IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, v. CONCORD MANAGEMENT AND CONSULTING LLC Defendant.	CRIMINAL NUMBER: 1:18-cr-00032-2-DLF

DEFENDANT CONCORD MANAGEMENT AND CONSULTING LLC'S MOTION FOR APPROVAL TO DISCLOSE DISCOVERY PURSUANT TO PROTECTIVE ORDER

Pursuant to the Protective Order entered in *United States v. Internet Research Agency, et al*, 1:18-cr-00032 (DLF), Dkt. No. 42-1, Defendant Concord Management and Consulting LLC ("Defendant" or "Concord"), by and through undersigned counsel, respectfully submits this motion for approval to disclose documents identified by the Special Counsel as "sensitive" to Concord's officers and employees for purpose of preparing for trial. In support of this motion, Concord states as follows:

I. INTRODUCTION

In this first-of-its-kind prosecution of a make-believe crime, the Office of Special Counsel maintains that it can unilaterally—and for secret reasons disclosed only to the Court—categorize millions of pages of non-classified documents as "sensitive," and prohibit defense counsel from sharing this information with Defendant Concord for purposes of preparing for trial. This, apparently only because the Defendant and its officers and employees are Russian as opposed to American. The Special Counsel's unique argument appears rooted in the maxim, "Happy the short-sighted who see no further than what they can touch."[1] Specifically, the short-

[1] Maillart, Ella K., *The Cruel Way* (1947).

term political value of a conviction far outweighs a reversal by a higher court years from now. This tactic, though rare, is not new. *See Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (unanimous reversal of conviction three years after the hysteria over the failure of Enron; which was three years too late for the survival of Arthur Andersen). Here, the Special Counsel ignores the obvious fact that "any consultation with counsel is rendered meaningless unless the defendants and their attorneys have an opportunity to review the evidence." *United States v. Medina*, 628 F. Supp. 2d 52, 54 (D.D.C. 2009).

Discovery is a fundamental right accorded to all defendants in all criminal cases. There is no "Russian Exception" to this right, which belongs to the defendant, not to defense counsel. It is not the burden of a defendant to convince the court it is entitled to view discovery, rather it is the burden of the Special Counsel to comply with Rule 16. *See United States v. Mejia*, 448 F.3d 436, 444 (D.C. Cir. 2006). Despite this fact, in the eight months since Concord voluntarily appeared to defend itself the Court has prohibited defense counsel from sharing or discussing with the Defendant unilaterally-designated "sensitive" discovery produced by the Office of Special Counsel. The Special Counsel has explicitly acknowledged that none of the discovery is classified. Moreover, the allegedly "sensitive" discovery appears to have been collected exclusively through the use of criminal subpoenas, search warrants, and orders issued pursuant to 18 U.S.C. § 2703, as opposed to any classified collection method. The Court has permitted the Special Counsel to support his position with disfavored *ex parte* submissions that are impossible to respond to because defense counsel has no idea of their contents. *See United States v. Rezaq*, 899 F. Supp. 697, 706-07 (D.D.C. 1995).

Since the entry of the Protective Order, the Special Counsel has produced nearly 4 million documents, 3.2 million of which it has designated as "sensitive." The Special Counsel

has not explained to defense counsel the reason for the designation of any particular document or category of documents, nor has he explained why—with non-classified material—defense counsel should not have access to his secret communications with the Court. The position of the Court and the Special Counsel creates an insuperable obstacle to defense counsel preparing for trial.[2]

II. LAW & ARGUMENT

A. Rule 16 applies equally to corporate defendants.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citation omitted). Indeed, "[i]t has long been established that Federal Rule of Criminal Procedure 16 was 'designed to provide to a criminal defendant, in the interests of fairness, the widest possible opportunity to inspect and receive such materials in the possession of the government as may aid him in presenting his side of the case.'" *United States v. Daum*, 847 F. Supp. 2d 18, 20 (D.D.C. 2012) (quoting *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989)).

