IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, **v.** [2] JULIO HERRERA-VELUTINI AND [3] MARK ROSSINI Defendants.	CRIMINAL NO. 22-342 (RAM)

REPLY TO THE "UNITED STATES' CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS REGARDING USE OF A FILTER TEAM (DKT. 135) AND RESPONSE TO "MOTION TO FILE EX PARTE SUPPLEMENT" (DKT. 136)

TO THE HONORABLE COURT:

COMES NOW Mr. Julio Herrera Velutini ("Mr. Herrera-Velutini") and Mr. Mark Rossini ("Mr. Rossini") (jointly, the "Defendants"), by their undersigned attorneys, and respectfully submit this Reply in response to Dkt.135 and in Opposition to the *Ex Parte* filing at Dkts.136-137.

I. Introduction

From the discovery provided to date it is clear that the Government reviewed and used Defendants privileged materials early on in the investigation and that their "Filter Team" process utterly failed allowing the Government to use and benefit from constitutionally protected materials. This alone mandates dismissal of the case and at the very least recusal of the Prosecution and Investigative Teams. The Government's disclosures to date as to how it handled Defendants' potentially privileged communications are devoid of factual detail as to at the very least require an evidentiary hearing before a ruling. What little has been revealed points to the Government's utter disregard for the Defendants' privileged materials (permitting unfettered rummaging into their phones and emails data) and exposure of the Investigative and Prosecution Teams to privileged

materials which mandates recusal and potentially dismissal of the charges.

To begin, the Government intentionally attempts to narrow the timeline of events. This case did not, commence in 2019 but instead, began with a criminal investigation into the bank that was initiated in approximately 2017. In spite of every effort to deploy coercive and overzealous tactics, including but not limited to, dilatory and abusive administrative proceedings by OCIF at the clear direction of the F.B.I. and the Department of Justice, no charges were brought at that time because there was absolutely no evidence of wrongdoing. Undeterred, the Government **sought to actively recruit regulatory and bank officials, third-party consultants and others,** through highly questionable and outrageously coercive tactics, to build a purported bribery case. In short, the Government orchestrated its "bribery" indictment by leveraging information from a prior failed investigation. When the 2020/2021 search warrants were executed, the Government's agents and attorneys were amply aware that bank officials, such as Mr. Herrera-Velutini, were communicating with counsel with regards to any liability on their part or the bank.

Further, contrary to the Government's contentions, the defense is not arguing that filter teams are "*per se*" improper. This postulation by the Government is a red herring designed to distract the court from the inadequacy of this Filter Team. First, as suspected, the Government took no "formal" filter measures to protect the privileged materials seized.[1] The Filter Teams were an afterthought after the investigation had concluded or was well underway, charging decisions were being made, and when the Government was planning the future discovery productions for this case. No presumption of correctness or good faith should be given to the Government, an evidentiary hearing should be held to determine how this review was conducted, how materials

[1] It also raises a series of potential constitutional violations that will likely merit suppression in this case, once the Government finishes providing discovery in this case. Defendants expressly reserve the right to file other pretrial motions in connection with the electronic search warrants and the execution of the same.

were segregated for non-responsiveness and privilege, what measures, if any, were taken to prevent access to privileged materials, who accessed documents, if the agents and prosecutors were from the same office, and the instructions, if any, to make privileged determinations.

Second, the "formal" filter teams, as described, have been similarly deficient. In March and September 2022, the Government claims it first implemented "Filter Teams," composed of members from the same section as the Prosecution Team. Specifically, the Department of Justice, Public Integrity Section (PIN), has several attorneys who are conducting the filter review alongside several different attorneys within the same section who are serving as trial attorneys on the Prosecution Team. The Government has stated that one of the Filter Team members is a supervisor in that section, his/her exact relationship with other members of the Prosecution Team is unknown.

Even more concerning, the defense uncovered a Protocol from December 2020, related to another subject, that show agents and members of the USAO-PR were part of that review, contrary to the Government's assertions. *See* Exhibit A.[2] This casts serious doubts on the Government's assertions in its Response and discredits their argument that these protocols should not be discoverable. Whether privileged materials have reached the Prosecution Team is a discoverable issue that should be subject to an evidentiary hearing.[3]

Third, the Government has offered that the only criteria employed to segregate privileged materials is to/from attorneys that the Government suspects represented Defendants or the bank. The Government had not bothered to even ask Defendants for a list of attorneys post indictment.

