

GCLVWALA

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA,

4 v. 16 CR 338 (PKC)

5 WILLIAM T. WALTERS,

6 Defendant. ARGUMENT

7 -----x

8 New York, N.Y.
9 December 21, 2016
2:22 p.m.

10 Before:

11 HON. P. KEVIN CASTEL,
12 District Judge

13 APPEARANCES

14 PREET BHARARA,
15 United States Attorney for the
16 Southern District of New York
17 JOAN M. LOUGHNANE
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1 (Case called)

2 THE COURT: The first order of business is I issued an
3 order in this case directing that the government file a
4 redacted version of the letter of December 16 which had been
5 submitted to me under seal. Yesterday afternoon, very late in
6 the day, I can't give you a precise time, I received a very
7 brief phone call from AUSA Goldman. On the line he had an
8 attorney for a nonparty special agent of the FBI.

9 Upon learning that they were calling with an ex parte
10 application, I inquired if there was any reason why Mr. Berke
11 should not be on the phone. AUSA Goldman said he could think
12 of none and, as a result, there was a gap in time that took
13 place which I came to learn was because Mr. Berke was being
14 brought up to speed on things that I had not yet been brought
15 up to speed.

16 In any event, a second call was placed with Mr. Berke
17 on the line. After having everyone identify themselves, I
18 think the first question I raised was the absence of
19 Mr. Walters on this call. Mr. Berke advised me that he was in
20 transit, he, Mr. Walters, was in transit; and that he was
21 waiving his appearance on this phone call.

22 We then proceeded to hear from this attorney for a
23 special agent who laid out what he considered to be medical
24 concerns about the agent who the government indicated to me
25 that they were prepared to identify in an unredacted version of

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1 the letter. They indicated that they took no position on
2 whether or not the agent's name should be removed from the
3 letter based on health circumstances, and I believe Mr. Berke
4 also indicated that he took no position.

5 What I did is to authorize the redaction of the
6 agent's name, subject to the agent, through his counsel,
7 submitting to me by, I believe the date I set was, December
8 29th, medical evidence as to why this redaction should continue
9 any further. I will see what comes in and then I will decide
10 what to do.

11 Now, Mr. Goldman, you and, I believe, Ms. Cucinella
12 were on the call yesterday; is that correct?

13 Is there any amendment, anything I may have overlooked
14 or any correction that you would offer?

15 MR. GOLDMAN: Only that we agreed with defense counsel
16 that the defendant should receive the unredacted version of the
17 ex parte submission, which we did provide to the defendant last
18 night.

19 THE COURT: You're absolutely correct. That's what
20 was said. And I gather that was what was done.

21 Mr. Berke, any amendments or corrections or
22 supplementations?

23 MR. BERKE: None, your Honor. That sounds exactly
24 right in terms of what happened.

25 THE COURT: All right.

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1 Now, I did today receive a redacted version of the
2 letter of December 16th, together with a letter explaining the
3 reasons for the redactions.

4 The first question I have for the government is
5 whether the letter that was sent to me December 20, whether
6 that has been shared with Mr. Berke.

7 MR. GOLDMAN: No, your Honor, it has not.

8 THE COURT: Any objection to doing so under seal?

9 MR. GOLDMAN: Yes, your Honor.

10 The letter actually does quote one phrase that was
11 redacted in the redacted version.

12 THE COURT: But I assume Mr. Berke has seen the one
13 phrase.

14 Maybe I misunderstood you. I thought I understood
15 from what you said that you were going to supply Mr. Berke or
16 you did supply Mr. Berke with an unredacted version of your
17 letter of December 16.

18 MR. GOLDMAN: Let me explain, your Honor.

19 We had two separate redacted versions. One went to
20 Mr. Berke that did not redact the name of the special agent,
21 and one was filed publicly which did redact the name of the
22 special agent. But both of those included the additional
23 redactions that are identified and explained in that letter
24 which we filed ex parte at the Court's recommendation in the
25 Court's order of December 19th.

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1 So Mr. Berke -- and the defendant has not seen that
2 letter, nor do we think it is necessary or appropriate, since
3 it addresses the bases for making the redactions that were
4 included in the version that went to the defendant.

5 THE COURT: All right.

6 I want to note something that I think is important to
7 state on the record. If one were to go to the docket of this
8 case and look at the letter on file, you would see a number of
9 redactions. This is the letter that was docketed on December
10 20th. One might conclude from a review of that document that
11 those are the redactions and that the letter of December 16 is
12 otherwise identical except for the redacted material. If you
13 made that assumption, which is the assumption I made when I
14 first read it, you would be wrong.

15 The version that has been docketed changes words and
16 omits words from the December 16 submission, but does not
17 indicate which words are changed or omitted. So I actually
18 have the December 16 letter, I have an unredacted -- I have the
19 unredacted version of it, I have a redacted version of it, and
20 then I have a version that's on the public docket which has
21 changes.

22 These are changes that appear to me to have been made
23 on a word processing machine to delete material and to change
24 the wording, from what I can surmise. And I didn't cross-check
25 the documents, so I'm going to ask for a representation. They

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1 seem to have either, A, deleted the name and title of the
2 individual special agent and also, wherever the proper name of
3 the special agent was used, replaced with the words "special
4 agent."

5 Is that correct?

6 MR. GOLDMAN: That is correct, your Honor. Those are
7 the only changes that were made. We did that for two reasons:

8 One, to remain consistent with the way we identified
9 the special agent on our public filing on December 16th. And
10 the other is that because there were other redactions in this
11 document, we were somewhat concerned that it would be very
12 confusing if we simply blacked out this special agent's name
13 and title in that document, and that it would not be clear that
14 we were referring to the special agent versus something else
15 that was redacted.

16 So we did, your Honor, take the liberty of making the
17 changes, and that is the only change that we made; we replaced
18 the special agent for the name and/or title of the special
19 agent that was included in the letter.

