

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v. -

KEITH RANIERE,

Defendant.

No. 18-cr-204 (NGG)

Date of service: January 25, 2019

**DEFENDANT KEITH RANIERE'S MOTION FOR IMMEDIATE
RELEASE OR IN THE ALTERNATIVE FOR RELEASE ON
CONDITIONS**

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TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	2
A. Previous Bail Motion	2
B. The Government's Handling of Discovery and the Trial Date.....	2
1. April 13, 2018 – Initial Appearance	2
2. May 4, 2018 – Arraignment.....	3
3. June 12, 2018 – Bail Hearing	4
4. July 25, 2018 – Arraignment on Superseding Indictment	4
5. July 26, 2018 – August 2, 2018 – Government Rejecting Offers to Meet & Confer	6
6. The September 11, 2018 Discovery Letter	7
7. September 14, 2018 – Status Conference	8
8. September 14, 2018 – Status Conference – Judge Scanlon.....	10
9. September 27, 2018 Conference – Judge Scanlon.....	11
10. October 4, 2018 Status Conference – Judge Garaufis	12
11. October 2018 Search Warrants and December 6, 2018 Status Conference.....	13
DUE PROCESS REQUEST THAT RANIERE BE RELEASED	15
A. Legal Standard	15
B. Argument	16
1. Because Ranieri's Trial Has Now Been Delayed Two More Months, and Ranieri Will Be Incarcerated Fifteen Months at the End of Trial, This Court Should Released.....	17
2. The Prosecution's Responsibility for the Delay of Trial	17
3. The Strength of the Evidence Upon Which Detention Was Based	18
4. The Relevance of Section 3164	19
IN THE ALTERNATIVE, THIS COURT SHOULD RELEASE RANIERE UNDER THE PROPOSED NEW CONDITIONS.....	19
A. Proposed Conditions of Release	19
B. The Proposed Conditions Will Assure Ranieri's Appearance in Court.....	20
1. The Nature and Circumstances of the Offense Charged.....	20
2. The Weight of the Evidence	21
3. Ranieri's History and Characteristics.....	23
4. The Nature and Seriousness of the Danger to Any person or the Community That Would Be Posed by Ranieri's Release.....	24
CONCLUSION.....	25

INTRODUCTION

We respectfully submit this motion requesting Keith Raniere's release. This motion asks the Court to (1) immediately release Raniere on no conditions based on the Government's violation of 18 U.S.C. § 3164 and the Fifth Amendment's Due Process Clause or (2) in the alternative, release him on conditions as set forth below.

As to the first basis, Raniere must be released as a matter of fundamental fairness under the Due Process clause of the United States Constitution, as (1) the Government has **NEVER** stated it was ready to try this case, (2) the Government has stated repeatedly that it possessed discovery material that it was refusing to provide to an incarcerated defendant because of a "continuing investigation," and (3) the Government has engaged in a provable and intentional pattern of delay so as to avoid trying an incarcerated defendant who has continually proclaimed his innocence. Through no fault of Raniere's, but through the Government's efforts, he has now has been detained for ten months and will have been detained for fifteen months by the end of the trial. At virtually each adjournment, Raniere has demanded that the Government that incarcerated him with bold, false claims of his dangerousness and risk of flight actually try him. And, at each adjournment, the Government cleverly—using all the tricks in its apparently bottomless bag of adjournments—has managed to avoid a trial.

In Title 18, United States Code, Section 3164, Congress stated with simple and remarkable clarity a principle that has been systematically violated in this case: "the trial ... of cases involving a detained person who is being held in detention solely because he is awaiting trial... **shall** be accorded priority." As will be demonstrated below, the Government has systematically violated this rule. Rather than giving the trial of Keith Raniere the priority that Congress mandated, the Government has engaged in a clear campaign to avoid the trial by delaying discovery, refusing to meet and confer with defense counsel regarding discovery (even when ordered to do so by this

Court), and refusing to turn over discovery in its possession due to the pending investigation since the inception of this case.

In the event the Court denies our Due Process application, we renew our bail application, as permitted under this Court's written decisions filed on June 20, 2018 (Dkt. 52), and December 5, 2018 (Dkt. 222), due to an increase in the collateral supporting a bond, specifically an additional suretor, who will post \$300,000 to secure the \$1 million bond.

BACKGROUND

A. Previous Bail Motions

Ranieri has previously made two motions for bail, and one motion to seal co-signers' names and addresses. (Dkt. 43, First Motion for Bond; Dkt. 116, Motion to Seal; Dkt. 46, Second Motion for Bond.) In both Orders denying bail for Ranieri, the Court has done so *without prejudice* because it "remains conceivable that Ranieri could address the court's concerns." (Dkt. 222, Order Denying Second Bail Motion; Dkt. 46, Order Denying First Bail Motion.)

B. The Government's Handling of Discovery and the Trial Date

A procedural review of this case shows (1) that Ranieri has done everything in his power start his trial and (2) that the Government has intentionally misused the discovery process and other methods to systematically deny him one. This delay to an incarcerated defendant violates two important principles – the Due Process Clause and Section 3164.

1. April 13, 2018 – Initial Appearance

On April 13, 2018, Keith Ranieri made his first appearance in this District. He pleaded not guilty to the complaint and when asked the defense position regarding the preliminary hearing, counsel responded, "**we are not waiving anything, Your Honor.**" (4/13/18 Transcript ("Tr.") at

4.) From that day and for every day during the 287 days since, Raniere has demanded a trial and the Government has refused to have one.

2. May 4, 2018 – Arraignment

On April 19, 2018, one week later, the Government unsealed an indictment charging Raniere and Allison Mack. On May 4, 2018, Raniere and Mack appeared before Your Honor for arraignment. The Court, cognizant of the fact that Raniere was incarcerated, asked the Government how long it believed it would take to provide discovery. The Government responded, “It is difficult for me to estimate exactly at this time,” citing concerns regarding a firewall to review privilege,¹ but stated, “I certainly will produce the bulk of what we have within the next month or so, but there will be ongoing discovery after that.” (5/4/18 Tr. at 5) The Government then added, “we anticipate that there will be additional charges and additional defendants.”² (Id.) The Court pressed the Government, “what is your current timeframe? And I ask this question because we have one defendant who is in custody...I think in this case it would be appropriate to move this case with alacrity...” (Id.) Defense counsel thanked the court for being mindful of Raniere’s incarceration, and stated, “**my client is asking for a speedy trial. He is not in a position to waive the speedy trial protections of the statute.**” (Id. at 9.) Responding to the Government’s statements regarding discovery, defense counsel stated, “we will give the Government whatever hard drives we need to [] get the discovery as quickly as possible.” (Id. at 10.) Raniere requested a trial date of **mid-July 2018** (id. at 14) and explained, “mid-July is not soon. It is down the road a way. If we need to scramble, that’s what we do and we will get ready” (id. at 15). Mack wanted to first to review the

¹ Notably, the Government did not engage Raniere’s attorneys with the Assistant U.S. Attorneys on the firewall team until **October 4, 2018, five months** after this appearance, and **nine months** after the account was seized.

² This would be the first of at least five times that the Government threatened a superseding indictment to delay trying Raniere. (See, e.g., 6/12/18 Tr. at 5; 7/25/18 Tr. at 12; Dkt. 248, Gov’t Response to Motions at 47 n. 20; 1/9/19 Tr. at 4.)

preliminary discovery the Government had not yet produced, and the Court set an October 1, 2018 trial date. (Id. at 16.)

3. June 12, 2018 – Bail Hearing

Ranieri filed a bail motion which was heard on June 12, 2018 and denied without prejudice. The Court began that hearing by asking the Government, “I set a trial date of October 1st, when will you be done with your discovery transfers to the defendants?” (6/12/18 Tr. at 4.) The Government responded, “it is difficult for us to estimate right now because we are still in the process of receiving certain materials.” (Id.) The Government, again citing the superseding indictment, said “we do expect a superseding indictment in this case and that there will be additional discovery obligations in accordance with the superseding indictment as well.” (Id. at 5.) When asked if the Government had an application for the exclusion of time, the prosecution said, “at this time, the Government is still willing to engage in such plea negotiations, but we have not heard from defense counsel.”³ (Id. at 10.)

4. July 25, 2018 – Arraignment on Superseding Indictment

The Government superseded and unsealed the Superseding Indictment, arresting four new defendants on July 24, 2018.⁴ All six defendants were arraigned on July 25, 2018. At the arraignment, the Government, sending a clear message that though it arrested four new defendants,

³ Being willing to have plea negotiations but not hearing from defense counsel is not a listed basis for an exclusion under the Speedy Trial Act.

⁴ The Superseding Indictment involved the following charges: (1) Additional charges regarding DOS, including a Wire Fraud Conspiracy (the DOS discovery was not complete until December 7 and it is unclear whether there is more DOS discovery the Government has not produced); (2) Charges regarding “hacking” of Ms. Bronfman’s father (from Ranieri’s review, there has been no discovery produced regarding this); (3) Charges alleging that Russell and Ranieri aided a Mexico alien in entering the United States through Canada (the Government produced discovery that appears to be related to this charge at the late date of on December 7); (4) Charges alleging that Ranieri and Lauren Salzman engaged in trafficking a victim for labor and services and document servitude (this allegation was made in the Government’s March 26, 2018 letter in support of detention (Dkt. 4), yet documents that appear related to this were not produced until August 3, 2018 and November 2018); (5) A charge alleging “a scheme to alter records for use in an official proceeding” (the Government has still refused to indicate to the defendants what the basis is of this extremely broad allegation, but they alleged it in their March 26, 2018 Letter in Support of Detention),

it had no intention of trying them on the scheduled trial date, immediately argued that “[i]n light of the additional defendants, additional discovery that will be involved, and the complexity of our superseding indictment, the Government...does not believe that the October 1 trial date is feasible at this point. I believe that Mr. Raniere, however, disagrees.” (7/25/18 Tr. at 8.) The Government had won again. It had managed to keep Raniere in jail and managed, more importantly, to avoid trying him on yet another trial date set by the Court. Nonetheless, Raniere continued to press the Court for the October 1, 2018 trial date:

I have a client who is incarcerated; I have a client about whom the Government says it will never, never, agree to any conditions of release...So, I feel it incumbent upon myself to do what I need to do to get ready for a trial October 1. I’m prepared to do that. I recognize, and I expect you’ll hear my co-counsel who have clients who are not incarcerated do not want a trial October 1. I’m well-versed in what that means from a speedy trial perspective, but asking me, personally, I would like a trial October 1.

(Id. at 9.) The Court then asked the Government about discovery. The Government responded:

[i]n light of the fact that we knew that there were going to be additional charges, there’s certainly a significant portion of discovery that was not produced to the defendants Raniere and Mack that is now relevant to the superseding indictment.

(Id. at 10.) This response made clear that despite the fact that Raniere was an incarcerated defendant demanding an immediate trial, the Government had intentionally withheld discovery from Raniere and Mack due to the impending Superseding Indictment. The Government kept open the possibility that there would be further superseding indictments. (Id. at 12.) The Court, announced a trial date stating, “January 7 to select a jury. We go to trial immediately after that.” (Id. at 17.) The Court then excluded time in “the interests of justice under the Speedy Trial Act on consent of all parties but Mr. Raniere ...” (Id. at 22.)

5. July 26, 2018 – August 2, 2018 – Government Rejecting Offers to Meet & Confer

On the day following the July 25, 2018 appearance, the Court entered a minute order requiring the parties to “meet and confer regarding discovery and a motion schedule prior to the next status conference.” (9/26/18 Order.) All defense counsel approached the Government to meet and confer, as directed by the Court. Kathleen Cassidy (counsel for Clare Bronfman) first sent an email to the prosecutors and all defense counsel on July 26, 2018 at 10:09 am. She proposed a meeting the next day, when all defense lawyers would be present, and said, if the Government was available, “we will send you a list later today of what information defendants hope to gather from the meet and confer.” (Ex. 1: Dkt. 127, Raniere Ltr. Requesting Discovery at Exhibit 3.)

When defense counsel still had not heard back from the prosecutors for over seven hours, counsel for Raniere sent a follow up email at 4:42 pm, stating, “since we have both out of town lawyers tomorrow..., can we lock in the meet and confer discussed in open court for after our appearances tomorrow. Thanks. Marc.” At 4:47 pm, the government responded, stating:

thank you for your emails. The first step is to have the new defendants sign the protective orders, which we will send to them tomorrow. We will begin producing discovery to all defendants next week and if a meet and confer is necessary at some point in the near future, we will be available. In the interim, you are certainly invited to send us a list of information you are seeking to gather.

The co-defendants’ counsel immediately signed the Protective Order. On August 1, 2018, William McGovern (counsel for Allison Mack) again asked for the meet and confer and stated that “Given the number of participants and summer schedules we don’t want to risk letting it slip any further into August. We are also cognizant that Judge Garaufis is holding the week of August 20 for us to address any outstanding issues not resolved during the meet and confer.” (*Id.*)

On August 2, 2018, the Government again refused to hold the meet and confer ordered by the Court stating:

All – As we’ve said before, we believe it will be more productive and practical to meet and confer to address issues relating to discovery, should that prove necessary, after some productions have gone out to you. We will be calling some of you individually to discuss issues that may be unique to your clients in coming weeks, and, as always, we welcome specific questions or requests at any time.