[2] The filter memorandum thus far found, in conjunction with its accompanying search warrant, points to over broadness in the items deemed responsive (including terms irrelevant to the alleged bribery inquiry). Requiring the production of the protocols in this case is even more imperative to understand if the search warrants were properly executed.

[3] "Where the government chooses to take matters into its own hands rather than using more traditional alternatives of submitting disputed documents under seal for in camera review by a neutral and detached magistrate or by court-appointed special masters, (citations omitted), it bears the burden to rebut the presumption that tainted material was provided to the prosecution team." *United States v. Neill*, *supra*, 952 F.Supp. 834, 841 (D.D.C. 1997).

This extremely narrow criteria leaves out a host of privileged materials which the Prosecution Team is now in possession of and have been utilized in the investigation in violation of the Defendants' constitutional rights.

Fourth, contrary to the Government's repeated claims, the violation of Defendants' constitutional rights are strongly implicated in this case. The Government contends that none of the Defendants knew they were being investigated by the federal authorities. As stated, this is simply not the case. Moreover, the Defendants' constitutional injury does **not only** emanate from the Sixth Amendment but also from the Fourth Amendment that protects from "unreasonable searches and seizure." Privileged materials are clearly outside the search warrants; Defendants' sloppy and unreasonable measures to screen the materials implicate the Fourth Amendment. [4]

Lastly, suppression will not remedy the harm of the Government's intrusion into the Defendants' privileged communications or exposure of these materials to non-privilege holders (including other defendants, experts, witnesses, etc.) – that is a bell that cannot be unrung. Dismissal will be the only appropriate remedy.

II. Arguments

A. The Prosecution and Investigation Teams Have Not Only Had Access to Privileged Material But Have Used Privileged Material In The Course Of the Investigation.

The Government has clearly reviewed and used privileged materials in the course of the investigation. Examples in which the Government likely used materials seized to support later search warrants are:

[4] Moreover, irreparable injury results from the Government's invasion of the Defendants' attorney-client privilege. *Matter of 636 South 66th Terrace*, 835 F. Supp. 1304, 1306 (D. Kan. 1993) ("This court also concludes that an invasion of the attorney-client privilege through a search and seizure generates an irreparable injury to the possessor of the privilege — in this case the movants.").

	What SW Material Was Used	**How SW Material Was Used**
1/13/2021	iCloud backups for Mark Rossini and Julio Herrera	Extensive use in support of search warrant for Wanda Vazquez Apple account.
12/8/2021	iCloud backups for either Rossini or Herrera or both	Agents showed Rossini WhatsApp messages exchanged between him and Herrera.
1/12/2022	iCloud backups for Mark Rossini, Julio Herrera, Wanda Vasquez, Herrera Yahoo! Account	Extensive use in support of search warrant for Wanda Vazquez cell phone
1/28/2022	iCloud backup for Mark Rossini and Herrera Yahoo! account	Extensive use in support of search warrant for Julio Herrera person and cell phone
2/18/2022	iCloud backup for Mark Rossini and Herrera Yahoo! account	Extensive use in support of search warrant for Julio Herrera person and cell phone

And this is only what the Defendants have discovered in an incredibly short period of time with only a preliminary review of the discovery produced. The damage done by the Government's mere possession of privileged materials for two years cannot be quantified. The Government's violation of Defendants' constitutional rights has afforded them a pronounced advantage in the development of this case.

The exposure to privileged materials, merits dismissal and at the very least an evidentiary hearing. First, the Government has admitted to a lack of formal filter procedures prior to March 2022 and September 2022. Next, communications show that at least two current members of the Prosecution Team were in active communications with the bank's counsel from at least November 2021 – months before March and September 2022 when Filter Teams were put in place. *See*

Exhibit B.[5] To the extent, the Government had an "(1)… objective awareness of an ongoing, personal attorney-client relationship between [an attorney] and the defendant;(2) [there was deliberate intrusion into that relationship; and (3) actual and substantial prejudice" disqualification of the original prosecution team may be merited. *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996)(concluding that the district court should have conducted an evidentiary hearing to resolve factual disputes).

