2019 WL 7604778 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

HARBOR HEALTHCARE SYSTEM, L.P., Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA, Defendant-Appellee.

No. 19-20624.
December 4, 2019.

On Appeal from the United States District Court for the
Southern District of Texas, Houston in Case No. 4:18-CV-3195,
Honorable Andrew S. Hanen, U.S. District Judge

**Brief for Plaintiff-Appellant**

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## *V *STATEMENT REGARDING ORAL ARGUMENT*

Plaintiff-Appellant Harbor Healthcare System, L.P. ("Harbor") [1] respectfully requests oral argument. This appeal presents significant issues concerning search warrants in white-collar investigations, including whether the Government may intentionally seize and review attorney-client privileged communications and attorney work product without prior judicial approval.

Another issue is whether pre-indictment relief is available under Fed. R. Crim. P. 41(g), which allows a person "aggrieved by an unlawful search and seizure of property" to move for the property's return. The District Court held Harbor's right to Rule 41(g) relief was barred by an alleged adequate remedy at law -- a theoretical motion to suppress, if Harbor is ever indicted. This holding effectively bars any pre-indictment relief, which conflicts with the rule's text and other federal decisions.

The District Court's opinion therefore has broad implications for the administration of justice, and Harbor submits that oral argument would assist the Court in deciding these important issues.

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## *1 *STATEMENT OF JURISDICTION*

Harbor appeals from the District Court's order (the "Order," [Text redacted in copy] is collectively referred to as the "Motion," [Text redacted in copy] Because no criminal charges were pending against Harbor, its Motion is construed as a civil complaint. *Bailey v. United States*, 508 F.3d 736, 737 (5th Cir. 2007). The District Court accordingly had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 and Fed. R. Crim. P. 41(g) because the claims for relief arose under the Fourth Amendment of the United States Constitution and other laws of the United States.

[Text redacted in copy] Harbor moved for reconsideration, which the District Court denied on the record during proceedings held on September 3, 2019. (Sept. 3 Hr'g Tr., ROA.364:17- *2 367:5.) Harbor timely appealed on September 5, 2019. (Notice of Appeal, ROA.275.)

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because the Order is final.

## *STATEMENT OF THE ISSUES PRESENTED FOR REVIEW*

1. The Government in this case executed search warrants on Harbor's corporate offices, seizing terabytes of data and hundreds of boxes of paper documents, based on warrants that were so facially overbroad as to violate the Fourth Amendment's particularity requirement. Further, in executing upon the warrants, the Government intentionally seized thousands of Harbor's attorney-client privileged and attorney work product documents without prior judicial authorization. Did the District Court incorrectly decline jurisdiction and dismiss Harbor's Fed. R. Crim. P. 41(g) motion for return of property?

a. Did the District Court err in dismissing Harbor's Motion by holding that the Government did not act with a "callous disregard" for Harbor's rights, without addressing the evidence Harbor proffered?

*3 b. Did the District Court err in holding that Harbor's interest in protecting its privacy, including its attorney-client privilege, weighed against granting relief pursuant to Rule 41(g)?

c. Did the District Court err in holding that Harbor faced no irreparable harm from the denial of Constitutional rights and intentional intrusion upon the attorney-client privilege and work product doctrine?

d. Did the District Court err in holding that Harbor had an adequate remedy in a contingent, later motion to suppress?

2. Did the District Court err in permitting a Government "taint team" to review documents Harbor identified as privileged, excusing the Government from its agreement not to do so?

3. Did the District Court err in failing to address whether the government may invoke the plain view doctrine to retain as evidence, emails and other writings, regardless of whether they are within the scope of a properly framed search warrant?

4. Did the District Court err in dismissing the Motion without holding an evidentiary hearing as Rule 41(g) requires, and without ***4** ordering the unsealing of the affidavits underlying the Government's search warrants?

## *STATEMENT OF THE CASE*

### I. *FACTUAL BACKGROUND*

[Text redacted in copy]

### A. *The Government Served a Civil Investigative Demand on Harbor About Two Months Before Executing Search Warrants on the Company, Thereby "Priming the Pump" For the Creation of Privileged Materials That It Would Later Seize.*

In July 2015, the U.S. Department of Health and Human Services, Office of Inspector General ("OIG") [Text redacted in copy]

***5** In March 2017, the U.S. Department of Justice and U.S. Attorney's Office for the Eastern District of Texas ("USAO-EDTX") [Text redacted in copy]

[Note: footnote missing in original document]

***6** **B.** ***The Government Sought and Executed Five General Warrants, and Seized Harbor's Documents Without Limits.***

In April 2017, Harbor [Text redacted in copy] After "priming the pump" for the creation of attorney-client [Text redacted in copy] *see also* Jan. 29, 2019 Hr'g Tr., ROA.1069:11-24.)

***7** [Text redacted in copy]

The Government took full advantage of the overbreadth of the search warrants. [Text redacted in copy] The Government acknowledged ***8** seizing at least 3.59 terabytes of Harbor's data. (ROA.273-274.) [Text redacted in copy] While Harbor still does not know the full extent of what was seized, the warrants' scope was broad enough to have enabled the Government to seize an enormous swath of business documents belonging to Harbor and its 94 affiliates for a seven-year period.

### C. *The Government Intentionally Seized Privileged Materials, Including Harbor's Core Legal Strategy Documents.*

The Government knew that without specific efforts to limit the search, it would be seizing significant quantities of Harbor's privileged documents. The Government's prior notification of an "official investigation" and service of a CID, and its contacts with Messrs. Mendez and Sprott regarding the CID before the warrants were served, removed all doubt. [Text redacted in copy]

***9** Take Mr. Sprott: [Text redacted in copy]

***10** [Text redacted in copy] The Government seized all of his privileged materials anyway.

[Text redacted in copy] Dec. 4, 2018 Hr'g Tr., ROA.297:8-15.)

***11** **D.** ***The Government Implemented An Ineffective Taint Team Review and Failed to Work With Harbor's Attorneys in Good Faith to Ensure that Harbor's Rights Were Protected.***

[Text redacted in copy]

  

***12** In August 2018, [Text redacted in copy]

***13** **II.** ***PROCEDURAL BACKGROUND***

[Text redacted in copy] The Government did not respond, leading Harbor to file an Entry of Default on November 27, 2018 (ROA.30-36) and a motion for default judgment on November 29, 2018 (ROA.39-59.) [Text redacted in copy] The District Court relieved the Government from its default and directed the Government to respond to the Motion. (Dec. 4, 2018 Hr'g Tr., ROA. 337:14-338:4.)

