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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. AARON J. SCHOCK, Defendant.	))))))))))	Case No. 16-cr-30061

DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION FOR EXTENSION OF TIME TO COMPLETE RULE 16 DISCLOSURE

COMES NOW Defendant Aaron J. Schock, by and through counsel, and respectfully submits this response to the government's Motion for Extension of Time to Complete Rule 16 Disclosure. Although Mr. Schock would not normally oppose the government's motion, Mr. Schock is compelled in this case to make a limited opposition.[1]

This case is on a relatively tight timeline, especially given the complexity that arises from the government basing the charges in the Indictment on its interpretations of rules and procedures of the House of Representatives and its interpretations of Federal Election Commission ("FEC") reporting requirements. That complexity, as it pertains to discovery, is also exacerbated by the government having elected to charge Mr. Schock under a theory of his having acted indirectly by causing others to make filings with the House and the FEC. This makes discovery of evidence concerning actions by him, if any, in connection with specific filings critical to his defense. At

[1] Counsel for Mr. Schock previously informed the government that Mr. Schock would not ordinarily object to a good faith request to delay production of discovery, but we stated that we would need to know the specifics of the bases for the request and that we would not want to disrupt the court's schedule. Much later, the government filed its request without further conferring with us.

least one of the Rule 17 subpoenas issued by the government and discussed below appears to be aimed at discovery on that issue.

It is apparent that the government is seeking this extension, in part, so that it may receive information it has improperly requested through the use of Rule 17 trial subpoenas, while also seeking early return on such subpoenas even after its application to the Court to do so was denied. It is equally apparent that the government is improperly continuing to investigate this case post-indictment, as – even to the limited extent known to the defense – the scope of the subpoenas it has issued are extremely broad and all encompassing, such as a demand to produce *nine years*' worth of electronic records estimated to contain *50,000* emails. Such a Rule 17 subpoena must be improper on its face. If allowed, the government would be able to circumvent its pretrial discovery obligations. By requesting early return by the date of its discovery deadline (as the government has requested of at least this one subpoena recipient of many), the government obviously has no intention of complying with that deadline. In addition, at least one of the government's Rule 17 subpoenas has been issued to witnesses who are not among the 100+ trial witnesses that the government previously identified. While troubling enough on its own, this picture of the government's use of Rule 17 subpoenas is likely to be incomplete, because the defense cannot know of other subpoenas that have not come to its attention or of instances where the government has sought voluntary production of information under threat of subpoena.

Thus, Mr. Schock must oppose the government's motion to the extent that it enables this abuse of the court's process. In addition, Mr. Schock requests that, in any order the court enters, (1) the government be directed to produce certain materials to which Mr. Schock is entitled and which the government has informed counsel for Mr. Schock that the government either intends to produce (but has not yet produced) or that it has determined it will not produce and (2) Mr.

Schock's deadline for completing his Rule 16 disclosure be extended for the same amount of time the government is granted any extension.

For the reasons detailed below, Mr. Schock respectfully submits that the Court should *sua sponte* quash all such subpoenas that the government has issued. At the very least, we submit that the Court should order the government to produce to the Court all information necessary for the Court to determine if these subpoenas are proper under Rule 17.

I. The Government's Abuse of Rule 17 Trial Subpoenas

In support of its motion for an extension of time, the government states that it needs additional time in part because it is awaiting materials in response to a Rule 17 trial subpoena to Mr. Schock's campaign treasurer and "several trial subpoenas" for travel and phone records. Mot. at 4. In response to these representations, counsel for Mr. Schock requested that the government provide copies of and further information regarding these trial subpoenas so that we could file an informed response to the motion at issue, including the identity of the recipients, the date each was served, the documents or things requested, the documents or things received to date, and whether the government intends to issue any additional Rule 17 subpoenas.[2] The government responded, in part, that it has "approximately seven trial subpoenas outstanding for travel records relating to private flights, Uber, [and] American Airlines," and that it also had "two trial subpoenas outstanding relating to FedEx records."[3] The government did not, however, provide us copies of the subpoenas, identify the recipients of the subpoenas for travel records, or provide any further information.

