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June 25, 2023

MISC 24 - 2518

Via Hand Delivery

GARAUFIS, J.

Clerk of the Court
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: **RE: PETITION OF ONE TASTE, INC., FOR RETURN OF CONFIDENTIAL
PRIVATE PROPERTY PURSUANT TO FED. R. CRIM. PRO. 41(G) AND FOR
SANCTIONS**

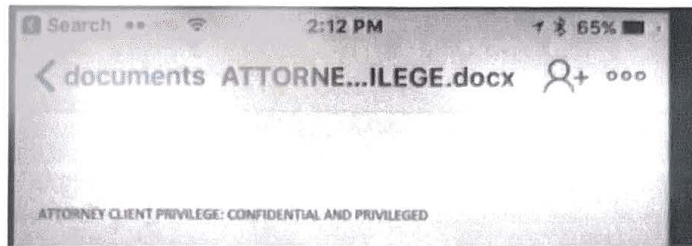
Dear Sir or Madame:

Movant, OneTaste, Inc., respectfully submits this letter pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure seeking the return of improperly obtained and retained private privileged materials. The bases for this petition and the relief sought are set forth below.

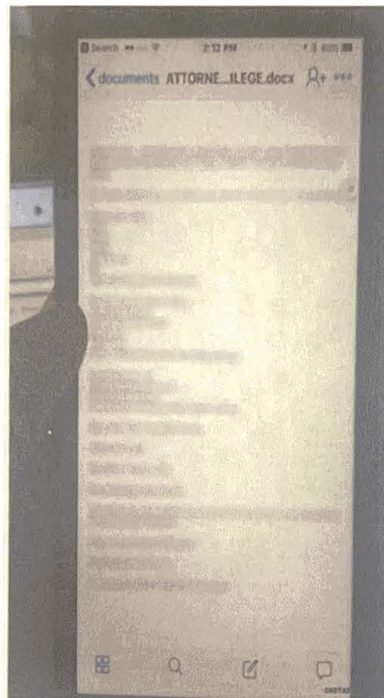
INTRODUCTION

In late April of 2024, OneTaste first discovered that the Prosecution Team¹ had, during the course of a lengthy and interminably harassing investigation, obtained stolen drafts of private confidential and privileged communications by OneTaste to their attorneys, which were plainly marked with “Attorney-Client Privilege” warnings. *See* example below.

¹ The Prosecution Team has been commonly identified to consist of the prosecutors and agents assigned to the matter being investigated—in this case a grand jury investigation of OneTaste, Inc., which began sometime after 2018. See Justice Manual §9-5.001.A.2.



These draft attorney communications, surreptitiously obtained by the Prosecution Team on November 19, 2021, without any notice to OneTaste and without constituting a DOJ mandated Filter Team, were directly related to the government’s half-decade long investigation of OneTaste - ultimately leading to the indictment of two current/former senior employees of OneTaste. *See United States v. Rachel Cherwitz and Nicole Daedone*, Case No. 23-CR-146 (E.D.N.Y.). In addition to being labeled as containing “attorney-client privilege” materials, it would have been immediately obvious to the Prosecution Team that the documents had been purloined from OneTaste by the witness and her co-schemers, as they consisted of surreptitious photos of cell phone screen shots of the privileged-marked documents. *See* example below.



Moreover, despite the “attorney-client privilege” warnings on the top of the majority of the illicitly obtained screenshots and their suspicious pedigree, the Prosecution Team failed to notify OneTaste, as a holder of the privilege (in blatant disregard of DOJ procedures, New York State ethical proscriptions and legal precedent) and irrevocably tainted themselves by reviewing, discussing and acting upon the presumptively privileged material without first simply constituting a Filter Team to preview the privileged-marked material.

After several requests, beginning after discovery of the breach in April of 2024 , the Prosecution Team relented and, belatedly, turned over the privileged-marked documents to a Filter Attorney. But the government, after futile discussions and constant moving of the goal posts, has refused to return the originals and to certify the destruction all copies of the private privileged materials within the government's electronic ecosystem.