With respect to documents and objects, Rule 16 does not distinguish between individual and organizational defendants; both are equally entitled to discovery. *See* Fed. R. Crim. P. 16(a)(1)(E). In cases involving corporate defendants, discovery is even more important because "[a]n organization has no self-knowledge of its own conduct, since it acts through its agents, and must be afforded an opportunity to learn what of its employees' conduct is being used against it at trial." *United States v. Maury,* 695 F.3d 227, 248 (3rd Cir. 2012). As to discovery of

[2] Concord initially requested authorization from the Court pursuant to the Protective Order to disclose a small number of specifically identified allegedly sensitive documents to particular Russian individuals, but to date the Court had not required the Firewall Counsel to respond to that request in writing. As such, Concord respectfully requests authorization to share all discovery with its individual officers and employees, so that it can confer with counsel and effectively participate in its defense.

statements, "[i]t is only by learning what statements can be attributed to it as an organization that a corporate defendant can defend itself at trial." *Id*. at 248-49 (citing Fed. R. Crim. P. 16(a)(1)(C) advisory committee's notes to 1994 Amendments).

Moreover, "[w]here the defendant objects to the government's proposed method of conducting discovery . . . the burden of showing good cause lies squarely on the government." *United States v. Johnson*, 314 F. Supp. 3d 248, 253 (D.D.C. 2018). Even a broad protective order does not give the government *carte blanche* to impose unnecessary limitations on discovery available to a criminal defendant. *See id*. at 252-53. This Court has recognized that although so-called "umbrella" protective orders "may be entered 'without a particularized showing to support the claim for protection,'" in those situations courts still "require a particularized showing [of good cause by the government] 'wherever a claim under [the umbrella] order is challenged." *Id.* (citations omitted) (second alteration in original).

Undersigned counsel has been unable to identify a single reported case where a corporate defendant was prohibited from viewing discovery, or where a Court or the prosecutor inserted themselves into the decision about which corporate representatives could view discovery. There is simply no good faith showing available to the Special Counsel, whether made in public or again in secret to the Court, that would result in any outcome other than the absolute inability of defense counsel to prepare for trial. Any attempt to persist in this novel and never-before-utilized method of prosecution would be fatal for the following reasons:

First, the government's desire—untethered to any statute or case law—to limit discovery to co-defendants who have appeared in Court cannot overcome Concord's constitutional rights as a present defendant. Corporate defendants enjoy the same discovery and disclosure requirements as individual defendants. *See* Fed. R. Crim. P. 16 advisory committee's note to 1994

Amendments. Moreover, disclosure is critical for Concord to prepare for trial because "[c]orporations may be held liable for specific intent offenses [like conspiracy] based on the 'knowledge and intent' of their employees." *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1118 (D.C. Cir. 2009) (quoting *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909)). The Court has already noted that Concord's specific intent will be an issue at trial, Nov. 15, 2018 Mem. Op. at 15, 25, Dkt. 74, and Concord must be able to view and consider the discovery materials in order to evaluate and rebut any such evidence at trial. The fact that the Indictment alleges that co-defendants may have had the ability to bind Concord makes it essential that defense counsel be able to disclose and discuss discovery with Concord. *See* Fed. R. Crim. P. 16 advisory committee's note to 1994 Amendments ("Because an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense, it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant.")

For example, the Indictment alleges that Concord controlled funding for the Internet Research Agency. Dkt. 1 at ¶ 11. Assuming the allegedly sensitive discovery contains documents allegedly generated by Concord on this issue, then how can undersigned counsel possibly prepare to defend against this allegation without discussing these documents with Concord?

Second, co-defendant Mr. Prigozhin is the only person directly affiliated with Concord identified in the Indictment. As such, Concord cannot be expected to make informed decisions regarding its defense or meaningfully confer with its counsel unless it—and specifically Mr. Prigozhin—understands the evidence the Special Counsel intends to use against it at trial. *Maury*, 695 F.3d at 248 (recognizing that "[a]n organization has no self-knowledge of its own

conduct, since it acts through its agents, and must be afforded an opportunity to learn what of its employees' conduct is being used against it at trial"). Such decision-making is fundamental to how a defendant navigates criminal proceedings. As the Third Circuit recognized in *Maury*, "[p]re-trial discovery allows an individual defendant the opportunity to seek suppression of these statements before they are introduced into evidence at trial, and to evaluate the weight of such direct evidence against him in deciding whether to take a plea or face trial." *Id*. at 252. Moreover, "the same limitations and driving principles which control in the individual context transfer, through incorporation, to the discovery rights afforded to organizational defendants under Rule 16(a)(1)(C)." *Id*. at 53.

