UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

- V. -

Dean Skelos and Adam Skelos,

Defendants.

S1 15 Cr 317 (KMW)

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO SUPPRESS EVIDENCE DERIVED FROM WIRETAP INTERCEPTIONS OF THEIR CELLULAR TELEPHONES

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Defendants Senator Dean Skelos and Adam Skelos respectfully submit this memorandum of law in support of their motion to suppress certain evidence obtained through the government's illegal wiretaps on various cellphones. Specifically, defendants move to suppress any evidence gathered as a result of the orders authorizing the interception of wire and electronic communications over (1) the cellular telephone with call number [redacted] (the "2603 Cellphone"), (2) the cellular telephone with call number [redacted] (the "8155 Cellphone") and (3) the cellular telephone with call number [redacted] (the "3888 Cellphone")(collectively, the "Target Cellphones").

While the standard for suppression of a wiretap is quite high, the unique circumstances of this case warrant it. As set forth more fully below, the initial wiretap application in this case was predicated on stale information and events, including some that had occurred more than two years earlier. Additionally, the government failed to comply with the statutory requirement to utilize alternative and much less intrusive investigative techniques at its disposal before resorting to a wiretap. Since it appears that the wiretaps were more a fishing expedition than a necessary tool to further the government's investigation, the evidence arising out of the interceptions of the Target Cellphones should be suppressed.

RELEVANT BACKGROUND

I. THE GOVERNMENT'S INVESTIGATION

In April 2014, the government initiated a grand jury investigation relating to then Senate Majority Leader Dean Skelos. After spending months investigating Senator Skelos's relationship with his law firm employer – including reviewing almost all aspects of this 20-year relationship – and finding no wrongdoing, the government shifted its focus and began targeting Senator Skelos's son, Adam Skelos. In particular, they began looking at the younger Skelos's employment with an Environmental Technology Company.

In October 2014, the government began obtaining through search warrants the email communications of Adam Skelos as well as those of the Environmental Technology Company's president and another key employee, [redacted], who was Skelos's primary contact at the Company. Like many people today, the participants used email as a primary mode of communication and, as reflected in the Initial Title III Application, they had lengthy discussions via email about many of the events that the government had begun investigating.[1] In addition to the email search warrants, the government also had subpoenaed Adam Skelos's wireless carrier, [redacted], for cellphone records, pen registers, and trap and trace data, and obtained documents from a variety of other sources.

II. TITLE III APPLICATIONS

On December 5, 2014, the government submitted its initial application for Title III authorization over a cellphone belonging to Adam Skelos (previously referred to as "the 2603 Cellphone").[2] United Sates District Judge Paul G. Gardephe granted the government's application the same day and it began intercepting communications over the 2603 Cellphone on December 6, 2014. On January 2, 2015 and January 30, 2015, United States District Judge Valerie E. Caproni authorized the continued interception of communications over the 2603 Cellphone. On March 2, 2015, Judge Gardephe authorized the interception of these communications for an additional 30 days.

On March 31, 2015, this Court granted the government's application for an additional 30-day extension of the interception order over the 2603 Cellphone. The government

[1] By November 24, 2014, the government had obtained thousands of emails from these three individuals.

[2] Per an agreement with the government, we will provide the Court a copy of the Initial Title III Application for the 2603 Cellphone, dated December 5, 2014 (the "Initial Title III Application") along with a courtesy copy of the defendants' pre-trial motions.

submitted its first periodic report on April 8th, which Judge Gardephe reviewed on April 14, 2015. The government advised Judge Gardephe that it had ceased intercepting wire communications on April 7, 2015.