**A.** ***The District Court Brokered an Agreement for Harbor to Conduct its Own Privilege Review, and Harbor Identified Thousands of Seized Privileged Documents.***

While the Motion was pending, Harbor became increasingly concerned about the potential for the taint team's disclosure of privileged information and again contacted the Government. This time the lead investigative AUSA responded that "approximately 363,227 emails ... ***14** were marked [by the Government] as privileged"--exponentially higher than the number of privileged documents returned by the taint team on the flash drive, and higher than Harbor believed possible. (Oct. 18, 2018 Harbor Letter to District Court, ROA.22-24; Sept. 11, 2018 email from C. Tortorice to E. Searby, ROA.25.)

The District Court held an initial hearing on December 4, 2018. At this hearing, the District Court mediated an agreement between the Government and Harbor to address the Government's intentional seizure of privileged material and its intent to continue reviewing this material with a taint team. By agreement, Harbor would conduct its own privilege review of the seized material, starting with Mr. Sprott, the Director of Compliance, as the first custodian. (Dec. 4, 2018 Hr'g Tr., ROA.335:22-337:11.) The Government and the District Court would then review the privilege log and the District Court would then decide how to proceed. (ROA.332:22-333:1.)

[Text redacted in copy] Harbor produced [Text redacted in copy]

***15** On April 2, 2019, Harbor wrote a letter to the District Court informing it of the status of the privilege review. (Apr. 2, 2019 Letter, ROA.251.) Harbor's letter also alerted the District Court to Harbor's discovery, after analyzing the data set represented to be the material the taint team transferred to the investigative side,[3] that "a significant number of privileged documents in fact passed from 'the taint team' to criminal and civil investigators." (ROA.251.) Harbor noted that "this development confirms [Harbor's] concerns surrounding the taint team review in the first instance..." (ROA.251-52.) Finally, the letter restated Harbor's request for an evidentiary hearing, citing the "government's inability or unwillingness to explain what has transpired." (ROA.252.)

***16** Notwithstanding the serious allegation that its underlying criminal and civil investigations had been tainted, the Government did not respond to the April 2 letter to the District Court. Nor did the District Court schedule a hearing to address any of these concerns.

**B.** ***The District Court Improvidently Dismissed Harbor's Action, Denied Reconsideration, and Then Relieved the Government From its Agreement.***

[Text redacted in copy]

***17** The District Court held a telephonic hearing on September 3, 2019. During this hearing, the Government, in responding to the issue that it had never returned or certified the destruction of the documents already listed on Harbor's privilege log, made an astounding disclosure: "(w)e did receive a privilege log. We had our litigation support, our case litigation support both *remove*

*those e-mails from what the investigative team would have had access to*." (Sept. 3, 2019 Hr'g Tr., ROA.354:23-355:1 (emphasis added.)) Eliminating any doubt about which side got sanitized, the Government lawyer later stated in the same hearing: "what we did with the privilege log that we had is we sent that to our taint litigation support ***18** people, and they removed those documents *from the investigative team's side*." (ROA.369:19-22 (emphasis added.))

Despite this admission of the failure of the Government's taint team, the District Court denied the Motion for Reconsideration (ROA.366:4-9), but stated that "(t)he only thing I'm staying is the actual review by the taint team of identified privileged documents, until Mr. Searby [Harbor] can get a ruling from the Fifth Circuit." (ROA.367:2-5.) However, in the Court's September 10, 2019 order denying reconsideration, the Court wrote that the "Government's taint team can continue to review the documents over which a claim for privilege is asserted...." (Order Denying Reconsideration, ROA.281.)

This timely appeal followed. (Notice of Appeal, ROA.275.)

## *SUMMARY OF THE ARGUMENT*

This case raises fundamental questions about the limitations on the Government's power to execute search warrants upon corporations. Here, the Government twice formally notified Harbor that it was under investigation. As would be expected, Harbor engaged outside counsel to represent it in response to the investigations. The Government then executed search warrants, seizing without subject matter limitation ***19** terabytes of Harbor's data and hundreds of boxes of its paper documents. The Government also intentionally seized thousands of privileged documents, including core attorney-client communications and work product related to the investigations. After unsuccessfully negotiating with the Government to address its concerns, Harbor invoked the only adequate remedy available: a Fed. R. Crim. P. 41(g) motion for return of property. The District Court initially exercised equitable jurisdiction, but then abruptly dismissed Harbor's Motion and even excused the Government from its agreement not to review the documents Harbor logged as privileged.

The District Court erred for several reasons.

First, the District Court dismissed Harbor's Motion without addressing the constitutional issues it raised, instead holding that because Harbor's documents were seized pursuant to warrants, the Government did not act with "callous disregard" of its rights under the factors set forth in *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975). But the Government *can* act with "callous disregard" even with a warrant. The District Court expressly declined to address Harbor's claim that the warrants failed to particularly describe the material to be seized so as to ***20** avoid the intrusion upon privileged material and other privacy interests. Nor did the District Court consider the Government's disregard in failing to inform the issuing judges of its intention to seize privileged materials during an ongoing investigation. The District Court further did not consider the Government's callous disregard in the execution of the search warrants, including the intentional seizure of privileged materials. Furthermore, the establishment of a "taint team" to "filter" the privileged material intentionally seized does not categorically demonstrate a regard for the privilege--particularly in this case, where the taint team failed in its duty of care and improperly transferred privileged materials to case investigators.

Second, the District Court erred in finding that Harbor's interest in protecting its privacy, including its attorney-client privilege, weighed against granting relief pursuant to Rule 41(g). As federal courts have long recognized, Rule 41(g), by its plain terms, provides a remedy for parties aggrieved by an unlawful search and seizure and not just by deprivation of property.

Third, the District Court erred in declining jurisdiction based on a finding that Harbor faced no irreparable harm. In so holding, the District ***21** Court ignored basic legal principles. First, federal courts have long recognized that the denial of a constitutional right constitutes irreparable harm. Second, the disclosure of privileged materials itself inflicts irreparable harm supporting injunctive relief. The privilege depends on confidentiality--that a person under investigation can obtain legal advice without those communications being intercepted by the Government. Hence, even a disclosure to a separate group of Government agents

and attorneys known as a "taint team" denies the confidentiality necessary for the operation of the privilege, and chills frank communication between attorney and client.