Here, Defendants have made a sufficient showing of serious factual disputes concerning the Government's purported access and use of their privileged information. Thus, the Government should not be allowed to rest on mere allegations and cloak their faulty procedures; at the very least an evidentiary hearing should be conducted.

B. Defendants Emergency Motion is not simply a per se challenge to taint teams; and specifically challenges the adequacy of the filter team employed in this case.

Defendants' objections to the Governments' ongoing review are case-specific. Pursuant to *In re Search Warrant Issued June 13, 2019*, 942.F.3d 159 (4th Cir. 2019), Defendants have argued that the Filter Team's review of attorney-client communications is not adequate since it allows the Government to unilaterally make the initial privileged determinations, and thus it is violative of the privilege. As recently discussed by a district court, the First Circuit has not expressly disavowed the Fourth Circuit opinion nor has "squarely ruled on this issue." *In re Search of the Pers. of O'Donovan*, 2022 U.S. Dist. LEXIS 189199, at *5 (D. Mass. Oct. 17, 2022).

Regardless, far from being a *per se* challenge to the Government's filter review, Defendants have argued that the filter procedures instituted in this case are inadequate and have requested an

[5] This exhibit is being filed *ex parte* since it contains attorney-client privileged communications.

evidentiary hearing to precisely review what measures if any, the Government has implemented thus far to protect Defendants' privileged communications, and how it plans to prevent privileged information from reaching non-privilege holders. The Government's Response confirms that the Defendants' concerns were not misplaced.

By any measure, the Government's search protocols are deeply flawed.[6] Privileged determinations are highly factual and even when attorneys are not copied; the communications may still be privileged. First, the Government concedes that no procedures were instituted until almost two years post seizure, very close to the Indictment date. Second, the Government has not even asked Defendants for a list of attorneys and has rested on mere assumptions to determine the identity of attorneys involved. *See* Government's Response (Dkt. 135) at 7. Thus, the only real filter employed is not only unreasonably narrow but also based on mere assumptions. Third, despite having access to a "sophisticated" search engine, the Government has not included additional terms such as "attorney-client," "confidential," or "work product" to make sure privileged materials were properly segregated. The Government has not even delegated the review to another DOJ uninterested section, but has instead relied on members (including a supervisor) of the same section, which is prosecuting the case, increasing the risk of a conflict of interest.

---

[6] Though the Government's current filter protocol remains unknown (the same were filed *ex parte*), the Government claims that its current filter protocol consists of:

1. "[K]eyword searches on the returns for Herrerea (sic) and Rossini for the names of certain attorneys who the Government had learned potentially represented The Bank or Rossini in any capacity prior the time the accounts were seized." *See Government's* Response at 6-7. (**These are the only data that has been segregated from the Prosecution Team.)**

2. These segregated materials are then given to a filter team comprised of "attorneys and a supervisor from the Public Integrity Section of the Criminal Division of the U.S. Department of Justice." *See* Government's Response at 6, fn. 6. (Three of the trial attorneys in this case are from the Public Integrity Section of the DOJ. **We do not know what interactions or relationships the trial attorneys have with the members of the Filter Team, including the supervisor. For example, are they are located in the same office with access to the same systems?).**

3. If the Prosecution Team encounters privileged information (rather than informing Defendants), they are only required to inform the Filter Team who will then remove it from their access. *See* Government's Response at 7. (**Effectively, allowing the prosecution team to be exposed to privileged materials without the Defendants knowing**.)

Fourth, the filter team has made unilateral and unreviewable privilege determinations. Even under the Government now suggested procedures, Defendants will only be involved after the initial privilege determinations are made, leaving Defendants completely unprotected. As admitted by the Government, the Filter Teams have only segregated materials using the names of attorneys the Government suspects represented Defendants. This exercise has generated "thousands" of positive results. *See* Government's Response (Dkt. 135) at 22.The Government has never requested a list of attorney's or third parties acting under privilege. These are fundamental flaws in its review process. The Court must halt its faulty review now.

