CBO2 and CBO3, specifically: (1) the journal entries for CBO and Fund of Funds (Gov. Ex. 33), (2) directory entries and file properties for the Fund of Fund directories (Gov. Ex. 35), (3) listing of links to CBO1.doc, CBO2.doc, and CBO3.doc (Gov. Ex. 136), and (4) references to CBO2.doc and CBO3.doc in slack space (Gov. Ex. 200). This evidence was timely and properly seized under Paragraph One of the Warrant

⁹ SA Rovelli did not keep contemporaneous notes of the steps he took during his search. Had he done so, at least with regard to the seizure of CBO2 and CBO3, such notes might have corroborated the government's account.

when SA Rovelli searched the laptop computer in April, 2000, and is not material obtained as a direct result of a warrantless search and seizure. See Wong Sun v. United States, 371 U.S. 471 (1963) (noting that the exclusionary rule bars physical, tangible materials obtained either during or as a direct result of an unlawful invasion). Accordingly, the properties, data and other information relating to CBO2 and CBO3 is not suppressed as fruits of the unlawful seizure of the documents themselves.

B. GOMES.DOC & BONUS LETTER

The document entitled "gomes.doc" is dated January 15, 1999, and is an assignment from Spadoni to George Gomes ("Gomes"), a deputy treasurer under Silvester, of Spadoni's interest in a \$400,000 deferred bonus that he was to receive from Triumph pursuant to a letter agreement dated December 10, 1998. The bonus and the assignment were payable in two installments: \$275,000 on January 15, 2000, and \$125,000 on January 15, 2001. The gomes.doc was once stored in the C:\MyDocuments\Andrews directory on Spadoni's laptop computer, but was not in that directory when SA Rovelli searched the laptop computer in April 2000. SA Rovelli found and seized the gomes.doc from the active files in the SpadoniC:\MyDocuments\Andrews directory. The document

entitled "bonus letter" appears to be the letter agreement referred to in the gomes.doc. It bears a date of November 10, 1998, but was drafted for McCarthy's signature with a date of December ____, 1998. SA Rovelli seized the bonus letter from the slack space.

The government maintains that the gomes.doc and the bonus letter were lawfully seized under the warrant because they are evidence of the criminal activity alleged in the warrant affidavit and fall within the scope of Paragraph One of Attachment B. The Court agrees.

The warrant affidavit outlines a scheme to pay bribes to Silvester's associates through bogus contracts. Gomes was a Silvester associate who pleaded guilty on April 3, 2000, to being part of a scheme to deprive the citizens of Connecticut of Silvester's honest services through the use of straw contributors to Silvester's reelection campaign. In addition to this, there are other indicia that support a finding that the documents were lawfully seized under the warrant as the Court previously construed it.¹⁰ Specifically, the documents

¹⁰ The Court held that the warrant was not to be read in a cramped or hypertechnical manner, but was to be construed as incorporating the facts set forth in the supporting affidavit that established probable cause to search the hard drive for evidence of the alleged criminal activity, including deletions of data and documents relating to Triumph's dealings with Silvester, Thiesfield, Stack and Andrews, not just files

were temporally related. The date of the bonus letter, November 10, 1998, coincides with the dates of the investments, the Thiesfield and Stack contracts and the events under investigation.

Further, the gomes.doc was located in the Andrews file in the SpadoniC: directory, but was no longer in the Andrews file in the C: directory when SA Rovelli searched the laptop computer. This supports its seizure under Paragraph One as evidence of data that was deleted,¹¹ as well as evidence that

and data relating to the specific contracts identified in paragraphs two through five; specifically, details of Silvester's and the defendants' alleged illegal campaign finance activities, details of other illegal acts of bribery that Silvester, Stack and the defendants engaged in, and efforts to disguise the alleged criminal activity. The Court also held that, in addition to evidence that the contracts between Triumph and Thiesfield, Triumph and Stack, and Triumph and Andrews had been deleted, Paragraph One also authorized seizure of evidence of other related deletions because such evidence would be relevant and admissible under Fed. R. Evid. 404(b) as probative of the defendants' intent to commit the alleged crime of obstruction of justice or the absence of mistake. In addition, the Court ruled that Paragraph One provided sufficient, ascertainable guidelines to assist SA Rovelli's exercise of judgment and discretion during the search and authorized seizure of the text or content of a file as well as information relating to it such as creation date, time, properties, size, last accessed date and directory information. See 211 F.R.D. at 81-85.

¹¹ SA Rovelli testified that he believed Spadoni did not know that the SpadoniC: directory existed because it was created by the system on February 18, 1999, when a new user was added to the computer and was set up in a way that the system automatically copied to it the entire contents of the C:\My Documents directory, which was the only directory that

Spadoni considered the document to be related to Andrews. Moreover, the location of the bonus letter in slack space¹² supports its seizure as evidence of data that was deleted.¹³ Finally, the properties and journal entries show a relationship between the gomes.doc and Silvester, Thiesfield, Stack, and Andrews. Specifically, the entries show that (1) the gomes.doc was deleted from the laptop and put on a disk; (2) the gomes.doc was accessed from the Andrews file in the C: directory on May 30, 1999, five days after the first grand jury subpoena was served on Triumph; (3) on May 31, 1999, a Thiesfield document was accessed from the same file and neither that document nor the gomes.doc were in the Andrews

Spadoni used. In addition, the SpadoniC directory was in pristine condition--no files had been deleted from it and Spadoni never accessed documents from it. The gomes.doc had been deleted from the C:\MyDocuments\Andrews directory, but not from the SpadoniC:\MyDocuments\Andrews directory.

¹² The Court previously defined slack space as "the unused space at the logical end of an active file's data and the physical end of the cluster or clusters that are assigned to an active file." The Court noted that "[d]eleted data, or remnants of deleted data can be found in the slack space at the end of an active file and may consist of relatively small, non-contiguous and unrelated fragments that may have come from any number of previously deleted files. A normal computer user does not see slack space when he opens an active file. Forensic tools are required to extract and view slack space." 211 F.R.D. at 46 n.7.

¹³ The Court previously ruled that data and information from slack space consisting of, inter alia, memos in the Andrews directory were properly seized. See 211 F.R.D. at 59.

file in the C: directory at the time of the search; (4) both the gomes.doc and that Thiesfield document were accessed on June 7, 1999, from a disk in the A: drive; and (5) the Thiesfield and Stack contracts were also accessed from the A: drive during this same time period.

All of these factors support a finding that the gomes.doc and the bonus letter were lawfully seized under the warrant.

CONCLUSION

For the foregoing reasons, the supplemental motion to suppress [Doc. No. 412] is GRANTED in part and DENIED in part. The motion to suppress individual documents [Doc. No. 548]¹⁴ is DENIED.

SO ORDERED.

ELLEN BREE BURNS
SENIOR DISTRICT JUDGE

Dated at New Haven, Connecticut, this ____ day of May, 2003.

¹⁴ Triumph Capital by motion [Doc. No. 556] adopted Spadoni's Motion to Suppress Individual Documents.