[2] Email from R. Bittman, Esq. to T. Bass, Esq., Apr. 10, 2017.
[3] Email from T. Bass, Esq. to R. Bittman, Esq., Apr. 11, 2017.

Despite the government's refusal to disclose the requested information about trial subpoenas it has already issued, it has come to Mr. Schock's attention that the government has served a trial subpoena for documents on at least one other individual who has never before been contacted by the government and who was not identified as one of the 100+ witnesses listed by the government in connection with the bond hearing as potential witnesses. In addition, an FBI agent has threatened to serve a subpoena (presumably a Rule 17 trial subpoena) on another individual with whom the government has not spoken, and who is also not on the list of the government's 100 witnesses, if he does not voluntarily speak with the government. Neither of these individuals have any apparent relation to conduct charged in the Indictment.

From the government's own statements and from other information recently received by counsel for Mr. Schock, the government appears to be abusing the court's process to conduct discovery and continue its investigation after the conclusion of the grand jury. This, despite the fact that the government had *twenty months* and two grand juries to conduct its investigation. The government should not therefore benefit from an extension of time and alter the court's schedule to obtain materials in violation of long-established court rules. The government's violations are twofold: First, the government has apparently told recipients of the Rule 17 trial subpoenas to produce the requested materials prior to the July 10, 2017, trial date without prior approval from this Court, in violation of Rule 17(c). In addition to violating Rule 17(c), the government's conduct circumvents this Court's order denying the government's request for early return of trial subpoenas. Second, the government's requests suggest that it is engaged in a far-reaching fishing expedition, which is forbidden under Rule 17(c). Mr. Schock requests that the court decline to extend the government's discovery deadline with respect to these materials, and suggests that the

Court exercise its inherent authority to quash these subpoenas, or take other remedial action as may be appropriate.

A. The Government is Abusing Rule 17 by Requesting Early Return of Rule 17 Materials Without Court Approval and After the Court Specifically Denied the Government's Request for a Blanket Early Return

Counsel for Mr. Schock have become aware that the government has issued several trial subpoenas pursuant to Rule 17.[4] We understand that these subpoenas, or at least a majority of them, were issued and served upon the recipients in March 2017 – perhaps only days prior to the government's discovery deadline. Pursuant to Federal Rule of Criminal Procedure 17(c), a party may issue a subpoena for documents or other objects to be returned at trial. If the court so orders, the return date for the subpoena may be prior to trial. *See* Fed. R. Crim. P. 17(c)(1). We do not know what return date the government listed on its Rule 17 trial subpoenas. However, in at least one of the Rule 17 subpoenas, which was made to Mr. Schock's campaign treasurer for a significant volume of emails, the government informed the treasurer's counsel that the government's discovery deadline was April 1 and expressed its understanding that the documents would be received by then. In another instance, the government again made a Rule 17 trial subpoena recipient aware of the government's discovery deadline (which the government stated was May 1, apparently anticipating the Court's granting of its motion) and requested that it receive the documents in April. These instances demonstrate a clear attempt by the government to obtain subpoenaed materials well in advance of the presumed return date on the subpoena. This is a clear violation of Rule 17(c).

[4] As noted, the government has informed counsel for Mr. Schock that it has issued approximately ten Rule 17 subpoenas, but the government has declined our request to produce copies of those subpoenas to us. Counsel for Mr. Schock is aware of a few of these subpoenas, but we have not seen and are ignorant of the contents and recipients of the majority of the government's trial subpoenas.