Third, Concord's officers and employees possess a critical first-hand understanding of its own business activities, and their input and insight about both is necessary for Concord to adequately prepare a defense. *See Philip Morris USA*, 566 F.3d at 1118 ("Because a corporation only acts and wills by virtue of its employees, the proscribed corporate intent depends on the wrongful intent of specific employees."). It is axiomatic that "an essential component to the Sixth Amendment right to counsel is that a defendant be allowed to assist and participate meaningfully in his own defense." *United States v. Darden*, No. 3:17-cr-00124, 2017 WL 3700340, at *2 (M.D. Tenn. Aug. 28, 2017). This Court has recognized that "any consultation with counsel is rendered meaningless unless the defendants and their attorneys have an opportunity to review the evidence." *Medina*, 628 F. Supp. 2d at 54. Information from Concord's officers and employees will help it understand the actions allegedly undertaken and statements allegedly made by those individuals and whether they were within the scope of their employment by Concord. *See United States v. Sun-Diamond Growers of Cal.*, 964 F. Supp. 486, 490 (D.D.C. 1997) ("the acts of a corporation are the acts of its employees acting within the

scope of their employment" (citing *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987))). Put another way, Concord (as a legal entity) has no memory or understanding of its actions independent of those of its officers and employees. Input from those individuals is necessary for Concord to respond to the charge against it.

Fourth, the documents that the government appears to contend are statements of Concord under Fed. R. Civ. P. 16(C)(i) and (ii) are primarily in Russian. While defense counsel has engaged translators to begin its review of the discovery materials, the only way to get fully accurate translations and prepare for trial is to speak to the individuals who allegedly wrote the documents. *See United States v. Archbold-Manner*, 577 F. Supp. 2d 291, 292-93 (D.D.C. 2008) (noting the need for translations of voluminous foreign language discovery in ruling relating to Speedy Trial Act). This is particularly true with respect to Russian, which is highly dissimilar to English and literal translations of words often result in lost meaning or context. *See, e.g.*, https://www.state.gov/m/fsi/sls/c78549.htm (Department of State's Foreign Service Institute School of Language Studies identifying Russian as a Category III Language "with significant linguistic and/or cultural differences from English"). Again, by way of example, certain allegedly sensitive documents contain the Russian word "шеф." This word can be translated into the English words "chief," "boss" or "chef"—a distinction that is critically important since international media often refers to Mr. Prigozhin as "Putin's Chef."

Given these facts, it is inconceivable how Concord can be afforded its Constitutional right to "a meaningful opportunity to present a complete defense," *Crane*, 476 U.S. at 690, without defense counsel being able to disclose and discuss the government's evidence with its own officers and employees who allegedly took actions on Concord's behalf. Any continuing Protective Order must be balanced against Concord's fundamental constitutional right to a fair

opportunity to present its defense. *See United States v. Lindh*, 198 F. Supp. 2d 739, 744 (E.D. Va. 2002) (in ruling on protective order recognizing need to balance national security interests with defendant's right to prepare and present a full defense at trial and that courts should ensure the protection is no broader than necessary). Here, there can be no question that the balance tips in Concord's favor, particularly now that potentially dispositive motions have been resolved and the case is being prepared for trial. *Id.* at 744 (approving proposed protective order but noting that at the time of trial the balance struck in favor of restricting disclosure of unclassified protected information may shift in favor of disclosure); *see also* Jun. 15, 2018 Hrg. Tr. at 20:22-23 ("I think over time this protective order could change.").

B. The Protective Order is Overly Broad

As defense counsel has repeatedly addressed with the Court, the government has grossly over-designated documents as "sensitive." Based upon what has been disclosed to date, this allegedly "sensitive" discovery includes a massive amount of irrelevant data ranging from promotional emails for airlines to personal correspondence, even including personal naked selfie photographs. Despite the fact that much of this allegedly sensitive material is irrelevant to the charges against Concord, the Special Counsel's over-designation creates a massive problem for defense counsel in trying to identify what is relevant and/or exculpatory. That is, currently only the defense team and a small number of court-approved translators have access to this data to be able to sift through, identify, and isolate the documents that are actually material to the defense. To date, the Defendant has been prohibited from assisting in any manner and, further, defense counsel is prohibited from discussing or even alluding to any relevant information that has been identified. This equates to the burden of preparing for trial without any ability to discuss the evidence with the client who is to be put on trial. This has never happened before in reported case law because the notion is too ludicrous to contemplate.