Similarly, OneTaste also recently discovered that the Prosecution Team tainted itself by subpoenaing and reviewing hundreds of pages of legal invoices imbued with attorney work product privileged material. These legal invoices were produced to the government on May 12, 2021, after the Prosecution Team has issued a grand jury subpoena to OneTaste's payments processor. The production by *Bills.com* even included the following warning:

Enclosed are non-privileged documents responsive to your subpoena. These documents are produced under the protection of *Braswell v. United States*, 487 U.S. 99 (1988). *If you have received any attorney-client or work-product privileged documents, please notify the Bank immediately by calling our toll free number 855.397.5598 and please immediately destroy the privileged document. The Bank does not intend to, nor does it consent to, waive privilege for such documents. (emphasis added).*

The Prosecution Team, nevertheless, directly violated DOJ policy and reviewed the work product privileged material, ultimately determining that it should be turned over to the defendants in the criminal case as Rule 16 material. Despite the common understanding that such invoices often contain work product privileged material, the Prosecution Team did not seek to isolate such material and has refused to concede what should be obvious to them –that OneTaste's legal invoices, of course, contain reams of attorney work product privileged information. Because of this lack of reasoned concession, the Prosecution Team failed to initially provide the legal bills to a Filter Team and the government has since refused to return the private privileged materials to OneTaste after demand.

This Petition follows.

A. **Statement of Facts**

In late April of 2024, OneTaste became aware of uniquely confidential attorney-client privileged materials amongst the documents provided in the Rule 16 discovery to the defendants in Case No. 23-cr-146-DG. Those private and confidential privileged materials were Bates Stamped "ONETASTE 00167250 through ONETASTE 001672776." These discovery materials, marked as "attorney-client privileged," *on their face* evidence that they had been obtained surreptitiously and purloined from OneTaste as they consist of photographs of screen shots of documents on an unidentified person's cellphone. Most important, virtually every page of the surreptitious screenshots is marked "attorney-client privileged."

By email dated April 24, 2024, counsel for OneTaste requested that the Prosecution Team surrender to OneTaste the original and all copies of the 27 pages of the privileged-marked materials Bate Stamped, ONETASTE 00167250 – ONETASTE 001672776.² Having not yet received OneTaste’s private privileged materials, on April 26, 2024, OneTaste again reached out to the Prosecution Team and was informed that the Prosecution Team was “working on it.” On April 29, 2024, still having not received a legally viable response to One Taste’s request for return of their private privileged material, counsel for OneTaste again reached out to the Prosecution Team again seeking immediate return of their private privileged material. The Prosecution Team responded merely that they were “continuing to look into the matter.” On April 30, 2024, OneTaste reached out to the Prosecution Team again seeking immediate return of their private privileged materials. On the morning of May 3, 2024, the Prosecution Team finally responded by stating that they had, unavailingly, turned the materials over to a Filter Team, and requested that OneTaste provide the Filter Team with “information establishing that the document contained communications (1) between OneTaste and its attorneys; (2) [were] intended to be kept confidential; (3) for the purpose of obtaining or providing legal advice?”

At 5:30 p.m. on that same date, OneTaste received its first communication from the Filter Team which articulated the alleged chain of events and emails which led to the Prosecution Team’s receipt of the purloined confidential privileged materials. The Filter Team, however, refused to provide a copy of those informative and material emails to OneTaste. The Filter team did demand, after the horses had left the barn, that OneTaste now establish that the confidential materials were in fact privileged communications. Despite an appropriate responsive attestation of privilege by OneTaste counsel and yet another demand for the immediate return of the confidential materials, the Filter Attorney, by email dated May 7, requested more information to allegedly satisfy the Filter Team that the materials were privileged. Specifically, the Filter Attorney stated: “I need more information about who created the document, when they created it, and which counsel instructed them to do so and for what purpose in order to assess the claim of privilege by OneTaste.”