20 THE COURT: I assume good faith here, but I would
21 advise you in the future in this courtroom and elsewhere to
22 never follow that process again. If you are literally going on
23 a word processing machine and altering the text of the letter,
24 prudence would dictate that where the alteration took place you
25 would have bracketed language to indicate that some language

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1 has been replaced or perhaps a mark, a proofreader's caret
2 mark, to indicate that material had been omitted from the text
3 of the letter.

4 A reasonable reader of the letter that is filed on the
5 docket would think, upon review, that the only variance between
6 the December 16th letter submitted to the judge ex parte under
7 seal and that which is on the docket are the words that were
8 blacked out as redacted. And the reasonable reader would not
9 know that there had been alterations to the text so far, as I
10 can tell. I stand to be corrected if the reasonable reader
11 would know that.

12 MS. LOUGHNANE: Your Honor, if it's all right with the
13 Court, perhaps we should do that now. We should file another
14 version that includes the brackets to make that set of changes
15 clear.

16 THE COURT: I think that's a wise move. I'll expect
17 you to do that by the end of the day tomorrow.

18 MS. LOUGHNANE: Certainly.

19 THE COURT: All right.

20 So now the defendant made his motion. I issued my
21 order directing a hearing, which was supposed to take place, I
22 believe, on the 12th. I got a request to adjourn the hearing
23 because there was some development that I was going to be
24 apprised of.

25 I will say that I've learned a lesson here. I

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1 reviewed the defendant's motion. I was somewhat skeptical that
2 the allegations could possibly be true, but I felt the
3 defendant had made a sufficient case to warrant an evidentiary
4 hearing. I felt that an evidentiary hearing was, at a minimum,
5 a wise prophylactic measure.

6 I wasn't cynical enough to think that I was going to
7 learn of deliberate disclosures by a special agent of the FBI
8 and deliberate disclosures after the fact of leaks became known
9 within the bureau and the U.S. Attorney's Office and a warning,
10 a strongly-worded warning, was issued by a person within the
11 bureau in a supervisory capacity. Human nature being what it
12 is, I could certainly understand if an agent found themselves
13 in communication with a member of the press and somehow a
14 conversation got out of hand and went beyond where it should
15 have, and the agent, without any real thought ahead of time,
16 misspoke. That is not what happened here. This included
17 dinner meetings and the like.

18 I am a wiser person today for having been exposed to
19 this. To say I was shocked would be an accurate statement.

20 Now, what the remedy is, I want to hear from
21 Mr. Berke.

22 It seems to me that, as a formal matter, as a judge, I
23 would refer this to the U.S. Attorney's Office to review for
24 possible prosecution as criminal contempt or as obstruction of
25 justice. If you look at New York Times v. Gonzalez, 459 F.3d

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1 160, they explain how unwarranted disclosures could amount to
2 obstruction of justice, 18 U.S.C., Section 1503(a). And
3 reviewing the statute, it breaches actions to corruptly
4 influence a proceeding. And "corruptly" in context may mean
5 nothing more than for an improper purpose.

6 I can't prejudge this. It may be because members of
7 the U.S. Attorney's Office are fact witnesses to aspects of
8 this, that it may be a threshold matter for the office to
9 consider whether it wishes to conduct the investigation or
10 wishes to bring in another office to do so. But the facts that
11 I've read here don't strike me as adequately addressed by some
12 form of an internal ethics review or the like.

13 Ms. Loughnane.

14 MS. LOUGHNANE: Your Honor, I have an update that I
15 think might be helpful to the Court.

16 Before I provide that, I hope it's clear to the Court
17 from our submissions that we do take this very, very seriously.
18 The leaks that we've reported should never have happened.
19 Uncharged allegations like this should not be aired in the
20 press; and they interfere with investigations, as they did
21 here. So we appreciate the seriousness of this and I hope
22 we've conveyed that.

23 By way of update, one thing has changed since we
24 initially submitted our letter, our ex parte and more detailed
25 letter to the Court. We reported then that we had made a

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1 referral to the Office of the Inspector General for the
2 Department of Justice. We learned yesterday evening that that
3 office, OIG, has, in fact, opened a criminal investigation into
4 the matters occurring here; and that will be a full criminal
5 investigation with all the tools that that involves and with
6 all available -- all criminal statutes that are applicable,
7 available as potential charges.

8 THE COURT: All right. That's a relief to know.

9 I do appreciate that.

10 I know what I read in the submissions. I don't know
11 anything beyond what I read in the submissions. But from what
12 I read in the submissions, it is fair to say that those in the
13 U.S. Attorney's Office who saw leaks happening were both
14 concerned and frustrated and didn't take it lightly. And from
15 what I gather, it was the actions, at least as told to me in
16 the submission of the U.S. Attorney for this district, that led
17 one particular supervisory person within the bureau to issue a
18 strongly-worded warning.

19 Based on what I see, I don't see the U.S. Attorney's
20 Office as having been complicit in anything here. They may be
21 fact witnesses to aspects of it, but I don't see any
22 involvement in this record, I'll just say that.

23 MS. LOUGHNANE: Your Honor, I think that's right.
24 That is the record that, as we understand it, having -- we've
25 spoken to 14 people at the U.S. Attorney's Office and at the

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1 FBI. We have reviewed the emails and texts. We don't see any
2 involvement of anyone at the U.S. Attorney's Office.

3 There was communication between the U.S. Attorney for
4 this district and the assistant director in charge of the FBI
5 about the outrage and frustration that these leaks caused.
6 There were directives within the FBI for this to stop. The
7 only thing I would say is that there were folks at the FBI as
8 well who were outraged.