On December 19, 2014, the government submitted an application to Judge Gardephe to intercept communications over a cellphone belonging to Dean Skelos (previously referred to as the "3888 Cellphone"). Judge Gardephe granted the application that day and the government thereafter began intercepting communications occurring over the 3888 Cellphone. At the government's request, Judge Gardephe signed orders authorizing the continued interception of these communications on January 16, 2015, and February 17, 2015. The government ceased intercepting communications over the 3888 Cellphone only ten days after Judge Gardephe's last order, on February 26, 2015.[3]

On March 13, 2015, the government submitted a Title III application to intercept wire communications over a second cellphone used by Adam Skelos (previously referred to as the "8155 Cellphone"). On the same day, Judge Gardephe granted the application to intercept

[3] The government advised Judge Gardephe that it was terminating the wiretap of the 3888 Cellphone because it had "determined that, likely due to publicity surrounding the Government's arrest of the Speaker of the New York Assembly in January 2015 and news reports regarding the Government's investigation of other public officials including DEAN SKELOS, the Target Subjects have significantly curtailed their use of the Target Cellphone to make telephone calls." (February 27, 2015 Letter to Honorable Paul Gardephe, at 9) (A copy of the letter will be provided to the Court along with the Initial Title III Application). While a clever explanation, it seems more likely that the real reason there were no pertinent calls from the 3888 Cellphone was because Senator Skelos was doing nothing wrong. If the government really believed that the referenced publicity had spooked the Target Subjects in the manner described, it would have been appropriate to cease intercepting calls over Adam Skelos's cellphone too. Instead, it continued intercepting the 2603 Cellphone for more than a month and also sought authorization on March 13, 2015, to intercept a second cellphone used by Adam Skelos. The likely reason for the government's decision to do so was because they knew Adam Skelos was misrepresenting and/or exaggerating his father's efforts on behalf of the Environmental Technology Company and wanted to continue recording these lies so that it could make a case against Senator Skelos based on them.

wire communications over the 8155 Cellphone. The government began intercepting communications over the 8155 Cellphone on March 13, 2015, and ceased intercepting these communications on April 7, 2015.

III. THE ARREST AND CHARGES

On May 4, 2015, Senator Skelos and Adam Skelos were arrested and charged in a six-count Complaint. The charges arose from allegations that Senator Skelos had obtained benefits for his son in 2012-13, including a job at the Environmental Technology Company and a $20,000 commission payment, in return for Senator Skelos's agreement to assist both a New York real estate developer (Developer-1) and the Environmental Technology Company. After being indicted on the same charges on May 28, 2015, both were arraigned before this Court on June 1, 2015, and pleaded not guilty.[4]

Since the filing of the Complaint, the government has been producing discovery to the defense, including Title III materials, audio recordings, line sheets of the recorded conversations, search warrants, emails, as well as materials it received in response to third party subpoenas.

On July 30, 2015, the Court ordered that defendants file all pre-trial motions on or before September 4, 2015.

APPLICABLE LAW

I. THE LIMITATIONS OF TITLE III INTERCEPTIONS

The Fourth Amendment strictly limits the government's use of wiretaps to record private conversations. *Katz v. United States*, 389 U.S. 347, 353 (1967). In 1968, Congress

[4] The defendants were arraigned and pleaded not guilty to a superseding indictment on July 30, 2015. The Superseding Indictment contained two additional substantive counts.

enacted Title III to establish a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard v. United States*, 408 U.S. 41, 46 (1972).[5]

In order to obtain wiretap authorization, the government must demonstrate, among other things: "that there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in [S]ection 2516 . . . [and] there is probable cause for belief that particular communications concerning that offense will be obtained through such interception." 18 U.S.C. §2518(3). In passing the legislation, Congress intended to "make doubly sure that the statutory authority [for wiretaps] be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *Giordano*, 416 U.S. at 515, 506 (noting wiretapping is an "extraordinary investigative device" and is "not to be routinely employed as the initial step in criminal investigation").

Courts have similarly long acknowledged the serious implications of authorizing a wiretap. The Second Circuit specifically recognized that "Congress knew that it was creating an investigative mechanism which potentially threatened the constitutional right to privacy" and "carefully wrote" protective procedures into the law. *United States v. Capra*, 501 F.2d 267, 276-77 (2d Cir. 1974); *see also United States v. Gigante*, 538 F.2d 502, 503 (2d Cir. 1976) (Congress enacted Title III in order "to ensure careful judicial scrutiny of the conduct of electronic surveillance and the integrity of its fruits.").

[5] Title III imposes "important preconditions to obtaining any intercept authority at all." *United States v. Giordano*, 416 U.S. 505, 515 (1974). Among other things, Title III limited the types of offenses that could be investigated through the use of a wiretap, excluding for instance Title 18, United States Code, § 666.