Fourth, the District Court erred in holding that Harbor had an adequate remedy at law via a theoretical motion to suppress evidence *if* an indictment is returned in the future. But a motion to suppress is not a prompt or certain remedy because it is unknowable if, or when, Harbor would even be indicted. Moreover, the potential *future* suppression of evidence cannot mitigate the *present* loss of Harbor's confidentiality in its attorney-client privileged communications and work-product regarding ongoing government investigations.

***22** Fifth, in denying Harbor's Motion for Reconsideration, the District Court compounded its prior errors by relieving the Government from its agreement to not review documents Harbor had identified as privileged on its privilege log. In so doing, the District Court ignored Harbor's principal argument that under the principles of *United States v. Zolin*, 491 U.S. 554 (1989), the Government may not intentionally review putatively privileged materials without prior judicial authorization based on a showing akin to probable cause.

Sixth, the District Court further erred in not addressing the Government's insistence on its right to invoke the plain view doctrine for emails and other writings. Combining the wholesale seizure of electronically stored information with the invocation of the "plain view doctrine," transforms this search into an unconstitutional general search.

Finally, the District Court should have held an evidentiary hearing under Rule 41(g) and should have required testimony on such significant issues as the intentional seizure of privileged material and the tainting of the underlying criminal and civil investigations. But the District Court never held an evidentiary hearing despite repeated requests to do so.

## ***23** *ARGUMENT*

### I. *THE DISTRICT COURT ERRED IN DECLINING JURISDICTION WITHOUT ADDRESSING THE MERITS*

Under Fed. R. Crim. P. 41(g), a "person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). Harbor moved pursuant to Rule 41(g) for the return of property, challenging the Government's unconstitutional general search and seizure, resulting even in the intentional seizure of Harbor's privileged communications and work product.

[Text redacted in copy]

#### ***24** A. *Standard of Review*

A mixed standard of review applies to the District Court's Order (ROA.1010-1017), which granted the Government's Motion To Dismiss For Lack Of Equitable Jurisdiction Or, In The Alternative, For Summary Judgment (ROA.182-196) directed to Harbor's Motion. A pre-indictment ***25** Rule 41(g) motion like Harbor's is treated as a civil complaint. *Bailey*, 508 F.3d at 737. A motion to dismiss a complaint for lack of subject-matter jurisdiction is reviewed de novo except for jurisdictional findings of fact, which are reviewed for clear error. *Lonatro v. United States*, 714 F.3d 866, 869 (5th Cir. 2013). Similarly, the grant of a motion for summary judgment on a Rule 41(g) motion is reviewed de novo. *Bailey*, 508 F.3d at 738, citing *United States v. Robinson*, 434 F.3d 357, 361 (5th Cir. 2005). Finally, this Court "reviews de novo a district court's interpretation of Rule 41(g)." *United States v. Oduu*, 564 Fed. App'x 127, 130 (5th Cir. 2014).

[Note: footnote missing in original document]

This Court, however, reviews for abuse of discretion a decision whether to exercise equitable jurisdiction over a Rule 41(g) motion. *Richey*, 515 F.2d at 1243. Under an abuse-of-discretion standard, "[a] District court would necessarily abuse its

  

discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gall v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

### *26 B. *The District Court Erred in Holding That The Government Did Not Act With "Callous Disregard" For Harbor's Rights.*

Applying the first *Richey* factor, [Text redacted in copy] It did so despite its initial exercise of equitable jurisdiction for nearly one year, (ROA.1012), itself an acknowledgment that Harbor's rights were jeopardized by the Government's conduct.

The District Court erred because it did not consider the substantial allegations of "callous disregard" which were supported by evidence and unrebutted by the Government. [Text redacted in copy] Contrary to this holding, the Government acted with callous disregard in at least three ways.

#### 1. *The Government callously disregarded Harbor's rights by drafting and executing warrants that provided no meaningful limitation as to the agents' discretion to seize property.*

***27** [Text redacted in copy] Such latitude cannot be reconciled with the constitutional command to particularly describe the evidence to be seized.

"The chief evil that prompted the framing and adoption of the Fourth Amendment was the 'indiscriminate searches and seizures' conducted by the British 'under the authority of general warrants.' " *United States v. Galpin*, 720 F.3d 436, 445 (2d Cir. 2013) (*quoting Payton v. New York*, 445 U.S. 573, 583 (1980)). As a result, the Fourth Amendment requires that warrants "particularly describe the place to be searched, and the persons or things to be seized." *United States v. Triplett*, 684 F.3d 500, 504 (5th Cir. 2012) (*quoting* U.S. Const. amend. IV).

The Particularity Clause "prevents the seizure of one thing under a warrant describing another," and insures that "nothing is left to the discretion of the officer executing the warrant." *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (*quoting Marron v. United States*, 275 U.S. 192, 196 (1927)); *accord*, *Williams v. Kunze*, 806 F.2d 594, 598 (5th Cir. 1986) ("(T)he items must be described with sufficient particularity such that the executing officer is left with no discretion to decide what may be ***28** seized.") "The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (*quoting Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984)).

The Government's general warrants here failed to limit the discretion of the executing agents. [Text redacted in copy]

The fact that magistrate judges signed these warrants does not establish the good faith of the agents and attorneys involved. The Supreme Court has repeatedly recognized that " 'a warrant may be so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid.' " *Groh*, 540 U.S. at 565 (*quoting United States v. Leon*, 468 U.S. 897, 923 (1984)).

***29** [Text redacted in copy] The Government had document productions in response to the 2015 OIG Request for Information, the 2017 CID, and no doubt other information about Harbor. The Government could have leveraged that information to draft its warrants to list the custodians from whom documents would be seized and to otherwise focus the seizure.

But the Government did not do so. It instead charged ahead with obtaining and executing facially deficient general warrants. In so doing, the Government showed callous disregard for Harbor's rights.

  

***2. The Government further callously disregarded Harbor's rights by intentionally seizing its privileged documents without prior judicial approval.***

Furthermore, the District Court ignored allegations that the Government acted in callous disregard in seeking the warrants in the first place. The Government used these warrants, which did not particularly identify legal and compliance officers by name or expressly authorize privileged documents to be seized, to target Harbor's privileged ***30** communications without authorization from senior officials in the Department of Justice for such an extraordinary search. *See* United States Attorneys' Manual § 9-13.420 (requiring prior consultation and authorization for a search of a "legal advisor" to a business organization). Nor did the Government inform the issuing judges of its intention to seize documents from Harbor's legal function or the background that made an intrusion upon the attorney-client privilege and the attorney work product a substantial certainty. In short, if apprised of the facts and the intention to seize privileged material, a reasonable jurist would not have signed the warrants as presented.