9 But I think your Honor's understanding is correct.

10 THE COURT: All right.

11 At this point I want to hear from Mr. Berke as to
12 where he and his client stand on this issue.

13 MR. BERKE: Thank you, your Honor. I appreciate the
14 opportunity.

15 If I may say, your Honor, every so often there are
16 cases where there's a suggestion of government misconduct, and
17 a judge doesn't simply accept the government's blanket denials,
18 but digs a little deeper, asks for more disclosure, orders a
19 hearing and, in the process, uncovers significant misconduct.

20 It happened obviously in this courthouse in the KPMG
21 tax shelter case that resulted in dismissal of the indictment;
22 it happened in the Ted Stevens prosecution that the government
23 itself dismissed when issues were raised. And I submit, your
24 Honor, we saw it here. Your Honor, of course, did not accept
25 the government's blanket denials, dug a little deeper, ordered

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1 a hearing and, as a result, we have learned an awful lot.

2 But I would submit to you, your Honor, if we look
3 closely at what has been disclosed, if we look at other
4 information which I'd like to address with your Honor, that the
5 government's submission raises as many, if not more, questions
6 than it answers. And I submit, your Honor, that a hearing and
7 further fact-finding is necessary and absolutely required to
8 address those questions.

9 To begin, I think the first sort of broad topic,
10 obviously there was a grand jury investigation underway related
11 to Mr. Walters and others. The FBI and the U.S. Attorney's
12 Office, as we know, should have simply had blanket refusals to
13 talk to the press. That's what the U.S. Attorney's Office
14 does, that's their policies; we are not talking about ongoing
15 grand jury investigation.

16 We not only had the leaking agent talking, we had
17 others talking as well, and conduct that I would submit is also
18 improper.

19 Your Honor, I have to confess, when we got the
20 slightly redacted letter or somewhat redacted letter with the
21 name of the leaking agent last night, I read it, I read it a
22 number of times. The more I read it and used other information
23 that we had, some related to the case, some other cases and the
24 like, it told a very different story to me by the last time I
25 read it than the first time. If your Honor would indulge me, I

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1 would like to just highlight some things in the letter that
2 raise questions that I think go directly to your Honor's
3 questions in your order in calling us here today.

4 First, we know that there's no question that certainly
5 the FBI leaked confidential information about an ongoing grand
6 jury investigation. We know that the leaking agent did it
7 because he believed that the investigation, as related to
8 Mr. Walters, was dormant and was looking for ways to
9 resuscitate that dormant investigation. We know he went so far
10 as to make a deal with a Wall Street Journal reporter that he
11 would give information to Susie Pulliam and others at the
12 journal in exchange for them taking that information and going
13 to their sources to see if they could produce additional
14 information to help the investigation. It's detailed in
15 different places in the letter, and I can point it out, but
16 clearly he was trying to use what we believe is now conceded
17 Rule 6(e) violations to get information from the reporter to
18 further investigations, obviously completely improper.

19 It wasn't just for an isolated or limited purpose, as
20 we now know. He did it -- first there was a 2013 -- a year
21 later, with the investigation still not going anywhere against
22 Mr. Walters, he did more. He had more contacts with The Wall
23 Street Journal. He earlier had a dinner with two New York
24 Times reporters where he talked about the case presumably for
25 the same purpose, to try to get information that could help

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1 him. He then did it a year later with three New York Times
2 reporters again getting information.

3 The seriousness which he took his efforts to violate
4 Rule 6(e) in order to further his investigation is that he used
5 a personal cell phone. He used personal email in order to
6 communicate privately with The Wall Street Journal. There's no
7 allegation that he was doing it for any purpose such as payment
8 or other reasons; he was doing it, as he said, to get
9 information because he thought it would help him try to
10 resuscitate a dormant investigation.

11 THE COURT: Correct me if I am wrong, and I think
12 we're operating from the same basis of information, but I think
13 I read that he was using his government-issued cell phone until
14 the warning came down and then he switched over to a personal
15 cell phone.

16 MR. BERKE: Exactly right, your Honor.

17 I thought it was significant that he thought these
18 communications were so important for whatever he was doing in
19 the investigation that he continued to try to do it using his
20 personal cell phone. Exactly, your Honor. I think at some
21 point he said he deleted his personal email account because of
22 his communications with The Wall Street Journal reporter.

23 Your Honor, there is concrete evidence suggesting that
24 other agents either could have been or were actually involved
25 in also leaking confidential information; it wasn't simply that

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1 the leaking agent was a sole rogue agent.

2 First, the leaking agent himself -- and your Honor, I
3 know you know his role in the case and investigation, I'm not
4 going to address it specifically because of the redactions, but
5 I think it's important in understanding his role with other
6 agents as well.

7 What I'll say is that agent, when confronted, said,
8 Yes, I leaked certain information; but other information must
9 have been leaked by others, including things such as trading
10 records, phone records, trading profits, the existence of grand
11 jury subpoenas to Dean Foods, for example. In other words,
12 suggesting even while he was admitting his own wrongdoing --
13 and we don't know what he's being truthful or not truthful
14 about, but he certainly admitted his own wrongdoing and
15 culpability in very inculpatory statements, but specifically
16 said he was not responsible for other leaks that in our papers
17 we laid out why we think that had to be grand jury information,
18 but that somebody else must have been responsible.

19 Second, if you look at every article in The Wall
20 Street Journal, none of them refers to a person with
21 information, a person with information of the probe of the
22 information, as they frequently do. They all refer to people.
23 They either say "people briefed on the investigation" or
24 "people familiar with the investigation," again, suggesting
25 multiple people who were involved in the investigation. Now,

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1 it certainly could have been an SEC person, it could have been
2 an FBI person, particularly with the denial by the leaking
3 agent of being responsible for a lot of the more problematic
4 information from our perspective.

5 We also have that the leaker, as well as the FBI New
6 York office employee, responsible for media outreach both said
7 that when they had a meeting that struck me as entirely
8 unprecedented and improper, I've never heard of such a meeting,
9 but when they met on May 27th, 2014, with The Wall Street
10 Journal, four of them, two of them said -- both the leaker who
11 was confessing, as well as the person in charge of media, said
12 they did discuss the investigation; they both discussed aspects
13 of the investigation and also told them things about their
14 story that were wrong, again, disclosing confidential
15 investigative information.