In the discovery produced in the criminal case, we also recently discovered that the government subpoenaed legal bills sent to OneTaste by law firms and attorneys representing OneTaste and/or company employees and/or executives. A review of these legal invoices provided in discovery revealed multiple attorney-client and work product privileged communications in the possession of the Prosecution Team. Thus, on May 13, OneTaste notified the Filter Team that we would be sending an itemized list of additional work product and/or attorney client privileged materials that we had located in discovery, which list OneTaste later provided to the Filter Team. Our repeated requests for the immediate return of these privileged materials, despite the valid legal foundation, continue to fall on deaf ears.

By email dated June 3, 2024, OneTaste provided to the Filter Team declarations from the CEO of OneTaste and OneTaste’s prior counsel at the time the pilfered privileged materials were created, satisfying the legal test for the privilege assertion, as requested by both the Prosecution and Filter Teams, of the confidential materials. OneTaste also reasserted its demand for the

² The undersigned has notified the Filter Team that two pages within this Bate stamped group (ONETASTE 0000 and ONETASTE consisting of a Yelp Review and personal entry) do not constitute privileged material.

immediate return of the private privileged materials. OneTaste further itemized the Bates Stamp numbers of the additional discovery material (legal bills) that also contained attorney client/work product privileged materials and requested that they be segregated from the prosecution team.

Despite having provided the requested sworn, on that same date the Filter Team requested that we provide *additional* documentation establishing that the pilfered materials constituted “work product” material—a position OneTaste had, of course, never asserted given that the materials were prepared by the client, not the attorneys. On the following day, June 4, OneTaste responded to the Filter Team pointing out that they were manufacturing legal theories that were not relevant, that they continued to move the goal posts and counter-demanding, yet again, the immediate return of our private privileged materials. On June 5 the Filter Attorney responded that they had “done some research” and had some unidentified “additional questions” they would want to ask prior counsel but, given that the indicted defendants had filed a motion to dismiss in the criminal case, they “expected” the “whole issue” would be decided in the criminal action—an action which OneTaste is certainly not a party.

By email dated June 6 (copy attached as Exhibit A), OneTaste again demanded the immediate return of the pilfered private privileged material and pointed out that any issues involved in the motion to dismiss filed in the criminal action would not impact the government’s legal and constitutional obligations to immediately return the private privileged material to OneTaste. The Filter Attorney responded by asserting, for *the first time*, and despite a month’s worth of emails demanding the return of the confidential privileged materials, that it was the “practice” of the office “not to destroy *or return* the material even if we agree[d] (or do not care to dispute) that it may be withheld from the [prosecution] team on privilege grounds.” While it is both telling and disappointing that, despite OneTaste’s consistent demand for the immediate return of the private privileged material, the government did not disclose it was *never* going to return the material, it is also an unlawful practice that fails to consider the proscriptions of the law and the Constitution.

Both the Filter Team and the Prosecution Team have, to this day, refused to honor our privileges and return the private materials, constituting an ongoing irreparable injury. This blatant usurpation by the both the Prosecution Team and the Filter Team of the proscriptions of the United States Constitution, ensconced in Second Circuit precedent, in the New York State ethical rules and guidelines and in DOJ Policy, demonstrates an unwarranted anti-justice arrogance and a uniquely problematic “ends justify the means” mindset, warranting expansive relief herein.