To the contrary, a reasonable jurist apprised of the facts would have required a specific showing to justify an intrusion upon the privilege, and, absent that would have required the warrants to be particularly drawn to avoid the intrusion upon the privilege. *See National City Trading Corp. v. United States*, 635 F.2d 1020, 1026 (2d Cir. 1980) (noting that "a law office search should be executed with special care to avoid unnecessary intrusion on attorney-client communications."); *see also*, United States Attorneys' Manual § 9-13.420 (a warrant "should be drawn as specifically as possible, consistent with the requirements of the investigation, to ***31** minimize the need to search and review privileged material to which no exception applies.") Circumventing recognized limitations on intrusion into the privilege, and intentionally seizing significant quantities of Harbor's privileged material, is a "callous disregard" of Harbor's rights.

"The basic purpose of this (Fourth) Amendment, as recognized in countless decisions of this (Supreme) Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 528 (1967). The attorney-client privilege and the attorney work product are firmly established rights to privacy. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1991); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *cf. In re: Search Warrant Issued June 13, 2019*, 942 F.3d 159, 174 (4th Cir. 2019) ("[T]he essence of the Sixth Amendment right to effective assistance of counsel is, indeed, privacy of communication with counsel") (internal citation omitted.)

The attorney-client privilege is sacrosanct as "the oldest of the privileges for confidential communications known to the common law." *Upjohn*, 449 U.S. at 389. This privilege operates as a bar to the disclosure of confidential communications between attorney and client. *See e.g.*, ***32** *Fisher v. United States*, 425 U.S. 391, 403 (1976); *In re*: *Search Warrant*, 942 F.3d at 173 (4th Cir. 2019) (*citing* Black's Law Dictionary 129 (6th ed. 1990)). The purpose of the attorney-client privilege is "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389.

"(I)t is not hyperbole to suggest that the attorney-client privilege is a necessary foundation for the adversarial system of justice." *In re Lott*, 424 F.3d 446, 450 (6th Cir. 2005). The right to the assistance of legal counsel "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Upjohn*, 449 U.S. at 389 (*quoting Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)); *accord, Zolin*, 491 U.S. at 571.

The same is true for attorney work-product materials. The law recognizes "a qualified privilege" to be held by lawyer and client for "certain materials prepared by an attorney 'acting for his client in anticipation of litigation.' " *United States v. Nobles*, 422 U.S. 225, 237-38 (1975) (*quoting Hickman v. Taylor*, 329 U.S. 495, 508 (1947)). As the Supreme Court explained, a lawyer must be able to "work with a certain ***33** degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman*, 329 U.S. at 510.

For privileged material, "mandatory disclosure...is the exact harm the privilege is meant to guard against." *In re Lott*, 424 F.3d at 451-52; *see also Zolin*, 491 U.S. at 571 (privilege requires protection from disclosure). In fact, under a straightforward application of the Supreme Court's decision in *Zolin*, the Government had to obtain prior authorization based upon a showing

akin to probable cause before intentionally seizing and reviewing privileged material. 491 U.S. at 572. In *Zolin*, the Government urged the court to review *in camera* certain putatively privileged tape recordings to determine whether the crime-fraud exception to the attorney-client privilege applied. *Id*. at 558-59. The Supreme Court addressed the question of whether *in camera* review by a court of allegedly privileged material should always be permitted. *Id*. at 565. The Supreme Court answered the question no, reasoning that "[a] blanket rule allowing in camera review as a tool for determining the applicability of the crime-fraud exception...would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk." *Id*. at 571. The Supreme Court emphasized that "[t]oo ***34** much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect." *Id*. at 570. Instead, the Supreme Court required a special showing to the court akin to probable cause before even a judge can knowingly review privileged material. *Id*.

If *in camera* review by a neutral judge poses a threat to the privilege and is not permissible absent a special showing, then the intentional seizure and review of privileged communications by the Government is unlawful absent a similar showing to the court. *Zolin* cannot be reconciled with the notion that the Government can seize and review privileged material whenever it chooses without demonstrating extraordinary grounds to do so and without prior judicial approval.

In this case, the Government failed to obtain advance approval for the intentional seizure of privileged material during an ongoing investigation. After notifying Harbor of its ongoing investigations, the Government executed its searches and seizures. As the Government knew, these prior notifications would "prime the pump" for the creation of privileged communications and work product regarding the ongoing investigations. [Text redacted in copy]

***35** In short, the drafting and issuance of the search warrants itself demonstrates "callous disregard" for Harbor's rights--not the required care for avoiding intrusion upon privileged material and the Fourth Amendment's particularity requirement. Nor can the issuance of the search warrants absolve the callous disregard in the execution of the search warrants. The District Court erred by failing to consider these unrebutted, supported allegations in dismissing Harbor's Motion.

While ignoring the allegations of callous disregard, the District Court suggested that getting a search warrant approved is all the regard required. In support, the District Court cited *Richey* and *In re Search of 5444 Westheimer Rd Suite 1570*, No. H-06-238, 2006 WL 1881370, *2 (S.D. Tex. July 6, 2006), but neither say as much. *Richey* simply compares in a footnote a case where a warrant was later invalidated to two cases ***36** where the agents obtained evidence allegedly by fraud or deceit. 515 F.2d at 1243 n.8. At most, this footnote suggests that a movant must suggest something more than an unlawful search; not that the issuance of a warrant insulates the government from any callous disregard. *In re Search of 5444 Westheimer Rd*. cited to a pre-*Richey* case, *Hunsucker v. Phinney*, which simply concluded the agents in that case did not act with "callous disregard" because they seized "bet memoranda, telephone and mileage records, sports schedules, ... and 'face and hand signals for gin' " pursuant "to a warrant issued in the normal manner..." *Hunsucker v. Phinney*, 497 F.2d 29, 34-35 (5th Cir. 1974).

But neither case supports that the issuance of a warrant ends the inquiry, particularly where, as here, the Government failed to inform the issuing judges of material information. Further, if judicial approval of a warrant categorically establishes a lack of "callous disregard," then Rule 41(g) would only be applicable in a few extreme cases where the Government seizes evidence without a warrant. Rule 41(g) does not say this.