The requirement that a party, including the government, seek the court's approval before setting an early return date on a Rule 17 subpoena "is no mere technicality. It is a vital protection against misuse or improvident use of such subpoenas *duces tecum*." *United States v. Noriega*, 764 F. Supp. 1480, 1493 (S.D. Fl. 1991) (quoting *United States v. Ferguson*, 37 F.R.D. 6, 8 (D.D.C. 1965)) (quotation marks omitted). While to Mr. Schock's knowledge the government's subpoenas list the trial date as the return date, and thus technically comply with the letter of the court's order, its conduct demonstrates an attempt to circumvent the vital protections built into Rule 17. The prosecutor in this case is not the first to attempt such an end run around the requirements of Rule 17 and draw the ire of the court.

In the recent case of *United States v. Vo*, the government issued subpoenas that set the trial date as the return date, but included language in its request that if the objects sought were produced "promptly" to the government, the recipient's obligations would be discharged. 78 F. Supp. 3d 171, 174 (D.D.C. 2015); *see also United States v. Candelario-Santana*, 929 F. Supp. 2d 24, 26 (D.P.R. 2013) (government handwrote notes on subpoenas directing early appearance of witnesses for pretrial interviews). The court held that it was contrary to Rule 17 and impermissible for the government to "invite" pretrial production: "Rule 17 . . . does not create a separate procedure for inviting pretrial production. The Rule describes only one scenario under which a subpoena may be used to obtain pretrial production—when the Court so directs." *Id.* at 179. The government could offer no legal justification for pretrial production in the absence of court authorization. *Id.* at 178-79. Similarly, the government should not be permitted in this case to make a wink and a nod towards the recipients, or to imply that the documents are necessary to comply with a deadline short of the date of trial, or to make any other effort that would undermine Rule 17 by causing the

pretrial return of subpoenaed materials. A direction or suggestion to a recipient to make an early production of materials is sufficient to violate Rule 17.

Moreover, the government's conduct evidences a clear attempt to evade an order of this Court. In mid-January, this Court denied the government's request for the early return of trial subpoenas. *See* Minute Entry, Jan. 17, 2017. Nevertheless, as shown above, the government has sought to have documents produced to it well in advance of trial.

B. The Government is Abusing Rule 17 by Demanding Materials Far Beyond the Lawful Scope of the Rule

The government's failure to seek the court's approval before directing the early return of a trial subpoena is a sufficient basis to establish a violation of Rule 17. However, the government's specific requests, laid out in the present motion, demonstrate that it is using trial subpoenas to engage in impermissible discovery. Therefore, the government's end-run around Rule 17 is not merely "harmless," but goes to the fundamental protections embedded in Rule 17.

It is well settled that Rule 17(c) "is not a discovery device. It is merely an aid for obtaining relevant and evidentiary materials which the moving party plans to use at trial or some other court proceeding." *Noriega*, 764 F. Supp. at 1492. The Seventh Circuit has held that "Rule 17(c) is not a discovery device to allow [a party] to blindly comb through . . . records . . . . Instead, it allows only for the gathering of specifically identified documents which a [party] knows to contain relevant evidence to an admissible issue at trial." *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002). In order for a party to obtain pre-trial return of a subpoena, they must demonstrate, among other things, "that the application is made in good faith and is not intended as a general 'fishing expedition.'" *United States v. Nixon*, 418 U.S. 683, 699-700 (1974).

A subpoena will not issue "on the mere hope that some . . . material might turn up." *United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980). A subpoena for which early return is

sought is more likely to be used for impermissible discovery, and one hallmark of a subpoena that is a mere "fishing expedition" is that it casts "a broad dragnet aimed at bringing in anything and everything . . . regardless of [its] identifiable or foreseeable significance to the charges at issue." *Noriega*, 764 F. Supp. at 1493. Moreover, trial subpoenas issued to non-witnesses are less likely to be calculated to obtain admissible evidence and are more likely to be an impermissible attempt at post-indictment discovery. *See Cuthbertson*, 630 F.2d at 145-46 (noting that subpoena proponent failed to demonstrate evidentiary use to obtain statements by non-witnesses).