To support their position, the Government relies on cases that do not relate to the review of privileged materials. For example, the Government cites *United States v. Keleher*, 516 F. Supp. 3d 162,170 (D.P.R. 2021), as support for the notion that the District Court of Puerto Rico assumes the legality of filter protocols. However, *Keleher* involved the use of filters to comply with the Fourth Amendment particularity requirement and did not pass on whether a filter team is proper in the review of privileged material or how the adequacy of filter procedures should be assessed.

The Government also cites *In re Search of the Pers. of O'Donovan*, 2022 U.S. Dist. LEXIS 189199, at *5-9 (D. Mass. Oct. 17, 2022) in support. In that case, the defendant, like one of the defendants in this case, was an attorney whose phone was seized. The warrant incorporated a search protocol, which the defendant contested. While still contesting the matter, the defendant was indicted. Rather than accepting the Government's search protocol, the court only accepted a modified the search protocol after considering the parties' submissions providing for the following:

> First, a FBI forensic analyst not associated with either the investigative team or the filter team would run certain search terms against the content of the phone to identify responsive materials without reviewing any of the underlying materials themselves. Any materials not captured by the search terms would be deemed non-

> responsive and **would be returned to O'Donovan without either the filter team or the investigative team ever reviewing them.**
>
> Following the return of such materials, the filter team would review the responsive materials. **The filter team would segregate any materials it identified as privileged and non-redactable and then return those materials to the movant**. With respect to the remainder of materials, that is, responsive materials identified as "not privileged, privileged but redactable, or otherwise excepted from protection," the filter team would consult with O'Donovan. [Id.]. O'Donovan would have five business days to review these materials and object or assent to their disclosure. [Id.]. Any non-disputed materials would pass to the investigative team at the close of the five-day period. [Id.]. By contrast, disputed materials would be submitted to the court under seal for a final determination. [Id.]. As such, under the government's proposed modified protocol, the investigative team would never see any non-responsive materials or responsive materials identified as privileged, and would not see any other responsive materials unless O'Donovan first assented to their disclosure or the court determined that disclosure was appropriate. *Id*. at *4-5.

Tellingly, the modified search protocol allowed for the post-indictment return of privileged and non-responsive materials, and for defense counsel's initial privilege review. The Court made clear that "the First Circuit has not squarely ruled on [whether filter review of attorney-client communications amounts to an "impermissible delegation of judicial power." *Id*. at *10, *see also*, *United States v. Vepuri*, CRIMINAL ACTION 21-132, at *1, 9 (E.D. Pa. Oct. 19, 2021) (where the court also ordered the return of privileged materials post-indictment).

United States v. Avenatti, 559 F. Supp. 3d 274 (S.D.N.Y. 2021) further weakens the Government's position. There, the defendant "was given an opportunity to review all communications before they were turned over to the prosecution team." *Id*. at 283 (emphasis added). The court expressly stated that Filter Team procedures may be sanctioned when the "defendant has the opportunity to seek judicial review before materials are turned over to those involved in his prosecution." *Id*. at 278. Unlike *Avenatti*, the Government here has unilaterally instituted filter procedures with no involvement of Defendants and has unilaterally turned them

over (and intends to continue turning over) documents to the Prosecution Team. *Id.* at 282 n.2 (noting that "Avenatti's prior counsel actually participated in the filter team's review process").

The Government also cites to *United States v. Patel*, 16-cr-798 (KBF), at *17-18 (S.D.N.Y. Aug. 8, 2017). In that case, the court noted that defendants had signed a disclosure notice, which constituted waiver of their privilege. Here, the Defendants have objected to the methods implemented to review their privileged materials shortly after being informed by the Government. Moreover, *United States v. St. George,* 2021 WL 4132662, at*3 n.5 (D. Mass. Sept. 11, 2021) and *United States v. Cadden,* 2015 WL 13683817, at *3 (D. Mass. Dec. 15, 2015) did not involve objections to the review of privileged communications, and thus these cases are clearly distinguishable. Similarly in *United States v. Liberty*, 2020 WL 5540193, at *5 (D. Me. Feb. 12, 2020), the adequacy of the Filter Team implemented was not being contested. Rather, the court evaluated if certain privileged communications came within the crime-fraud exception.