The only cases that undersigned counsel has been able to find where a defendant was prohibited from viewing non-classified discovery were those involving specific threats to the safety of witnesses/informants, or factually dissimilar cases where the discovery involved the object of the crime, *i.e.* child pornography. *See, e.g., United States v. Hill*, 322 F. Supp. 2d 1081, 1093 (C.D. Cal. 2004) (protective order stating that "Defendant himself shall not be permitted to access or view any graphic image file containing actual or alleged child pornography . . ."); *United States v. Morris*, No. 17-cr-107, 2018 WL 3546198, at *2 (D. Minn. July 24, 2018) (in a case involving charges of sex trafficking the protective order initially prevented defendant from reviewing any discovery identified as "Protected Material" because threats had been made to victims and their families; but this restriction was later relaxed to allow defendant to assist in trial preparation). Nor has undersigned counsel been able to identify a single case in which a court dictated which employees or officers of a corporate defendant were allowed to view protected discovery.

Moreover, the case law that does exist supports Concord's position that the government cannot simply hide behind a broad Protective Order in an effort to block access to discovery materials necessary for the defendant to prepare for trial. *See, e.g., Johnson* 314 F. Supp. 3d at 253-56 (rejecting the government's effort to preclude defense counsel from showing a defendant un-redacted body-camera footage, and ultimately requiring the government to redact that footage so defendant could view and use it to prepare his defense); *United States v. Carriles*, 654 F. Supp. 2d 557, 562, 570 (W.D. Tex. 2009) (rejecting the government's proposed protective order related to sensitive but unclassified discovery which would have prevented defendant from disseminating any sensitive discovery material to prospective witnesses without first obtaining court approval, and instead allowing defendant to disclose materials necessary for trial

preparation after obtaining a memorandum of understanding related to the protective order); *Darden*, 2017 WL 3700340, at *3 (rejecting the government's proposed protective order that prohibited the defendants from reviewing discovery materials unless in the presence of counsel and adopting a less restrictive protective order which specified precisely which discovery materials defense counsel could review with the defendants but could not provide or leave with the defendants). These cases illustrate the importance of the competing interests at stake, while still recognizing that the government cannot simply seek a broad protective order without making the requisite good cause showing.

1. The Protective Order's Restrictions Place No Burden on the Government.

It is the government—not Concord—that bears the burden of showing good cause for the restriction it seeks. *Johnson*, 314 F.Supp. 3d at 251. And that burden is not satisfied by merely dumping millions of pages of discovery on Concord and then secretly whispering to the Court about why the discovery cannot be shared with the Defendant. *See id.* at 253 ("Rather, Johnson argues—correctly—that the government has not explained why its attorneys are any less capable of reviewing the [discovery materials] and redacting sensitive information than is Johnson's attorney."). "Protective orders are the exception, not the rule, and appropriate reasons must be given for their entry." *United States v. Stone*, No. 10-20123, 2012 WL 137746, at *3 (E.D. Mich. Jan. 18, 2012). Other courts to have addressed similar issues agree that protective orders should be more limited at the trial preparation stage. *See Morris*, 2018 WL 3546198, at *2 (recognizing that "this case is shifting from the pretrial discovery stage to trial preparation. Defendants need to be able to participate more thoroughly in the review of discovery and the formulation of their defense at trial"); *Lindh*, 198 F. Supp. 2d at 744.

While Concord has undertaken the onerous task and enormous cost of complying with the Protective Order, the discovery process up to this point has imposed literally no burden on the government. The government has not been required to explain publicly or confidentially to defense counsel the basis of its designation of any discovery as sensitive, nor has it been asked to re-evaluate that designation at any time. The government has not been not required to ensure in any way that it has designated the discovery appropriately. As a result, the Special Counsel has simply made a blanket designation of data related to hundreds of individuals and accounts, none of which on its face implicates any national security or law enforcement secrets—imposing significant burden on Concord—without consequence.