(Id.) First, the Government stated a disingenuous and nonsensical excuse that certain defendants had not signed the protective order, then even after each defendant signed the protective order, the Government still refused to hold the meet and confer.

6. The September 11, 2018 Discovery Letter

After the Government refused to meet and confer with defense counsel about discovery, defense counsel had no choice but to bring this issue to the Court, which it did on September 11, 2018. The letter informed the court that (1) defendants were still not in receipt of the majority of the discovery—materials the Government had “in March 2018 or even earlier,” (2) the Government refused to meet and confer with defense counsel, (3) Raniere continued to demand a January 7, 2018 trial,⁵ (4) the Government had still not identified the Jane and John Does in the Superseding Indictment and (5) the Government failed to respond to a Brady letter.⁶ (See Ex. 1: Dkt. 127.)⁷ Counsel, once again, reiterated that “Raniere has not waived and does not waive his right to a speedy trial and requests that this Court keep the January 7, 2019 trial date.” (Id.) Six months into the case, with Raniere in prison the entire time unable to get a trial, the Government had failed to turn over the vast majority of discovery. (Id. at 5.) In response, the Government blamed any discovery delay on “privilege review on certain materials,” although they had not

⁵ As part of his demand for a January 7, 2019 trial date, Raniere wrote that “since the inception of this case, the government has maintained that Mr. Raniere must be remanded pending trial and, yet, has employed every basis available to avoid a trial.” Little did he know at the time that the Government’s efforts to avoid a trial were only beginning.

⁶ The Government has still not responded to this letter, and has instead indicated it will comply with its Brady obligations by belatedly disclosing statements when it turns over 3500 material.

⁷ Between the Superseding Indictment and this date, the defendants received just three discovery productions. In the time since, the defendants have received thirteen.

engaged the defendants with the privilege team, and instead sought instead to designate the case as complex. (See Dkt. 129, Case Update Letter at 1, 3-4.)

The Government was intentionally slow-rolling discovery, specifically to avoid the trial date, which is clear from the fact that as of September 11, 2018, it had still refused to identify the Jane and John Does in the Superseding Indictment.⁸ While the Government offered excuses for failing to provide other forms of discovery, identifying the Jane and John Does takes a matter of seconds. Therefore, the delays were not mere negligence; rather they were intentional. Worse still, the delays were intentional as means to avoid trying a case that the Government was not ready to try, despite the fact that the Government continued to demand Raniere remain held without bail.

7. September 14, 2018 – Status Conference

At the September 14, 2018 conference, the Court started by mentioning the September 11 letter. The Government responded that it wanted to “first discuss our motion to designate this case as complex.” (9/14/18 Tr. at 4.) The Court, bringing the Government back to the discovery issue, stated, “well, I think that the heart of the matter is the concern raised by the defendants that there has been a delay in providing discovery that was obtained back in February, March, January of 2018, which cannot be easily understood or explained.” (Id. at 5.) In attempting to explain the delay, the Government stated that the defendants’ “letter was misleading in a number of respects” and that discovery productions were taking time because the Government “have begun searches

⁸ The defendants had sent a letter requesting a Bill of Particulars, including the names of the Jane and John Does, on August 14, 2018. (See Ex. 1 at 6.) The defendants followed up with the Government asking for the names of the Jane and John Does. It was not until the defendants filed the September 11 letter that the Government disclosed this basic piece of information.

of those materials indicated in the warrants” and the defendants “wanted metadata” and wanted “discovery bates stamped.” (Id. at 6.)⁹

They also sought to designate the case as complex for the first time. (Id. at 10.) The Government’s request to make this case complex should be seen for what it actually is: a ruse to be absolved from the problems the Government itself created by refusing to meet with defense counsel and failing to oblige by their discovery obligations in a case where it was holding a defendant in jail who had the temerity to demand a trial.

When asked if the Government could meet the schedule in the letter submitted by Ranieri’s counsel, the Government responded, “we don’t believe that a hard-stop discovery deadline is going to be appropriate...the Government is always constantly receiving new evidence both from witnesses from subpoenas that have been issued.” (Id. at 10.) The Government then returned to its mantra we have all been hearing for a year: “we think it is highly likely that we will supersede to add additional charges against the defendants, who have already been charged, within the next several months.” (Id. 11-12.) Ranieri’s counsel noted the Government’s refusal to meet and confer with counsel and continued to press for timely discovery:

This is all manageable. And honestly...I think they [the Government] want[s] it complicated. I think they’d rather keep it vague, they’d rather keep it mysterious, because then they can say, ‘well we might supersede; well, its 144 library floors of stuff, we don’t want to have a trial January 7th.’ **Well, we do, we want a trial.** ...We will help the Court and we will help the Government get ready. **We want this trial. We all do and we want it January 7th, and we will make it happen.**

⁹ This is yet another disingenuous excuse. The Government provides discovery with metadata in every case, especially where the Government has received returns on search warrants from technology companies such as Yahoo, Google and Apple, as it has here. Therefore, the defendants’ request for metadata for these devices and accounts was entirely reasonable and has never, in our collective experience as defense counsel, taken over six months to be produced. Moreover, defense counsel has never been in a case where discovery is produced without bates stamps. When counsel for Ranieri and Mack received un-bates stamped discovery in **May** and discovery without meta data, we immediately brought it to the attention of the Government. This was entirely reasonable. Yet, the Government used this as an excuse for its inexcusable delays at a **September** conference.

(Id. at 16.) In a somewhat remarkable statement, the defendant in a criminal case stated explicitly to the court that he wanted a trial so desperately that he would help the Government get ready to try him. The Government, however, would not have it. The Court sent the parties to Judge Scanlon, who threw a spotlight onto the tardy and non-existent discovery productions.

8. September 14, 2018 – Status Conference – Judge Scanlon

Judge Scanlon immediately asked the Government, “what’s the Government’s objection to starting with an all-counsel conversation and then coming back to me with ... a somewhat more agreed-upon list of disputes.” (Id. at 13.) The Government responded, “Well, I can tell you right now that dispute is one that we are unwilling to engage...” The Court then asked, “What does that mean, you’re unwilling to engage?” The prosecutor responded:

So, what I’m telling you, Your Honor, is that we have already disclosed those things that are the products of searches that **we are willing to disclose**. We are not – this is an ongoing investigation, Your Honor. We’ve already stated in front of Judge Garaufis that we expect there to be additional charges. We are not in a place where we are willing to disclose everything based on – potentially based on charges that have not been brought, for example.

The prosecutor here stated explicitly that despite the fact that Raniere is incarcerated and has been demanding an immediate trial and discovery, the prosecution has intentionally not provided discovery because of an ongoing investigation. Moreover, the prosecutor stated that the Government is unwilling to tell the defense what materials the prosecutor has that it is unwilling to disclose. This obviously put the defense in an impossible position in terms of starting a trial because the Government is saying that it has discovery that it is intentionally not providing.

Judge Scanlon ordered the parties to meet and confer and the parties finally discussed the discovery issues. Judge Scanlon ordered the Government file multiple updates on the discovery (some of which did “not include all of the required information” she had asked for (9/24/18 Minute Order)), which forced the Government to start producing more of the material.

9. September 27, 2018 Conference – Judge Scanlon

During this conference, the Court inquired about a discovery cut-off date of December 7, 2018. The Government responded that “the December 7th date that we proposed was not proposed as a discovery cutoff.” The Court asked, “So what is it?” The Government responded:

[w]e proposed that date as a date by which we would endeavor to make substantial productions on an ongoing basis. Your Honor, we’re in a case that has been designated complex. We understand that the defendants are saying that they want a trial soon....The government isn’t aware of a criminal case in which an arbitrary discovery cutoff was made, absent there being a fixed trial date.

Your Honor, what the government doesn’t want is an arbitrary cutoff date based on a trial date that appears not to be set right now.¹⁰

(9/27/18 Tr. 6-7.) Judge Garaufis had already noted that the January 7th date was predicated upon the Magistrate Judge “establish[ing] a discovery schedule” and that “no one wants [a January 7th date] more than” him. (9/13/18 Tr. at 19.) Yet, the Government was in front of Judge Scanlon arguing that there *could not be a cut-off date* because there was no set trial date. Indeed, the *only* reason there was no set trial date was *because* the Government had not produced discovery. The Government continued that “we will try to endeavor to get substantial discovery out there by then.” (*Id.* at 10.) The Court replied “Try and endeavor, this is the problem.” (*Id.*) The Government continued that they had to complete discovery because they “have unindicted coconspirators” and obligations to produce discovery,” but that “the trial is not looking like it’s going to be until spring or some later date.” (*Id.* at 10-11.)

Ranieri’s counsel again reiterated, “I want to try the case January 7th. Sometimes my colleagues don’t always agree with that and I’m trying to harmonize all the views...it’s really

¹⁰The Government has been permitted to use its failure to produce discovery as a means to violate Ranieri’s right to a speedy trial. Rather than enforcing the trial date and demanding that the Government produce discovery consistent with the trial date, the Court has permitted the Government to systematically and repeatedly move the trial date because the Government cannot, or worse still, will not, produce discovery that it has in its possession.

incumbent upon me, I think, to move as quickly as possible.” (*Id.* at 26.) The Court ordered the parties to work on the issues and propose a schedule by October 3, 2018. (*Id.* at 52.) The parties filed a joint schedule on that date. In light of discussions before Judge Scanlon and the defendants finally learning of the massive discovery, this schedule contemplated March 18, 2019 for opening statements. (See Dkt. 157, 10/3/18 Jointly Proposed Schedule.)

10. October 4, 2018 Status Conference – Judge Garaufis

The Court asked for the status of the discovery to which the Government responded that they “have been working diligently to produce discovery and [] have made a significant portion of discovery available to all defendants.” (10/4/18 Tr. at 4.) They stated that they “**do not intend at this point to file a comprehensive list of what is in the Government’s possession**” because “**what is discoverable under Rule 16 is continually in flux as our case develops.**” (*Id.* at 5.)¹¹

Next, as to the issue of the trial date moving from January 7 to March 18, 2019. When the Court asked if Raniere was “consenting” to the adjournment from January to March, counsel responded:

I want to answer Your Honor’s question about how we got here. We got here through a lot of compromise. We got here through a lot of conversation. I think we all feel that Your Honor sending us to Judge Scanlon has been very productive. It put us together. It was the right move at the right time. It’s exactly what the case needed and I had to compromise. I didn’t get what I wanted.

(10/4/18 Tr. at 8.) The Government agreed that the parties worked effectively with Judge Scanlon and “have reached an agreement on a workable pretrial schedule with an anticipated trial date of March 18, 201[9].” (*Id.* at 4.)

¹¹ If there was a clearer example of what a violation of 18 U.S.C. § 3164 looks like, counsel can’t imagine it. An incarcerated defendant is proclaiming his innocence and demanding an immediate trial – indeed has been demanding an immediate trial for several months – and the Government actually states on the record that it will not provide him with discovery because it is continuing to investigate and does not know what will be discoverable. When Congress stated that incarcerated defendants SHALL get priority, this is specifically what Congress was seeking to prevent.

This date, March 18, 2019, was the product of a tremendous amount of discussion with the Government. (See Dkt. 280, Raniere Ltr. Demanding March Trial at 1.) Raniere did not want this date. He wanted January 7, 2019, as has been stated clearly on the record. However, Raniere agreed to a March 18, 2019 trial date for one reason and one reason alone: because it was a **FIRM DATE**. It was a firm date because the **Government agreed to it** and because **all defense counsel agreed to it** and because the **Court agreed to it**. Getting the Government to agree to a trial date was such an uphill, seemingly impossible battle, that when the Government finally agreed (an agreement on which it could renege), this was something Raniere could not pass up. Moreover, his co-defendants, all of whom have stated repeatedly their need to review the discovery that was just being produced, all agreed. So, having demanded and been denied (1) a mid-July 2018 trial, (2) an October 1, 2018 trial, and (3) a January 7, 2019 trial, Raniere could not help but notice how adept the Government was at keeping innocent people in prison by simply refusing to try them and by using its own failure to produce discovery as an excuse to keep Raniere in prison. Therefore, securing the agreement of all parties and the Court to an agreed-upon trial date seemed like the only way to get an actual trial. The Court agreed that the March 18th trial date was a firm date and Raniere relied on the fact this date was being considered as a firm trial date with the consensus of all parties and the agreement of the Court.