As stated, the Government's case authority generally refuses to rubber stamp filter procedures and instead expressly considers whether the procedures sufficiently protect the privilege. In the Eleventh Circuit opinion cited by the Government, *In re Search Warrant & Application for a Warrant by Tel or Other Reliable Elec. Means*, 11 F.th 1235. 1242 (11th Cir. 2021), the district court expressly allowed for the party asserting privilege "to conduct the initial privilege review" to safeguard against "the inadvertent disclosure or privileged materials as to the investigation and prosecution team;" requiring agreement by the party or a court order prior to disclosure to the investigative team and allowing privilege disputes to be litigated.

C. Defendants have suffered irreparable harm and will continue to suffer such harm if the Government is allowed to continue its flawed review process.

The Government focuses all of its energy in contesting the propriety of Filter Teams *per se* while ignoring Defendants' requested relief in their Emergency Motion.[7] Defendants have argued that the Governments' deficient and unilateral review of documents (that allow only Government agents to make the initial privileged determinations) in this case provides no meaningful safeguards. As means of relief, it has requested review by a neutral party, or to allow the Defendants to conduct this initial determination as to privilege (in other words, to determine what materials should be segregated to then be reviewed for privilege).

Because the Government had refused to disclose its protocols by the time the Emergency Motion was filed, Defendants were prevented from directly attacking it. Now, the scant (and unsupported) information the Government has provided in its response leaves no doubt that the Government is undergoing a procedurally flawed review of attorney-client and work product privileged electronic data, and in violation of the Fourth Amendment, meriting equitable relief.

i. Governments' Arguments as to Success on the Merits

Courts have granted both remedies – special master and allowing counsel to participate in the initial segregation of potentially privileged materials – when confronted with inadequate review filter procedures. First, the Government has not cited any First Circuit opinion prohibiting the use of special masters. As a result, this Honorable Court can fully examine *In re Search Warrant Issued June 13, 2019*, 942.F3,d 159, 179 (4th Cir. 2019), and decide whether to follow

[7]Defendants requested an order: "[1] enjoining the Government from continuing its unilateral and procedurally flawed review of attorney-client and work product privileged electronic data, which was undertaken without any judicially authorized procedures, [2] an evidentiary hearing ….[3] for the return of attorney-client and work product privileged electronic data to Mr. Herrera-Velutini and Mr. Rossini; and [4] for an order barring the Government from using such privileged materials in any way, including at trial, in preparation for trial, or for any ongoing investigation. Dkt. No. 135 at p. 1-2.

its reasoning. Second, in the case of allowing Defendants or their counsels to make the initial privileged determination, even a district court in this circuit has recently granted such a remedy, as previously indicated.[8]

Moreover, as discussed, the Filter Protocols thus far implemented are wholly inadequate. Because the Filter Protocols currently in place are deficient, the Government's conclusory statement that Defendants have not shown likely success in the merits should be rejected. Thus, the Defendants are likely to succeed in proving that the Government's protocols are inadequate; thus, meriting equitable relief.

ii. The Government's conduct has caused irreparable harm to Defendants.

The harm to Defendants does not only rest in the privileged materials being used against them in trial proceedings, **but the harm also rests on the disclosure itself**. *Matter of 636 South 66th Terrace*, 835 F. Supp. at 1306. Moreover, as stated, Defendants' constitutional rights under the Sixth and Fourth Amendment are implicated in this case. *United States v. Neill*, 952 F.Supp. 834, 839 (D.D.C. 1997). Here, the harm has materialized. Defendants have been indicted, and the Government has admitted to failing to timely implement taint privilege procedures. Now, the Government is applying a prophylactic "Filter Team" not to protect Defendants, but to be later be able to claim good faith or waiver when these documents are provided to non-privilege-holders such as the other defendants, and potentially to witnesses and experts to be used in this case.

As is well known once the Government infringes upon privileged communications, it **cannot simply "unring the bell," as the Government alleges.** *Manness v. Meyers*, 419 U.S.