II. REVIEW OF WIRETAP APPLICATIONS AUTHORIZED UNDER TITLE III

To enforce the strict standards of Title III, disclosure of the contents of any intercepted wire or oral communication or evidence derived therefrom may not be used in any trial, hearing, or other proceeding in or before any court if disclosure of that information would be in violation of Title III. 18 U.S.C. § 2515. Accordingly, under 18 U.S.C. § 2518(10)(a), any "aggrieved person" – "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed," *see id.* § 2510(11) – may move to suppress the contents of an intercepted communication on the ground that the communication was "unlawfully intercepted." *Id.* § 2518(10)(a); *see also In re Flanagan*, 533 F. Supp. 957, 960 (E.D.N.Y. 1982) ("In the context of wiretapping, the rule has crystalized that the only persons with standing to suppress the fruits of an illegal wiretap are parties at whom the wiretaps were directed, parties to the call that was intercepted, or parties owning the premises where the conversations were intercepted."), *aff'd in relevant part, In re Grand Jury Subpoena of Flanagan*, 691 F.2d 116, 119 n.2 (2d Cir. 1982); *United States v. De Leon*, No. 10-CR-188A, 2012 WL 3313072 at *1 (W.D.N.Y. June 15, 2012) (finding "a named target and interceptee on the Title III interception orders . . . [had] demonstrated standing to move against the intercept orders").

ARGUMENT

I. THE INFORMATION CONTAINED IN THE INITIAL TITLE III APPLICATION WAS STALE AND THEREFORE DID NOT SUPPORT PROBABLE CAUSE FOR THE INTERCEPTIONS

"It is elementary that the probable cause needed to validate the issuance of an authorization for a wiretap must exist at the time of issuance." *United States v. Martino*, 664 F.2d. 860, 866 (2d Cir. 1981) (citing *United States v. DePalma*, 461 F.Supp. 800, 809 (S.D.N.Y. 1978)). While there is no bright line for determining staleness, "the principal factors in assessing

whether or not the supporting facts have become stale are [not only] the age of those facts [but also] the nature of the conduct alleged to have violated the law." *Gigante*, 979 F. Supp. at 963 (citing *United States v. Gallo* 863 F.2d 185, 191 (2d Cir. 1988)).

The government's probable cause showing for its initial wiretap was premised almost entirely on "old facts" regarding alleged crimes, which if they occurred at all – and defendants deny they did – were completed long before the submission of the Initial Title III Application, which occurred on December 5, 2014. These allegations included: Adam Skelos securing his job at the Environmental Technology Company in November 2012 (Initial Title III Application, ¶¶ 24-25, 70-86); receiving a $20,000 payment from Developer-1 in early 2013 (*id.* ¶¶ 90-92); and Senator and Adam Skelos purportedly threatening to cease work on a stormwater contract with Nassau County unless the Environmental Technology Company increased Adam Skelos's compensation in April 2013 (*id.* ¶¶ 103-104). There is no precedent in this Circuit known to the defense for a Title III Order where so many of the relevant facts occurred so much earlier than the Initial Title III application. While Title III permits the use of a wiretap to investigate past acts, the government must still establish "fresh" reasons for believing that a wiretap will lead to evidence of the past acts. *See Martino*, 664 F.2d. at 866. The government failed to do so here.

This case is readily distinguishable from those instances where courts have allowed dated information to support a wiretap application. As a review of the relevant case law demonstrates, those cases typically involve sophisticated, ongoing criminal enterprises such as mafia organizations or narcotics operations where there is a strong likelihood of ongoing criminal activity. *See Martino*, 664 F. 2d. 860; *Gigante*, 979 F. Supp. 959. Additionally, in *Martino*, – a case involving a heroin operation – the information establishing probable cause for

the wiretap was only a few weeks old and came with a representation from the defendant to another member of the drug conspiracy that he would be in a position to sell more heroin to him within ten days of the last meeting. *See* 664 F.2d. at 867.

