UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA **v.** **GORDON J. COBURN and STEVEN SCHWARTZ,** **Defendants.**	Crim. No. 19-120 (KM) **MEMORANDUM and ORDER**

KEVIN MCNULTY, U.S.D.J.:

This matter comes before the Court on the motion (DE 160) of defendant Steven Schwartz to compel discovery in support of a motion. For the reasons set forth below, the motion for discovery is **GRANTED IN PART.**

I. Background

Schwartz raises concerns that actions by Cognizant Technology Solutions Corporation ("Cognizant"), Schwartz's prior employer and a Government cooperator in this case, have allowed the Government to intrude into the defense camp. As a result, Schwartz moves before the Court to compel discovery from the Government and Cognizant. (DE 160.)

Separate from the criminal case before this Court, Schwartz and Cognizant engaged in an ongoing dispute over whether Cognizant is required to pay Schwartz's legal fees. That dispute was the subject of a previous lawsuit in Delaware Chancery Court, and Cognizant has since sued Bohrer PLLC, one of the firms representing Schwartz in this matter, in the U.S. District Court for the Southern District of New York.[1] Schwartz now expresses concerns over

[1] That second suit was filed in the Southern District of New York at Civ. No. 21-5340. I take judicial notice of the fact of that suit and the Complaint filed at DE 1, but not for the truth of the assertions therein. *United States v. Graves*, 849 F. App'x 349,

Cognizant's investigation related to the fee dispute. In particular, Cognizant's counsel provided Schwartz a draft complaint containing allegations from a July 2020 email, which Cognizant later indicated was sent by Steven Ward, the lead investigator on Schwartz's defense team. Schwartz indicates that Ward continued working on the case for ten months after sending that email, despite apparently communicating further with Cognizant. (DE 160-1 ("Def. Brf.") at 6.) Schwartz emphasizes the role that Ward played on Schwartz's defense team, describing him as "intimately involved with nearly every aspect of the investigative efforts" and having been involved in numerous meetings with Schwartz and counsel regarding defense theories. (Def. Brf. at 6). Schwartz also asserts that Cognizant hired its own investigator who has interviewed employees of Bohrer PLLC, including attorneys, investigators, administrative staff, and interns, in connection with the fee dispute.

Schwartz's specific request is that the Government produce documents that show: (i) the nature, extent, and timing of Cognizant's contacts with the defense's lead investigator and current and former employees and agents of the Bohrer firm; (ii) whether and when they became aware of the defense's lead investigator's position as a member of Mr. Schwartz's legal defense team; (iii) what information was sought and obtained by Cognizant from the defense's lead investigator and current and former employees and agents of the Bohrer firm; and (iv) the Government's role in (and/or knowledge of) the foregoing subject matter.

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354 (3d Cir. 2021 (noting a court may take judicial notice of another court's docket). As Schwartz notes in his reply brief (DE 178), the complaint states that "Guidepost [Cognizant's investigator] was careful to admonish every individual it approached that it was not seeking any privileged or confidential information regarding Schwartz's defense, but was interested in only non-privileged information regarding potentially fraudulent billing practices by Bohrer and his firm in connection with invoices paid by Cognizant." (SDNY Compl. at ¶ 42.)

II. Discussion

Rule 16(a)(1)(E) provides that, upon a defendant's request, the Government must permit the defendant to inspect items that are within the Government's possession, custody, or control if "the item is material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E); *see also United States v. Stiso*, 708 F. App'x 749, 755 (3d Cir. 2017) (describing rule). Inherent in the rule is a requirement of materiality, and a threshold showing of materiality is necessary to compel disclosure. *See United States v. Hobbs*, 612 F. App'x 94, 97 (3d Cir. 2015) (defendant's speculation that discovery could be potentially helpful in some unknown way was "far from sufficient" to establish a violation of Federal Rule of Criminal Procedure 16); *United States v. Mitrovich*, 458 F. Supp. 3d 961, 964 (N.D. Ill. 2020) ("Rule 16(a)(1)(E) imposes on [defendant] the burden to "make at least a *prima facie* showing that the requested items are material to his defense.") (quoting *United States v. Thompson*, 944 F.2d 1331, 1341 (7th Cir. 1991)).

Schwartz seeks discovery in aid of a pretrial motion. He argues that Cognizant's investigation had at least the potential to violate his Sixth Amendment right to counsel and Fifth Amendment right to due process. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Randolph v. Sec'y Pennsylvania Dep't of Corr.*, No. 20-9003, 2021 WL 3043377, at *8 (3d Cir. July 20, 2021) (quoting U.S. Const. amend. VI). A "a surreptitious invasion by a government agent into the legal camp of the defense may violate the protection of the Sixth Amendment." *Hoffa v. United States*, 385 U.S. 293, 306 (1966). In particular, the Third Circuit has stated that the Sixth Amendment is violated "when the government (1) intentionally plants an informer in the defense camp; (2) when confidential defense strategy information is disclosed to the prosecution by a government informer; or (3) when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the

defendant." *United States v. Costanzo*, 740 F.2d 251, 254 (3d Cir. 1984). As to a potential Fifth Amendment violation, "[a] claim of outrageous government conduct premised upon deliberate intrusion into the attorney-client relationship will be cognizable where the defendant can point to actual and substantial prejudice." *United States v. Voigt*, 89 F.3d 1050, 1066 (3d Cir. 1996).