[8] *See, In re Search of the Pers. of O'Donovan*, *supra*. Other courts, albeit in other circuits, have also granted the same remedy. *See Vepuri*, *supra*; *In re Sealed Search Warrant & Application for a Warrant*, No. 20-MJ-03278, 2020 WL 5658721, at *7(S.D. Fla. Sept. 23, 2020), *aff'd sub nom; In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means*, No. 20-03278-MJ, 2020 WL 6689045 (S.D. Fla. Nov. 2, 2020) at *6; *Korf*, *supra*.

449,460 (1975); *In re Search Warrant Issued June 13, 2019*, 942.F.3d at 175 ("And that harm is plainly irreparable, in that the Filter Team's review of those privileged materials cannot be undone.").

Moreover, suppression does not adequately redress the government's intrusion into the Intervenors' personal and privileged affairs. In contrast, Rule 41(g) can. It offers the remedy of returning to the Intervenors any improperly seized documents protected by privilege before the government has reviewed them. *United States v. Korf* (In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means), 11 F.4th 1235, 1247 (11th Cir. 2021); *see also Harbor Healthcare System, L.P. v. United States*, 5 F.4th 593, 601 (5th Cir. 2021) ("Suppression only protects criminal defendants from the procedural harm arising from the introduction of unlawfully seized evidence. Rule 41(g) protects persons from the deprivation of property by an unlawful search and seizure."). Waiting for the Government to finish its faulty review that will expose privileged materials to non-privileged holders, will cause additional irreparable damages to Defendants. Waiting until suppression, will not cure the harm.

iii. The balance of the equities favor granting the relief requested

The Government has sat on the materials obtained from these electronic warrants for nearly two years without implementing privilege Filter Protocols. Then, it unilaterally implemented highly deficient measures to segregate privileged materials and has given the rest to the Prosecution Team. At no point has the Government proposed allowing Defendants to make the initial privileged determinations at the segregation phase. The Government argues that "disallowing the use of the filter team will shift the burden of the production of discovery from the Government to the Court." Neither method proposed by the Defendants shifts the burden to the Court. Defendants will conduct the review. Meaningfully, the Government accepts that the purpose

of its Filter Team is for the "production of discovery"; not to shield the Prosecution Team from potentially privileged materials to which it presumably already have access. If the purpose of the filter review is for discovery, the equities clearly favor that the holder of the privilege be the one to make the privileged determinations; not the Government. As such, the balance of the equities favors protecting Defendants' privilege.

iv. Public policy also favors granting the remedy requested by Defendants.

As noted in the Emergency Motion, the attorney-client privilege is one of the oldest privileges legally recognized. The Government should not be allowed to abrogate it by indiscriminately seizing documents and then implementing an inadequate review process. The cost of granting the remedies requested through either dismissal, special master or modifying the protocols to allow Defendants' counsel to make the initial privileged determination do not outweigh the public interest in protecting attorney-client relationships.

D. An evidentiary hearing should be held prior to ruling on Defendants' motions and disclosure of the protocols is merited.

The Governments' incomplete disclosures should be viewed with suspicion. While admitting it has segregated "thousands" of potentially privileged materials, the Government continues to conceal how it has handled Defendants' privileged materials from the onset and how it has continued to implement its protocols. It has submitted the protocols *ex parte*, **claiming that they are protected work-product.**

First, the Government should be ordered to produce basic information such as its protocols. As stated, Defendants have found at least one memorandum, for another subject, in the production; negating its blanket protected status. Second, to the extent these protocols constitute "fact work product," defendants have shown a substantial need. "The production of fact work product may be

compelled where a party demonstrates a "substantial need" for the information and an "undue hardship" should it not be produced. *In re San Juan Dupont Plaza Hotel Fire Litig*., 859 F.2d 1007, 1015 (1st Cir. 1988). Here, the information of the protocols is vital for the Defendants to assess if past and current protocols are adequate and sufficient to shield the Investigative and Prosecution Teams or if privileged materials have been passed unto them. Further, the information within these protocols will allow the Defendants to properly assess whether the Governments' contention as to adequacy have merit. The burden on the government is minimal since it will only require disclosing documents that have already been submitted to the court.[9] As in *Cadden*, *supra*, the memorandums were prepared "not as a means of constructing a legal theory of the case (in which case they would be presumptively protected), but as a mechanism for determining the scope of the government's obligation to produce discovery to the defendants." *Id*. Thus, "there is little doubt that the search terms are fairly classified as fact discovery." *Id*. Here, the protocols are not likely to contain any opinion work product (and if they do these statements could be redacted).