Here, there was no legitimate argument – nor could there have been – of any criminal activity occurring at the time of the Initial Title III Application. While the Initial Title III Application does identify emails related to Adam Skelos's work for the Environmental Technology Company through 2014 – these emails demonstrated nothing more than the performance of his widely known and well-documented duties for the Company. As such, these facts alone cannot remedy the "staleness" of the earlier allegations.

Moreover, the government's toll records analysis, which is typically required to ensure fresh information, also failed to cure the staleness problem. First, the government cleverly conducted its toll record analysis over a 14-month period so that it was able to reach back and include calls between the targets from the time when some of the relevant events were actually occurring. (Initial Title III Application, ¶158). However, even with this broader analysis, the government still fell short because the numbers that were called the most were also the most innocent. Not surprisingly, first on the government's list of frequently called numbers was Adam's father, who he apparently called more than 700 times between September 30, 2013 and November 24, 2014. While the government wishes it were otherwise, this data demonstrated only a close familial relationship between father and son. The second number listed was the cellphone belonging to [redacted] – Adam Skelos's co-worker and someone he took direction from while at the Environmental Technology Company. As such, the fact that Adam Skelos called these two numbers frequently, and within two weeks of the Initial Title III Application, was unsurprising and meaningless for purposes of a "probable cause" finding.

Importantly, the toll records reflected only 30 calls over the same fourteen month period with a cellphone associated with [redacted], an employee of Developer-1, and someone who the government contends was a central figure in the alleged crimes. The last call between Skelos and [redacted] was almost one month prior to the Initial Title III Application. Since under normal circumstances these toll records would not satisfy the probable cause requirement, they certainly cannot do so here in light of the historical nature of so many of the acts relied on in the Initial Title III Application.

II. TRADITIONAL TECHNIQUES WERE AVAILABLE AND THE GOVERNMENT DID NOT DEMONSTRATE SUCH TECHNIQUES WOULD BE "UNLIKELY TO SUCCEED" OR "TOO DANGEROUS"

Under 18 U.S.C. § 2518(3), a judge may approve a wiretap application only after the government demonstrates that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." This prerequisite is often referred to as the "necessity" showing as it is intended to "restrict wiretaps to those which are necessary as well as reasonable." *United States v. Daly*, 535 F.2d 434, 438 (8th Cir. 1976); *see also United States v. Concepcion*, 579 F.3d 214, 218 (2d Cir. 2009) ("[T]he question is not whether a wiretap provides the simplest, most efficient means of conducting an investigation; telephonic surveillance may only be used when it is necessary to assist in law enforcement."). "In short, the requirement is 'simply designed to assure that wiretapping is not resorted to in situations where traditional investigation techniques would suffice to expose the crime.'" *United States v. Fury*, 554 F.2d 522, 530 (2d Cir. 1977) (quoting *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974)).

A proper Title III application must include a "full and complete statement" demonstrating that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C.

§ 2518(3)(c). While the government is not required to exhaust all possible means of investigation, *United States v. Torres*, 901 F.2d 205, 231 (2d Cir.1990), *abrogated on other grounds by United States v. Al Jaber* 436 F. App'x 9, 2 (2d Cir. 2011), it is not permitted to intrude on the privacy of a citizen without "a genuine need for it," *Dalia v. United States*, 441 U.S. 238, 250 (1979). The government failed to establish such a need in its Title III applications.

A. Search Warrants And Grand Jury Subpoenas Appeared To Be Adequate Investigative Tools

There was no need for a Title III order in this case because the government had successfully obtained thousands of other electronic communications (in the form of emails) involving the individuals identified as Target Subjects and others.[6] Based on a review of the Title III Application, it is not only clear that the eventual Target Subjects used email regularly but also that they communicated openly about the issues relevant to the government's investigation, including Adam Skelos's employment at the Environmental Technology Company, the Company's efforts to secure the Nassau County Contract, and its efforts to get paid on the Contract. In fact, the government referenced more than 250 emails in its Initial Title III Application.