For example, in the briefing relating to entry of the Protective Order, the Special Counsel argued to the Court that the presence of personal identifying information ("PII") constitutes good cause for the restrictions on discovery. Government's Mot. For a Protective Order Under Federal Rule of Criminal Procedure 16(d)(1) at 9-10, Dkt. 24. Notably, however, this is not among the categories of information included in the definition of "sensitive" in Paragraph 10 of the Protective Order. As such, it is not clear whether the presence of PII is a basis on which the government has designated materials as sensitive or whether the government believes the other restrictions in the Protective Order are sufficient to protect this information. In any event, undersigned counsel has made clear that it does not want or need access to specific PII, such as social security numbers, dates of birth, addresses, or financial account numbers, unless it is relevant to the defense of the case, the Special Counsel intends to use it in its case-in-chief at trial, or the information was obtained from or belongs to Concord. *See* June 15, 2016 Hr'g Tr. at 22:1-4; Concord's Opposition to the Special Counsel's Motion for a Protective Order at 8, Dkt. 27.

But rather than impose on the government the burden of identifying the materials that actually contain PII, so that the specific documents or information can be redacted or restricted, the Special Counsel has used the Protective Order to designate the entirety of various data productions to completely restrict Concord's ability to view the vast majority of discovery regardless of whether specific documents contain PII. *See Johnson*, 314 F. Supp. 3d at 255 (nothing the default approach under Rule 16 is that "it is the government's obligation—not defense counsel's—to review the information in the government's possession and to determine what information, if any, should be withheld"). Further, because the Special Counsel has provided no clear definition of what constitutes "sensitive" discovery, there is no way for defense counsel to challenge or contest any specific designation thereunder. But the law is clear that the government "may not circumvent its responsibilities by seeking a blanket protective order from this Court or by indiscriminately invoking ['sensitive' material]." *United States v. O'Keefe*, No. 06-0249, 2007 WL 1239207, at *2 (D.D.C. Apr. 27, 2007).

Relatedly, the government itself has described some of the "sensitive" discovery in great detail in public filings, yet has made no effort to subsequently re-categorize those very same documents as no longer sensitive. For example, in an affidavit in support of a criminal complaint filed under seal on September 28, 2018 in the Eastern District of Virginia and unsealed on October 19, 2018, an FBI Special Agent described "detailed financial documents that tracked itemized Project Lakhta expenses" allegedly transmitted between an employee of Concord and an employee of its co-defendant, Internet Research Agency. *See* Ex. A, Criminal Compl., *United States v. Elena Khusyaynova*, 1:18-mj-464 (E.D. Va.) (filed Sept. 28, 2018; unsealed Oct. 19, 2018) ("the Holt Affidavit"). The Holt Affidavit goes on to state that "[b]etween at least January 2016 and July 2018, these documents were updated and provided to Concord on approximately a

monthly basis," and provides "illustrative examples" of these documents, including identifying the individual who sent the document (the defendant identified in the complaint); describing the date on which the documents were allegedly sent and the approximate dollar value contained in the document; and even quoting from the documents. *Id*. ¶ 21. To the extent that these very same documents are among those designated by the Special Counsel as "sensitive," it is impossible to understand why they cannot be shared with Concord in order to defend itself against criminal charges in this case.

2. Discovery in this case should not be withheld on the basis of either an ongoing investigation or sensitive investigatory techniques.

Because much of the proceedings related to the Protective Order have been undertaken *ex parte*, (*see infra* Section II.C), Concord is not privy to any basis on which the government obtained the Protective Order, nor does it know the basis by which the government seeks to prevent the disclosure requested herein. Nevertheless, the Special Counsel has publicly invoked—in the Protective Order itself and its briefing—both an "ongoing investigation" and "sensitive investigatory techniques" as grounds for preventing disclosure, neither of which should apply here.

Undersigned counsel must assume for now that the "ongoing investigation" referred to in the Protective Order is related to the criminal complaint recently unsealed in the Eastern District of Virginia. Ex. A. Because this complaint is now unsealed, and the ongoing investigation has been publicly revealed, there is no further need to protect this investigation from disclosure.

With respect to "sensitive investigatory techniques," the discovery produced to date comes from legal process issued to various companies, including email providers, internet service providers, financial institutions, and other sources. *See* Government's Mot. For a Protective Order Under Federal Rule of Criminal Procedure 16(d)(1) at 2, Dkt. 24. But any