In order to authorize early return of a trial subpoena, the government must clear three hurdles: "(1) relevancy; (2) admissibility; (3) specificity." *Nixon*, 418 U.S. at 700. Here, the government's subpoenas do not appear to be calculated to produce specific, relevant, and admissible evidence. For example, the government's description of the scope of its subpoenas in its own motion demonstrates a lack of appreciation for these strict limits on the use trial subpoenas. The government states in its motion that it is seeking email communications from Mr. Schock's campaign treasurer "to ensure that *all relevant records* . . . are completely produced." Mot. at 4 (emphasis added). Quite simply, a desire to obtain "all relevant records" is well beyond the purpose and scope of Rule 17. However, even the admission by the government that it wanted to obtain "all relevant records" does not tell the full story. Indeed, the government's Rule 17 trial subpoena to Professional Data Systems ("PDS"), dated March 8, 2017, demands "all emails, including attachments, of PDS employees to and from the following [four] email accounts and [two] individuals for the period January 1, 2009 to the present." That is, the government's "trial" subpoena sought *over eight years* of email communications, totaling over *50,000* emails. Although some of the 50,000 emails responsive to the government's request might be relevant, the request is so broad that it cannot be said to be specific or calculated to produce admissible evidence in

accordance with Rule 17. This type of request appears to be typical of the government's Rule 17 subpoenas. In another instance of which Mr. Schock has become aware, the government's Rule 17 subpoena to the recipient makes a broad request for the production of records pertaining to Mr. Schock's flights. Such a broad request cannot be intended to obtain specific, relevant evidence for use at trial. It can only be understood as a tool of discovery.

Additionally, the government represents in its motion that it has issued "several" trial subpoenas for travel records and subscriber information associated with "relevant" phone records. *Id.* The government confesses that it expects to receive these materials by May 1, the date to which the government seeks to extend discovery. *Id.* At least one individual to whom a subpoena has been addressed has not previously been identified by the government as potential witnesses (despite the fact that the government has identified over 100 such witnesses to date), and another witness who has not previously been identified has been threatened with a subpoena if he does not voluntarily provide information to the government. To Mr. Schock's knowledge, the records sought by the subpoena or the information sought by threat of subpoena do not pertain to any count in the Indictment. Neither do these subpoenas (issued or threatened) appear to be aimed at relevant or admissible evidence. Indeed, they are directed at individuals with no known connection to any charge in the Indictment. *See Noriega*, 764 F. Supp. at 1492 n.11 (holding that "the purpose of a trial subpoena is limited to obtaining admissible evidence relevant to specific offenses already identified.").

Given the scope of the government's requests, the fact that they have been addressed to at least one individual who has not been identified as potential trial witnesses for matters that are not charged in the Indictment, and that the government has expressed to subpoena recipients that an

early return is expected, the inescapable conclusion is that the government is continuing its investigation by conducting a fishing expedition.[5]

C. The Court has the Inherent Power to Remedy the Government's Abuse of its Process

This "Court has an independent duty to review the propriety of the subpoena" issued using its process. *Vo*, 78 F. Supp. 3d at 176 (quoting *United States v. Vasquez*, 258 F.R.D. 68, 72 (E.D.N.Y. 2009)) (quotation marks omitted). Indeed, "[c]ourts must be careful that rule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases found in Fed. R. Crim. P. 16." *Cuthbertson*, 630 F.2d at 146. "Use of the supervisory power to quash the government's subpoena is justified to prevent the government from misusing the trial subpoena as a discovery device." *United States v. McCollom*, 651 F. Supp. 1217, 1225 (N.D. Ill. 1987). "The subpoena is an illustration of the government's limited but coercive power, and the prosecution assumes an awesome responsibility when it brings that power to bear on the lives of average citizens." *Candelario-Santana*, 929 F. Supp. 2d at 27. In this case, there is a grave risk that the prosecutor "has manifestly abused this extraordinary coercive power." *Id.* at 27-28. As demonstrated above, the government's conduct has all the hallmarks of a forbidden fishing expedition; the sole purpose of its subpoenas appears to be to conduct discovery and continue its already lengthy investigation. Therefore, the Court has an ample basis for invoking its inherent power *sua sponte* to quash the subpoenas.