16 More to the point, all four of these agents had this
17 very what I believe to be unorthodox and improper meeting with
18 The Wall Street Journal over the objection of the U.S.
19 Attorney's Office who properly said, Don't do that. They went
20 ahead and did it anyway and they told the U.S. Attorney's
21 Office.

22 In terms of the many factual disputes raised by the
23 submission, which I'll address a little bit later with your
24 Honor's indulgence, is the FBI says -- identified in the
25 footnote -- they thought the U.S. Attorney's Office ultimately

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1 agreed for them to meet. The U.S. Attorney's Office said, We
2 never agreed. It was over our objection. You weren't supposed
3 to do that, but you did it anyway. And that included the
4 leaking agent's supervisor, thereby perhaps communicating in
5 some way that that's okay.

6 There's more, your Honor.

7 Again, while the letter -- I would just say this --
8 says two of the participants in that meeting with the journals
9 denied that any detailed information was disclosed, somebody
10 other than the leaker, as well as the leaker, contradict that.
11 And also everybody says the purpose of the meeting was to try
12 to persuade The Wall Street Journal to hold off on that
13 meeting; and at least the leaker says to do that, they had to
14 disclose some information, although they recognize limits.

15 All apparently agree that at that meeting, they did
16 something else that is -- again, I would submit, suggesting
17 something improper, they agreed to tip off The Wall Street
18 Journal if they learned that any other competitive paper was
19 going to cover this. I think it's particularly relevant, given
20 some of the submissions to your Honor.

21 So, in fact, if you look at the exhibits that were
22 submitted, Exhibit B in particular, the same day that the FBI
23 learned that The New York Times reporters had called the SEC,
24 that very day they had an email exchange where someone says,
25 Oh, we should tell The Wall Street Journal. An internal FBI

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1 person says, Hold on. If we tell The Wall Street Journal,
2 they're going to publish and we haven't yet spoken to our
3 individuals; we'll have to rush down there.

4 They also observed, since they haven't called us yet,
5 The New York Times, and they would have to call the FBI before
6 writing a story that involves a criminal investigation, we have
7 time. And an agent, again, a supervisor to the leaking agent,
8 Special Agent Frankel is identified, says, I want to do it
9 anyway. He's identified as the person who says, We want to do
10 it anyway; we're calling The Wall Street Journal immediately.
11 So we'll talk about the submission to your Honor which was
12 different than that, but what was clear is The Wall Street
13 Journal article was caused by the FBI deciding not to wait,
14 despite the views that The New York Times was not going to
15 publish anything, because they would call the FBI to get a
16 comment or to confirm facts, as they do, as they are required
17 to do, before publishing a story. Nevertheless, the FBI
18 themselves instigated The Wall Street Journal article in the
19 chain of events that we talk about in a different context. And
20 I think it raises questions.

21 Now turning to the U.S. Attorney's Office. I
22 appreciate your Honor's comments about who was responsible for
23 the leaking. I really want to address another piece of it, and
24 that is who knew or should have known and turned a blind eye to
25 it in a significant way, in a way that directly impacted this

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1 investigation and had other severe consequences which I'll
2 address as well.

3 First, what we know is on June 1st, 2014, there was
4 email correspondence about the leaks, which you could just read
5 the paper, and we thought it was pretty clear when we wrote our
6 motions that that has to be a leak from the criminal
7 authorities given what was in there. Apparently so did the
8 U.S. Attorney's Office and the FBI, because the U.S. Attorney
9 himself recognizes this was outrageous conduct; refers to it as
10 "outrageous leaks." He sends it to the head of the New York
11 office of the FBI and says, Let me know what action you want to
12 take together. June 1st, 2014.

13 Apparently, there was none.

14 Now, we know the FBI believed that they were
15 responsible for the leaks. We know that because when the U.S.
16 Attorney himself for the Southern District of New York sent
17 that email to the head of the New York office, he forwarded it
18 to others in his office and said, these obvious leaks, that
19 they were "an embarrassment to the office," meaning the FBI's
20 office, again, accepting responsibility for the leaks.

21 Again, the question is, what did they do? Did anyone
22 go so far as to ask anyone, Hey, anyone on our team, did you
23 disclose information? Did you talk to the FBI? Did they do
24 any fact-finding? All these questions remain open.
25 Apparently, there is nothing to indicate what people did to try

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1 to conduct investigation, fact-finding, identify who is
2 responsible, do they have a rogue agent, do they have rogue
3 agents, is this a pattern of practice? Apparently nothing.

4 It got even more extreme.

5 Approximately 11 days later, the No. 2 person in the
6 U.S. Attorney's Office -- very respected, experienced person --
7 No. 2 person, got a call, like a call I've never heard of. If
8 it was in a movie, I'd say it has to be made up because that
9 would never happen. A reporter from The New York Times calls
10 him to complain and says that he was leaked information by an
11 FBI person; and it was incorrect, it was wrong in some way, and
12 he was upset about it.

13 THE COURT: I think he might have said he felt he was
14 lied to.

15 MR. BERKE: He was lied to. Exactly.

16 The No. 2 person in the U.S. Attorney's Office,
17 sophisticated person, immediately says -- because he reported
18 this. He called this call an astonishing conversation. When
19 he referred to -- quoted the New York Times reporter was
20 referring to an FBI man, he puts in paren, just to get the
21 wording exactly right, he says, Sounds like an agent.

22 So again, the natural conclusions that flowed from the
23 articles themselves, the outrageous leaks, are now confirmed by
24 a reporter himself making an extraordinary call saying he was,
25 in fact, leaked about the investigation, true or not, by an FBI

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1 person believed by senior people in the U.S. Attorney's Office
2 to be an agent.