person anywhere in the world connected to the Internet already knows that law enforcement agencies can and do gather evidence from these types of companies through legal process in criminal matters, and specifically what can be gathered through those various processes is widely known and is not in need of protection. For example, Google explains in detail on its website precisely what information it will disclose in response to legal process in the form of a subpoena, court order, or search warrant. *See* https://support.google.com/transparencyreport/answer/7381738?hl=en. Google specifically publicizes that in response to a subpoena for Gmail data, it can be compelled to disclose subscriber registration information (e.g., name, account creation information, associated email addresses, phone number), and sign-in IP addresses and associated time stamps. *Id*. In response to a court order for Gmail data, Google may provide "non-content information (such as non-content email header information)" and in response to a search warrant Google can be compelled to produce email content, in addition to the data produced in response to a subpoena or court order. *Id*. Facebook publishes similar information, explaining that in response to a subpoena, it may disclose "basic subscriber records," which may include name, length of service, credit card information, email addresses, and recent login/logout IP addresses. *See* https://www.facebook.com/safety/groups/law/guidelines/. In response to a court order, Facebook may disclose message headers and IP addresses, as well as basic subscriber records. *Id*. In response to a search warrant, Facebook may disclose stored contents of the account, including messages, photos, videos, timeline posts, and location information. *Id*.

Twitter, Apple, Microsoft, Yahoo!, Instagram, and WhatsApp, all publish similarly detailed information about the types of data available to law enforcement through subpoenas, court orders, and search warrants. *See* https://help.twitter.com/en/rules-and-policies/twitter-law-enforcement-support (explanation from Twitter that obtaining non-public information requires

valid legal process like a subpoena, court order, or other legal process and that requests for the contents of communications require a valid search warrant or equivalent); https://www.apple.com/privacy/government-information-requests/ (explanation from Apple, Inc. of what government and law enforcement agencies can obtain through legal process); https://www.microsoft.com/en-us/corporate-responsibility/lerr (explanation from Microsoft that a subpoena is required for non-content data, and a warrant or court order is required for content data); https://r.search.yahoo.com/_ylt=A0geK.OJvA5cPPUAkCJXNyoA;_ylu=__X3oDMTEyaDM4Z2dkBGNvbG8DYmYxBHBvcwMxBHZ0aWQDQjQ4NTNfMQRzZWMDc3I-/RV=2/RE=1544498442/RO=10/RU=https%3a%2f%2fwww.eff.org%2ffiles%2ffilenode%2fsocial_network%2fyahoo_sn_leg-doj.pdf/RK=2/RS=sXU4pB1SMj3WwjZBx3ltlU4S6v__w- (explanation from Yahoo of precisely what data may be disclosed in response to a subpoena, 2703(d) order, or Search Warrant); https://faq.whatsapp.com/en/android/26000050/?category=5245250 (explanation from WhatsApp detailing what information is available through various forms of legal process); https://help.instagram.com/494561080557017 (explanation from Instagram describing the information it will disclose in response to subpoenas, search warrants, and court orders). Financial institutions and internet service providers also openly describe what information is available to law enforcement through various legal process. *See, e.g.*, https://www.paypal.com/us/webapps/mpp/law-enforcement (explanation from PayPal describing the type of data it collects and when that data is made available to law enforcement as required by law); https://www.verizon.com/about/portal/transparency-report/faqs/ (explanation from Verizon of the types of information it is required to disclose when properly requested by law enforcement or court order).

Thus, if it is the so-called "manner of collection" of the discovery that the Special Counsel seeks to protect—that is, the fact that law enforcement agencies can collect a certain type of data—that fact is widely known and does not justify the burdens the Protective Order imposes on Concord's right to present a defense.[3]

C. The Government Should Not Be Permitted to Proceed *Ex Parte*.

When the government is given an opportunity to make its case for preventing Concord from viewing the "sensitive" discovery at this stage of proceedings, it should not be permitted to do so *ex parte*. "This [C]ourt generally disfavors *ex parte* proceedings involving the government," and has acknowledged that such "communications between a district court and the prosecution in a criminal case are greatly discouraged, and should only be permitted in the rarest of circumstances." *Rezaq*, 899 F. Supp. at 707 (requiring government to file motions for leave to make *ex parte* submissions, to serve those motions on the defendant, and to litigate them in an adversarial hearing); *see also United States v. George*, 786 F. Supp. 11, 16 (D.D.C. 1991) ("*Ex parte* proceedings are generally disfavored, even when the federal rules expressly permit them."). The Advisory Committee's notes for Rule 16 explain that the language regarding *ex parte* communications is permissive, not mandatory. Fed. R. Crim. P. 16 advisory committee's note to 1975 Amendments. "Thus, if a party requests a protective or modifying order and asks to