B. ARGUMENT

The casual abuse of the attorney-client and work product privileges through the use of privileged-labeled stolen material and subpoenaed material, as well as the failure to implement appropriate DOJ protocols to protect against government access to obvious private and critical privileged information as set forth above, appears to be the canary in the coal mine of routine abuse

of process here in the Eastern District of New York.³ At every step along OneTaste's efforts to retrieve our confidential privileged materials the Prosecution Team has failed to observe the exercise of even a modicum of rectitude. Rather, the Prosecution Team has defiantly, attempted to justify what appears to be recurring abhorrent behavior that has volitionally cast aside the law of this circuit, DOJ policy and New York's Rules of Professional Responsibility. The cavalier refusal of the Prosecution Team to take simple DOJ mandated prophylactic measures to secure probably privileged/work product materials that they have no right to possess and return it to the possessors of the privilege speaks volumes and warrants severe sanction. The immediate return of OneTaste's private privileged materials and requisite sanctions are plainly warranted.

It is by now axiomatic that the attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also In re Grand Jury Subpoenas*, 454 F.3d 511, 519 (6th Cir. 2006) (explaining that "[t]he privilege protecting confidential communications between an attorney and his client dates back to the Tudor dynasty"). The purpose of the attorney-client privilege is to ensure "full and frank communication" between a client and his lawyer and "thereby promote broader public interests in the observance of law and administration of justice." *See Upjohn Co.*, 449 U.S. at 389. As the Supreme Court has consistently emphasized, the attorney-client privilege exists because "sound legal advice or advocacy serves public ends and . . . such advice or advocacy depends upon the lawyer's being fully informed by the client." *Id.*; *see also Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."). The attorney-client and work-product privileges thus play a vital "role in assuring the proper functioning of the criminal justice system" and provide a means for a lawyer to prepare his client's case. *See United States v. Nobles*, 422 U.S. 225, 238 (1975).

"[W]here no criminal proceedings against the movant are pending or have transpired, a motion for the return of property is treated as a civil equitable proceeding even if styled as being pursuant to [Rule] 41(e) [now Rule 41(g)]." *Mora v. United States*, 955 F.2d 156, 158 (2d Cir. 1992). As an equitable remedy, Rule 41(g) relief "is available only when there is no adequate remedy at law and the equities favor the exercise of jurisdiction." *De Almeida v. United States*, 459 F.3d 377, 382 (2d Cir. 2006).

OneTaste seeks the return of originals and destruction of all electronic and paper copies of the seized private materials, including its attorney client and work product privileged documents, as the government has refused to return the confidential privileged materials citing "office practice." As set forth in the most recent circuit court ruling directly on point, in *Harbor Healthcare System, L.P. v. United States*, 5 F.4th 593 (5th Cir. 2021), the court confirmed that the privilege holder "remains injured as long as the government retains its privileged documents" due

³ Not only has the Filter Team asserted that it was the "practice" of the Office to not return private privileged material to which they have no legal right to even possess, but the very Prosecution Team in this case has trampled on the attorney-client privilege on multiple occasions in this investigation.

to the “ongoing intrusion into its privacy and the continued possession [by DOJ] of attorney-client privileged documents.” *Id.* at 600.

The magnitude of the injury to OneTaste and their business cannot be understated.⁴ Throughout 2019, 2020, 2021, 2022 and through June of 2023, the “tainted” Prosecution Team continued to review OneTaste’s private communications prepared at the request of their lawyers, *without regard to their privileged contents, and once tainted*, conducted an interminable, harassing and public “investigation” of OneTaste, to the continuing economic detriment of its legitimate business.

C. RIPENESS AND JURISDICTION

This issue is ripe for resolution because the doctrine of equitable and anomalous jurisdiction allows this Court to entertain a Rule 41(g) motion for return of property as no criminal prosecution exists, nor is a lawful criminal prosecution of OneTaste imminent given the disqualifying taint extant here. *See United States v. Almeida*, 459 F.3d 377, 382 (2d Cir. 2006)(Rule 41(g) relief “is available only when there is no adequate remedy at law and the equities favor the exercise of jurisdiction”); *see also, Harbor Healthcare*, 5 F.4th at 598-600 (reversing district court’s refusal to exercise equitable jurisdiction on a pre-indictment Rule 41(g) motion related to a Filter Team’s refusal to return privileged material to privilege holder).