By way of example, the initial Title III Application contained more than twenty paragraphs related to the alleged payment of $20,000 to Adam Skelos as well as his employment at the Environmental Technology Company (Initial Title III Application, ¶¶ 41-46, 70-93). Many of these same emails, or at least the information contained therein also appeared in the government's Complaint (*see generally* Complaint, ¶¶ 25-35). The Indictment also relied

[6] Specifically, the government obtained the emails of Adam Skelos, [redacted] (the president of the Environmental Technology Company), and [redacted] (a second Environmental Technology Company employee who later became a cooperating witness).

heavily on telephone and bank records, all of which were available to the government before it filed the Initial TIII Application.

In *United States v. Lilla*, the Court found dispositive the fact that "normal investigative procedures that *were* used were successful." 699 F.2d 99,104 (2d Cir. 1983). The same is true here. The targets of this investigation communicated regularly and openly over email and these electronic communications are no different than calls. Since they were made contemporaneously as opposed to months and sometimes years later, they clearly were sufficient on their own to gather the necessary information to complete this investigation. Having obtained them, there was no longer a need to double-down years after the events with an intrusive and unnecessary wiretap. *See Kahn*, 415 U.S. at 153.

While the government itself acknowledged in its Initial Title III Application that it believed these emails had proven fruitful to its investigation – even claiming that it had allowed the government to "confirm" what it believed was a bribery scheme involving the Environmental Technology Company, it nonetheless complained that the emails were not sufficient to meet its investigative needs (mainly because the emails demonstrated that neither Dean nor Adam Skelos had committed any crimes). Among other things, the government noted that the emails were not revealing what "specific actions" were taken or contemplated by Senator Skelos. (Initial Title III Application, ¶ 179). The government's explanation is telling and goes to the heart of not only why a Title III order was unnecessary here, but also the overall failing with the government's case. It was not the investigative tool that was deficient since it had provided substantial information about many relevant topics, but rather the government's prosecution theory. The emails were not showing what actions Senator Skelos was taking on behalf of the Environmental Technology Company, not because as the government suggested, he did not communicate via

email but rather because he never took any such actions. (*Id.* ¶¶ 179-180). If it truly intended to comply with Title III and pursue all other alternative means, the government at least would have obtained Senator Skelos's emails before proceeding with its invasive Title III investigation.

B. Other Techniques Were Available

In its Initial TIII Application, the government also rejected without ample justification a number of less intrusive investigative techniques. For instance, the government summarily dismissed the possibility of securing a cooperating witness in this case by stating only that "the Target Subjects have close bonds and are not likely to work with the Government against each other if the Government approached one of them." While this boilerplate response may justify the need for wiretaps in the connection with investigations of criminal organizations like drug cartels, it does not work in cases like this where you have sophisticated and savvy business people conducting very public business. The government offered no credible proof prior to making its Initial Title III Application that any of the individuals involved in these activities was concealing their activities. To the contrary, all of it was out in the open.

For instance, the government was well aware both that Adam Skelos was working at the Environmental Technology Company pursuant to a carefully negotiated employment agreement, and that the Nassau County storm water contract with the Environmental Technology Company was a publicly available document. There was nothing secret about any of these activities that required the Title III intrusion.

However, the best proof of the availability and success of this technique is that the government approached [redacted] only a short time after obtaining the Title III Order. Not only did [redacted] begin providing information to the government but he worked for months as a

confidential cooperating witness.[7] During this period, [redacted] presumably met regularly with the government to discuss its investigation and also made a number of secret recordings. These recordings included: (1) meetings and telephone calls with Adam Skelos and Environmental Technology Company president [redacted]; (2) a meeting with a sitting New York State Senator; and (3) a public event featuring Senator Skelos as a speaker. There is no reason to believe that the government could not have approached him sooner rather than seeking the Title III order.