3 That email exchange that we have that references
4 this -- and this is part of the exhibits to the letter --
5 concludes by saying, Obviously we need to discuss and we'll
6 need to address this with the FBI.

7 Now, again, what is most surprising and, again, raises
8 even more questions, after their suspicions are confirmed, the
9 FBI suspicions, to say it's an embarrassment, the U.S.
10 Attorney's suspicions, outrageous, now they know it's
11 confirmed, it is an FBI person leaking to The New York Times,
12 and both emails say -- the FBI says, We have to do something,
13 the U.S. Attorney's Office do something. Nevertheless, on the
14 letter we received on the Sunday night that we received from
15 the government said there was no fact-finding done, none, about
16 the leaks until your Honor issued your order much later.

17 Again, the questions raised. How could it be that,
18 again, no one even asked the agents, said, Did you leak? Did
19 you talk to The New York Times? Any inquiry whatsoever. They
20 are next-door; they are right in the same office. All they had
21 to do was walk over. Hey, anybody talk to this New York Times
22 reporter? It's crazy. Did they have a meeting? Did anyone
23 ask a single question? Because apparently the leaking agent,
24 it didn't take much for him to confess when people asked.
25 Nobody apparently asked him; nobody asked who worked with him

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1 or anyone else. It raises questions did they not want to find
2 out.

3 There was more.

4 All the office would have had to do apparently is look
5 at something they do all the time in conducting investigations:
6 Look at the leaking agent's emails. They revealed it. Text
7 messages, phone records, a whole host of things would have
8 revealed it. They recognized there are more articles that
9 said -- the FBI itself and the exhibits that were attached
10 said, My agents tried to hide this article from me. I'm
11 paraphrasing, but he said, It's interesting how I get every
12 article sent to me except this one. And then said, I don't buy
13 what my agents are telling me that Phil Michelson's lawyer was
14 the one who leaked the fact that the FBI agents interviewed
15 him, as the article reported -- it's public -- but instead it
16 had to be I don't believe his lawyer would leak that, that it
17 had to be us. And still, no evidence of any investigation
18 whatsoever.

19 I would say the description of the FBI's knowledge
20 also raises more questions.

21 The New York Times ran additional articles. That's
22 the articles that talked about the wiretaps and information
23 that was squarely within the purview of the U.S. Attorney's
24 Office, not SEC materials, not other materials.

25 Again, a third strike.

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1 First you know it's your office; then the U.S.
2 Attorney's Office gets the call that they share with the FBI;
3 then more articles with more leaking. What did the FBI do in
4 response? Did they then conduct an investigation? Was there a
5 reason they didn't want to? Did they know the answers? Were
6 they hiding from it?

7 And then the articles kept going. There were seven
8 articles in total that were obvious leaked materials. There's
9 nothing in the government's letter that even addresses what
10 conversations happened. When the FBI and the U.S. Attorney's
11 Office said they are going to do something, what did they do?
12 How did this continue? Was it that folks recognized it was
13 helping the investigation, because these are people who are
14 well-known in the business community; getting sources from The
15 Wall Street Journal could be very helpful, especially after
16 they publish all these articles. It was on national news.
17 Everybody was talking about it because it didn't only involve
18 Mr. Walters and a famous sports figure; it involved a famous
19 businessman, it was everywhere.

20 So certainly once they dropped the bomb, Wall Street
21 Journal, which has a lot of contact businesspeople, a lot of
22 sources, may be able to help our investigation.
23 Extraordinarily improper; much more improper, I would submit,
24 than simply doing it for a personal benefit. He's doing it for
25 a governmental benefit in a way directly harmful to

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1 Mr. Walters, I submit. I think there's a lot more evidence of
2 it, your Honor. I don't want to beg your patience.

3 I would submit the leaks that continued further
4 apparently helped them build their case against Mr. Walters.
5 Just to be clear on the timing, your Honor, the investigation
6 was dead in 2012, apparently still dead in 2013. Again,
7 reading the government's letter, dormant, whatever you want to
8 say. It was still, even after the initial leaks, two years
9 before they could build the case. And you see reasons why that
10 if the leaking agent thought this was helpful to the grand jury
11 investigation to try to make a case against Mr. Walters, that
12 he would continue to do it and go so far as your Honor rightly
13 pointed out to get a personal cell phone to use, he uses
14 personal emails.

15 The government's letter says nothing about what
16 happened with these subsequent letters or how people responded
17 now that they knew there was an FBI agent talking to The New
18 York Times.

19 I would submit, your Honor, that others at the FBI
20 knew that what the leaker was doing -- even if they didn't know
21 who it was at the time, because they didn't want to find out,
22 they didn't try to find out, knew it was to be done to help
23 their case; because, very tellingly, Exhibit C to the
24 government's letter is the whole supervisor of the New York
25 office, Special Agent Venizelos, who said, after reading a Wall

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1 Street Journal article and giving the warning that your Honor
2 rightly says, Stop talking to The Wall Street Journal, doesn't
3 ask, Did you talk, who talked, what did you say, just stop
4 talking, that's all he said, but then tellingly said, "If we
5 don't have enough evidence by now, it's over."

6 Now, again, we have to have fact-finding to find a
7 little more what he meant. But as I read that line, if we
8 don't have enough evidence by now, it's over. So, in other
9 words, stop talking to The Wall Street Journal, even if you're
10 trying to get evidence to make this case. If we don't have it
11 by now after investigating Mr. Walters -- at the time I think
12 it was six, seven years, although Mr. Schoeman will correct me
13 if my math is a little exaggerated, but it was many years, I
14 think that is an extraordinarily telling email by the head of
15 the New York office that raises tremendous questions in
16 addition to all these other questions.