[5] This conclusion is bolstered by the government's admission that it has issued a post-indictment search warrant for a trial witness's email account. Mot. at 3-4. No longer able to issue investigatory grand jury subpoenas, the government appears to be resorting to whatever tool is at hand to continue its investigation of Mr. Schock. Upon information and belief, the witness whose email is the subject of the search warrant has previously complied with a grand jury subpoena for relevant documents from this email account, and has complied with subsequent government requests for additional documents and information. That the government has now executed a search warrant post-indictment on the personal email account of a cooperating witness is troubling.

If the Court is not inclined to quash the subpoenas, it may direct the government to provide information setting out its justifications for issuing overbroad subpoenas and directing the recipients to make an early return. Although counsel for Mr. Schock have sought information from the government regarding the trial subpoenas it has issued, the government has declined to provide copies of the requested details. Accordingly, Mr. Schock is constrained to request that the Court direct the government to provide information regarding the Rule 17 trial subpoenas it has issued in this case, so that the Court may definitively determine whether the government has abused its process and, if so, decide on the appropriate remedy. Depending on the severity of the government's misconduct, the Court would be entitled to quash any outstanding subpoenas, *Vo*, 78 F. Supp. 3d at 175-76, order the destruction of the improperly obtained materials, *id.* at 177, and/or disqualify the government attorney who "was the lead actor behind the abusive Rule 17 practice," *Candelario-Santana*, 929 F. Supp. 2d at 29.[6]

II. The Government's Representations Regarding the Scope of Its Disclosure Are Inaccurate

Mr. Schock does not oppose the government's motion to the extent that it seeks an extension of time to comply with its obligations under Rule 16, though Mr. Schock requests that he be granted a commensurate extension.[7] However, Mr. Schock is compelled to comment on the government's motion, and the request that the Court order the government to produce certain Rule

[6] Mr. Schock notes that he has standing to quash the government's Rule 17 subpoenas, and may so move once defense counsel obtain more information relating to such subpoenas. "A third party . . . has standing to quash a subpoena if it infringes on their legitimate interests." *United States v. Segal*, 278 F. Supp. 2d 896, 900 (N.D. Ill. 2003).

[7] The Court set Mr. Schock's Rule 16 deadline for May 1, 2017, one month after the government's deadline. We request the same one-month time period to review and assess the government's complete production before Mr. Schock is obligated to comply with his Rule 16 disclosures that are by nature at least partially dependent on the government's disclosures. Mr. Schock of course cannot disclose that he intends to use an item in his case-in-chief at trial, *see* Fed. R. Crim. P. 16(b)(1)(A), if he does not yet have it.

16 materials, because the government's motion does not give a complete picture of its compliance to date. The government's compliance with its rule-based and constitutional discovery obligations has been characterized by broken promises and marred by repeated technical deficiencies, thus warranting this response.[8]

Pursuant to Federal Rule of Criminal Procedure 16(a)(1)(E), a defendant is entitled, upon request, to inspect documents and other materials "within the government's possession, custody, or control." Mr. Schock is entitled to these materials if they are (1) "material to preparing the defense"; or (2) if "the government intends to use the item in its case-in-chief at trial." Fed. R. Crim. P. 16(a)(1)(E)(i)-(ii). Mr. Schock has made repeated requests of the government, and has yet to receive the following items:

1. Mr. Schock has yet to receive any *Brady* or *Giglio* material beyond that contained in agent reports or witness statements already produced. Mr. Schock asserts that the government's obligations under *Brady* extend to favorable evidence known to its confidential informant ("CI"). Under *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*,