### ****37* 3. *The Government exacerbated, rather than mitigated, its disregard for Harbor's rights through its "taint team" review of Harbor's privileged documents.***

Nor does the Government's establishment of a "taint team" demonstrate a *lack* of callous disregard. The unrebutted record demonstrates that the "taint team" failed to safeguard Harbor's privilege.

[Text redacted in copy] Breaking his silence months later, the taint team attorney announced that the [Text redacted in copy] After Harbor raised this concern, the Government then claimed that it identified 363,277 privileged documents in its possession--a number that confirmed the remarkable intrusion into the privilege, but appeared overstated and thus heightened concerns

about the reliability of the taint team. (Oct. 18, 2018 Harbor Letter to District Court, ROA.22-24; Sept. 11, 2018 email from Tortorice to Searby, ROA.25.)

***38** Later, when Harbor reviewed what was represented to be the set of material transferred from the taint team to the investigative team, Harbor discovered privileged documents wrongly passed to the investigators. (See Apr. 2, 2019 Letter, ROA.251-52; Sept. 3, 2019 Hr'g Tr., ROA.353:4-10.) In the final telephonic hearing, the Government admitted the scope of the breach was greater than Harbor had itself identified. The Government acknowledged that it employed Harbor's privilege log identifying 3,843 privileged emails to "remove those e-mails from what the *investigative team* had access to." (Sept. 3, 2019 Hr'g Tr., ROA.354:23-355:1 (emphasis added)).

The Government's assertions about what case investigators did and did not review were at best unreliable. In fact, the AUSA represented at the initial hearing that the investigators and attorneys from the DOJ Civil Division (overseeing the parallel civil investigation giving rise to the CID) did not have access to the materials seized from Harbor, stating "[w]e haven't -- we didn't and never would do that, take documents from a search warrant and give them to [the Civil Division] -- no. That didn't happen." (Dec. 4, 2018 Hr'g Tr., ROA.338:16-18.) However, the AUSA later admitted that:
***39** [Text redacted in copy]

[Text redacted in copy] This and other inconsistencies cast doubt on whether the AUSA was fully aware of who had access to thousands of privileged emails, casting further doubt on the Government's later assertion that no one reviewed them. (Sept. 3, 2019 Transcript, ROA. 369:19-24) (emphasis added) (Mr. Tortorice: "Not that the investigative team was looking at anything already, but -- and I can reconfirm that.")

The District Court addressed *none* of these extraordinary facts in finding the establishment of a "taint team" to demonstrate a lack of callous disregard. This too was a clear abuse of discretion.

### C. *The District Court Wrongly Held That Harbor's Privacy Rights Did Not Support Rule 41(g) Relief*

The District Court further erred in holding [Text redacted in copy] ***40** But the District Court erred as a matter of law in weighing against the exercise of jurisdiction the detailed allegations of unlawful searches and seizures.

Read in full context, Harbor's Motion sought the return of property to prevent the unwarranted invasion of privacy from the Government's review of information it never had the lawful right to seize, including thousands of privileged documents. Harbor sought the return of most of the privileged material, not for lack of access to these documents, but because it sought to prevent the Government from breaching their confidentiality. For privileged material, "mandatory disclosure...is the exact harm the privilege is meant to guard against." *In re Lott*, 424 F.3d at 451-52.

The District Court erred as a matter of law in suggesting that Rule 41(g) relief is limited to the need for actual physical possession of property. To the contrary, Rule 41(g) provides in the disjunctive that a "person aggrieved by an unlawful search and seizure of property *or* by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g) (emphasis added). By its plain terms, Rule 41(g) provides a remedy not only when a person needs the return of property, for ***41** example, to run an ongoing business, but when the seizure violates Fourth Amendment rights.

Federal courts order the return of documents to protect against intrusion upon privileged materials and *not simply based upon need of access to property*. *See e.g.*, *United States v. Rayburn House Office Bldg.*, Room 2113, Washington, D.C. 20515, 497 F.3d 654, 665 (D.C. Cir. 2007) (reversing and ordering return of privileged legislative materials); *Klitzman, Klitzman, & Gallagher v. Krut*, 744 F.2d 955, 961 (3d Cir. 1984) (affirming order to return property based on grounds that "law firm could not function without many of the seized materials, *and more important*, that the seizure represented a gross imposition on the attorney-client privilege." (emphasis added)); *In re: Search Warrant*, 942 F.3d at 175 (finding "the district court erred as a matter of law by

affording insignificant weight to the foregoing principles protecting attorney-client relationships."). Accordingly, the District Court abused its discretion by minimizing Harbor's privacy interest in derogation of these fundamental legal principles and without citing any legal support.

### *42 D. *The District Court Erred In Finding A Lack of Irreparable Harm.*

The District Court further erred in holding, [Text redacted in copy] In so holding, the District Court adopted the Government's "straw man argument" which Harbor never made (that the grand jury may rely on illegally seized evidence in returning an indictment). Indeed, Harbor's Motion did not seek the suppression of evidence in any context, but the return of the seized property. *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1173 (9th Cir. 2010) (en banc). In stating that [Text redacted in copy] the District Court ignored the firmly established grounds for irreparable harm cited by Harbor below.

#### 1. *The denial of a constitutional right constitutes irreparable harm as a matter of law.*

Harbor relied upon the firmly established principle that " '(t)he denial of a constitutional right...constitutes irreparable harm for the purposes of equitable jurisdiction.' " (Reply in Support of Motion at 16, ROA.235) (*quoting Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987)). In *Opulent Life Church v. City of Holly Springs, MS.*, 697 F.3d 279, 295 (5th Cir. 2012), this Court recognized that "[w]hen an alleged deprivation ***43** of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary" (*citing* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995)). *See also Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (denial of Fourth Amendment rights is irreparable harm.) Harbor articulated a settled basis for irreparable harm: the conduct of a general search in violation of the Fourth Amendment. The District Court erred in not addressing the allegation.

#### 2. *Any intrusion into the privilege, even by a "taint team," poses a clear harm to holders of privilege.*

In finding no irreparable harm, the District Court also relied upon [Text redacted in copy] The District Court further relied on [Text redacted in copy]

For the reasons that follow, a "taint team" does not alleviate the irreparable harm that flows from the Government's intentional seizure of privileged materials. And the "taint team" in this case, which disclosed ***44** privileged materials to case investigators, certainly did not do so. As for the "process" which returned the identification of privileged documents to Harbor, that process had broken down prior to the District Court ordering the dismissal of the case. The District Court abused its discretion in ignoring the clear irreparable harm, dismissing the case, and even restoring the Government's right to review by taint team the documents listed on Harbor's privilege log.

