IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. INTERNET RESEARCH AGENCY LLC, *et al.*, Defendants.	CRIMINAL NUMBER: 1:18-cr-00032-DLF

DEFENDANT CONCORD MANAGEMENT AND CONSULTING LLC'S OPPOSITION TO THE SPECIAL COUNSEL'S MOTION FOR A PROTECTIVE ORDER UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 16(d)(1)

Defendant Concord Management and Consulting LLC (hereinafter "Defendant" or "Concord"), by counsel, respectfully opposes the Special Counsel's Motion for a Protective Order ("Mot."), and in support thereof states as follows:

A. Introduction

Having produced not one iota of discovery in this criminal case, the unlawfully appointed Special Counsel requests a special and unprecedented blanket protective order covering tens of millions of pages of unclassified discovery. Having made this special request based on a secret submission to the Court[1] and a hysterical dithyramb about the future of American elections, one would think that the Special Counsel would cite to case holdings that support this remarkable request.[2] But no, instead, the Special Counsel seeks to equate this make-believe electioneering

[1] There is no small irony that the Special Counsel has chosen to use secrecy as both a sword and a shield, happy to submit its secrets to the Court in support of its instant motion while at the same time refusing to submit its secret instruction to the grand jury to the Court for review. *See* ECF 20, Response to Defendant Concord Management's Motion for In Camera Review of Grand Jury Materials.

[2] While Fed. R. Crim. P. 16 provides for *ex parte* submissions, courts in this district disfavor this process even when dealing with classified information. *See United States v. Rezaq*, 899 F. Supp. 697 (D.D.C. 1995); *see also United States v. Libby*, 429 F. Supp. 2d 18, 21 (D.D.C. 2006); *United States v. George*,

case to others involving international terrorism and major drug trafficking, and relies only on irrelevant dicta from inapposite, primarily out-of-circuit cases. In short, fake law, which is much more dangerous than fake news.

Moreover, if the Special Counsel has any lawful authority at all, which he does not, he certainly has no authority to conduct non-criminal alleged national security investigations related to future elections as he appears to admit he is unlawfully doing. Mot. at 6-8. The Special Counsel has also made baseless unilateral determinations without any involvement of the Court or any opportunity for Defendant to object about what evidence will be admissible at trial. *Id*. at 6 ("Discovery in this case contains sensitive information about investigative techniques and cooperating witnesses that goes well beyond the information that will be disclosed at trial.").

Further, the Special Counsel attests to the Court that the defense has agreed "on many procedures designed to enable the government to turn over discovery," Mot. at 2, while failing to tell the Court the truth; that any such concessions were made as part of a concerted effort by undersigned counsel to reach a stipulated agreement of this issue, and absent that stipulation there is in fact no agreement at all. Despite this fact, and as a courtesy to the Court only, Defendant Concord represents that it is willing to accept the draft protective order attached hereto as Exhibit A, which will permit it to protect its constitutional rights in defending this criminal case.[3]

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786 F. Supp. 11, 17 (D.D.C. 1991). Given the Special Counsel's statement that no classified information is contained in the discovery materials, and the fact that the Special Counsel is not seeking to withhold any of the discovery materials from production, there is no legitimate reason to prevent counsel for defendant from seeing the *ex parte* submission for purposes of opposing the protective order the Special Counsel is seeking.

[3] To the extent that the media seeks to intervene in this matter, Defendant Concord takes no position and intends to expend no resources defending the Special Counsel's position that all of the discovery in this case must be subject to a protective order.

B. The Special Counsel's Special Request

The Special Counsel seeks the unprecedented process of prohibiting defense counsel from sharing or discussing any discovery with any co-defendant—including the only person affiliated with Concord named in the Indictment—unless those individuals come to the United States to become hostages in this political game of tit-for-tat. *See* ECF 24-1, proposed Protective Order at ¶ 2. Next, the Special Counsel seeks to create a special category of unclassified discovery (which, according to the Special Counsel impacts more than half of the ten million pages of documents) that cannot be shared by defense counsel with *anyone* without approval of the Court and a make-believe "firewall counsel" employed by the Special Counsel, thus exposing the entire defense strategy to the Special Counsel's Office in advance of trial. *See id* at ¶¶ 10-12. (note also ¶ 12, carrying over the hostage theme).