11. October 2018 Search Warrants and December 6, 2018 Status Conference

In the parties' October 3, 2018 letter, the Government agreed that December 7, 2018 was the "date by which Rule 16 discovery currently in government's possession would be substantially complete." (Dkt. 157 at 2 n.2.) Less than two weeks later, in late October, the Government obtained new search warrants for Keith Raniere's Yahoo account, Clare Bronfman's Google account, and all of the devices seized at Nancy Salzman's house. The Government first disclosed the existence

of these new warrants to defense counsel and Judge Scanlon in a letter filed on November 2, 2018.¹² Notably, the majority of the stated “probable cause” for the new warrants was information that the Government had apparently already investigated and relied upon at the outset of this case in their successful attempt at imprisoning Raniere. (Compare allegations in Government’s Letter in Support of Detention (Dkt. 4) at 2-4 with statement of probable cause in the October warrants.)¹³

Despite the Government obtaining thousands of new documents from the new warrants, Raniere still agreed to the March date. At the December 6th status conference, Raniere once again stated, **“We’re very happy with the March 18 date to open and we consent in the interim.”** (12/6/18 Tr. at 22.) At the January 9, 2019 appearance, Raniere **“agree[d] to continue it to March.”** (1/9/18 Tr. at 72.) That day, however, the Government turned over three terabytes of data from Bronfman’s email account, Raniere’s email account, the Oregon Trail devices,¹⁴ and numerous videos. This “massive volume of discovery” that was produced gave the non-DOS defendants “grave concerns that the March date is not feasible” due to insufficient “time to prepare for trial.” (Dkt. 276, Motion to Sever at 23.)¹⁵

¹² The Government disclosed in this letter the massive amount of discovery they had produced in recent weeks, including “over 96,000 pages of discovery, including substantial productions of the result of searches of electronic accounts belonging to defendants Keith Raniere, Clare Bronfman, and Allison Mack.” As noted several times before this Court, law enforcement seized this information from January to March of 2018 and only began producing this in late October, due to Judge Scanlon’s order.

¹³ The Government attempted to keep these warrants from the defendants, as well, until the defendants proposed that the search warrants be “Attorneys’ Eyes Only” until the Government’s arbitrary deadline of December 21, 2018. (See Dkt. 236, Limited Unsealing Order.) The reason for the arbitrary date of “December 21, 2018” is unknown to defendants because this was presented to the Court in an ex parte filing.

¹⁴ The defendants have had “full discovery copies” of the Oregon Trail devices since October 29, 2018 and November 16, 2018. Ms. Bronfman and Mr. Raniere have declined to waive their 4th Amendment rights by sharing the entire contents of their email devices with co-defendants, so the defendants are now receiving bulk returns from the accounts. It is unclear whether the Government had the majority of the other items in their possession prior to December 7, 2018.

¹⁵ **Incredibly, there is even more discovery the Government has in their possession that they have not produced to defendants.** The Government made an ex parte application to Judge Scanlon on December 4, 2018, seeking to “defer[] disclosure of certain evidence until six weeks before jury selection” in the case. (Dkt. 246, Order re 12/4/18 Ex Parte Filing at 1.) This application was granted. According to the March 18, 2019 trial schedule, the defendants would have received this discovery in January 2019—now, it will not be produced until February 25, 2019.

Unsurprisingly, the Government agreed to the continuance it made all but inevitable, stating that because the non-DOS defendants' were concerned that the March date will not allow them enough time to prepare with the benefit of the new discovery, "it would be appropriate for the Court to adjourn [] the current trial date." (Dkt. 279, Gov't Ltr. Requesting Adjournment at 1.)¹⁶ Significantly, the Government did not indicate that it was ready to start the trial. Rather, seeing the non-DOS defendants open the adjournment door solely because of the Government's discovery production pattern, the Government rushed through it, seeking yet another reprieve to keep Raniere in jail six more weeks.

Raniere strenuously objected to this adjournment and noted that the Government "honestly has done everything in its power thus far to avoid a trial of the incarcerated Raniere." (Dkt. 280, Ltr. Demanding March Trial at 2.) On January 15th, the Court adjourned this trial six weeks, from March 18th until April 29th to accommodate the adjournment requests. (See Dkt. 287.) This adjournment violates Raniere's constitutional rights and the clear dictates of Section 3164, stating that the trial of an incarcerated person SHALL get priority.

I. Due Process Requires that Raniere Be Released

A. Legal Standard

As an initial matter, because this Court has denied Raniere bail *without prejudice*, this Court does not have to review a reopening of detention under 18 U.S.C. § 3142(f), which allows this Court to reopen detention at any time before trial if information exists that was not known to the movant at the time of the hearing. This Court may review a pretrial detention order "to determine whether [it] violates [Raniere's] right to due process." United States v. Ojeda Rios, 846 F.2d 167, 169 (2d Cir. 1988); United States v. Archambault, 240 F.Supp.2d 1082 (D.S.D.

¹⁶ This is a clear set-up by the Government: fail to provide discovery, wait for at least one defendant to ask for an adjournment based on the lack of discovery, and then agree.

2002)(detention must be reopened for a fundamental reason to examine due process implications of the defendant's continued detention). "In some cases, due process violations have been found and the defendants ordered released due to their prolonged detention." Archambault, 240 F.Supp.2d at 1085 (citing Ojeda Rios, 846 F.2d 167, 168–69 (2d Cir.1988); United States v. Gonzales Claudio, 806 F.2d 334, 341–43 (2d Cir. 1986), cert. denied, 479 U.S. 978, 107 S.Ct. 562, 93 L.Ed.2d 568 (1986); United States v. Ailemen, 165 F.R.D. 571, 572–601 (N.D.Cal. 1996); United States v. Shareef, 907 F.Supp. 1481, 1482–85 (D.Kan.1995); United States v. Chen, 820 F.Supp. 1205, 1209–11 (N.D.Cal. 1992); United States v. Gatto, 750 F.Supp. 664, 672–76 (D.N.J. 1990); United States v. Gallo, 653 F.Supp. 320, 334–45 (E.D.N.Y. 1986)).

In the Second Circuit, to determine whether prolonged pretrial detention implicates due process, a Court must consider (1) the length of detention; (2) the extent of the prosecution's responsibility for the delay of trial; and (3) the strength of the evidence upon which the detention was based. United States v. Orena, 986 F.2d 628, 630 (2d. Cir. 1993). Determinations concerning due process limitations on pre-trial detention require a case-by-case assessment. Gonzales Claudio, 806 F.2d at 340 ("the due process limit on the duration of preventive detention 'requires assessment on a case-by-case basis, since due process does not necessarily set a bright line limit for length of pretrial confinement."); Ojeda Rios, 846 F.2d 167 (where defendant was detained solely on risk of flight for 32 months prior to trial, "due process [could not] tolerate any further pretrial detention" where the Government would not agree to severance and they bore the burden of delay and the trial would last months").

B. Argument

1. Because Raniere's Trial Has Now Been Delayed Two More Months, and Raniere Will Be Incarcerated Fifteen Months at the End of Trial, This Court Should Release Him

This Court must release Raniere because his due process rights have been violated due to the Government's systematic and constant delays. Raniere, a first arrest United States citizen who does not stand convicted of anything, yet has been held without bail since March 27, 2018.

2. The Prosecution's Responsibility for the Delay of Trial

The delay in this trial is solely due to the Prosecution's conduct. First, as detailed supra at pp. 1-16, due to the Prosecution's vague yet continuous promises to supersede the indictment, which will add even more discovery, Raniere will be incarcerated for over a year at the start of trial, despite asking for a prompt trial since April 13, 2018.

Second, the constant adjournments of the trial date are solely due to the Prosecution's conduct. When Raniere first stated he was not waiving anything, the Government indicted Raniere and Mack, knowing Mack would not consent to a July date. When the Court set an October date, the Government superseded the Indictment adding four defendants, knowing they would not consent to an October date without the benefit of all discovery. Then, in disregard of this Court's Order, the Government refused to meet and confer with defendants regarding discovery forcing defendants to file a discovery motion. When this Court sent the parties to meet with Judge Scanlon, the Government finally started turning over material that had been in their possession for six months, but then executed new warrants so that defendants would have even more terabytes to review after the December 7th deadline. Now, the Government is sitting on even more discovery that they will not produce until six weeks before jury selection.

Now, after dumping 3 terabytes of discovery on defendants on January 11th and 44 gigabytes on December 7th, the Government tells this Court "it would be appropriate for the Court

to adjourn [] the current trial date” to accommodate the non-DOS defendants’ request to review the Government’s own tardy discovery. (Dkt. 279, Gov’t Ltr. Requesting Adjournment at 1.) A problem of the Prosecution’s own making is now leading them to request a trial adjournment, keeping Raniere in prison in violation of his rights, all the while insisting he sits in prison while they continue their investigation.

Even if the Court “[does] not determine with precision the amount of pretrial delay attributable to the prosecution, nor assess the extent to which the Government may [be] at fault in contributing to the delay,” it is clear that the Government “bears a responsibility for a portion of the delay significant enough to add considerable weight to [Raniere’s] claim that the duration of detention has exceeded constitutional limits.” Gonzales Claudio, 806 F.2d at 342-43.

3. The Strength of the Evidence Upon Which Detention Was Based

The strength of the evidence upon which detention was based is addressed below in Point III.B.1 and III.B.2 on pages 20-24. Additionally, this Court has now received numerous submissions by defendants on the weakness of the Government’s case.

Moreover, this Court has held multiple times that Raniere is detained because the proposed conditions of release do not mitigate against risk of flight and *not* because of any finding of dangerousness to the community. (See Dkt. 46 at 16; Dkt. 222 at 14). “[T]he constitutional limits on a detention period based on dangerousness to the community may be looser than the limits on a detention period based solely on risk of flight. In the former case, release risks injury to others, while in the latter case, release risks only the loss of a conviction.” Orena, 986 F.2d at 631. Here, there is been no finding as to dangerousness, and indeed, Raniere has put forward several arguments that any dangerousness typically associated with sex trafficking does not exist here. (Dkt. 222, Order at 9: (“Raniere claims that the Government possesses critical exculpatory

evidence related to its sex trafficking charges. He avers that the ‘overwhelming majority’ of women in DOS did not have sex with him and that any sexual relationships he had were ‘entirely consensual and aggressively pursued by [his] partners.’”)

4. The Relevance of Section 3164

When Congress stated that the trial of incarcerated defendants shall be given priority, Congress was seeking to prevent precisely what the Government has done here and it continuing to do here. Congress was concerned that prosecutors would arrest people, incarcerate them and then turn their attention to other aspects of the investigation, allowing them to sit in prison while the prosecutors built their case. That concern has come to pass. The Government has violated this provision. It arrested Raniere on the thinnest of evidence, kept him jail and has gone on to investigate other defendants and other aspects of the case while Raniere in vain demands to be either tried or released. This conduct is not only wrongful, it violates the clear dictate of Congress in section 3164. Keith Raniere must be released immediately.

II. **In the Alternative, This Court Should Release Raniere Under the Proposed New Conditions**

With the benefit of the new proposed conditions below, Raniere asks this Court, in the alternative, to release him under the updated conditions of release:

A. Proposed Conditions of Release

The proposed release conditions are as follows:

- (1) A \$1M personal recognizance bond;
- (2) The bond shall be secured by the following five properties, with the owners of the properties signing onto the bond:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

- (3) Several other people—the identities of whom will be provided to the government and the Court in advance of any hearing, will also sign onto the bond, offering the following cash amounts to secure the bond: [REDACTED]
- (4) The defendant shall be on full home confinement in Brooklyn, NY or Clifton Park, NY, until the trial begins;
- (5) The defendant will be electronically-monitored by a GPS device that tracks his every movement;
- (6) The defendant shall not leave the location of his home confinement, except for emergent medical matters and scheduled court appearances; his lawyers will be obligated to travel to this location for any meetings, and he must check in with his pretrial officer every day.¹⁷
- (7) When the trial starts, or if the defendant's presence at court is required on a more regular basis, he will live at a location near the courthouse, and will be accompanied by one of his attorneys from that location to the courthouse;
- (8) The defendant shall not communicate with anyone by phone or in person aside from his attorneys or authorized members of their staff or unless his attorneys are present;
- (9) The defendant shall have access to a computer to review the discovery provided in this case, but no internet access; and
- (10) Surrendering of the defendant's passport and an agreement not to secure new travel documents.

B. The Proposed Conditions Will Assure Raniere's Appearance in Court

We rely on our previous bail motions (Dkt. 43; Dkt. 191) and assume the Court's familiarity of Raniere's analysis with respect to risk of flight and safety to the community. We briefly write to address the bail factors, specifically, this Court's concern about (1) Raniere's lack of financial stake in the previous bail proposal and (2) the weight of the evidence. We submit this \$1 million bond secured by more cash and property is a sufficient condition.

1. The Nature and Circumstances of the Offense Charged

In its Second Order, this Court found that due to the Superseding Indictment, "this factor supports continued detention even more strongly than at the time of the First Bail Order." (Dkt. 222 at 8.) While Raniere does not dispute that these charges add potentially more prison time to

¹⁷ The condition of requiring Raniere to call pretrial services once a day has been imposed in other cases where due process implications were considered. See Orena, 986 F.2d at 628.

an indictment that was already charging him with a potential life-in-prison offense, Raniere notes that the Superseding Indictment in one instance does not even charge proper venue (Count Seven) and the majority of its RICO acts were laid out in a Detention Letter to this Court filed the date of Raniere's arrest. (Dkt. 4, Gov't Ltr. in Support of Detention.) In short, with the exception of a few acts, these are allegations the Government started pedaling in March.