#### a. *Taint teams risk disclosure of privileged communications and come at a significant cost to the privilege.*

The Government has characterized the review of putatively privileged material by government taint teams as "hardly remarkable," (Government Opp. to Motion for Reconsideration, ROA.254), but it should be.

In fact, "taint teams pose a serious risk to holders of privilege, and this supposition is substantiated by past experience." *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006). As Judge Boggs recognized, there is "an obvious flaw in the taint team procedure: the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion." *Id. See also In re:* ***45** *Search Warrant*, 942 F.3d at 177-78 (relying upon *In re Grand Jury Subpoenas* in recognizing risk of harm posed by taint teams); *see also*, *United States v. SDI Future Health, Inc.*, 464 F. Supp. 1027, 1037 (D. Nev. 2006) ("Federal Courts have taken a skeptical view of the government's use of taint teams...").

Even when a "taint team" functions without error (and it did not here), there is still harm to the attorney-client privilege. Whatever you call the separate group of agents and attorneys reviewing privileged communications, this review still comes at a cost to the guarantee of confidentiality necessary to the functioning of the attorney-client relationship. *See, e.g., Zolin*, 491 U.S. at 571; *Upjohn*, 449 U.S. at 389; *Hunt*, 128 U.S. at 470; *In re Grand Jury Subpoenas*, 454 F.3d at 523. As the Supreme Court explained in *Hunt*, the right to assistance of legal counsel "can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." 128 U.S. at 470; *see also United States v. Neill*, 952 F. Supp. 834, 839 (D.D.C. 1997) ("One of the principle purposes of the attorney-client privilege is to promote the free and open exchange between the attorney and client, and substantial ***46** questions of fundamental fairness are raised where...the government invades that privilege.").

Here, Harbor had been the subject of a pending investigation for two years at the time the warrants were executed. Harbor received further notice of the investigation two months prior to the warrants' execution. Of course, a party who is the subject of a governmental investigation would retain counsel to provide critical legal services in connection with the investigation. And Harbor did so here, consulting [Text redacted in copy]

For the Government to then get general warrants and seize vast quantities of privileged materials, even with a "taint team," has a foreseeable chilling effect on that party's confidence in the privacy of its communications with counsel, which threatens counsel's ability to effectively represent the client. The Government has never justified such a severe intrusion upon the privilege in this case.

In holding that Harbor failed to establish irreparable harm, the District Court erred as a matter of law "affording insignificant weight to ***47** the foregoing principles protecting attorney-client relationships" and the clear harm posted by taint team review in this and similar cases. *In re: Search Warrant*, 942 F. 3d at 175.

**b.** ***The taint team failed to protect Harbor's privilege as it disclosed privileged material to the investigative team.***

This case demonstrates that this "serious risk" is quite real. After the District Court's initial intervention, Harbor finally, over a year after the search, had the opportunity to review the documents the Government claimed had transferred from "the taint team" to the case investigative team. Harbor discovered privileged documents were wrongly disclosed to the investigators. (*See* Apr. 2, 2019 Letter, ROA.251-52; Sept. 3, 2019 Hr'g Tr., ROA.353:4-10.) But the extent of the breach was far more significant than Harbor initially knew. During the September 3, 2019 hearing on Harbor's Motion for Reconsideration, the Government acknowledged that it used Harbor's privilege log identifying 3,843 privileged emails to "remove those e-mails from what the investigative team had access to." (Sept. 3, 2019 Hr'g Tr., ROA.354:23-355:1.)

These facts confirmed Harbor's fears--that the Government botched its "taint team" process and wrongly allowed its case ***48** investigators access to privileged material--and should have alarmed the District Court and motivated action. Instead, the District Court dismissed the case and, by its final Order, restored to the Government taint team the right to review the substance of even documents already specifically identified as privileged. (Order Denying Reconsideration, ROA.281.) This was an abuse of discretion.

But prior to the entry of its Order, Harbor had written to the Court expressing concern that this process had stalled, and that the Government had already "tainted" its underlying investigations. (April 2, 2019 Letter, ROA.251-52.) The District Court recognized the risk to the privilege, but paradoxically withdrew judicial supervision while ordering the parties [Text redacted in copy]

Moreover, once the Court dismissed the case, the Government notified Harbor that it was no longer even bound to respect the privilege assertions submitted on Harbor's log, stating [Text redacted in copy] Harbor then filed a motion for reconsideration [Text redacted in copy] ***49** The District Court initially agreed, directing the taint team to suspend any further review of the documents listed on Harbor's privilege log pending Fifth Circuit appeal. (Sept. 3, 2019 Hr'g Tr. at ROA.367:2-5.) However, the

District Court's written order unexpectedly stated that "(t)he Government's taint team can continue to review the documents over which a claim for privilege is asserted..." (Order Denying Reconsideration, ROA.281.)

These decisions, too, constitute an abuse of discretion as they gave insufficient respect to Harbor's privilege concerns and permitted the Government to continue a botched "taint team" review that failed to preserve Harbor's privilege.

### 3. *The District Court erred in finding that Harbor had an adequate remedy at law through a hypothetical, future motion to suppress evidence.*

The District Court further erred when, under *Richey's* fourth factor (the existence of an adequate remedy at law), [Text redacted in copy] This holding means that Harbor has no right to ***50** challenge the Government's conduct of a search and seizure prior to the return of an indictment.

But not every form of hypothetical alternative form of relief at law is "adequate." To the contrary, "it is well settled that if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit." *Dawson v. Kentucky Distilleries Co.*, 255 U.S. 288, 296 (1921). Rather, to bar relief in equity, "an available remedy at law must be plain, clear and certain, prompt or speedy, sufficient, full and complete, practical, efficient to the attainment of the ends of justice and final." *Interstate Cigar Co. v. United States*, 928 F.2d 221, 223 (7th Cir. 1991).

A later motion to suppress satisfies none of these criteria. The District Court implicitly recognized that its proposed remedy is neither certain nor prompt. (Order at 6, ROA.1015) [Text redacted in copy] A party cannot move for suppression until indicted. Whether or when there will be a criminal proceeding here is uncertain and perhaps undecided for years. "(W)here equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." *American Life Ins. Co. v.* ***51** *Stewart*, 300 U.S. 203, 214 (1937). The District Court's substitution of a contingent future remedy is *not* an adequate substitute for the equitable remedy provided in Fed. R. Crim. P. 41(g), and the District Court abused its discretion by so holding.