[8] The government's document production in this matter has been fraught with issues. The government's initial production was in a format incompatible with our existing database and was thus limited in its capacity for review and analysis (which is critical in a case with such a large volume of documents). The government reproduced the documents, but the technical errors in the files as produced then necessitated the defense to ask the government to reproduce materials again three times over the last two months. In the last several days, the defense finally received a full set of documents without any technical errors or missing documents. However, defense counsel discovered that the scanning format in which much of the production has been sent (where multiple separate documents are scanned all as one record instead of as separate records) have rendered them unable to be searched effectively and efficiently. Thus, the defense is now having to invest time and resources to unitize much of the production so that it will be able to be reviewed in a meaningful fashion. As the government's production in total comprises over 3.5 million pages, the problems created by these issues and the manner in which the files have been produced have seriously frustrated the defense's efforts to efficiently prepare for trial.

514 U.S. 419, 437 (1995). This duty to disclose evidence extends to "any evidence possessed exclusively by those actors assisting him in investigating and trying his case." *Fields v. Wharrie*, 672 F.3d 505, 513 (7th Cir. 2012) (citations omitted). When favorable information is in the possession of an agent of the government, knowledge of that information will be imputed to the prosecutor where the agent is "part of the team that investigated [the] case or participated in its prosecution." *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996). Thus, "[t]he prosecution must disclose, even in the absence of a request from the defendant, all such evidence known by all individuals acting on its behalf in the case at hand." *United States v. Caputo*, 373 F. Supp. 2d 789, 793 (N.D. Ill. 2005).

As the Southern District of New York observed in *United States v. Meregildo*, "[w]hen the Government uses an informant as a government agent and directs him to gather information, a court may hold the Government responsible for his actions," thus imputing the informant's knowledge of evidence to the government. 920 F. Supp. 2d 434, 444 (S.D.N.Y. 2013). Therefore, whether an agency relationship exists between the informant and the government is a critical factor in determining whether the informant's knowledge can be imputed to the government. *See id.* at 443-44 (contrasting a cooperating witness with an informant). As argued in Mr. Schock's Memorandum In Support of Motion for Discovery Regarding Use of Confidential Informant, the CI was plainly an agent of the government under Seventh Circuit precedent. d/e 62 at 18-20. The CI was admonished that he had to comply with instructions from the FBI, and his instructions further directed him not to take any action on behalf of the United States without authorization, clearly contemplating an agency relationship.[9] Accordingly, the CI, as an active source, is an agent

[9] SA G. Spencer, FBI Form FD-1040a, CHS Admonishments (March 16, 2016) [AGENT_RPT_00001037]; SA G. Spencer, FBI Form FD-1040a, CHS Admonishments (March 25, 2016) [AGENT_RPT_00001039].

of the government and part of the investigatory team. His knowledge of favorable evidence may be imputed to the prosecutor, triggering disclosure obligations under *Brady*.

2. Although the government represents that it has produced all consensual recordings, it has not produced in legible form text messages between its agents and the CI, even though they were his handlers. The government has not produced the original texts, instead providing what appears to be a photocopy of the screen of an iPhone. As even the government has acknowledged to counsel for Mr. Schock, at minimum the dates and times on some of the texts are illegible in the photocopy format in which they have been produced.[10] An example of the government's production is attached as Ex. A. When asked to produce the original text messages, the government informed defense counsel that the agent handling the CI had "deactivated" her original phone and forgotten her password, so she could now no longer access text messages on her phone.[11] The government informed counsel for Mr. Schock that it tried to contact Apple, Inc. for assistance in gaining access to the text messages, to no avail. Counsel for Mr. Schock asked the government to try to obtain the text messages from some other source, including from the CI, who was the other party to the text messages and who may have them on his phone. The government

[10] On April 1, 2017, the government informed defense counsel that it would provide us with transcriptions of the text messages "next week." To date, we have not received the transcriptions.