2. The Weight of the Evidence

Though this Court recognizes Raniere's arguments that the Government possesses critical exculpatory evidence related to its sex trafficking charges, it states that Raniere "has made no similar claims about the Government's evidence regarding the racketeering conspiracy, forced-labor conspiracy, wire fraud conspiracy, and identify theft conspiracy charges against him." (Dkt. 222 at 9.) The Court stated that the "Government claims to have significant evidence against Raniere" and "there appears to be ample evidence against" him. (*Id.* at 9.) However, we caution the court to

be vigilant not to unduly rely upon a proffer of a set of accusations and weighty evidence in support thereof to substantiate an order of pretrial detention. After all, in this District, among many others, such a strong proffer is typical. Rather, a careful balancing of all the relevant factors is essential to ensuring that not even one defendant is unnecessarily deprived of her interest in liberty pending trial, all while protecting the community at large, and, by extension, ensuring the integrity of and respect for the criminal system.

United States v. Paulino, 335 F.Supp.3d 600 (S.D.N.Y. Aug. 16, 2018). We disagree that we have not made similar claims about the Government's case, as we have repeatedly and vehemently argued that Raniere is innocent. However, we attempt to provide "specifics regarding the nature of the evidence in the Government's possession." (Dkt. 222 at 10.)

First, with respect to the racketeering conspiracy, as the Court will soon see, this conspiracy was predicated mainly on the acts of the [REDACTED]¹⁸ The discovery shows that Raniere was not involved in these [REDACTED], schemes and at trial, this will become eminently clear to Your Honor and the jury. Raniere has also provided context for nearly every email cited in the Government's detention letters and search warrants in his Motion to Suppress and Motion for a Franks Hearing filed under seal on January 9, 2019. (Dkt. 269.)

Second, with respect to the Forced Labor Conspiracy, Raniere has argued that the forced labor conspiracies and sex trafficking conspiracies simply do not allege "force" as required by the statute. It is apparently the Government's theory that "collateral" formed the basis of the "force" element in the Forced Labor substantive and conspiracy charges and we have stated repeatedly that collateral did not act as a measure of force. In Raniere's First Motion for Bond, he stated:

However, there has never been an instance where a woman provided collateral against her will, or where she was compelled to join DOS against her will. Rather, every woman who provided collateral in connection with her admission into DOS did so knowingly, intelligently and with full knowledge and awareness of her actions.

Moreover, counsel is aware of no instance where the collateral of anyone was actually released as a punishment or for any other reason. The collateral is akin to "consideration" in a contract or as a form of commitment to one's membership in DOS. The view shared by many DOS members is that DOS is effective precisely because it requires a tangible commitment, and that the collateral is central to the personal commitment that makes DOS effective.

(Dkt. 43 at 6-7.) Moreover, the Court's question to the Government at oral argument goes to the heart of why Raniere, Mack and Lauren Salzman will strenuously argue that there was no forced labor: "going to Dunkin' Donuts and picking up some coffee and doughnuts for the folks that

¹⁸ Raniere has been demanding a prompt trial because, among other reasons, Raniere is anxious for the Court and public to learn the truth about these accusations.

actively house, is that labor and services for purposes of a forced labor conspiracy?” (1/9/19 Tr. at 38.) A first-arrest, U.S citizen should not be held on allegations that are routine acts of friendship.

Third, with respect to the Wire Fraud Conspiracy, it is astonishing that the Government has charged this when the February Complaint acknowledges, and the discovery confirms, that every member of Ms. Mack’s sorority women **knew of Raniere’s involvement in DOS**. (Compl. ¶ 47.)

Finally, with respect to the Identity Theft Conspiracy, this Count does not even allege proper venue. However, even if it did—as we assume this will remain an act in the RICO count—we have stated in public filings the ridiculousness of this charge:

The closest thing to [a charge of stealing another person’s money] is that the government says that Mr. Raniere and the mother of his child used Pamela Cafritz’s credit card after her death. (See Superseding Indictment at ¶ 40 (Count Seven); Gov’t Detention Ltr. at 7.) It is undisputed that Ms. Cafritz and Mr. Raniere were live-in lovers, partners and the best of friends for the better part of three decades. **Mr. Raniere had an unlimited Power of Attorney over her affairs, was her estate’s executor, and sole beneficiary.** So, the notion that Mr. Raniere misappropriated funds from an estate of which he was the beneficiary, with the goal of committing tax evasion on tax not yet due, is ridiculous.

(Dkt. 191, Raniere Second Motion for Bond at n.13) (emphasis added). The Government’s only retort is “Raniere was the executor of Ms. Cafritz’s estate in December 2016 and could not make “gifts” from her estate without violating a fiduciary duty unless and until the funds in the estate were transferred to him as a beneficiary.” (Dkt. 291, Gov’t Reply to Privilege Brief at 6 n.4.)

3. Raniere’s History and Characteristics

Raniere has exhaustively put forth details regarding his stay in Mexico and the Court has accepted these. The Court however, is troubled that Raniere “continues to have access to supporters with substantial resources, some of whom are in Mexico” because of Raniere’s stay in the resort in Puerto Vallarta. Raniere seeks to provide more information about this stay. [REDACTED] who has agreed to post [REDACTED] to secure Raniere’s bond, paid for this stay [REDACTED] Therefore, with

the benefit of ██████ in the courtroom, the Court would be able to assess Raniere’s “supporter[] with substantial resources...in Mexico.” (Dkt. 222 at 12.)

Additionally, the other guests at the Puerto Vallarta hotel included Ms. Bronfman, who, due to her indictment, “now has less ability to help Raniere flee.” (Dkt. 222 at 12.) Ms. Lauren Salzman and Ms. Mack, were also at the resort and have no ability to help Raniere flee, as they too are indicted defendants held on bail with strict conditions. Several DOS members were also at the resort, all of whom live in Mexico and do not have great financial means, and, those who have houses in the United States, cannot act as suretors because they have a legitimate fear of arrest. (See Dkt. 197, Agnifilo Aff. ¶¶ 30, 32.) Yet, ██████ who paid for this trip is willing to come to this Court and pledge “substantial resources” to assure Raniere’s appearance. (Dkt. 222 at 12.)

4. The Nature and Seriousness of the Danger to Any Person or the Community That Would Be Posed by Raniere’s Release

The Court has accepted “the Government’s representations as to how Raniere has psychologically abused DOS members...and continues to believe ‘there is at least some risk that if Raniere is released, he may unlawfully exploit women or obstruct justice.’” (Dkt. 222 at 13-14.) Here, once again, the Government’s proffers should not persuade the Court, especially in light of recently produced discovery. In the Government’s Complaint, they write that after “a DOS slave (who was also a high-ranking member of Nxivm) defected in a public way” (Compl. ¶ 33), “Jane Doe [5]¹⁹ began to believe she might also be able to leave without having her collateral released” (Id. ¶ 51).

Once again, the Government has concealed from the Court—and from defendants for nine months of this case—the discovery that shows that Jane Doe 5 in fact thought that DOS was a

¹⁹ Jane Doe 5 is referred to as Jane Doe 1 in the Complaint.

[REDACTED] nearly two months after the DOS slave “defected in a public way,” and three weeks after a blog revealed the existence of DOS (Dkt. 116 at 10 n.13), Jane Doe 5 wrote [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

A month later, on [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Accordingly, we submit that the factors do not weigh in favor of the Government, and instead, weigh in favor of Raniere’s release. These are not [REDACTED] of a DOS member who was “psychologically abused.” (Dkt. 222 at 13.)

CONCLUSION

For the reasons set forth above, we ask that the Court release Raniere.

Dated: January 25, 2019
New York, NY

Respectfully submitted,

/s/ _____
Marc Agnifilo
Teny Geragos

cc: The Court and the Government (via ECF and email)

²⁰ We are submitting these redacted on the docket pursuant to the Protective Order entered in this case. Counsel has discussed with the Government that if the Government’s response discloses their own discovery that they have banned the defense from using publicly, we will immediately file a motion to unseal to this Motion.

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September 11, 2018

BY HAND AND ECF

Honorable Nicholas G. Garaufis
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: United States v. Keith Raniere, et al., 18 Cr. 204 (NGG)

Dear Judge Garaufis:

We represent Keith Ranieri in the above-captioned case and write in advance of the status conference on September 13, 2018 to address issues of concern, including: (1) the government's progress in producing discovery and its repeated refusal to schedule a meet and confer with counsel pursuant to this Court's July 26, 2018 Minute Order; (2) the importance of keeping the January 7, 2019 trial date; (3) the government's failure to identify the Jane and John Does in the Superseding Indictment, as well as failing to respond to the Defendants' request for a Bill of Particulars; and (4) the government's failure to respond to a Brady letter raising significant specific issues requiring immediate attention. These issues will be addressed in turn below.

Discovery

To date, very little substantive discovery has been produced to all defendants and since Mr. Raniere and Ms. Mack's arrest, the government has refused to (a) state what discovery exists, or (b) provide a timetable for when it intends to produce the remaining discovery.

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Materials Produced to the Defendants:

On August 3, 2018, the government produced to defendants Raniere, Mack, Bronfman, Nancy Salzman and Lauren Salzman eight discs containing 39 gigabytes of data.¹ (See Exhibit 1: 8/03/18 Discovery Letter.)² The government produced this discovery to Kathy Russell on August 28, 2018. The majority of this discovery had already been produced to Mr. Raniere and Ms. Mack. Therefore, much of this material is not new discovery for defendants Raniere or Mack.

Just last night at 11:07 p.m. on September 10, 2018, the government sent a discovery letter stating that seven categories of documents, emails, and/or videos would be available for the defendants to obtain. (Exhibit 2: 9/10/18 Discovery Letter.)

Materials Not Produced to the Defendants:

At the July 25, 2018 status conference, the government stated it has “approximately 60 electronic devices and/or accounts.” (7/25/18 Transcript at 11.) The prosecutors represented that they “have produced substantial portions of that, but [] have a lot more to go.” (*Id.*) In their August 3rd discovery letter, the government stated they are in possession of two email accounts, two iCloud accounts, a cell phone, a Dropbox account, and electronic devices obtained through the execution of two search warrants. (Ex. 1 at 4-5.) At Ms. Bronfman’s hearing on August 21, 2018, the government stated that they “now have an estimate that is approximately 12 terabytes worth of data.” (8/21/18 Transcript “Tr.” at 39.)

It does not appear that the majority of these 12 terabytes have been produced. Nor has the government identified the nature of the discovery material constituting these terabytes.³ Until last night, the government had not produced any information responsive to the search warrants executed on any of these devices. [REDACTED]

¹ The government has also provided the full return of Mr. Raniere’s Yahoo email account to Mr. Raniere.

² While it is the United States Attorney’s Office for the Eastern District of New York’s practice to file Rule 16 Discovery Letters on the public docket, the government has not done so in this case. For this reason and to not run afoul of the Protective Order signed August 2, 2018 (see Dkt. No. 85: Protective Order), we have redacted the discovery letters cited in the public filing and are providing the Court with unredacted copies.

³ As is true of virtually all warrants for electronically stored information, the warrants obtained in this investigation anticipate a two-step process for executing the warrants – first, the government obtains the entirety of the hard drive or email account within a certain date range from the searched premises or the email provider; then the government must undertake a search to identify items that fall within the scope of the warrant’s terms. Accordingly, the search warrant that the government has produced only authorizes the seizure of items that “constitute evidence, fruits and instrumentalities of the Subject Offenses,” not the seizure of entire accounts and devices. (See, e.g., Ex. B to Search Warrant on Oregon Trail.)

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Therefore, the fact that the government has only just turned over information [REDACTED] is simply unreasonable.

Indeed, it appears that despite seizing a majority of the devices and accounts in March 2018 or even earlier, the government has either not yet searched many of these accounts and devices for items responsive to the warrant, or seeks to avoid producing to the defense the results of any searches performed. In the government's August 3rd letter, it stated that absent an objection from defendants, it would produce "full discovery copies" of electronic devices to all defendants. (*Id.*) Each defendant responded, through counsel, that he or she does not waive his Fourth Amendment rights and does not consent to the government seizing from his or her electronic devices or email accounts and producing to other parties personal and private materials as to which the government did not have a valid warrant authorizing seizure. In other words, material on electronic devices or in email accounts that is not responsive to the warrant may not be seized by the government, and may not be shared with other parties.

In sum, each defendant declined to waive his or her Fourth Amendment right to privacy and insisted that the government follow the law and execute the search warrants and seize from the electronic devices and email accounts only the items which a Court authorized the government to seize.

The Government's Failure to Comply with This Court's Order, Failure to Engage in Discussions with Defense Counsel and Failure to Produce Discovery

On July 26, 2018, this Court ordered the parties to meet and confer regarding discovery. (*See* 7/26/18 Minute Order). On July 26th, Ms. Bronfman's counsel proposed a date for a meet and confer. (Ex. 3: Emails Between Defense Counsel and Government at 3.) The government responded that the first step is to produce discovery and if a meet and confer is necessary, "we'll be available." (*Id.* at 2.) Once all counsel signed the protective order, counsel for Ms. Mack again reached out for a date to meet and confer regarding discovery. (*Id.*) Again, the government responded that "it will be more productive and practical to meet and confer to address issues relating to discovery, should that prove necessary, after some productions of discovery have gone out...." (*Id.* at 1.)