[3] To the extent that the government argues that limiting access to discovery will ensure the safety of witnesses, there is no valid basis for such argument. Specifically, even in cases where there is such a risk (and undersigned counsel knows of no such risk here), there must be more than "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning." *Johnson*, 314 F. Supp. 3d at 251. In those instances, courts are still willing to allow a defendant to review the evidence, subject to certain parameters. *See, e.g., id.*, at 254 (requiring government redaction of discovery materials); *Darden*, 2017 WL 3700340, at *3 (adopting less-restrictive measure to ensure witness safety). If the government has a legitimate concern about witness safety, the burden is on it to specifically articulate the concern, identify precisely the documents that would lead to the identification of a witness, and redact that information or propose an alternative means of restricting disclosure.

make its showing ex parte, the court has two separate determinations to make. First, it must determine whether an ex parte proceeding is appropriate, bearing in mind that ex parte proceedings are disfavored and not to be encouraged. . . . Second, it must determine whether a protective or modifying order shall issue." *Id*. As an example, the Advisory Committee explained that "[a]n ex parte proceeding would seem to be appropriate if any adversary proceeding would defeat the purpose of the protective or modifying order. For example, the identity of a witness would be disclosed and the purpose of the protective order is to conceal that witness' identity." *Id*. Here, an adversary proceeding would not defeat the purpose of the Protective Order because any proceeding could be conducted in a sealed filing that is disclosed to undersigned counsel, thus ensuring that appropriate counter-arguments can be made to the Court, while not being litigated on the public docket.

In the context of classified information—which is not at issue in this case—the Court has identified three limited exceptions to the rule disfavoring *ex parte* proceedings, but has noted that they are "'both few and tightly contained.'" *Libby*, 429 F. Supp. 2d at 21 (quoting *Abourezk v. Reagan*, 785 F.2d 1043, 1060 (D.C. Cir. 1986)). First, "the 'inspection of materials by a judge isolated in chambers may occur when a party seeks to *prevent use* of the materials in the litigation;'" second, "when the government has properly invoked, for example, the state secrets privilege," it must demonstrate "'compelling national security concerns,'" and must disclose "'as much of the material as it could divulge without compromising the privilege'" before *in camera* review; and third, "*ex parte* proceedings are permitted when a statute expressly provides for such proceedings." *Id.* (quoting *Abourezk*, 785 F.2d at 1061) (emphasis in original).

None of the exceptions articulated in *Libby* apply in this case. The first exception is not present here because the Special Counsel has already produced the information to defense

counsel pursuant to Fed. R. Crim. P. 16. The second exception also does not apply because unlike *Libby*, the Special Counsel has not asserted the state secrets privilege and there is no classified information in the discovery. *See* Government's Submission Related to a Permanent Protective Order Under Federal Rule of Criminal Procedure 16(d)(1) at 2, Dkt. 40 (recognizing the discovery is not classified). With respect to the third exception, no statute allowing *ex parte* proceedings is implicated in this case.

D. The Protective Order's Restrictions If Left in Place Would Render Concord's Representation Ineffective as a Matter of Law.

As a final matter, preventing Concord's officers and employees from viewing the purportedly "sensitive" discovery material will effectively deprive Concord of its constitutionally-guaranteed right to effective assistance of counsel. To be effective, counsel must be able to investigate the allegations against the defendant—a process that will be all but meaningless here if defense counsel cannot even discuss the discovery with the Defendant's officers and employees, much less disclose the information. Courts have recognized that counsel's failure to conduct an adequate investigation amounts to ineffective assistance. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 691 (1984) (recognizing that "counsel has a duty to make reasonable investigations . . . "); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (recognizing deficiencies in counsel's investigation); *United States v. Mohammed*, 863 F.3d 885, 890 (D.C. Cir. 2017) (finding counsel's performance deficient on the basis of a "complete failure to investigate" (internal quotation marks omitted)). No reasonable investigation of the allegations against Concord can take place if counsel is prohibited from reviewing and discussing the discovery with Concord.

III. Conclusion

Should the Court grant approval of the requests contained herein, undersigned counsel will take necessary steps to protect the discovery from unauthorized disclosure. Undersigned counsel is submitting under seal as Exhibit B hereto a specific proposal for how the discovery is to be shared with the Defendant.

A proposed order is submitted herewith.

Dated: December 20, 2018

Respectfully submitted,

CONCORD MANAGEMENT AND CONSULTING LLC

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