It is not disputed that Cognizant, after agreeing to cooperate with the Government in connection with the subject matter of this criminal prosecution, conducted an investigation in connection with a separate dispute over Defendant's legal fees. Schwartz has not cited to, and the Court is not aware of, any case in which a Sixth or Fifth Amendment violation via an intrusion into the defense camp was found without evidence of the Government's involvement in the intrusion or the Government's possession of confidential information obtained via the intrusion. Schwartz does not appear to suggest that (1) the Government intentionally planted Cognizant in the defense camp. A potential Sixth Amendment violation under *Weatherford*, then, would have to fall under one of the other prongs, which apply (2) when confidential defense information is disclosed to the prosecution by a government informer; or (3) when there is no intentional intrusion or disclosure of confidential defense strategy, but a disclosure by a government informer leads to prejudice to the defendant. *Costanzo*, 740 F.2d at 255. Either scenario requires, as a threshold, that the Government have received such information from Cognizant. Additionally, a Fifth Amendment claim requires a showing of prejudice. *Voigt*, 89 F.3d at 1066.

In its reply, the Government states that it "simply has nothing to produce," and that it does not have any information about Cognizant's interviews of or interactions with Schwartz's defense team. (DE 173 at 1.) In routine Rule 16 discovery matters, such representations by officers of the Court may well suffice; as the prosecution points out, discovery "just to check" the government's representations would defeat the limitations of Rule 16. In

this specialized context, however, I consider whether additional probing in discovery is required.

Schwartz cites to cases in which factual development was necessary to determine whether a defendant's constitutional rights were violated via an intrusion into the defense camp. In *United States v. Brink*, for example, the Third Circuit held that a defendant had made a colorable claim for a Sixth Amendment violation where the Government placed him in a cell with an informant, to whom the defendant confessed his crime. 39 F.3d 419, 422-24 (3d Cir. 1994). The Third Circuit remanded for a factual determination of whether the informant was acting under an agreement with the Government while collecting the information from the defendant. In that case, however, it was clear that the cellmate had both received information from the defendant and passed it on to the Government. In *United States v. Danielson*, the government had obtained recordings of an informant's conversations with the defendant concerning trial strategy (including his defense and whether he and his wife would testify) and kept memoranda containing privileged information about trial strategy. 325 F.3d 1054 (9th Cir. 2003). Post-trial, the Court of Appeals remanded for an evidentiary hearing on whether the government used the trial strategy information, with prejudice resulting.

In *United States v. Voigt*, a defendant's personal attorney had acted as an informant to the Government. 89 F.3d at 1063. The defendant moved pretrial to dismiss the indictment, arguing that the government's reliance on the attorney's information was a violation of the Fifth Amendment. The Third Circuit stated that the district court "should have" conducted an evidentiary hearing, noting that the defendant's moving papers "raised enough of a specter of ethical impropriety on the government's part to warrant closer scrutiny." *Id.* at 1067. Still, post-trial, the Third Circuit declined to remand on that issue, finding that that the defendant had not made an adequate showing of prejudice and had failed to demonstrate that any of the information the informant provided to the government was in fact privileged.

Brink, *Danielson*, and *Voigt* fall far short of requiring that affirmative relief be granted here. Given the basic facts about the interaction between Cognizant and the defense team, however, those cases do suggest that some factual development, beyond the Rule 16 minimum, is called for. I note in addition that many events and transactions relating to this case occurred in India, a circumstance that has made fact-gathering more complex and difficult. (*See* accompanying opinion regarding enforcement of subpoenas.) Those circumstances limit what can be obtained by subpoena and heighten the need to obtain such information as is available from the Government.

The influence that the Government may have wielded is important, but the real crux of this issue is whether confidential, prejudicial information made its way, via Cognizant, from the defense to the prosecution.[2] Under the circumstances, the most efficient approach is to concentrate on what the Government learned from Cognizant. I will order the Government to produce all communications between itself and Cognizant, including any documents furnished, that are relevant to the investigation of Defendants Schwartz and Coburn, dating from the onset of the investigation until the date of the Indictment.[3] Items already produced in discovery need not be furnished again. If the Government has particular, valid reasons to withhold a particular item, it may be submitted for in camera inspection.[4]

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[2] Schwartz also suggests scenarios in which government inaction may be relevant: for example, failure to instruct an informant to refrain from eliciting privileged information (DE 173, citing *Costanzo*, 740 F.2d at 254; *Danielson*, 325 F.3d at 1068-69), or requiring the cooperating entity to stop paying a defendant's legal fees (DE 160 at 13, citing *United States v. Stein*, 541 F.3d 130, 143 (2d Cir. 2008).

[3] Such discovery should have the additional benefit of revealing any influence that may or may not have been brought to bear concerning Cognizant's interviews of Defendants—the so-called *Garrity* issue—which has been the subject of discovery requests to Cognizant. Thus far, however, the Court has not seen an independent basis to order discovery on that issue.

[4] Schwartz also indicates that an evidentiary hearing may be necessary. That request is premature. To require a pretrial evidentiary hearing, the defendant must raise a "colorable claim" for relief. *Voigt*, 89 F.3d at 1067. In order to be "colorable," a defendant's motion must consist of more than mere allegations of misconduct. *Id.*

ORDER

Defendant's motion (DE 160) is **GRANTED** to the extent of requiring discovery, as outlined above, within 21 days, but is otherwise **DENIED**.

SO ORDERED this 24th day of January, 2022.

/s/ Kevin McNulty

Kevin McNulty
United States District Judge

Further, there must be disputed issues of fact "material to the resolution of the defendant's constitutional claim." *Voigt*, 89 F.3d at 1067.