The government also summarily dismissed its ability to approach other relevant witnesses. In this regard, the government explained that "[a]pproaching individuals with knowledge of the Target Offenses will serve only to alert the remaining Target Subjects of the Government's investigation." (Initial Application Affidavit, at 183). The government added that "it is extremely unlikely that any outsider would have sufficient insight to be able to provide meaningful assistance to the Government's investigation . . . . Moreover, even if these individuals were willing to cooperate and were able to provide limited insight into the scheme, it is likely that the individuals would alert the Target Subjects to the existence of the Government's investigation and thereby cause the TARGET SUBJECTS to alter their behavior or otherwise

[7] The government stated in its Initial Title III Application that it considered approaching [redacted] as a potential witness, but claimed that his apparent interest in the Environmental Technology Company succeeding may cause him to warn the Target Subjects. (Initial Tile III Application, ¶185). In the same application, the government shared its belief that [redacted] may have been deleting relevant emails. (*Id.* ¶ 147). The agent signing the affidavit stated, "I believe, from my review of emails, that [redacted] has been deleting and selectively retaining emails in order to reduce the risk that the scheme will be discovered." Interestingly, the government changed its view on this issue after [redacted] began cooperating. In subsequent Applications, this fact was delegated to a footnote suggesting that the government was not sure what had happened to the emails or, in some cases, deleted altogether. Remarkably, the government continued suggesting that it had not fully debriefed [redacted] on this issue for almost two months.

frustrate the Government's efforts to ascertain the motives, means and methods of the Target Subjects' participation in the scheme." (Initial Title III Application, ¶¶ 183-184).

This boilerplate response fails to reflect the reality at the time and the corresponding likelihood that witnesses would have spoken to the government (although as reflected in the June 22nd Disclosure letter, not necessarily told the government what it wanted to hear). First, the government had subpoenaed Developer-1 already in connection with another investigation and obtained documents relevant to current charges (in fact, the government conceded that the documents prompted the investigation of Adam Skelos). The government's suggestion that it could not issue a follow up subpoena to Developer-1 without tipping it off to the "[Environmental Technology Company] scheme" rings hollow in light of the fact that the Company had produced documents already on this very subject. Moreover, the government could have simply requested all of [redacted]'s emails since it knew he had a significant role in obtaining Skelos's employment for the Environmental Technology Company. The same holds true regarding the government's suggestion that it could not re-interview [redacted] or [redacted] (who had been interviewed by the government in connection with this separate investigation).

Second, as mentioned above, the events at issue in the government's investigation had occurred long before the government's investigation started and so the risk of an "approach" was seriously diminished. In fact, in light of this passage of time, one could argue that losing the already diminished recollections of its witnesses outweighed any risk that an approach might cause to its investigation of these past acts. This is especially true here where the witnesses would also be "victims" of the alleged criminal activity.

Finally, it was widely known at the time of the initial Title III Application that the government had launched a wide-ranging investigation into corruption in Albany. Since the targets of the investigation included the Senate Majority Leader, his son, and an outside political consultant to Developer-1, it is highly likely that they would have been aware of the government's activity (like almost everyone in Albany).[8]

Simply put, the government could have utilized various investigative tools far less intrusive than intercepting the private communications of a father and son to conduct its investigation, but simply chose not to in this case. This clear failure to comply with a statute designed to ensure the Constitutional protections of all citizens cannot be condoned. As such, the evidence must be suppressed.

[8] Within days of the initial Title III approval, the New York Times published a similar article. William K. Rashbaum, *U.S. Said to Investigate Sheldon Silver, New York Assembly Speaker, Over Payments*, N.Y. TIMES (Dec. 29, 2015), http://www.nytimes.com/2014/12/30/nyregion/us-said-to-investigate-new-york-assembly-speaker-over-pay-from-law-firm.html?_r=0. This article, which appeared weeks before Mr. Silver's arrest and was written by, among others, William Rashbaum, stated "Federal Authorities are investigating substantial payments made to the State Assembly speaker, Sheldon Silver, by a small law firm . . ., according to people with knowledge of the matter." *Id.* The article went on to report that "Prosecutors from the United States attorney's office for the Southern District of New York and agents of the Federal Bureau of Investigation have found that the law firm . . . has paid Mr. Silver the sums over roughly a decade." *Id.*

CONCLUSION

For the reasons set forth above, Defendants Senator Skelos and Adam Skelos respectfully request that the Court suppress any and all evidence and/or information, and the derivative fruits thereof, gathered as a result of the wiretap warrants issued for the Target Cellphones, and for such other and further relief as to this Court may deem just and proper.

Dated: September 4, 2015
New York, New York

Respectfully submitted,

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