Moreover, Rule 41(g) requires the court to "receive evidence on any factual issue necessary to decide the motion." FRED. R. CRIM. P. 41(g). The First Circuit requires an "evidentiary determination … to ensure that there is sufficient evidence to support the court's decision." *U.S. v. Cardona-Sand*, 518 F.3d 13, 16 (1st Cir. 2008). Here, Defendants have asked the court to make a specific determination as to the measures taken to protect the Defendants' privileged communications and if these measures have been reasonable. To this day, the Government has kept Defendants in the dark as to what it has done in the past and is currently reviewing through its so called "Filter Teams." Defendants nor this Honorable Court should rely on mere unsupported

[9] *See also United States v. Barry J. Cadden & 13 Others*, CRIMINAL ACTION No. 14-10363-RGS, at *6 (D. Mass. Sep. 30, 2015) (allowing the disclosure of search terms within the Governments' memorandums since they were created as a "mechanism for determining the scope of the government's obligation to produce discovery to the defendants.").

hearsay. To properly assess the adequacy of the protocols employed by the Government an evidentiary hearing should be held.

V. Conclusion

Under the facts before this Court, where the Government has rummaged through the phone and emails of various defendants, which self-admittedly contain thousands of potentially privilege documents and where a filter team is incapable of making fact-specific privileged determinations, the Defendants stand to suffer irreparable damage. This Honorable Court should not take the Government at its word, and should conduct an evidentiary hearing to understand what the Government did with the privileged documents it seized and to craft an appropriate remedy, including recusal of the Investigative and Prosecution Team. Based on the Government's repeated blunders in this review process, equitable relief is merited. Protective measures should be put in place to prevent further exposure of privileged materials, especially to non-privilege holders for which suppression will provide no relief. Moreover, the returns of privilege materials and others that are outside the search warrant, is also appropriate and necessary to preserve the privilege and constitutional protections.

WHEREFORE, Mr. Herrera-Velutini and Mr. Rossini respectfully request that their Emergency Motion be granted.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 13th day of December 2022.

Attorneys for Julio Herrera-Velutini

The LS Law Firm
One Biscayne Tower, Suite 2530
2 South Biscayne Blvd.
Miami, Florida 33131
Telephone: (305) 503-5503
Facsimile: (305) 503-6801

/s/ Lilly Ann Sanchez
Lilly Ann Sanchez, Esq.
Fla. Bar No. 195677
Email: lsanchez@thelsfirm.com

DLA Piper (Puerto Rico) LLC
500 Calle de la Tanca Ste. 401
San Juan, PR 00901-1969
Tel. 787 281-8100

/s/ Sonia Torres-Pabón
Sonia Torres-Pabón
USDCPR No 209310
Email: Sonia.torres@us.dlapiper.com

Zweiback Fiset & Zalduendo LLP
523 W. 6th Street, Suite 516
Los Angeles, CA 90014
Tel. 213-266-5170

/s/ Michael Zweiback
Michael Zweiback
CA SBN 143549
Email: michael.zweiback@zfzlaw.com

Attorneys for Mark Rossini

LIZARRIBAR-MASINI LAW OFFICE, LLC
G-14 O'Neill Street, Suite A
Hato Rey, PR 00918
Tel. (787) 525-5462

/s/ Lydia Lizarribar
USDC-PR No. 124301
Email: lizarribarlaw@gmail.com

STUMPHAUZER KOLAYA NADLER & SLOMAN, PLLC
Two South Biscayne Boulevard, Suite 1600
One Biscayne Tower
Miami, FL 33131
Telephone: (305) 614-1400
Facsimile: (305) 614-1425

/s/ *Michael B. Nadler*
Michael B. Nadler

Fla. Bar No. 51264
mnadler@sknlaw.com

Admitted pro hac vice

CERTIFICATE OF SERVICE

It is hereby certified that on this date the present motion is filed with the Clerk of the Court through the CM/ECF electronic system which will notify and provide copies to all parties of record.

/s/ Sonia I. Torres-Pabón
SONIA I. TORRES-PABÓN