4 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

⁵ The government has designated the [REDACTED] as "Victim Discovery Material," and therefore, we are redacting these sentences in the public filing consistent with our obligations in the Protective Order.

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After the first discovery production, Ms. Bronfman’s counsel sent the government a letter laying out the issues that defense counsel would like to discuss with the government. (Ex. 4: Bronfman 8/07/18 Letter.) Among other things, Ms. Bronfman asked the following questions:

- Please identify the 60 devices and/or accounts that will be produced and where they were seized or obtained from.
- When do you anticipate completing your review for responsive materials for each of the 60 devices and/or accounts?
- What other materials of significant volume outside of the 60 devices/accounts do you anticipate producing and what is the anticipated timetable for production?

(Id. at 2.) Ms. Bronfman and the other defense counsel have not received a response to this letter.

Instead, on August 28, 2018, the government sent a discovery letter to all counsel that thirteen devices seized from 3 Oregon Trail were being made available to all defendants. (See Ex. 5: 8/28/18 Discovery Letter.) Two days later, on August 30, 2018, the government wrote to inform us that “due to an objection by counsel for another defendant, discovery copies of the materials identified in the government’s August 28, 2018 letter to you are being held from production to all defendants” and blaming the delay in producing this discovery on the defendant’s objection. (Ex. 6: 8/30/18 Letter to Defendants at 1.)

Based on the government’s August 30th letter, it thus appears the government has not complied with its legal obligations and executed the search warrants, even though many of the materials were seized more than five months ago and the government has an obligation to execute search warrants of electronic storage devices promptly. As a result of this failure, the government has sought to force the defendants to waive their Fourth Amendment rights and, failing that, has simply not produced discovery to the defendants.

Following this, on September 3, 2018, Ms. Bronfman’s counsel again wrote to the government, noting the government’s failure to produce discovery and requesting once again that the government provide information about what Rule 16 discovery the government will be producing and when. (Ex. 7: Bronfman 9/03/18 Letter.) Specifically, the defense requested answers to the following questions:

- Is any discovery ready to be produced? If so, what does it consist of and what is the size of the production? When will it be produced?
- For which seized materials (from any warrants executed in the course of the investigation) has the government not completed the review process to identify items responsive to search warrants? What is the timetable for finishing that review process? What is the anticipated volume of that data?
- For which seized materials (from any warrants executed in the course of the investigation) is the government undertaking a privilege review process? How long do you anticipate that process will take? What is the anticipated volume of that data?

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(Id. at 2.)

The government did not respond to either of Ms. Bronfman's letters, has not provided answers to these questions. Thus, five months after the arrest of Keith Raniere and Allison Mack, and more than six weeks after the arrest of the other defendants, the government still has not begun to produce the bulk of the discovery in this case.

Trial Date

Next, we write to reiterate that Mr. Raniere has not waived and does not waive his right to a speedy trial and requests that this Court keep the January 7, 2019 trial date. As we have stated previously, Mr. Raniere was forcibly seized in Mexico at the behest of United States authorities in the absence of an international, or provisional, arrest warrant on March 26, 2018. (See Dkt. No. 43, Raniere Motion for Bond at 8.) Since the inception of this case, the government has maintained that Mr. Raniere must be remanded pending a trial and, yet, has employed every basis available to avoid a trial. As the Court will recall, on May 4, 2018, Mr. Raniere requested a trial date of mid-July 2018. (See 5/04/18 Transcript at 14.) Because Ms. Allison Mack had been arrested in advance of the arraignment date, the Court set a trial date of October 1, 2018. So as to avoid the October 1, 2018 trial date, the government superseded the Indictment on July 24, 2018, adding four defendants. Defendant Raniere continued to press the Court for the October 1, 2018 trial date. (See 7/25/18 Transcript at 9.) However, in light of the additional defendants, the Court set a January 7, 2019 trial date. (Id. at 16-17.)

We anticipate the possibility that the government will continue to deny Mr. Raniere a speedy trial while continuing to demand his pretrial incarceration. Therefore, Mr. Raniere requests that the Court keep the January 7, 2019 trial date, and that the government be directed to meet its discovery obligations immediately. At Ms. Bronfman's bail hearing on August 21, 2018, the government stated that "[w]e may be seeking to have the case designated as a complex case officially, given how much data that there is in this case." (8/21/18 Tr. at 41.) As detailed above, the fact that the government has not met their discovery obligations does not make this case complex. It should be noted that the search warrant on 3 Oregon Trail was executed on March 27, 2018 – one day after Mr. Raniere's arrest. The government should have provided this material a long time ago. The fact that the government has failed to promptly fulfill its discovery obligations does not transform an eminently manageable case into a complex one. Moreover, the government cannot now use its neglect as a basis to delay the trial date and keep Mr. Raniere in jail. Mr. Raniere asserts his complete innocence and he desires a trial immediately. Failing that, he asks only that the January 7, 2019 trial date be kept.

In terms of the mechanics of a January 7, 2019 trial date, we offer a proposal. Given the notoriety and length of this trial, we believe that the use of juror questionnaires is appropriate. We also believe that the Court may want to summon between 500 and 700 jurors. Therefore, we humbly propose that on January 7th, the Court orders the jurors and ask them to fill out juror questionnaires that will be agreed-upon ahead of time. We expect that all counsel will need time to go through the completed questionnaires and agree upon strikes for cause. Once that process is completed, the Court can bring the non-struck jurors to court for the continuation of jury selection

BRAFMAN & ASSOCIATES, P.C.

and preemptory challenges. This would cause opening statements to be toward the end of January or early February 2019.

Identity of Jane and John Does

As noted above, the defense has repeatedly asked the government to disclose to all defense counsel the identities of the Jane and John Does named in Counts One through Seven of the Superseding Indictment. On August 14, 2018, counsel served the government with a Bill of Particulars letter on behalf of all defendants, asking for this information, among other things. It is now four weeks since the defendants sent the Bill of Particulars letter and the government has still not provided this information. As the government is obviously aware of these identities, this is a task that should take a few minutes to complete. Yet, the government still has not responded, leaving all counsel to conclude that this refusal to provide the names is another way that the government is seeking to delay the trial date and frustrating the defendants' efforts to prepare for this trial.

Defendants Raniere's and Mack's Specific Brady Demand

On July 18, 2018, prior to the superseding indictment adding defendants Bronfman, Russell, Nancy Salzman and Lauren Salzman, defendants Raniere and Mack provided the government with a specific Brady request in the form of a letter. (See Ex. 8: Brady Letter). We believe that the government has been told by a number of people the government considers "DOS slaves" during proffer sessions with the AUSAs and the FBI agents assigned that no sex trafficking or other illegal conduct took place. These witnesses provided information which contradicts the factual allegations and theory of the prosecution. Defense counsel believes, moreover, that when confronted with these accounts of alleged "DOS slaves" that no illegal conduct took place that the government attempted to "convince" these witnesses to the contrary. The defense is concerned with the propriety of this investigation in light of this information. The defense is moreover concerned that the government has ignored for close to two months a specific Brady letter on July 18, 2018.

Simply put, if the government has been told by someone it believes to be a "DOS slave" that nothing inappropriate happened, contradicts information alleged by any of its witnesses or that any defendant did not act with the requisite mental state required for the commission of the crime, that is the very definition of Brady material, and it must be disclosed immediately. Therefore, in light of the fact that the government has ignored our July 18, 2018 letter, we ask the Court to direct the government to provide an answer to our specific Brady request.

Conclusion

In sum, the government has taken an aggressive position – we believe unreasonably so – in this case. It has caused the forcible seizure of a U.S. citizen in another country in the absence of an arrest warrant justifying that action and it has sought highly restrictive conditions for several peaceable citizens who lack any criminal record and have no history of violence. This is exacerbated by the fact that the government is objectively deficient in timely providing discovery,

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providing Brady disclosures and basic particulars, such as the identities of the John and Jane Does. Rather than moving this case forward toward a trial in a legal and responsible fashion, the government seems far more intent on finding ways to avoid a trial.

We ask that the Court keep the January 7, 2019 trial date and that it order the government to do the things it is required to do in order to make that trial fair and in conformity with the law and the established procedures.

Thank you for your consideration.

Sincerely,



Brafman & Associates, PC

By: Marc Agnifilo
Teny Geragos
Jacob Kaplan

DerOhannesian & DerOhannesian

By: Paul DerOhannesian II
Danielle R. Smith

cc: All Counsel (via ECF and email)

EXHIBIT 1



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

MKP/TH
F. #2017R01840

*271 Cadman Plaza East
Brooklyn, New York 11201*

August 3, 2018

By Email and FedEx

Marc Agnifilo, Esq.
Brafman & Associates
767 Third Avenue
New York, NY 10017

Re: United States v. Keith Raniere, et al.
Criminal Docket No. 18-204 (NGG) (S-1)

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Very truly yours,

RICHARD P. DONOGHUE
United States Attorney

By: /s/ Moira Kim Penza
Moira Kim Penza
Tanya Hajjar
Assistant U.S. Attorneys
(718) 254-7000

Enclosures

EXHIBIT 2



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

MKP/TH
F. #2017R01840

*271 Cadman Plaza East
Brooklyn, New York 11201*

September 10, 2018

By Email

Marc A. Agnifilo
Brafman & Associates
767 Third Avenue
New York, NY 10017

Re: United States v. Raniere, et al.
Criminal Docket No. 18-204 (S-1) (NGG)

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Very truly yours,

RICHARD P. DONOGHUE
United States Attorney

By: /s/ Moira Kim Penza
Moira Kim Penza
Tanya Hajjar
Assistant U.S. Attorneys
(718) 254-7000

EXHIBIT 3

Teny Geragos

From: Kathleen E. Cassidy [REDACTED]
Sent: Tuesday, August 07, 2018 7:42 PM
To: Hajjar, Tanya (USANYE); Penza, Moira Kim (USANYE)
Cc: Marc Agnifilo; Teny Geragos; Sean.Buckley [REDACTED] Susan Necheles; hector.diaz [REDACTED] david; William.McGovern [REDACTED] pau [REDACTED]; David Stern; james.burke [REDACTED]; wp [REDACTED]
Subject: RE: US v. Raniere et al -- meet and confer
Attachments: 2018.08.07 Letter to Govt re M&C and ESI v2.pdf

Moira and Tanya:

Please see the attached correspondence.

Thanks,
Kate

Kate Cassidy
Hafetz & Necheles LLP

From: Hajjar, Tanya (USANYE) <[REDACTED]>
Sent: Thursday, August 02, 2018 10:11 AM
To: David Stern <[REDACTED]>; William.McGovern [REDACTED]
Cc: Penza, Moira Kim (USANYE) <[REDACTED]>; Marc Agnifilo <[REDACTED]>; Kathleen E. Cassidy <[REDACTED]>; Teny Geragos [REDACTED]; Sean.Buckley [REDACTED] Susan Necheles [REDACTED]; hector.diaz [REDACTED] david <[REDACTED]>; pau [REDACTED]
Subject: RE: US v. Raniere et al -- meet and confer

All – As we've said before, we believe it will be more productive and practical to meet and confer to address issues relating to discovery, should that prove necessary, after some productions of discovery have gone out to you. We will be calling some of you individually to discuss issues that may be unique to your clients in coming weeks, and, as always, we welcome specific questions or requests at any time.

Thanks,
Tanya

From: David Stern [REDACTED]
Sent: Thursday, August 2, 2018 8:43 AM
To: [William.McGovern](#) [REDACTED]
Cc: Penza, Moira Kim (USANYE) [REDACTED]; Marc Agnifilo [REDACTED]; Kathleen E. Cassidy [REDACTED]; Hajjar, Tanya (USANYE) [REDACTED]; Teny Geragos [REDACTED]; [Sean.Buckley](#) [REDACTED] Susan Necheles [REDACTED]; [hector.diaz](#) [REDACTED] david [REDACTED]; [pau](#) [REDACTED]
Subject: Re: US v. Raniere et al -- meet and confer

Either is fine for me.

David Stern, Esq.
Rothman, Schneider, Soloway & Stern, LLP

On Aug 1, 2018, at 6:19 PM, "[William](#)" > wrote:

Dear Moira and Tanya:

Now that all counsel have signed the protective order and assuming we receive additional discovery this week we should try to hold a date on the calendar for next week for the meet and confer. Given the number of participants and summer schedules we don't want to risk letting it slip any further into August. We are also cognizant that Judge Garaufis is holding the week of August 20 for us to address any outstanding issues not resolved during the meet and confer.

How about Monday afternoon or Tuesday morning?

Bill

William F. McGovern

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From: Penza, Moira Kim (USANYE) >
Sent: Thursday, July 26, 2018 4:47 PM
To: Marc Agnifilo >; Kathleen E. Cassidy >
Cc: Hajjar, Tanya (USANYE) >; Teny Geragos >; William McGovern >; Sean S. Buckley >; Susan Necheles >; [hector.diaz](#) >; david >
Subject: RE: US v. Raniere et al -- meet and confer

Marc/Kathleen,

Thank you for your emails. The first step is to have the new defendants sign the protective orders, which we will send to them tomorrow. We will begin producing discovery to all defendants next week and if a meet and confer is necessary at some point in the near future we'll be available. In the interim, you are certainly invited to send us a list of information you are seeking to gather.