[11] The government has not provided the defense with details about the "deactivation" – such as when the deactivation occurred or all the steps the government took to retrieve data from the deactivated phone. The government has also not explained how or why a federal law enforcement officer would or would be allowed to "deactivate" a mobile phone that contains highly relevant communications with a confidential informant about a pending criminal case. Nor has the government explained how or why this deactivation would occur or would be allowed to occur without the agent – or someone more responsible – making a copy of the contents of the agent's phone. One can only wonder what criminal charges an aggressive prosecutor would bring if an ordinary citizen took steps to make highly relevant information unavailable during an investigation.

has not explained why it could not obtain text messages from the other agents who interacted with the CI, or from the CI himself.

3. In response to a request for information in the confidential informant's possession, such as the aforementioned text messages between the CI and his handlers, the government has stated only that it has complied and will continue to comply with its constitutional discovery obligations. Mr. Schock requests that the court's order granting the government an extension of time reiterate the government's obligation to comply with its Rule 16 discovery requirements with respect to materials in the possession of its CI. The CI is an agent of the government. The government has represented that he remains an active source. The government admonished the CI that he was required to follow all FBI instructions.[12] Accordingly, documents that are within the CI's possession are under the government's control, and therefore the government may be required to obtain Rule 16 information from him to produce to Mr. Schock. *See United States v. Stein*, 488 F. Supp. 2d 350, 363-64 (S.D.N.Y. 2007) (requiring government to produce, pursuant to Rule 16, records of a company that was obligated to turn documents over to the government on request).

4. Mr. Schock has requested that the government produce an *exact* duplicate of the recordings made by the CI. The government responded and stated that it has provided Mr. Schock with "copies" of the recordings, which we understand are in a different electronic format than the original records. Moreover, a "copy" is not a "duplicate" in that an exact duplicate contains additional metadata not found on a version that was copied in a different format. Although a technical matter, the government's failure to provide duplicates prevents Mr. Schock from performing forensic analysis of the recordings.

[12] *See supra* note 9.

5. The government represents that it has produced all *completed* law enforcement reports. Mot. at 3. Over one month ago, however, the government had represented to Mr. Schock that it had produced its law enforcement reports and grand jury transcripts and did not advise that any additional reports would be forthcoming. Following defense counsel's review of the material, we informed the government that we had reason to believe that government agents had conducted several interviews for which we had not received a law enforcement report. It was only after defense counsel raised the issue, and specifically identified five witnesses that we had reason to believe had been interviewed, that the government informed Mr. Schock that two additional law enforcement reports (for interviews of two of those five witnesses, which had been conducted many months prior) were "in process." To date, the government still has not produced these reports. The prosecutor further represented that he was not aware of any substantive interviews of the other three witness for which reports had not already been provided, but he stated that he would ask the agents to confirm. Mr. Schock requests that the court's order direct the government to conduct a thorough search for and produce all witness reports, as it is apparent that the government is not certain with regard to the material in its possession.

6. The government's document production also omits IRS records and tax computations. While the government has produced records obtained from Mr. Schock's tax return preparers and copies of Mr. Schock's tax returns on file with the IRS, it has not produced any IRS-generated records within its possession material to the defense of the tax charges. In particular, it has not produced IRS Certificates of Assessment, Transcripts of Account, or tax computations prepared by its forecasted expert witness.

As pertinent here, the government must produce documents (or make them available) if they are within the government's possession, custody or control and are (i) material to the defense,

or (ii) will be used in the government's case in chief. Fed. R. Crim. P. 16(a)(1)(E)(i)-(ii). The government must also provide a written summary of expert testimony it intends to introduce in its case in chief, including the expert's opinion and the bases for those opinions, as well as the expert's qualifications. Fed. R. Crim. P. 16(a)(1)(G).