C. The Special Counsel's Grossly Misleading Use of Case Authority

The Special Counsel does not cite a single reported criminal case where officers and employees of a corporate defendant were prohibited from reviewing discovery materials, let alone a single case where any such review was subject to pre-approval by the Court or the government. Nor does the Special Counsel cite a single reported criminal case where millions of pages of unclassified discovery were subject to a blanket protective order. However, this only becomes apparent from actually reading the entirety of each of the cases used by the Special Counsel to mislead this Court. The Special Counsel's pleading is representative of one important theme, that is, they have twice now tried to pull a fast one on the Court and cannot be trusted to accurately advise the Court of the relevant law. *See* Concord's Opp. to Special Counsel's Motion to Continue, ECF No. 8.

1. No reported court case has ever endorsed a blanket protective order of this magnitude for unclassified discovery

To support restrictions on defense counsel's use of discovery materials, the Special Counsel cites to *United States v. Alderman*, 394 U.S. 165 (1969) and *United States v. O'Keefe*, No. 06-cr-0249, 2007 WL 1239204 (D.D.C. Apr. 27, 2007). *See* Mot. at p. 4. The quote from *Alderman* suggesting that the trial court should impose a protective order is dicta, and bore no relationship to the holding in the case related to the defendant's Fourth Amendment rights to obtain all recordings made at his home and on which his voice appeared. Moreover, nothing in the Court's observation about the nature of a protective order suggested that it was approving an order as broad and onerous as what the Special Counsel has proposed here. *Alderman*, 394 U.S. at 185.

The *O'Keefe* opinion cited by the Special Counsel related to a defense motion to compel discovery and had nothing at all to do with a protective order. 2007 WL 1239204, at *1. Moreover, the Special Counsel declined to advise this Court that the *O'Keefe* Court, on the same day in a separate opinion, ***denied*** the government's *ex parte* application for a blanket protective order as sought by the Special Counsel in this case, and instead ordered the government to identify specific documents it intended to use at trial or that were material to the defense and to seek a protective order for those specific documents only. *See United States v. O'Keefe*, Cr. No. 06-0249, 2007 WL 1239207, at *2 (D.D.C. Apr. 27, 2007).[4]

2. Analogies to cases involving violent crime fare no better

In defense of his proposed "firewall counsel," the Special Counsel relies on an unpublished out-of-circuit protective order in the prosecution of the notorious "El Chapo,"

[4] It is difficult to believe that the Special Counsel's failure to advise the Court of this holding was an unintentional oversight.

alleged to be one of the biggest narcotics traffickers in the world and accused of bribing Mexican government officials and murdering competitors. *See* Mot. at p. 4, fn. 2 (citing *United States v. Loera*, No. 1:09-cr-466 (E.D.N.Y. Apr. 3, 2017) (ECF No. 51). This unpublished order in that case provides no precedent or relevance, however, because it was premised upon the court's finding that the defendant had a documented history of using professionals, including lawyers, to further his alleged drug cartel activities. *See* Ex. B, Order at p. 3, *Loera*, 1:09-cr-00466 (Mar. 21, 2017), ECF No. 51. Surely the Special Counsel would have cited to a case in this circuit involving firewall counsel if any such case existed.

Instead, the Special Counsel doubles down on cases involving violent crime by pointing to three out-of-circuit cases in the prosecutions of the "American Taliban," the "Twentieth Hijacker," and Osama Bin Laden for the proposition that protective orders can be used to protect unclassified materials. *See* Mot. at 5. But in *United States v. Lindh*, 198 F. Supp.2d 739 (E.D.Va. 2002), the protective order was limited to only thirteen interview reports of alleged al Qaeda detainees, and required only that experts and witnesses sign memoranda of understanding to be filed *ex parte* with the court. *Id.* at 742-43. Moreover, the court took pains to emphasize the importance of balancing its limited protective order with the need to "ensur[e] that no inappropriate burden is imposed on defendant's right to prepare and present a full defense at trial." *Id.* at 742.