Best,
Moira

Moira Kim Penza | Assistant United States Attorney
U.S. Attorney's Office, EDNY
271 Cadman Plaza East | Brooklyn, NY 11201

[REDACTED] | [REDACTED]
[REDACTED]

From: Marc Agnifilo [REDACTED]
Sent: Thursday, July 26, 2018 4:42 PM
To: Kathleen E. Cassidy [REDACTED]
Cc: Penza, Moira Kim (USANYE) [REDACTED]; Hajjar, Tanya (USANYE)

[REDACTED]; Teny Geragos [REDACTED]; [REDACTED]
[REDACTED] Susan Necheles [REDACTED]
[REDACTED]

Subject: Re: US v. Raniere et al -- meet and confer

Since we have both out of town lawyers tomorrow in court tomorrow, can we lock in the meet and confer discussed in open court for after our appearances tomorrow. Thanks. Marc

Sent from my iPhone

On Jul 26, 2018, at 10:09 AM, Kathleen E. Cassidy <[REDACTED]> wrote:

Moira and Tanya:

Given that a number of lawyers will be in Court tomorrow morning and that Hector Diaz (Lauren Salzman's counsel) will still be in town from Arizona, would you be available to do the meet and confer on discovery tomorrow after the court appearances are concluded? If so, we will send you a list later today of what information defendants hope to gather from the meet and confer.

Thank you,
Kate

This e-mail message is from Kobre & Kim LLP, a law firm, and may contain legally privileged and/or confidential information. If the reader of this message is not the intended recipient(s), or the employee or agent responsible for delivering the message to the intended recipient(s), you are hereby notified that any dissemination, distribution or copying of this e-mail message is strictly prohibited. If you have received this message in error, please notify the sender immediately and delete this e-mail message and any attachments from your computer without retaining a copy.

[REDACTED] [REDACTED]
[REDACTED] [REDACTED]
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EXHIBIT 4

HAFETZ & NECHELES LLP

ATTORNEYS AT LAW

10 EAST 40TH STREET, 48TH FLOOR
NEW YORK, N.Y. 10016
TELEPHONE: (212) 997-7400
TELECOPIER: (212) 997-7646

August 7, 2018

By Email

Moir Kim Penza
Tanya Hajjar
Assistant United States Attorneys
Eastern District of New York
271 Cadman Plaza East
Brooklyn, NY 11201

Re: *United States v. Clare Bronfman, et al.*, S1 18 Cr. 204 (NGG)

Dear AUSAs Penza and Hajar:

We are in receipt of the discovery you produced by letter dated August 3, 2018, and write on behalf of our client Clare Bronfman to address two issues related to that initial production and letter.

First, we reiterate our request and the requests made by other defense counsel that you meet and confer with defense counsel as soon as possible to address the scope, format, and timing of the anticipated discovery in this case, which we understand will be voluminous. As we discussed at the status conference on July 25, 2018, we believe it would facilitate the efficient production of electronic discovery for all parties to meet to discuss what electronic discovery you anticipate producing, what format it will be produced in, the anticipated size of those productions, and a proposed timetable for production. We note that this procedure, to meet and confer shortly after indictment and at the outset of the discovery process in a case involving “substantial or complex” electronic discovery, was incorporated as one of the guiding principles in the *Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases* (2012) (“ESI Protocol”), jointly issued by the DOJ in collaboration with defender groups and the federal judiciary.¹ ESI Protocol at Principle 3 and Recommendations, p. 2.

¹ *Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases* (2012) (“ESI Protocol”), DEP’T OF JUSTICE AND ADMIN. OFFICE OF THE U.S. COURTS JOINT WORKING GRP. ON ELEC. TECH. IN THE CRIMINAL JUSTICE

HAFETZ & NECHELES LLP

Moreover, the Court ordered the parties to confer on the discovery process and on a schedule for motion practice in advance of the September 13 status conference, and anticipated that the parties would bring any discovery issues requiring earlier Court intervention to the Court's attention the week of August 20th. In order to be able to meet the Court's expectations of when the parties will raise any issues requiring Court intervention, we propose scheduling a date no later than next week for the meet and confer.

The issues we would like to address at the meet and confer include:

- At the status conference on July 25 you stated that there are approximately 60 electronic devices and/or accounts that will be produced to defendants as Rule 16 material. The August 3 discovery letter refers to 7 specific accounts or devices and an unidentified number of electronic devices seized from two search addresses. Please identify the 60 devices and/or accounts that will be produced and where they were seized or obtained from.
- At the status conference on July 25 and in the August 3 discovery letter, you indicated that the review of search warrant materials for responsive materials is ongoing. When do you anticipate completing your review for responsive materials for each of the 60 devices and/or accounts?
- What other materials of significant volume outside of the 60 devices/accounts do you anticipate producing and what is the anticipated timetable for production?

Second, we write to address the statement in your August 3 letter that the government will produce "full discovery copies" (p. 5) of electronic devices and other sources of electronic evidence to all defendants. If this statement means that the government intends to produce all ESI collected pursuant to the first step of a search warrant procedure without conducting the second step of identifying material responsive to the warrants, we object to this procedure with respect to any ESI that belongs to or was obtained from Ms. Bronfman or her accounts. Ms. Bronfman does not consent to the seizure by the government or the production to any co-defendants of any of her private communications or data that were not obtained pursuant to a validly executed search warrant or that have not been deemed responsive to that warrant. It is the government's obligation to expeditiously conduct the search required by the warrant in order to segregate items that may be seized pursuant to the warrant from items that may not, and to return the items that may not. Thus, with respect to any ESI that belongs to Ms. Bronfman or was seized from any account that she was the owner of, we ask that you (1) promptly produce only to Ms. Bronfman the entirety of ESI collected that was obtained from her accounts or

SYS., available at <https://www.fd.org/sites/default/files/Litigation%20Support/final-esi-protocol.pdf> (copy of ESI Protocol attached to this letter).

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devices or that belongs to her (*see* Fed. R. Crim. P. 16(a)(a)(E)(iii)); (2) produce as expeditiously as possible the material that the government deems responsive to the warrant; and (3) return to Ms. Bronfman any ESI that the government identifies as having been collected but that is outside the scope of the warrant. To be clear, Ms. Bronfman does not waive any of her rights under the Fourth Amendment.

We look forward to hearing back from you regarding scheduling a meet and confer.

Sincerely,

/s/

Kathleen E. Cassidy

cc: All defense counsel of record (by email)

Attachment

“Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases”

**Department of Justice (DOJ) and Administrative Office of the U.S. Courts (AO)
Joint Working Group on Electronic Technology in the Criminal Justice System
(JETWG)**

February 2012

Introduction to Recommendations for ESI Discovery in Federal Criminal Cases

Today, most information is created and stored electronically. The advent of electronically stored information (ESI) presents an opportunity for greater efficiency and cost savings for the entire criminal justice system, which is especially important for the representation of indigent defendants. To realize those benefits and to avoid undue cost, disruption and delay, criminal practitioners must educate themselves and employ best practices for managing ESI discovery.

The Joint Electronic Technology Working Group (JETWG) was created to address best practices for the efficient and cost-effective management of post-indictment ESI discovery between the Government and defendants charged in federal criminal cases. JETWG was established in 1998 by the Director of the Administrative Office of the U.S. Courts (AOUSC) and the Attorney General of the United States. It consists of representatives of the Administrative Office of U.S. Courts' (AOUSC) Office of Defender Services (ODS), the Department of Justice (DOJ), Federal Defender Organizations (FDO), private attorneys who accept Criminal Justice Act (CJA) appointments, and liaisons from the United States Judiciary and other AOUSC offices.

JETWG has prepared recommendations for managing ESI discovery in federal criminal cases, which are contained in the following three documents:

1. **Recommendations for ESI Discovery in Federal Criminal Cases.** The Recommendations provide the general framework for managing ESI, including planning, production, transmission, dispute resolution, and security.
2. **Strategies and Commentary on ESI Discovery in Federal Criminal Cases.** The Strategies provide technical and more particularized guidance for implementing the recommendations, including definitions of terms. The Strategies will evolve in light of changing technology and experience.
3. **ESI Discovery Checklist.** A one-page Checklist for addressing ESI production issues.

The Recommendations, Strategies, and Checklist are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case. They are not intended for all cases. The Recommendations, Strategies, and Checklist build upon the following basic principles:

Principle 1: Lawyers have a responsibility to have an adequate understanding of electronic discovery. ([See #4 of the Recommendations.](#))

Principle 2: In the process of planning, producing, and resolving disputes about ESI discovery, the parties should include individuals with sufficient technical knowledge and experience regarding ESI. ([See #4 of the Recommendations.](#))

Principle 3: At the outset of a case, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. Where the ESI discovery is particularly complex or produced on a rolling basis, an on-going dialogue may be helpful. ([See #5 of the Recommendations](#) and [Strategies.](#))

Principle 4: The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should maintain the ESI's

integrity, allow for reasonable usability, reasonably limit costs, and, if possible, conform to industry standards for the format. ([See #6 of the Recommendations](#) and [Strategies.](#))

Principle 5: When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. ([See #6 of the Recommendations](#) and [Strategies.](#))

Principle 6: Following the meet and confer, the parties should notify the court of ESI discovery production issues or problems that they reasonably anticipate will significantly affect the handling of the case. ([See #5\(s\) of the Strategies.](#))

Principle 7: The parties should discuss ESI discovery transmission methods and media that promote efficiency, security, and reduced costs. The producing party should provide a general description and maintain a record of what was transmitted. ([See #7 of the Recommendations](#) and [Strategies.](#))

Principle 8: In multi-defendant cases, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek appointment of a Coordinating Discovery Attorney. ([See #8 of the Recommendations](#) and [Strategies.](#))

Principle 9: The parties should make good faith efforts to discuss and resolve disputes over ESI discovery, involving those with the requisite technical knowledge when necessary, and they should consult with a supervisor, or obtain supervisory authorization, before seeking judicial resolution of an ESI discovery dispute or alleging misconduct, abuse, or neglect concerning the production of ESI. ([See #9 of the Recommendations.](#))

Principle 10: All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access, and they should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure. ([See #10 of the Recommendations.](#))

The Recommendations, Strategies, and Checklist set forth a collaborative approach to ESI discovery involving mutual and interdependent responsibilities. The goal is to benefit all parties by making ESI discovery more efficient, secure, and less costly.

Recommendations for ESI Discovery Production in Federal Criminal Cases

1. Purpose

These Recommendations are intended to promote the efficient and cost-effective post-indictment production of electronically stored information (ESI) in discovery¹ between the Government and defendants charged in federal criminal cases, and to reduce unnecessary conflict and litigation over ESI discovery by encouraging the parties to communicate about ESI discovery issues, by creating a predictable framework for ESI discovery, and by establishing methods for resolving ESI discovery disputes without the need for court intervention.

ESI discovery production involves the balancing of several goals:

- a) the parties must comply with their legal discovery obligations;
- b) the volume of ESI in many cases may make it impossible for counsel to personally review every potentially discoverable item, and, as a consequence, the parties increasingly will employ software tools for discovery review, so ESI discovery should be done in a manner to facilitate electronic search, retrieval, sorting, and management of discovery information;
- c) the parties should look for ways to avoid unnecessary duplication of time and expense for both parties in the handling and use of ESI;
- d) subject to subparagraph (e), below, the producing party should produce its ESI discovery materials in industry standard formats;
- e) the producing party is not obligated to undertake additional processing desired by the receiving party that is not part of the producing party's own case preparation or discovery production²; and
- f) the parties must protect their work product, privileged, and other protected information.

The following Recommendations are a general framework for informed discussions between the parties about ESI discovery issues. The efficient and cost-effective production of ESI discovery materials is enhanced when the parties communicate early and regularly about any ESI discovery issues in their

¹ The Recommendations and Strategies are intended to apply only to disclosure of ESI under Federal Rules of Criminal Procedure 16 and 26.2, *Brady*, *Giglio*, and the Jencks Act, and they do not apply to, nor do they create any rights, privileges, or benefits during, the gathering of ESI as part of the parties' criminal or civil investigations. The legal principles, standards, and practices applicable to the discovery phase of criminal cases serve different purposes than those applicable to criminal and civil investigations.

² One example of the producing party undertaking additional processing for its discovery production is a load file that enables the receiving party to load discovery materials into its software.

case, and when they give the court notice of ESI discovery issues that will significantly affect the handling of the case.

2. Scope: Cases Involving Significant ESI

No single approach to ESI discovery is suited to all cases. These Recommendations are intended for cases where the volume and/or nature of the ESI produced as discovery significantly increases the complexity of the case.³ In simple or routine cases, the parties should provide discovery in the manner they deem most efficient in accordance with the Federal Rules of Criminal Procedure, local rules, and custom and practice within their district.

Due to the evolving role of ESI in criminal cases, these Recommendations and the parties' practices will change with technology and experience. As managing ESI discovery becomes more routine, it is anticipated that the parties will develop standard processes for ESI discovery that become the accepted norm.