Initially, a party remains injured from DOJ’s intrusion into their right to privacy in their privileged communications so long as DOJ continues to keep any copies of their privileged documents. *Id.* at 599. (“A taint team serves no practical effect if the government refuses to destroy or return the copies of documents that the taint team has identified as privileged.”). Here, the government has, to date, refused to return and/or destroy all copies of OneTaste’s demonstrated attorney client and work product privileged documents.⁵

It is important to consider that the Prosecution Team had constituted no functioning Filter Team after receiving the marked privileged material beginning in November of 2021, nor at any time thereafter including the return of an indictment in April of 2022, until May of 2024 when OneTaste first discovered and demanded the return of the privileged material. *See In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 177 (4th Cir. 2019)(requiring a Filter Team AUSA

⁴ An evidentiary hearing may be required to determine the extent of the injury to OneTaste.

⁵ In addition, the government’s failure to even implement a Filter Team when confronted with privileged marked documents constitutes a *per se* intrusion on OneTaste’s attorney client privilege as confidential privileged communications and attorney work product plainly were utilized by the Prosecution Team in the investigation and charging of this matter. *In re Search Warrant Issued June 13, 2019*, 942 F. 3d 159, 177 (4th Cir. 2019), as amended (Oct. 31, 2019); *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

to make *all* privilege determinations). During that entire time, the Prosecution Team had unfettered access to OneTaste's privileged documents. *Id.* at 178.⁶

The issues here are not complex. The government must be required to immediately return and confirm the destruction of all copies of the confidential privileged materials and reimburse OneTaste for all attorney's fees incurred in the attempt to retrieve the materials they had no right to in the first instance under the application of any law. Moreover, each member of the Prosecution Team, having been corruptly tainted by exposure to the private privileged material, must be permanently recused from any ongoing investigation of the matter.

OneTaste's repeated requests for the return of its privileged materials have been rejected, without basis, by the government. As set forth above and below, USAO-EDNY may not indefinitely keep OneTaste's privileged materials and they must be immediately returned

A. Protection from *Any* Disclosure is the Primary Purpose of The Attorney-Client Privilege

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co.*, 449 U.S. at 389. Courts have recognized that the benefits of the privilege "accrue only if clients remain 'free from the consequences or the apprehension'" of involuntary disclosure of those confidential communications. *In re Itron, Inc.*, 883 F.3d 553, 561 (5th Cir. 2018) (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)). Moreover, the privilege empowers the privilege holder with the right to "prevent *any* other person from disclosing confidential communications between him and his attorney." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 173 (4th Cir. 2019) (quoting Black's Law Dictionary 129 (6th ed. 1990)).

Courts have routinely confirmed that confidentiality and protection from any disclosure is the primary purpose of the privilege. "Mandatory disclosure of the communications is the exact harm the privilege is meant to guard against, and this disclosure is not remedied merely because a disclosed confidence is not used against the holder in a particular case." *In re Lott*, 424 F.3d 446, 451-52 (6th Cir. 2005); *see also Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984) (forcing a party to comply with a discovery order while it appealed a claim of privilege destroys the right sought to be protected). That is why courts have found that a privilege holder suffers irreparable harm when the government seizes their attorney-client privileged materials. *Matter of 636 S. 66th Terrace, Kansas City, Kan.*, 835 F. Supp. 1304, 1306 (D. Kan. 1993) (with the privileged materials in the hands of the government, any confidentiality of the privileged materials was lost and the movants were "effectively denied the protection of the privilege."). The immediate loss of confidentiality when the government reviews privileged materials cannot be

⁶ *See. e.g., Taylor Lohmeyer Law Firm P.L.L.C. v. United States*, 982 F.3d 409, 411 (5th Cir. 2020) (Elrod, J., dissenting from denial of rehearing *en banc*) ("Although the privilege may at times prevent the government from obtaining useful information, 'this is the price we pay for a system that encourages individuals to seek legal advice and to make full disclosure to the attorney so that the attorney can render informed advice.'" (quoting *In re Grand Jury Subpoena for Att'y Representing Crim. Defendant Reyes-Requena*, 926 F.2d 1423, 1432 (5th Cir. 1991))).

cured “even though communications later deemed to be privileged will be inadmissible at trial.” *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992).