17 So, your Honor, thank you for letting me go through
18 that.

19 I would submit, in response to your questioning, you
20 know my answer, are further hearings necessary and, if so, what
21 would they look like. I would say absolutely, your Honor. I
22 would say first three things in response to why more generally
23 and specifically further fact-finding is necessary.

24 First, absolutely we are not required simply to accept
25 the U.S. Attorney's Office's own suggestion of what happened.

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1 Clearly they reveal information that they learned about this
2 leaking agent, as they are required to do, and they did that,
3 but it obviously is very limited, as I'm pointing out. More
4 importantly, as your Honor recognized and I think the office
5 recognizes, they have a conflict. They are investigating their
6 own colleagues, their own bosses. They interviewed the U.S.
7 Attorney himself. They are interviewing the FBI agents who
8 bring cases to them and the Eastern District or else it has to
9 make a decision where to bring their cases. These are people
10 they work with. They can't do that.

11 They are self-interested because they have culpability
12 potentially as well. They could be criticized for not
13 uncovering this sooner, for not turning a blind eye. In fact,
14 I find it quite striking, your Honor, that the very first
15 sentence in the very first bullet point under their findings,
16 the very first one was, The U.S. Attorney's Office -- we have
17 no evidence indicating that anyone from the U.S. Attorney's
18 Office participated in the leaks. To the contrary. And they
19 go on.

20 Again, first absolving themselves of responsibility.
21 And whether they directly did the leaks, the initial leaks, the
22 later leaks, or failed to stop it or turned a blind eye,
23 obviously they have a conflict where they could be criticized
24 or worse for potential culpability in the actions that happened
25 to assist their investigation of Mr. Walters.

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1 I'm going to say this next, your Honor. And again, I
2 thought long and hard; talked to Mr. Schoeman a lot how to
3 address this issue, but I think it has to be addressed.

4 The government's statements to the Court, I would
5 submit, are very difficult to understand or square with what we
6 now know the actual facts are.

7 THE COURT: I took a look at them last night myself.

8 MR. BERKE: It means, again, with all respect -- I
9 have a lot of respect for that office -- there's no basis to
10 trust their recitation of fact-finding in this case, I would
11 submit. And it may mean more than that, your Honor. I think
12 there's some law suggesting it may be more, but I leave that to
13 your Honor.

14 But I would like to take a moment to compare what the
15 government said to your Honor at various points specifically
16 and what we now know. Curiously, again, the Sunday letter that
17 we received said in a footnote that in their initial
18 submissions, they never denied having leaked information; they
19 simply talked about legal arguments. Again, I read the briefs
20 to be exactly the opposite.

21 On page 2 of the government's brief they refer to
22 allegations of supposed leaks of grand jury material. They say
23 "of which there was none." Of which there was none. No leaks.
24 They are then referring to fishing expedition, unfounded
25 speculations. They said, Baseless accusations are undermined

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1 by the facts. They said, Cannot support a finding that the
2 source of the information was an attorney or agent for the
3 government.

4 I think more pointed, your Honor, or as pointed, this
5 issue of -- the second issue, but it overlaps -- when and why
6 they sent agents to interview subjected or targets of the
7 investigation. And what the government wrote in their brief,
8 as well as the declaration, said -- I'm going to summarize both
9 together; they are essentially the same. But what they said
10 was they learned that The New York Times and Wall Street
11 Journal were writing an article. They knew that if both of
12 them were writing, it wasn't reasonable to assume that they
13 would both hold off writing. So somebody would publish, so
14 they figured they'd better go down and do it quickly. And
15 again, sounds reasonable until you know the facts.

16 What happened was they knew The Wall Street Journal
17 was publishing; they agreed to hold off. They knew The New
18 York Times called the SEC. But then it was the U.S. Attorney's
19 Office themselves, as we talked about, who decided to call the
20 journal, even though there was a viewpoint expressed by other
21 agents that they didn't have to because The New York Times
22 wasn't publishing anytime soon because they hadn't called the
23 bureau itself. And they didn't wait so much as a day or two
24 days, the immediate day they learned from the SEC about the FBI
25 call, not even waiting to see if The New York Times calls the

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1 FBI, they called the journal knowing that it would immediately
2 prompt an article. It was only then, based on the FBI's own
3 actions, that they had to rush down and interview these folks.

4 Again, whatever you think of that issue, the timing
5 and the like, what is most significant to us are the
6 representations of the U.S. Attorney's Office.

7 I said the U.S. Attorney's Office. I should be clear,
8 your Honor. I meant the FBI, it was not the U.S. Attorney's
9 Office involved in those discussions. The FBI. I apologize.

10 Your Honor, there's more, but I think you get the
11 point.

12 Again, I think it's raised serious questions. But
13 certainly from our perspective the reason why the government's
14 letter which raises so many questions, we would submit, is
15 really the starting point for understanding what really
16 happened here and didn't happen here to evaluate the harm we're
17 talking about.

18 The second part I'd like to say is -- and this I
19 alluded to slightly earlier and pointed out some examples, that
20 the government's letter we received last night makes it clear
21 that there are a wide range of factual questions not addressed.
22 The government themselves acknowledge in the letter there are
23 limitations to their fact-finding. And if you go through it,
24 we made lots of charts and the like of all the questions they
25 can't answer.

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1 Why did two special agents say that confidential
2 information was disclosed at the May 27th meeting with The Wall
3 Street Journal and two say nothing was disclosed? There are
4 conflicts throughout in terms of what people say and they don't
5 say. Why does the FBI say the U.S. Attorney's Office
6 authorized the very unorthodox meeting such that I've ever
7 heard of? Why did the U.S. Attorney's Office say, We never --
8 we told them not to do it; we thought it was improper?