3. Limitations

These Recommendations and the accompanying Strategies do not alter the parties' discovery obligations or protections under the U.S. Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, or other federal statutes, case law, or local rules. They may not serve as a basis for allegations of misconduct or claims for relief and they do not create any rights or privileges for any party.

4. Technical Knowledge and Experience

For complex ESI productions, each party should involve individuals with sufficient technical knowledge and experience to understand, communicate about, and plan for the orderly exchange of ESI discovery. Lawyers have a responsibility to have an adequate understanding of electronic discovery.

5. Planning for ESI Discovery Production - The Meet and Confer Process

At the outset of a case involving substantial or complex ESI discovery, the parties should meet and confer about the nature, volume, and mechanics of producing ESI discovery. The parties should determine how to ensure that any "meet and confer" process does not run afoul of speedy trial deadlines. Where the ESI discovery is particularly complex or produced on a rolling basis, an on-going dialogue during the discovery phase may be helpful. In cases where it is authorized, providing ESI discovery to an incarcerated defendant presents challenges that should be discussed early. Also, cases involving classified information will not fit within the Recommendations and Strategies due to the unique legal procedures applicable to those cases. ESI that is contraband (*e.g.*, child pornography) requires special discovery procedures. The [Strategies](#) and [Checklist](#) provide detailed recommendations on planning for ESI discovery.

³ Courts and litigants will continue to seek ways to identify cases deserving special consideration. While the facts and circumstances of cases will vary, some factors may include: (1) a large volume of ESI; (2) unique ESI issues, including native file formats, voluminous third-party records, non-standard and proprietary software formats; and/or (3) multiple defendant cases accompanied by a significant volume of ESI.

6. Production of ESI Discovery

Production of ESI discovery involves varied considerations depending upon the ESI's source, nature, and format. Unlike certain civil cases, in criminal cases the parties generally are not the original custodian or source of the ESI they produce in discovery. The ESI gathered by the parties during their investigations may be affected or limited by many factors, including the original custodian's or source's information technology systems, data management practices, and resources; the party's understanding of the case at the time of collection; and other factors. Likewise, the electronic formats used by the parties for producing ESI discovery may be affected or limited by several factors, including the source of the ESI; the format(s) in which the ESI was originally obtained; and the party's legal discovery obligations, which may vary with the nature of the material. The Strategies and Checklist provide detailed recommendations on production of ESI discovery.

General recommendations for the production of ESI discovery are:

- a. The parties should discuss what formats of production are possible and appropriate, and what formats can be generated. Any format selected for producing discovery should, if possible, conform to industry standards for the format.⁴
- b. ESI received from third parties should be produced in the format(s) it was received or in a reasonably usable format(s). ESI from the government's or defendant's business records should be produced in the format(s) in which it was maintained or in a reasonably usable format(s).
- c. Discoverable ESI generated by the government or defense during the course of their investigations (*e.g.*, investigative reports, witness interviews, demonstrative exhibits, etc.) may be handled differently than in 6(a) and (b) above because the parties' legal discovery obligations and practices vary according to the nature of the material, the applicable law, evolving legal standards, the parties' policies, and the parties' evolving technological capabilities.
- d. When producing ESI discovery, a party should not be required to take on substantial additional processing or format conversion costs and burdens beyond what the party has already done or would do for its own case preparation or discovery production. For example, the producing party need not convert ESI from one format to another or undertake additional processing of ESI beyond what is required to satisfy its legal disclosure obligations. If the receiving party desires ESI in a condition different from what the producing party intends to produce, the parties should discuss what is reasonable in terms of expense and mechanics, who will bear the burden of any additional cost or work, and how to protect the producing party's work product or privileged information. Nonetheless, with the understanding that in certain instances the results of processing ESI may constitute work product not subject to discovery, these

⁴ An example of "format of production" might be TIFF images, OCR text files, and load files created for a specific software application. Another "format of production" would be native file production, which would accommodate files with unique issues, such as spreadsheets with formulas and databases. ESI in a particular case might warrant more than one format of production depending upon the nature of the ESI.

recommendations operate on the general principle that where a producing party elects to engage in processing of ESI, the results of that processing should, unless they constitute work product, be produced in discovery along with the underlying ESI so as to save the receiving party the expense of replicating the work.

7. Transmitting ESI Discovery

The parties should discuss transmission methods and media that promote efficiency, security, and reduce costs. In conjunction with ESI transmission, the producing party should provide a general description and maintain a record of what was transmitted. Any media should be clearly labeled. The Strategies and Checklist contain detailed recommendations on transmission of ESI discovery, including the potential use of email to transmit ESI.

8. Coordinating Discovery Attorney

In cases involving multiple defendants, the defendants should authorize one or more counsel to act as the discovery coordinator(s) or seek the appointment of a Coordinating Discovery Attorney⁵ and authorize that person to accept, on behalf of all defense counsel, the ESI discovery produced by the government. Generally, the format of production should be the same for all defendants, but the parties should be sensitive to different needs and interests in multiple defendant cases.

9. Informal Resolution of ESI Discovery Matters

- a. Before filing any motion addressing an ESI discovery issue, the moving party should confer with opposing counsel in a good-faith effort to resolve the dispute. If resolution of the dispute requires technical knowledge, the parties should involve individuals with sufficient knowledge to understand the technical issues, clearly communicate the problem(s) leading to the dispute, and either implement a proposed resolution or explain why a proposed resolution will not solve the dispute.
- b. The Discovery Coordinator within each U.S. Attorney's Office should be consulted in cases presenting substantial issues or disputes.

⁵ Coordinating Discovery Attorneys (CDA) are AOUSC contracted attorneys who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple defendant cases. The CDAs may be appointed by the court to provide in-depth and significant hands-on assistance to CJA panel attorneys and FDO staff in selected multiple-defendant cases that require technology and document management assistance. They can serve as a primary point of contact for the U.S. Attorneys Office to discuss ESI production issues for all defendants, resulting in lower overall case costs for the parties. If a panel attorney or FDO is interested in utilizing the services of the CDA, they should contact the National Litigation Support Administrator or Assistant National Litigation Support Administrator for the Office of Defender Services at 510-637-3500.

- c. To avoid unnecessary litigation, prosecutors and Federal Defender Offices⁶ should institute procedures that require line prosecutors and defenders (1) to consult with a supervisory attorney before filing a motion seeking judicial resolution of an ESI discovery dispute, and (2) to obtain authorization from a supervisory attorney before suggesting in a pleading that opposing counsel has engaged in any misconduct, abuse, or neglect concerning production of ESI.
- d. Any motion addressing a discovery dispute concerning ESI production should include a statement of counsel for the moving party relating that after consultation with the attorney for the opposing party the parties have been unable to resolve the dispute without court action.

10. Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure

Criminal case discovery entails certain responsibilities for all parties in the careful handling of a variety of sensitive information, for example, grand jury material, the defendant's records, witness identifying information, information about informants, information subject to court protective orders, confidential personal or business information, and privileged information. With ESI discovery, those responsibilities are increased because ESI is easily reproduced and disseminated, and unauthorized access or disclosure could, in certain circumstances, endanger witness safety; adversely affect national security or homeland security; leak information to adverse parties in civil suits; compromise privacy, trade secrets, or classified, tax return, or proprietary information; or prejudice the fair administration of justice. The parties' willingness to produce early, accessible, and usable ESI discovery will be enhanced by safeguards that protect sensitive information from unauthorized access or disclosure.

All parties should limit dissemination of ESI discovery to members of their litigation team who need and are approved for access. They should also take reasonable and appropriate measures to secure ESI discovery against unauthorized access or disclosure.

During the initial meet and confer and before ESI discovery is produced, the parties should discuss whether there is confidential, private or sensitive information in any ESI discovery they will be providing. If such information will be disclosed, then the parties should discuss how the recipients will prevent unauthorized access to, or disclosure of, that ESI discovery, and, absent agreement on appropriate security, the producing party should seek a protective order from the court addressing management of the particular ESI at issue. The producing party has the burden to raise the issue anew if it has concerns about any ESI discovery it will provide in subsequent productions. The parties may choose to have standing agreements so that their practices for managing ESI discovery are not discussed in each case. The Strategies contains additional guidance in sections 5(f), 5(p), and 7(e).

⁶ For private attorneys appointed under the Criminal Justice Act (CJA), this subsection (c) is not applicable.

Strategies and Commentary on ESI Discovery in Federal Criminal Cases

1. Purpose

This commentary contains strategies for implementing the ESI discovery Recommendations and specific technical guidance. Over time it will be modified in light of experience and changing technology. Definitions of common ESI terms are provided in paragraph 11, below.

2. Scope of ESI Gathered

In order to promote efficiency and avoid unnecessary costs, when gathering ESI the parties should take into consideration the nature, volume, and mechanics of managing ESI.

3. Limitations

Nothing contained herein creates any rights or privileges for any party.

4. Technical Knowledge and Experience

No additional commentary.

5. Planning for ESI Discovery Production - The Meet and Confer Process

To promote efficient ESI discovery, the parties may find it useful to discuss the following:

- a. **ESI discovery produced.** The parties should discuss the ESI being produced according to the following general categories:
 - i. **Investigative materials** (investigative reports, surveillance records, criminal histories, etc.)
 - ii. **Witness statements** (interview reports, transcripts of prior testimony, Jencks statements, etc.)
 - iii. **Documentation of tangible objects** (*e.g.*, records of seized items or forensic samples, search warrant returns, etc.)
 - iv. **Third parties' ESI digital devices** (computers, phones, hard drives, thumb drives, CDs, DVDs, cloud computing, etc., including forensic images)
 - v. **Photographs and video/audio recordings** (crime scene photos; photos of contraband, guns, money; surveillance recordings; surreptitious monitoring recordings; etc.)
 - vi. **Third party records and materials** (including those seized, subpoenaed, and voluntarily disclosed)

- vii. **Title III wire tap information** (audio recordings, transcripts, line sheets, call reports, court documents, etc.)
 - viii. **Court records** (affidavits, applications, and related documentation for search and arrest warrants, etc.)
 - ix. **Tests and examinations**
 - x. **Experts** (reports and related information)
 - xi. **Immunity agreements, plea agreements, and similar materials**
 - xii. **Discovery materials with special production considerations** (such as child pornography; trade secrets; tax return information; etc.)
 - xiii. **Related matters** (state or local investigative materials, parallel proceedings materials, etc.)
 - xiv. **Discovery materials available for inspection but not produced digitally**
 - xv. **Other information**
- b. **Table of contents.** If the producing party has not created a table of contents prior to commencing ESI discovery production, it should consider creating one describing the general categories of information available as ESI discovery. In complex discovery cases, a table of contents to the available discovery materials can help expedite the opposing party's review of discovery, promote early settlement, and avoid discovery disputes, unnecessary expense, and undue delay.¹ Because no single table of contents is appropriate for every case, the producing party may devise a table of contents that is suited to the materials it provides in discovery, its resources, and other considerations.²
- c. **Forms of production.** The producing party should consider how discoverable materials were provided to it or maintained by the source (*e.g.*, paper or electronic), whether it has converted any materials to a digital format that can be used by the opposing party without disclosing the producing party's work product, and how those factors may affect the production of discovery materials in electronic formats. For particularized guidance *see* paragraph 6, below. The parties should be flexible in their application of the concept

¹ *See, e.g., U.S. v. Skilling*, 554 F.3d 529, 577 (5th Cir. 2009) (no *Brady* violation where government disclosed several hundred million page database with searchable files and produced set of hot documents and indices).

² A table of contents is intended to be a general, high-level guide to the categories of ESI discovery. Because a table of contents may not be detailed, complete, or free of errors, the parties still have the responsibility to review the ESI discovery produced. With ESI, particular content usually can be located using available electronic search tools. There are many ways to construct a general table of contents. For example, a table of contents could be a folder structure as set forth above in paragraph 2(a)(i-xv), where like items are placed into folders.

of “maintained by the source.” The goals are to retain the ESI’s integrity, to allow for reasonable usability, and to reasonably limit costs.³

- d. **Proprietary or legacy data.** Special consideration should be given to data stored in proprietary or legacy systems, for example, video surveillance recordings in an uncommon format, proprietary databases, or software that is no longer supported by the vendor. The parties should discuss whether a suitable generic output format or report is available. If a generic output is not available, the parties should discuss the specific requirements necessary to access the data in its original format.
- e. **Attorney-client, work product, and protected information issues.**⁴ The parties should discuss whether there is privileged, work product, or other protected information in third-party ESI or their own discoverable ESI and proposed methods and procedures for segregating such information and resolving any disputes.⁵
- f. **Confidential and personal information.** The parties should identify and discuss the types of confidential or personal information present in the ESI discovery, appropriate security for that information, and the need for any protective orders or redactions. *See also*, section 5(p) below.
- g. **Incarcerated defendant.** If the defendant is incarcerated and the court or correctional institution has authorized discovery access in the custodial setting, the parties should consider what institutional requirements or limitations may affect the defendant’s access to ESI discovery, such as limitations on hardware or software use.⁶
- h. **ESI discovery volume.** To assist in estimating the receiving party’s discovery costs and to the extent that the producing party knows the volume of discovery materials it intends to produce immediately or in the future, the producing party may provide such information if such disclosure would not compromise the producing party’s interests.