Moreover, the District Court missed that Rule 41(g) and a motion to suppress have "fundamentally different purposes." *See Comprehensive Drug Testing*, 621 F.3d at 1173. The former seeks an order for the return of property, and thus more directly serves the protection of privacy, one of the core purposes of the Fourth Amendment. In contrast, as discussed above, a later motion to suppress *may* result in the exclusion of evidence, but it does not prevent the ongoing unjustified review of privileged and private papers the Government should never have seized in the first place.

As for the privilege, a later motion to suppress can never provide "full and complete" relief at law because "mandatory disclosure is the exact harm the privilege is meant to guard against, and thus disclosure is not remedied merely because a disclosed confidence is not used against the holder in a particular case." *In re Lott*, 424 F.3d at 451. A theoretical motion to suppress does not prevent the ongoing intrusion into privileged ***52** material. As one Texas judge put it, " 'one cannot put the toothpaste back in the tube' and 'one cannot unscramble the egg.' " *Texas v. United States*, 328 F. Supp. 3d 662, 742 (S.D. Tex. 2018).

The injunctive relief in Rule 41(g) provides a remedy against extraordinary intrusions into the privilege and thus provides security for communications between attorneys and clients. *See Upjohn*, 449 U.S. at 392. This is a case where the Government targeted the legal and compliance functions of a corporation. (*See generally* Search Warrants, ROA.492-646.) Such functions make tempting targets for prosecutors looking for a shortcut to the facts, but intrusions such as in this case "threaten(s) to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Upjohn*, 449 U.S. at 392. "But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Id.* at 393. Where, as here, the Government goes outside the lines, there must be a means for judicial review before the harm is incurred.

In the end, the District Court's decision precludes all pre-indictment relief pursuant to Rule 41(g). In every such case, the movant ***53** will have a theoretical motion to suppress. The District Court thus read into Rule 41(g) a limitation which guts the rule

  

and is contrary to the long-standing case law affording a pre-indictment motion for return of property. *See e.g.*, *Bailey*, 508 F.3d at 736 (a Rule 41(g) motion filed in a matter where no criminal charges are pending is construed as a civil complaint); *In re Search of Kitty's East*, 905 F.2d 1367, 1370 (10th Cir. 1990) (treating Rule 41(g) motion as civil equitable proceeding); *White Fabricating Co. v. United States*, 903 F.2d 404, 407-08 (6th Cir. 1990) (reversing district court for declining jurisdiction to hear pre-indictment challenge to conduct of search.). The District Court's decision in this regard is reversible error.

## II. *THE DISTRICT COURT ERRED IN AUTHORIZING THE GOVERNMENT TO REVIEW DOCUMENTS IDENTIFIED ON HARBOR'S PRIVILEGE LOG.*

The District Court's final order of September 10, 2019 denying Harbor's Motion for Reconsideration did more than affirm the dismissal of the case; it authorized the Government to review even the documents identified on Harbor's privilege log.[5] The District Court abused its ***54** discretion[6] for at least two reasons.

### A. *The Government Has No Right to Review Putatively Privileged Materials Without a Showing to the Court to Support That The Privilege Will Not Apply.*

As set forth above, the Supreme Court held in *Zolin* that *in camera* review by even a presumably independent judge poses a threat to the privilege and is not permissible absent a special showing. *Zolin*, 491 U.S. at 558-59. *Zolin* cannot be reconciled with the government's insistence that it can seize and review (by taint team) privileged material whenever it chooses without demonstrating extraordinary grounds to do so. *Zolin* further cannot be reconciled with the District Court's September 10, 2019 Order allowing the Government's taint team to review even the material identified on Harbor's privilege log. *See also In re: Search Warrant*, 942 F.3d at 176 (denying the Government the right to conduct taint team review.)

The Government claims the automatic right to review even documents identified as privileged provided they do it with a separate ***55** group of attorneys and agents, but this is a "remarkable" departure from the precedent set forth above. The District Court should have required the Government to submit any disputes over Harbor's privilege log to a neutral judicial officer and *not* permitted the Government taint team to review communications Harbor identified as privileged in the first instance.

### B. *The District Court Further Erred in Relieving the Government From its Agreement.*

The District Court's Orders further demonstrate a lack of respect for the agreement the District Court supervised between the Government and Harbor to resolve the privilege dispute. This Agreement shifted the privilege review from the Government's taint team back to Harbor, as the holder of the privilege. In reliance on this Agreement, Harbor incurred the substantial effort and expense of reviewing tens of thousands of emails from the Director of Compliance's email account (which included archived emails from the former General Counsel) in order to identify privileged documents. When the District Court dismissed this case [Text redacted in copy]

***56** Like any party, the Government is obligated to honor its agreements under general principles of contract law. *See e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971) (when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); *United States v. Cantu*, 185 F.3d 298, 302 (5th Cir. 1999) (relying on general principles of contract law to hold that the Government "must perform its reciprocal promise" in a non-prosecution agreement.). Confronted with allegations that the Government intended to unilaterally rescind its obligation not to review the seized documents, the District Court erred in allowing the Government's taint team to review the nearly four thousand documents identified as privileged.

## III. *THE DISTRICT COURT ERRED IN FAILING TO DECIDE THE ISSUE OF THE GENERAL WARRANTS AND PLAIN VIEW REVIEW*

As discussed above, the Government executed general warrants in violation of the Fourth Amendment. The Government took full advantage of the lack of particularity, seizing over 3.59 terabytes of electronic ***57** evidence (ROA.273-74) [Text redacted in copy] Just one cell phone or smartphone may have the capacity to store "millions of pages of text, thousands of pictures, or hundreds of videos." *Riley v. California*, 573 U.S. 373, 394 (2014). Smartphones "are in fact minicomputers" with "immense storage capacity" for all different types of information wholly unrelated to whatever showing of probable cause the government may claim. *Id*. Indeed, by seizing electronic data in this way, the Government likely removed exponentially more information than if it had simply removed every single paper document in all five locations searched. [Text redacted in copy]

In this and other cases, the Government abuses the need to find a needle of evidence in the electronic haystack into a general license to review and retain evidence without limitation. A computer's ability to store "a huge array of one's personal papers in a single place...makes the particularity requirement that much more important." *United States v.* ***58** *Otero*, 563 F.3d 112, 113 (10th Cir. 2009); *accord, United States v. Richards*, 659 F.3d 527, 537-38 (6th Cir. 2011) (the risk of an unconstitutional general search has increased exponentially in the computer era); *In the Matter of Search of Black iPhone 4*, 27 F. Supp. 3d 74, 79 (D.D.C. 2014) (allowing the government to search all of the records on an electronic device regardless of "whether they bear any relevance whatsoever to the investigation" is "precisely the type of 'general exploratory rummaging in a person's belongings' that the Fourth Amendment prohibits") (internal citations omitted).