B. DOJ Bears the Responsibility to Protect the Privilege of Materials DOJ Elected to Acquire

Numerous courts have confirmed that DOJ is obligated to protect the privileged materials that DOJ elected to review. As the Fourth Circuit noted recently, “[F]ederal agents and prosecutors rummaging through [legal] materials that are protected by attorney-client privilege and the work-product doctrine is at odds with the appearance of justice.” *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 183 (4th Cir. 2019), as amended (Oct. 31, 2019); *see also, United States v. Sullivan*, No. CR 17-00104 JMS-KJM, 2020 WL 1815220, at *8 (D. Haw. Apr. 9, 2020) (DOJ’s responsibility to protect the attorney client and work product privileges is particularly important when DOJ chooses to use a Filter Team in a criminal proceeding); *Pedersen*, 2014 WL 3871197, at *29 (recognizing that the paramount purpose of DOJ’s Filter Team is to prevent the disclosure of privileged information to the Prosecution Team and to protect the attorney-client privilege). Accordingly, the government’s contrary position, that it can indefinitely retain private privileged material, is absurd, unconstitutional and without legal basis. *Harbor Healthcare*, 5 F.4th at 599 (“Despite Harbor’s great privacy interest, the government has held its attorney–client privileged documents since May 18, 2017—the government has deliberately held on to Harbor’s privileged material for over four years. The district court erred by failing to account for Harbor’s privacy need, which weighs heavily in favor of granting Rule 41(g) relief.”).

C. Pursuant to Federal Rule of Criminal Procedure 41(g), the Court Should Order the Government to Return OneTaste’s Privileged Property

A district court must consider four factors when deciding whether to grant a pre-indictment motion for return of property: (1) whether the motion for return of property accurately alleges that the government agents ... displayed “a callous disregard” for the rights of the plaintiff; (2) whether the plaintiff had an individual interest in and need for the material whose return he seeks; (3) whether the plaintiff would be irreparably injured by the denial of the return of property; and (4) whether the plaintiff has an adequate remedy at law for the redress of his grievance. *See, e.g., Richey v. Smith*, 515 F.2d 1239, 1243-44 (5th Cir. 1975). As demonstrated by the Fifth Circuit’s recent Harbor Healthcare decision, OneTaste meets all the four equitable factors listed above.

In *Harbor Healthcare*, the United States Attorney’s Office for the Eastern District of Texas (“USAO”) was conducting a parallel investigation of Harbor Healthcare with the Department of Health and Human Services and the Civil Division at DOJ. *Harbor Healthcare*, 5 F. 4th at 595. The Civil Division issued a Civil Investigative Demand seeking documents. Harbor retained attorneys and generated privileged material related to the defense of the civil investigation. *Id.* Following these actions, the USAO sought a search warrant to search Harbor’s offices and executed the warrants in May 2017. *Id.* at 595-96. The USAO seized terabytes of electronic documents and hundreds of boxes of paper documents. *Id.* The USAO assembled a Filter Team to review the seized materials for privileged materials. *Id.* Unlike our facts here, the USAO in Texas, prior to review of the materials, actually provided Harbor Healthcare a list of documents that the Filter Team had promoted to the Prosecution Team. *Id.* at 596. From that list, Harbor Healthcare identified a significant number of privileged documents that the USAO’s Filter Team

had promoted to its Prosecution Team. *Id.* Harbor Healthcare repeatedly attempted, but ultimately failed, to get the Filter Team to return Harbor Healthcare's privileged material. *Id.* As a result, Harbor Healthcare filed a pre-indictment Rule 41(g) motion for the return of its property. *Id.* at 596. Harbor Healthcare asked the district court for an order requiring DOJ to return all seized documents to Harbor. *Id.*

The district court granted the government's motion to dismiss stating that it would not exercise its equitable jurisdiction over Harbor Healthcare's pre-indictment Rule 41(g) motion because DOJ had adequate processes in place to protect Harbor Healthcare's privileged information. Harbor Healthcare appealed. The Fifth Circuit held otherwise and reversed the district court. *Id.* at 601.