9 Again, there are questions throughout. What happened?
10 Why did they say in their emails, We have to get together to
11 figure out what to do; and then there was no sign that there
12 was any fact-finding, anything was done, from the FBI, U.S.
13 Attorney's Office repeatedly. What happened when they learned
14 The New York Times was leaked by an FBI agent early on in the
15 investigation, June 2014, still two years before they even
16 bring an indictment? What did they do to check their team?
17 Can they trust them? Are they safe? Can they give them
18 confidential information, especially when articles are still
19 coming out repeatedly over time about Mr. Walters, about this
20 case and about other allegations that are still out there that
21 are not subject to any indictment, but are very damning to
22 Mr. Walters and other well-known public figures which make them
23 also more toxic in terms of the press wanting to repeat them in
24 every article that may come out.

25 There are other key issues that are just not

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1 addressed. And we would submit, your Honor -- I'll get to this
2 in a moment, why all these questions are so relevant, but let
3 me just say, the questions are, Was there really only one
4 leaker? Even though the leaker disputes that. What exactly
5 was leaked? Why did he leak? How did it help his
6 investigation? Why did he think it continued to help his
7 investigation? What did FBI supervisors know about the leaks
8 and when? Was any FBI investigation done at the time and, if
9 not, why?

10 The full scope of warnings given to agents not to
11 leak, and what was done, if anything, when it became clear that
12 the leaking was going on by simply reading the articles? What
13 did the U.S. Attorney's Office know and when? What did it do
14 and why? Were there any complaints from witnesses or their
15 counsel about the leaking? What was the government's response?
16 What did they do in response to those complaints from the
17 subjects of those leaks?

18 How the leaks impacted the grand jury process,
19 including whether the newspaper leaks and stories were used to,
20 quote, manipulate witnesses or the investigation, to improperly
21 obtain incriminating testimony or evidence that helped to make
22 their case that they ultimately presented to the grand jury.
23 And also did the leaker or anybody else who may have leaked in
24 this case, did they leak in any other investigations? Did the
25 FBI know about those other leaks? Did they have suspicions?

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1 Are there similar emails that predated this that should have
2 made them suspicious? And each I will address in a second,
3 your Honor, if I may.

4 And that is, I referenced your Honor the consequences,
5 the pattern of the government turning a blind eye to the
6 obvious instances of leaking in this case. But the question is
7 should there even have been more reason for them to be
8 suspicious when they saw these articles, when they knew they
9 were outrageous leaks, when they knew they were from the FBI,
10 when they were told they were from the FBI? And I submit, your
11 Honor, the leaking agent, as well as many others involved in
12 the story, were involved in some of the most high-profile
13 insider trading investigations that predated the time period we
14 are talking about.

15 I will tell your Honor -- I don't want to take too
16 much of your time, but I just want to take one lawyer, me. I
17 know myself well. 2011, same leaking agent, same squad of the
18 FBI. I represented a young analyst at Neuberger Berman who was
19 going about his business. Wall Street Journal report, same
20 reporters, Michael Rothfeld, Susan Pulliam, it covered the
21 Chiasson/Newman; it said my client is about to be charged,
22 provided details, he was never charged, but suspended from his
23 job.

24 THE COURT: Mr. Berke, that's part of the reason you
25 got your hearing. I read you loud and clear with the prior

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1 cases, the prior reporters. The similarity was such that it
2 aided your cause in persuading me that a hearing was necessary.

3 MR. BERKE: Thank you, your Honor. I appreciate that.

4 I would only add one other thing in terms of the
5 consequences of the government action that may be relevant
6 under some of the legal standards. And that is even after all
7 of these events happened, the leaking agent remained in his
8 position, working, again, with the same group of agents. I
9 represented a person, Sanjay Valvani.

10 There were grand jury leaks. We wrote a letter to the
11 U.S. Attorney's Office, concerns about Mr. Valvani and the
12 grand jury leaks. I have the government's response, which was
13 essentially, if I may -- and I have copies if you would like,
14 your Honor. This is 2016, without us having any knowledge of
15 this. We wrote a long letter detailing how the government
16 leaks that identified Mr. Valvani as the sole target of their
17 investigation provided details. And the U.S. Attorney's Office
18 responded in April 2016 that the government understands its
19 obligations when conducting a grand jury investigation; takes
20 all practical measures to ensure the grand jury information is
21 not made public; and takes seriously any publication of
22 information regarding any ongoing investigation.

23 Mr. Valvani was put on leave from his position and it
24 started a stream of very lengthy articles about his culpability
25 based on what we believe to be the same group involving the

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1 same leaking agent about Mr. Valvani, your Honor.

2 If I can, your Honor, address -- and thank you, your
3 Honor, for your patience for letting me do that.

4 THE COURT: Mr. Berke, let me tell you what I'm going
5 to do here.

6 Why don't you have a seat for a second.

7 I'm going to hear from the government. I'm going to
8 give them an opportunity to respond. But where this is all
9 headed -- because I've given you an opportunity, a fair
10 opportunity, to speak, more than fair opportunity to speak.
11 Where this is all headed, sir -- you can remain seated.

12 MR. BERKE: I'm sorry, your Honor.

13 THE COURT: -- is I'm going to allow you to make a
14 motion to dismiss the indictment based on the information that
15 you have. You can, in your submission, explain to me why you
16 believe you're entitled to a further hearing. When I review
17 your motion, I may grant you a further hearing, I may conclude
18 you have a basis for dismissal of the indictment, or I may
19 conclude you have neither.

20 But the orderly way to proceed -- because my opening
21 thrust here is to find out from you what relief you're seeking.
22 We haven't gotten to that and I've given you a fair chance. So
23 I'm telling you what I'm doing here, Mr. Berke, and I'll set a
24 date on it. I'm going to give the government an opportunity to
25 respond, because there was a lot said here this afternoon.

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1 When would it be convenient for you to file your
2 motion, sir?