This situation is even more problematic because of the Government's insistence here on its right to seize all of the electronically stored evidence and to invoke "the plain view doctrine" to retain as evidence even documents outside of the scope of its purported healthcare fraud investigation. (Reply in Support of Motion, ROA.245-47.)

Federal courts have expressed the need for judicial oversight to prevent the government from "overseizing data and then using the process of identifying and segregating electronic data to bring constitutionally protected data...into plain view." *United States v. Schesso*, 730 F.3d 1040, 1047 (9th Cir. 2013) (*citing Comprehensive Drug* ***59** *Testing*, 621 F.3d at 1180. "Once the government has obtained authorization to search the hard drive, the government may claim that the contents of every file it chose to open were in plain view and, therefore admissible even if they implicate the defendant in a crime not contemplated by the warrant." *Galpin*, 720 F.3d at 437. This results in "a serious risk that every warrant for electronic information will become, in effect, a general warrant, rendering the Fourth Amendment irrelevant." *Comprehensive Drug Testing*, 621 F.3d at 1176; *accord, United States v. Stabile*, 633 F.3d 219, 237 (3d Cir. 2011) ("[G]ranting the Government a carte blanche to search every file on the hard drive impermissibly transforms a limited search into a general one.").

The solution to this problem is not judicial abstention in abrogation of the Fourth Amendment but increased judicial oversight. Harbor fully briefed the issue below, but the Court simply abstained from deciding it. The District Court should have secured from the Government its agreement to abide by meaningful limits, including forswearing invoking plain view review for emails and other writings, or else it would order the return of property. *See* ***60** *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (stating concern that expansive interpretation of the plain view exception will render the particularity requirement meaningless).

## IV. *THE DISTRICT COURT ERRED IN SUMMARILY DENYING THE RULE 41(G) MOTION WITHOUT A HEARING OR UNSEALING THE AFFIDAVITS*

The District Court abused its discretion[7] in dismissing the Rule 41(g) Motion without holding an evidentiary hearing or unsealing the search warrant affidavits. Rule 41(g) provides that "(t)he court must receive evidence on any factual issue necessary to decide the motion." Fed. R. Crim. P. 41(g). A court must ensure that it has "sufficient information to decide a Rule 41(g) motion." *Albinson*, 356 F.3d at 282.

Here, the District Court decided the case, including such fact specific issues as callous disregard, without an evidentiary hearing. The summary dismissal is even more shocking because the record below, including affidavits filed by Harbor and other information in the record, demonstrated a probable violation of Harbor's rights and should have caused the District Court to act.

An evidentiary hearing was needed to document the full extent of ***61** the Government's breach. For example, the Government did not respond to Harbor's notice to the Court that the taint team had disclosed privileged material to the investigative team. (*See, e.g.*, Apr. 2, 2019 Letter, ROA.251-52.) However, after the dismissal of the case, the Government acknowledged using Harbor's privilege log to remove "those documents *from the investigative team's side*," but claimed that the investigative team did not review this material prior to deletion. (Sept. 3, 2019 Hr'g Tr., ROA. 369:19-24) (emphasis added). Notwithstanding this stunning admission, the District Court maintained its order finding "no callous disregard" and no "irreparable harm" without ever receiving any actual evidence from the Government or investigating the issue further.

The District Court abused its discretion in finding no callous disregard without unsealing the search warrants or even balancing the interests. In particular, the District Court never addressed whether the Government proffered any probable cause to target the legal and compliance functions of the company. Nor did the District Court unseal the affidavits underlying the search warrant to determine whether there was ever any factual basis to support targeting the legal function of the ***62** Company. [8]

The absence of documented probable cause to believe that the former General Counsel or the Director of Compliance were involved in the conduct under investigation would demonstrate a complete lack of respect for the privilege and further support the granting of Rule 41(g) relief.

## *CONCLUSION AND RELIEF REQUESTED*

For the foregoing reasons, Plaintiff-Appellant, Harbor Healthcare System, L.P., respectfully requests that this Court reverse the Order of the District Court declining jurisdiction and dismissing the case.

***63** Date: December 4, 2019

Houston, Texas

Respectfully submitted,

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## Footnotes

1 The District Court record frequently refers to Harbor as "HHCS." This Court should consider Harbor and HHCS to refer to the same party.

2 At this time, Mr. Sprott held a law degree but was not yet admitted to the bar.

3 At Harbor's request, the District Court directed the Government to produce a copy of the full set of materials that the investigators had access to. (Jan. 29, 2019 Hr'g Tr., ROA.1069:13-1070:15.)

4 As an initial matter, this Court should consider whether the *Richey* factors for finding "anomalous jurisdiction" even apply. *See Linn v. Chivatero*, 714 F.2d 1278, 1285-86 (5th Cir. 1983) (Clark, C.J., concurring). Federal Rule of Criminal Procedure 41(g) provides an established basis for a court to order relief, and as Chief Judge Clark recognized, there is no need for "anomalous jurisdiction," where, as here, a movant seeks relief for a Fourth Amendment violation. *Id*. There is federal subject matter jurisdiction because the claims arise under the Constitution. *Id*.

5 The Government has agreed to abstain from reviewing the documents identified on Harbor's privilege log until this appeal is decided. In reliance on that agreement, Harbor did not seek an emergency stay from this Court.

6 A decision to deny a motion for reconsideration under Fed. R. Civ. P. 59(e) is reviewed for abuse of discretion. *Midland West Corp. v. Federal Deposit Insurance Corp.*, 911 F.2d 1411, 1145 (5th Cir. 1990).

7 See *United States v. Albinson*, 356 F.3d 278, 284 (3d Cir. 2004) (decision to forgo hearing on Rule 41(g) motion reviewed for abuse of discretion).

8 There is a common law qualified right of access to pre-indictment warrant materials. *United States v. Sealed Search Warrants*, 868 F.3d 385, 391 (5th Cir. 2017).