The Special Counsel also points to an unpublished protective order entered in *United States v. Moussaoui*, No. 01-cr-455 (E.D.Va. Feb. 5, 2002), yet failed to attach it to his pleading, despite the fact that it is not available to the Court through Pacer. Having obtained it from the court and reviewed it, however, it is of little assistance to the Special Counsel. In that case involving the "Twentieth Hijacker," a terrorist involved in the biggest mass murder of American

citizens in modern history, the Court simply ordered that discovery could not be provided by defense counsel to expert witnesses without *ex parte* approval of the court; and "particularly sensitive discovery materials," could not be shown by defense counsel to any witnesses without *ex parte* prior approval of the court. *See* Ex. C, Protective Order for Unclassified but Sensitive Material, *United States v. Moussaoui*, 01-cr-455 (E.D. Va. Feb. 5, 2002).[5]

3. The Special Counsel's classified information cases go even farther afield

In a similar vein, the Special Counsel cites *Snepp v. United States*, 444 U.S. 507 (1980) for the proposition that publication of information about intelligence activities could harm the United States. Mot. at 6-7. But *Snepp* has nothing to do with protective orders in criminal cases, and instead addressed whether the defendant breached his contract with the CIA by publishing a book and, by doing so, he disclosed classified material. There was no protective order in that case because the confidential information had already been published. To bolster the irrelevance of *Snepp* the Special Counsel stretches to *CIA v. Sims*, 471 U.S. 159 (1985), *see* Mot. at p. 7, fn. 3; another civil case having nothing to do with protective orders where the issue was whether the CIA could refuse under FOIA to produce the names of classified intelligence sources that were protected by another statute. Nor does *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), help the Special Counsel's cause because in that employment case against the Department of Defense having nothing to do with protective orders the court simply cited to *Snepp* with no analysis. Similarly, the Special Counsel's reliance on *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989) is ludicrous. There, the court refused to compel the government to produce a small

[5] *United States v. Bin Laden*, 58 F. Supp. 2d 113 (S.D.N.Y. 1999), involved classified information which is not the case here.

amount of classified information because after *in camera* review that court determined that it was not relevant to the defense.

In any event, the Special Counsel's entire argument on this point is irrelevant because he concedes that the information at issue here is not classified. Mot. at p. 6.

4. No published case in this Circuit has adopted a blanket protective order like that proposed here

The Special Counsel continues his cruise through out of circuit cases containing no precedent with *United States v. Bundy*, No. 2:16-CR-046-GMN-PAL, 2016 WL 7030431 (D.Nev. Nov. 30, 2016); and *United States v. Luchko*, No. CRIM. A. 06-319, 2006 WL 3060985 (E.D. Pa. Oct. 27, 2006). Mot. at 5. Both cases stand for the unremarkable proposition that protective orders can be used when there is a large volume of sensitive information. However, a careful reading of *Bundy* makes clear that the Magistrate Judge refused to issue the protective order proposed by the government. *See Bundy*, 2016 WL 7030431, at *2. Despite the existence of documented evidence that witnesses and law enforcement officers in that case had been threatened, the Court adopted the Magistrate Judge's simple protective order restricting the use of the discovery materials to defense of the case and requiring that confidential documents be filed under seal. *Id.* at *2; *see also* Ex. D, Protective Order, *United States v. Bundy*, 2:16-cr-00046 (D. Nev. July 15, 2016), ECF No. 609.