The Fifth Circuit held that DOJ showed callous disregard for several reasons that also apply here. First, DOJ failed to seek express prior authorization from the issuing Magistrate Judge for the seizure of attorney-client materials. *Id.* at 599. Second, the USAO knew that the acquired materials would contain privileged materials. *Id.* Third, the USAO refused to return Harbor's privileged materials after demand. *Id.* at 599-600.

Those same essential facts exist here. First, the Prosecution Team received documents that contained two obvious features indicative of privilege, 1) they were marked privileged and 2) they had been clandestinely removed from OneTaste. Second, the government cannot dispute that the Prosecution Team knew that OneTaste sought to maintain the confidentiality of these privileged materials.

The Fifth Circuit also held that Harbor had a need for the seized documents because Harbor had a need to protect the privacy of the privileged material in its documents. *Harbor Healthcare*, 5 F. 4th at 600-01. The Court criticized the USAO for retaining Harbor Healthcare's privileged documents for approximately four years—since the search on May 18, 2017. *Id.* OneTaste, likewise, must immediately recover the private privileged-marked materials obtained by the Prosecution Team *more than five years ago*.

The Fifth Circuit also emphasized that "Harbor remains injured as long as the government retains its privileged documents. That injury can only be made whole by the government returning and destroying its copies of the privileged material." *Id.* at 600. Similarly, OneTaste has demonstrated irreparable injury here because the government retains its privileged documents, refuses to return its privileged documents, refused to disclose its protocols for the handling of privileged materials, refuses to recognize its responsibility to protect OneTaste privileges, and has taken affirmative steps to violate OneTaste's right to privacy.

Finally, the Fifth Circuit held that a motion to suppress was inadequate because it was not certain that charges would ever be filed against Harbor—so Harbor may never have an opportunity to file a motion to suppress. *Id.* In addition, the Fifth Circuit emphasized that suppression motions vindicate an interest entirely different from a Rule 41(g) motion because a suppression motion does not force the government to return the seized material to the defendant. *Id.* Like *Harbor Healthcare*, OneTaste may never have the ability to file a post-indictment motion and any post-indictment motion would address a different interest—the right to not have illegally obtained evidence used at trial—than the right that this motion addresses—OneTaste's right to privacy.

D. The Failure of the Prosecution Team to Return all Documents in a Timely Manner Warrants Broad Relief

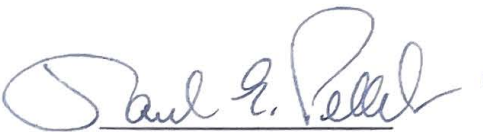
The Filter Team, other than continuously moving the goal posts, has offered no legitimate basis to believe that the questioned materials are in fact not privileged. Nevertheless, and despite the constant and substantial economic disruption to OneTaste's ongoing business operations, the Prosecution Team continues to shirk and attempt to offload its lawful responsibilities resulting from its flawed and corrupt collection and retention of the material pilfered from OneTaste. The Prosecution Team has grossly failed at that task and now equity demands that the privileged materials unlawfully obtained from OneTaste be returned to immediately. *See, e.g., Harbor Healthcare*, 5 F. 4th at 601 (in Rule 41(g) proceeding the district court abused its discretion and erred by "misunderstanding the harm alleged by [movant] and by equating return of property with suppression of evidence."). OneTaste must also be made whole due to this surreptitious half-decade breach of the privilege.