3 MR. BERKE: Your Honor, thank you for your patience
4 today, your Honor.

5 Would the second week of January work with your
6 Honor's schedule?

7 THE COURT: That would be fine.

8 MR. BERKE: Thank you, Judge.

9 THE COURT: So January 13th, does that work?

10 MR. BERKE: It certainly does, your Honor. Thank you
11 very much.

12 THE COURT: Okay.

13 And I would give the government until January 27th,
14 and I would give you until February 3rd to reply.

15 MR. BERKE: Your Honor, thank you. I appreciate that,
16 your Honor.

17 THE COURT: All right.

18 Ms. Loughnane.

19 MS. LOUGHNANE: Your Honor, we look forward to
20 responding to the defendant's motion in writing. There was a
21 lot covered. Unless the Court would like to hear on specific
22 matters now, perhaps we should wait for the defendant's motion.
23 We'll do whatever is most helpful to the Court.

24 THE COURT: That's fine.

25 I should say to Mr. Berke also, I'm not foreclosing

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1 you from asking for other or different relief. You can say
2 whatever you want to say.

3 You can be seated, Ms. Loughnane.

4 You can say whatever you want to say in terms of
5 relief. You may say dismissal. You may say, Judge, if you're
6 not going to grant dismissal, then as alternative relief I
7 believe you should do thus and so. And that's perfectly
8 acceptable as well. It may be that upon a review of the case
9 law you conclude that dismissal is not likely based on the
10 facts. If you believe that, then you can seek some other
11 sanction or different sanction without prejudice to your
12 position otherwise.

13 The thing that I find -- an overused word in the
14 English language is "ironic." It's often misused. But I think
15 it is truly ironic that Mr. Walters is charged with, among
16 other things, tipping material nonpublic information to
17 another. And to help support that case, the special agent
18 apparently tipped material nonpublic information improperly to
19 another. That's what we have here. And it is a true irony.

20 Now, Mr. Berke went on.

21 If there's anything, Ms. Loughnane, you wish to say in
22 the record today, this afternoon, here and now, I've given you
23 the opportunity. You can rest on the submission you'll be
24 making, which is perfectly fine to me; but I think fairness
25 dictates that I give you an opportunity to respond orally.

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1 MS. LOUGHNANE: I appreciate that, your Honor. And I
2 think I will respond, but try to be brief because I don't want
3 to waste the Court's time.

4 Mr. Berke has raised a number of questions that he
5 says require a hearing in this case. I think it will be clear
6 from our submission -- and I'm happy to give you more detail
7 today -- that many of the questions Mr. Berke raises either are
8 not genuine questions, was there only one leaker, I don't think
9 anyone has taken that position. The last footnote in our
10 submission to the Court says that our understanding from a
11 reporter was there was certainly another source, but at the
12 SEC. So I think some of the questions Mr. Berke poses are not
13 really questions.

14 Other questions he has suggested to you are just not
15 relevant to the legal analysis because, as I sensed the Court
16 already understands, the remedies that are available have sort
17 of two branches for a 6(e) leak. There are remedies that are
18 directed at the defendant in the criminal case and any harm
19 that has come or not come to him in these criminal proceedings.
20 Those are things like dismissal of the indictment.

21 But Mr. Berke has now made four separate submissions
22 to the Court and, of course, argued at length today. And there
23 has been no showing of prejudice, and not even really a
24 plausible theory of prejudice. In that kind of a situation,
25 the remedies that are applicable for a 6(e) violation are

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1 remedies that are directed at punishing the wrongdoer and, by
2 extension, deterring this kind of conduct. Those remedies, we
3 submit -- and there are a variety of them -- are fully
4 appropriate for the Court to consider. They include the
5 now-launched criminal investigation that we discussed at the
6 beginning of this case.

7 Finally, with respect to the government's reaction to
8 this matter, we certainly know today things that we did not
9 know even two or three weeks ago and we wish we had known. I
10 wish we had done a better job discovering what happened back in
11 2014.

12 What the Court has already mentioned and seasoned the
13 record is a stern admonishment of the people involved in this
14 case from the highest level of the FBI and the U.S. Attorney's
15 Office. The agent that we've all been talking about is on that
16 email from the assistant director in charge. He receives that
17 email. And I think it would be a fair intuition for those
18 supervisors to believe that those admonishments would have the
19 appropriate effect. They did not.

20 THE COURT: There is an argument advanced here and I
21 think you should think about it. I've never been a prosecutor,
22 but I can imagine and understand that there is competition for
23 cases between and among offices. There's nothing wrong with
24 that in the slightest. It's probably gone on as long as there
25 have been multiple districts and a bureau of investigation. It

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1 is not inappropriate that a U.S. Attorney's Office would want
2 to maintain warm, cordial relations with other law enforcement
3 agencies. That, in concept, is a good thing. But that can
4 lead to something approximating -- if not willful -- blindness.
5 I'm not saying it happened here, I don't know yet, where an
6 office doesn't press too hard because they would prefer not to
7 create friction with an agency that is so important to the
8 success of the office. Let's not brush that under the carpet.

9 MS. LOUGHNANE: I take your Honor's point. I
10 understand it.

11 You are right that the FBI is an important partner for
12 us and an independent agency.

13 The one thing I would reiterate in response, and
14 we'll, of course, address this more fully in our briefing, is
15 that these leaks really hurt our cases. And so it is in our
16 interest as well not to have them happen.

17 THE COURT: Thank you.

18 MS. LOUGHNANE: Thank you.

19 THE COURT: All right.

20 Mr. Berke, anything else you want to say?

21 MR. BERKE: No, other than thank you again, your
22 Honor, for letting me address these issues.

23 THE COURT: All right.

24 Is there anything else from the government?

25 MS. LOUGHNANE: No, your Honor.

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1 THE COURT: Anything else from the defendant?

2 MR. BERKE: No, your Honor.

3 THE COURT: All right.

4 I wish everybody good holidays and peace on earth to
5 all. So I will see you in the new year.

6 MR. BERKE: To you as well, your Honor.

7 MS. LOUGHNANE: Thank you, your Honor.

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