In *Luchko*, unlike here, the government sought a protective order covering only a small number of interview reports, grand jury transcripts and search warrant affidavits. *See Luchko*, 2006 WL 3060985 at *1. And again, as in *Bundy*, the court eventually issued a protective order simply restricting discovery to preparation of the defense. *See United States v. Luchko*, Cr. No. 06-319, 2007 WL 16511349 *12 (E.D. Pa. June 6, 2007). While the *Luchko* court discussed the concept of a blanket protective order, as noted above that concept was rejected by Judge

Friedman of this Court in *United States v. O'Keefe*, 2007 WL 1239207 *2, and undersigned counsel has been unable to identify any published opinion in a criminal case in this circuit where the concept of a blanket protective was accepted by the court.[6]

Not yet ashamed, the Special Counsel plays the personal identifying information ("PII") card. *See* Mot at p. 9. However, undersigned counsel has already advised the Special Counsel that Defendant does not seek any personal identifying information that is irrelevant to the defense. The Special Counsel stated to undersigned counsel that it would not be possible to remove any such information from the discovery. But that is the Special Counsel's problem, not Concord's. And undersigned counsel will not accept any such information unless the Special Counsel can demonstrate that, in fact: 1) it is relevant to the defense of the case; 2) the Special Counsel intends to use the item in its case-in-chief at trial; or 3) the information was obtained from or belongs to Defendant. *See* Fed. R. Crim. P. 16(a)(1)(E). The Special Counsel's reliance on the out of circuit case *United States v. Johnson*, 191 F. Supp. 3d 363 (M.D. Pa. 2016) provides no cover. To the contrary, *Johnson*, a drugs and firearms case, returns to the concept of an umbrella protective order that is unheard of in published opinions in this district, and further addresses PII which we are not seeking unless it is relevant to the defense.[7]

[6] The Special Counsel's discussion of the Crime Victims' Rights Act is perplexing. *See* Mot. at 5-6. In any event, both cases relied upon by the Special Counsel involve attempts by the media to obtain the names of single crime victims and as such are completely irrelevant to the issue before the Court.

[7] The Special Counsel's description of the PII to undersigned counsel makes it difficult to understand how it could be relevant to the defense. The Special Counsel generally noted that some of the discovery contains financial account numbers of innocent individuals. As noted above, undersigned counsel refuses to accept or be responsible for any such irrelevant data. As to names, addresses and other personal information of the same or other individuals, undersigned counsel has no intention of making any such information public prior to trial.

5. Concord cannot be ordered to prevent its own officers and employees from viewing discovery

As the Special Counsel reaches his shameful crescendo, he claims there is case law to support the argument that a corporate officer of Defendant Concord, Mr. Prigozhin, should not have access to discovery in this case because he is indicted and had not appeared. But alas, there is no such case, so the Special Counsel pivots to reliance on *Degen v. United States*, 517 U.S. 820 (1996); *In re Assets of Martin*, 1 F.3d 1351 (3d Cir. 1993), and *Williams v. Holbrook*, 691 F.2d 3 (1st Cir. 1982). Mot. at 11. So let us see what those cases actually say.

In *Degen* the Supreme Court ***reversed*** the court of appeals' holding that a criminal fugitive could not "seek benefits from the judicial system," Mot. at 11; that is, the Court concluded that a fugitive ***could*** contest a criminal forfeiture case from outside the United States. 517 U.S. at 828. This holding is absolutely contrary to the Special Counsel's argument in this case. In *Martin*, (a pre-*Degen* case that likely cannot withstand the holding in *Degen*), an out-of-circuit court dismissed the appeal of a defendant as to an order imposing a restraint on his assets where the defendant fled after conviction. 1 F.3d at 1356. And *Holbrooke* is a state prison habeas corpus petition case holding that a prisoner's escape ***did not*** estop her from subsequently raising constitutional claims. 691 F.2d at 13.

To wrap up this disingenuous mess the Special Counsel cites to two out-of-circuit cases—*United States v. Nabepanha*, 200 F.R.D. 480, 483 (S.D. Fla. 2001) and *United States v. Gorcyca*, No. 08-CR-9 (FB), 2008 WL 4610297 (E.D.N.Y. 2008)—and *United States v. Lorenzana-Cordon*, 197 F. Supp. 3d 1 (D.D.C. 2016), apparently hoping that the Court will not read any of these cases either.

In *Nabepanha*, a defendant who fled the United States after becoming aware of charges was personally denied discovery under the fugitive disentitlement doctrine. 200 F.R.D. at 483.