CONCLUSION

For the reasons stated above, OneTaste respectfully requests that this Court direct the government to return all original copies and certify destruction of electronic copies throughout the government's ecosystem of the wrongfully possessed privileged material; divulge the specifics of matriculation of the privileged materials through that ecosystem; identify all of the agencies, agents and prosecutors who were exposed to the privileged material; conduct such hearings as necessary to establish same; and award such monetary relief as is necessary to sanction the government's entrenched unlawful conduct set forth herein. Dated: June 21, 2024

Respectfully submitted,

By:



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Cc: Shannon Jones, AUSA, EDNY
Clerk of Court

*Pro hac vice previously granted by Judge Chen for Grand Jury motion practice in this investigation.

EXHIBIT A

From: Paul Pelletier pepelletier3@gmail.com
Subject: Re: [EXTERNAL] Demand for Immediate Return of Privileged Material
Date: June 6, 2024 at 3:56 PM
To: Jones, Shannon (USANYE) 5 Shannon.Jones@usdoj.gov



Shannon:

Now you have me confused. Our request for the return of private privileged materials, which has been pending since April, is wholly independent of anything any individuals may file in a separate criminal case. As you are surely aware, I represent OneTaste which is not a party to any filed criminal action. Our constitutional right to privacy has been violated; as such you have no right and no legitimate legal basis to retain our private materials imbued with the attorney-client privilege. The law of this and other circuits, the Justice Manual and New York Rules of Professional Responsibility are all very clear that you may not retain such material. As you know these documents, which you refuse to return despite these expressly mandated prohibitions, were each marked as containing attorney-client privilege material when they were received by the Prosecution Team from the person who obviously purloined them from OneTaste. Despite these markings, you ultimately insisted (incredibly through a member of the Prosecution Team) that I “prove” they were otherwise privileged by showing that the materials involved a communication that was “(1) between OneTaste and its attorneys; (2) intended to be kept confidential; (3) for the purpose of obtaining or providing legal advice?” I did so by providing a declaration form OneTaste’s attorneys and CEO establishing each element. In response, you moved the goal posts again, creating a new and invented standard demanding (without legal basis) that I also show that the document was prepared “in anticipation of litigation.” When I responded by demonstrating that such a request was in fact invented and lacked any basis in the law, you silently acquiesced, but then, moved the goal posts again, now stating that you had “done some research” and had follow-up questions for the prior attorneys who had requested the privileged materials which your Prosecution Team obtained from the malfeasant. Shannon, you represent the United States, *this is not a game*— the New York State Bar and the Second Circuit, rightly take these breaches and the sanctions attendant thereto very seriously. We have provided sworn declarations, at your request, which establish beyond reasonable question that the material, in the wrongful possession of the Prosecution Team since November 2021, is absolutely imbued with the attorney client privilege. There can now be no excuses which justify your continued retention of that privileged material. Nevertheless, you now state that you refuse to return, what you have no legitimate reason to deny, materials imbued with OneTaste’s private attorney-client privilege. Your rationale for doing so, that the privileged material is also at issue in another matter pending in this district — a matter in which we are not a party and therefore our rights cannot be adjudicated, finds no basis in the law. I am asking you again, as a professional courtesy, to return to us our private privileged material for which privilege is not the subject of legitimate dispute. I am sure you are also aware that the case law is replete with similar factual scenarios where the government has been subject to sanction by the court and the bar for interfering with the attorney-client privilege and failing to return improperly seized privileged materials. *See, e.g., U.S. v Stein*, 541 F.3d 130 (2d Cir. 2008). If you do not reconsider, we must continue to seek relief in an appropriate forum(s). But in advance, we urge you to expeditiously move forward with your original plan and return our Constitutionally protected, unquestionably private privileged materials at your earliest convenience. I would also ask you to consider the internal ramifications of kicking this can down the road as we understand that your Office’s investigation may be ongoing. Pep