IRS records about Mr. Schock's filing and payment history are material to the defense. These basic records are routinely provided in criminal tax cases, indeed so much so that it appears no case has ever litigated whether they must be disclosed under Rule 16. "IRS-CI's investigative files typically include . . . ICS histories; information retrieved from IRS databases (e.g., transcripts of taxpayer accounts, filing histories); . . . . " U.S. Department of Justice, Tax Division Discovery Policy. These basic IRS transactional records are material to determining, among other things, (1) whether the tax returns at issue were in fact filed, and when, and (2) third party reporting to the IRS about Mr. Schock's income and tax payments in any given tax year, which bears on the materiality of any allegedly-omitted income. Even if the government does not intend to use the IRS transcripts in its own case, they are material to the defense and must be produced.

Moreover, the government has indicated that it intends to call IRS Revenue Agent Michael Welch as an expert witness, but it has not made adequate expert disclosure. RA Welch has been involved in fact witness interviews related to the tax counts. The government has called RA Welch as an expert in other cases after providing appropriate notice. *See e.g. United States v. Vallone*, No. 04-CR-0372, 2008 WL 516715 (N.D. Ill. Feb. 21, 2008). To be sure, computation of tax is typically (although not universally) a proper subject for expert testimony. *Vallone,* 2008 WL at *4-5. But when the government seeks to introduce expert testimony from an IRS Revenue Agent about a purported tax deficiency, to comply with Rule 16's expert notice requirement the government must produce copies of its tax computations illustrating the specific items of omitted

income, as well as any agent reports and exhibits the Revenue Agent relied upon in reaching his conclusions about the proper computation of tax. *United States v. Thompson*, 923 F. Supp. 144, 145-46 & n.1 (S.D. Ind. 1996). The government has not done so here, and to that extent it is not yet in compliance with Rule 16.

CONCLUSION

For the reasons stated above, Aaron J. Schock respectfully requests that the Court enter an order denying the government an extension of time to comply with its discovery obligations arising out of the improper use of Rule 17 trial subpoenas and granting an extension for the government to produce other Rule 16 material, including material in the possession of the CI, subject to the requested admonishments above.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

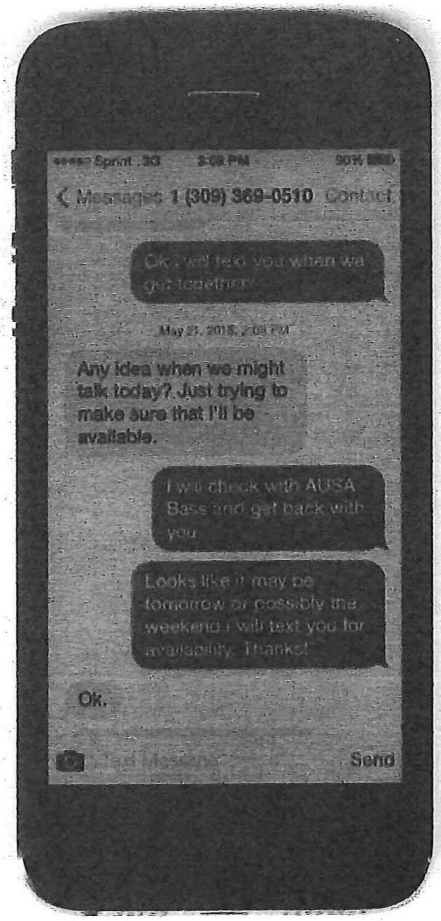
The undersigned certifies that the foregoing instrument was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record at their respective email addresses disclosed on the pleadings on this 14th day of April, 2017.

/s/ Robert J. Bittman

Robert J. Bittman

E-FILED
Friday, 14 April, 2017 05:06:57 PM
Clerk, U.S. District Court, ILCD

Exhibit A


Sprint 3G
3:08 PM
90%
Messages 1 (309) 369-0510 Contact
Ok, I will text you when we get together.
May 21, 2015, 2:08 PM
Any idea when we might talk today? Just trying to make sure that I'll be available.
I will check with AUSA Bass and get back with you.
Looks like it may be tomorrow or possibly the weekend. I will text you for availability. Thanks!
Ok.
Send