But there are several problems with this holding by a United States Magistrate Judge. First, it has never been cited by any other court for the proposition that the fugitive disentitlement doctrine applies to preclude discovery to a person associated with a corporate defendant. Second, the court relied upon the proposition that mere absence does not render a person a fugitive; instead it must be shown that the defendant absented himself from the jurisdiction with the intent to avoid prosecution. *See id.* at 482. Here, the indictment does not allege that either Defendant Concord or Mr. Prigozhin were ever in the United States in the first place. Third, Defendant Concord voluntarily appeared and is entitled to discovery.

In *Gorcyca*, the court refused to hear a motion to dismiss the indictment from a fugitive who had resisted extradition for seven years. 2008 WL 4610297, at *1. The opinion states nothing about discovery or a protective order. Finally in *Lorenzana-Cordon*, Judge Kollar-Kotelly of this Court refused to unseal the names of indicted fugitives where the defendant already had a copy of the entire indictment containing the names of all of the defendants from his extradition proceeding. *See* 197 F. Supp. 3d at *3. What this holding has to do with the Special Counsel's request to the Court remains a mystery.

In sum, none of the decisions cited by the Special Counsel involve facts even remotely similar to those at issue here, and should be rejected as such.

D. The Sum and Substance of the Actual Law

Defendant Concord has voluntarily appeared in Court and is entitled to discovery. *See generally* Fed. R. Crim. P. 16(a). The Special Counsel concedes as much, yet has produced no case authority from this circuit to support a blanket protective order covering ten million pages of discovery, nor has he produced any out of circuit authority that is persuasive. Instead, the Special Counsel ignored law from this district rejecting this concept. *See O'Keefe*, 2007 WL 1239207 at *2 (ordering the government to disclose certain documents to each of the defendants

in the case, noting that it could "not circumvent its responsibilities by seeking a blanket protective order from this Court or by indiscriminately invoking [privacy laws].").

The Special Counsel has produced no published case law to support its request for pre-screening of people who will obtain discovery, the designation of authorized persons to receive discovery on behalf of a corporate defendant, the bulk designation of millions of pages of discovery as unclassified but "sensitive," or the use of "firewall counsel." Instead he relies solely on an unpublished protective order in a major narcotics case where there was evidence presented to the court that the defendant had used professionals, including lawyers, to further the activities of his drug cartel. *See* Mot. at p. 4, fn. 2 (citing *Lorea*). And even the protective order issued in that case, while providing for pre-screening of individuals not part of the defense team prior to obtaining discovery, contains no restriction on review of discovery by the defendant himself as is sought by the Special Counsel here.

E. Defendant Concord's Agreed-Upon Protective Order

The Special Counsel's requests are fashioned to deal with problems of his own making. He alone decided who and when to indict. There are no statute of limitations issues apparent from the face of the Indictment. He chose to indict a case while his investigation was apparently ongoing. He must deal with the consequences or he can dismiss the case.

As a courtesy to the Court, Defendant Concord will not challenge the proposed protective order attached hereto as Exhibit A. This order will allow undersigned counsel to communicate with the defense team, their client and potential witnesses without unlawful interference by the Special Counsel or the necessity of the Court having to rule every time counsel must discuss discovery with a potential witness. This attached proposed order is all that is necessary for discovery of unclassified information, and strikes the appropriate balance between the Special Counsel investigation and Concord's right to prepare its defense and is consistent with a

protective order from this Court in similar circumstances. *See* Ex E, Protective Order, *United States v. O'Keefe*, 1:06-cr-00249 (D.D.C. July 3, 2007), ECF. No. 57 (addressing discovery that includes both personal information and sensitive government information).

WHEREFORE, Defendant Concord respectfully requests that the Special Counsel's Motion for a Protective Order be denied, or in the alternative, if the Court deems that a protective order is necessary, that it enter the proposed order attached hereto as Exhibit A.

Dated: June 14, 2018

Respectfully submitted,

CONCORD MANAGEMENT AND CONSULTING, LLC

By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) all counsel of record registered with the CM/ECF system.

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