³ For example, when the producing party processes ESI to apply Bates numbers, load it into litigation software, create TIFF images, etc., the ESI is slightly modified and no longer in its original state. Similarly, some modification of the ESI may be necessary and proper in order to allow the parties to protect privileged information, and the processing and production of ESI in certain formats may result in the loss or alteration of some metadata that is not significant in the circumstances of the particular case.

⁴ Attorney-client and work product (*see, e.g.*, F.R.Crim.P. 16(a)(2) and (b)(2)) issues arising from the parties’ own case preparation are beyond the scope of these Recommendations, and they need not be part of the meet and confer discussion.

⁵ If third party records are subject to an agreement or court order involving a selective waiver of attorney-client or work product privileges (*see* F.R.E. 502), then the parties should discuss how to handle those materials.

⁶ Because pretrial detainees often are held in local jails (for space, protective custody, cost, or other reasons) that have varying resources and security needs, there are no uniform practices or rules for pretrial detainees’ access to ESI discovery. Resolution of the issues associated with such access is beyond the scope of the Recommendations and Strategies.

Examples of volume include the number of pages of electronic images of paper-based discovery, the volume (*e.g.*, gigabytes) of ESI, the number and aggregate length of any audio or video recordings, and the number and volume of digital devices. Disclosures concerning expected volume are not intended to be so detailed as to require a party to disclose what they intend to produce as discovery before they have a legal obligation to produce the particular discovery material (*e.g.*, Jencks material). Similarly, the parties' estimates are not binding and may not serve as the basis for allegations of misconduct or claims for relief.

- i. **Naming conventions and logistics.** The parties should, from the outset of a case, employ naming conventions that would make the production of discovery more efficient. For example, in a Title III wire tap case generally it is preferable that the naming conventions for the audio files, the monitoring logs, and the call transcripts be consistent so that it is easy to cross-reference the audio calls with the corresponding monitoring logs and transcripts. If at the outset of discovery production a naming convention has not yet been established, the parties should discuss a naming convention before the discovery is produced. The parties should discuss logistics and the sharing of costs or tasks that will enhance ESI production.
- j. **Paper materials.** For options and particularized guidance on paper materials see paragraphs 6(a) and(e), below.
- k. **Any software and hardware limitations.** As technology continues to evolve, the parties may have software and hardware constraints on how they can review ESI. Any limitations should be addressed during the meet and confer.
- l. **ESI from seized or searched third-party ESI digital devices.** When a party produces ESI from a seized or searched third-party digital device (*e.g.*, computer, cell phone, hard drive, thumb drive, CD, DVD, cloud computing, or file share), the producing party should identify the digital device that held the ESI, and, to the extent that the producing party already knows, provide some indication of the device's probable owner or custodian and the location where the device was seized or searched. Where the producing party only has limited authority to search the digital device (*e.g.*, limits set by a search warrant's terms), the parties should discuss the need for protective orders or other mechanisms to regulate the receiving party's access to or inspection of the device.
- m. **Inspection of hard drives and/or forensic (mirror) images.** Any forensic examination of a hard drive, whether it is an examination of a hard drive itself or an examination of a forensic image of a hard drive, requires specialized software and expertise. A simple copy of the forensic image may not be sufficient to access the information stored, as specialized software may be needed. The parties should consider how to manage inspection of a hard drive and/or production of a forensic image of a hard drive and what software and expertise will be needed to access the information.
- n. **Metadata in third party ESI.** If a producing party has already extracted metadata from third party ESI, the parties should discuss whether the producing party should produce the extracted metadata together with an industry-standard load file, or, alternatively,

produce the files as received by the producing party from the third party.⁷ Neither party need undertake additional processing beyond its own case preparation, and both parties are entitled to protect their work product and privileged or other protected information. Because the term “metadata” can encompass different categories of information, the parties should clearly describe what categories of metadata are being discussed, what the producing party has agreed to produce, and any known problems or gaps in the metadata received from third parties.

- o. **A reasonable schedule for producing and reviewing ESI.** Because ESI involves complex technical issues, two stages should be addressed. First, the producing party should transmit its ESI in sufficient time to permit reasonable management and review. Second, the receiving party should be pro-active about testing the accessibility of the ESI production when it is received. Thus, a schedule should include a date for the receiving party to notify the producing party of any production issues or problems that are impeding use of the ESI discovery.
- p. **ESI security.** During the first meet and confer, the parties should discuss ESI discovery security and, if necessary, the need for protective orders to prevent unauthorized access to or disclosure of ESI discovery that any party intends to share with team members via the internet or similar system, including:
 - i. what discovery material will be produced that is confidential, private, or sensitive, including, but not limited to, grand jury material, witness identifying information, information about informants, a defendant’s or co-defendant’s personal or business information, information subject to court protective orders, confidential personal or business information, or privileged information;
 - ii. whether encryption or other security measures during transmission of ESI discovery are warranted;⁸
 - iii. what steps will be taken to ensure that only authorized persons have access to the electronically stored or disseminated discovery materials;
 - iv. what steps will be taken to ensure the security of any website or other electronic repository against unauthorized access;
 - v. what steps will be taken at the conclusion of the case to remove discovery materials from the a website or similar repository; and
 - vi. what steps will be taken at the conclusion of the case to remove or return ESI discovery materials from the recipient’s information system(s), or to securely archive them to prevent unauthorized access.

⁷ The producing party is, of course, limited to what it received from the third party. The third party’s processing of the information can affect or limit what metadata is available.

⁸ The parties should consult their litigation support personnel concerning encryption or other security options.

Note: Because all parties want to ensure that ESI discovery is secure, the Department of Justice, Federal Defender Offices, and CJA counsel are compiling an evolving list of security concerns and recommended best practices for appropriately securing discovery. Prosecutors and defense counsel with security concerns should direct inquiries to their respective ESI liaisons⁹ who, in turn, will work with their counterparts to develop best practice guidance.

- q. **Other issues.** The parties should address other issues they can anticipate, such as protective orders, “claw-back” agreements¹⁰ between the government and criminal defendant(s), or any issues related to the preservation or collection of ESI discovery.
- r. **Memorializing agreements.** The parties should memorialize any agreements reached to help forestall later disputes.
- s. **Notice to court.**
 - i. *Preparing for the meet and confer:* A defendant who anticipates the need for technical assistance to conduct the meet and confer should give the court adequate advance notice if it will be filing an *ex parte* funds request for technical assistance.
 - ii. *Following the meet and confer:* The parties should notify the court of ESI discovery production issues or problems that they anticipate will significantly affect when ESI discovery will be produced to the receiving party, when the receiving party will complete its accessibility assessment of the ESI discovery received,¹¹ whether the receiving party will need to make a request for supplemental funds to manage ESI discovery, or the scheduling of pretrial motions or trial.

6. Production of ESI Discovery

- a. **Paper Materials.** Materials received in paper form may be produced in that form,¹² made available for inspection, or, if they have already been converted to digital format,

⁹ Federal Defender Organizations and CJA panel attorneys should contact Sean Broderick (National Litigation Support Administrator) or Kelly Scribner (Assistant National Litigation Support Administrator) at 510-637-3500, or by email: sean_broderick@fd.org, kelly_scribner@fd.org. Prosecutors should contact Andrew Goldsmith (National Criminal Discovery Coordinator) at Andrew.Goldsmith@usdoj.gov or John Haried (Assistant National Criminal Discovery Coordinator) at John.Haried@usdoj.gov.

¹⁰ A “claw back” agreement outlines procedures to be followed to protect against waiver of privilege or work product protection due to inadvertent production of documents or data.

¹¹ See paragraph 5(o) of the Strategies, above.

¹² The decision whether to scan paper documents requires striking a balance between resources (including personnel and cost) and efficiency. The parties should make that determination on a case-by-case basis.

produced as electronic files that can be viewed and searched. Methods are described below in paragraph 6(b).

b. **Electronic production of paper documents.** Three possible methodologies:

- i. *Single-page TIFFs.* Production in TIFF and OCR format consists of the following three elements:
 - (1) Paper documents are scanned to a picture or image that produces one file per page. Documents should be unitized. Each electronic image should be stamped with a unique page label or Bates number.
 - (2) Text from that original document is generated by OCR and stored in separate text files without formatting in a generic format using the same file naming convention and organization as image file.
 - (3) Load files that tie together the images and text.
- ii. *Multi-page TIFFS.* Production in TIFF and OCR format consists of the following two elements:
 - (1) Paper documents are scanned to a picture or image that produces one file per document. Each file may have multiple pages. Each page of the electronic image should be stamped with a unique page label or Bates number.
 - (2) Text from that original document is generated by OCR and stored in separate text files without formatting in a generic format using the same file naming convention and organization as the image file.
- iii. *PDF.* Production in multi-page, searchable PDF format consists of the following one element:
 - (1) Paper documents scanned to a PDF file with text generated by OCR included in the same file. This produces one file per document. Documents should be unitized. Each page of the PDF should be stamped with a unique Bates number.
- iv. *Note re: color documents.* Paper documents should not be scanned in color unless the color content of an individual document is particularly significant to the case.¹³

c. **ESI production.** Three possible methodologies:

¹³ Color scanning substantially slows the scanning process and creates huge electronic files which consume storage space, making the storage and transmission of information difficult. An original signature, handwritten marginalia in blue or red ink, and colored text highlights are examples of color content that may be particularly significant to the case.

- i. *Native files as received.* Production in a native file format without any processing consists of a copy of ESI files in the same condition as they were received.
- ii. *ESI converted to electronic image.* Production of ESI in a TIFF or PDF and extracted text format consists of the following four elements:
 - (1) Electronic documents converted from their native format into a picture / image. The electronic image files should be computer generated, as opposed to printed and then imaged. Each electronic image should be stamped with a unique Bates number.
 - (2) Text from that original document is extracted or pulled out and stored without formatting in a generic format.
 - (3) Metadata (*i.e.*, information about that electronic document), depending upon the type of file converted and the tools or methodology used, that has been extracted and stored in an industry standard format. The metadata must include information about structural relationships between documents, *e.g.*, parent-child relationships.
 - (4) Load files that tie together the images, text, and metadata.
- iii. *Native files with metadata.* Production of ESI in a processed native file format consists of the following four elements:
 - (1) The native files.
 - (2) Text from that original document is extracted or pulled out and stored without formatting in a generic format.
 - (3) Metadata (*i.e.*, information about that electronic document), depending upon the type of file converted and the tools or methodology used, that has been extracted and stored in an industry standard format. The metadata must include information about structural relationships between documents, *e.g.*, parent-child relationships.
 - (4) Load files that tie together the native file, text, and metadata.
- d. **Forensic images of digital media.** Forensic images of digital media should be produced in an industry-standard forensic format, accompanied by notice of the format used.
- e. **Printing ESI to paper.** The producing party should not print ESI (including TIFF images or PDF files) to paper as a substitute for production of the ESI unless agreed to by the parties.
- f. **Preservation of ESI materials received from third parties.** A party receiving potentially discoverable ESI from a third party should, to the extent practicable, retain a copy of the

ESI as it was originally produced in case it is subsequently needed to perform quality control or verification of what was produced.

- g. **Production of ESI from third parties.** ESI from third parties may have been received in a variety of formats, for example, in its original format (native, such as Excel or Word), as an image (TIFF or PDF), as an image with searchable text (TIFF or PDF with OCR text), or as a combination of any of these. The third party's format can affect or limit the available options for production as well as what associated information (metadata) might be available. ESI received from third parties should be produced in the format(s) it was received or in a reasonably usable format(s). ESI received from a party's own business records should be produced in the format(s) in which it was maintained or in a reasonably usable form(s). The parties should explore what formats of production¹⁴ are possible and appropriate, and discuss what formats can be generated. Any format selected for producing discovery should, if possible and appropriate, conform to industry standards for the format.
- h. **ESI generated by the government or defense.** Paragraphs 6(f) and 6(g) do not apply to discoverable materials generated by the government or defense during the course of their investigations (*e.g.*, demonstrative exhibits, investigative reports and witness interviews - *see* subparagraph i, below, etc.) because the parties' legal discovery obligations and practices vary according to the nature of the material, the applicable law, evolving legal standards, and the parties' evolving technological capabilities. Thus, such materials may be produced differently from third party ESI. However, to the extent practicable, this material should be produced in a searchable and reasonably usable format. Parties should consult with their investigators in advance of preparing discovery to ascertain the investigators' ESI capabilities and limitations.
- i. **Investigative reports and witness interviews.** Investigative reports and witness interviews may be produced in paper form if they were received in paper form or if the final version is in paper form. Alternatively, they may be produced as electronic images (TIFF images or PDF files), particularly when needed to accommodate any necessary redactions. Absent particular issues such as redactions or substantial costs or burdens of additional processing, electronic versions of investigative reports and witness interviews should be produced in a searchable text format (such as ASCII text, OCR text, or plain text (.txt)) in order to avoid the expense of reprocessing the files. To the extent possible, the electronic image files of investigative reports and witness interviews should be computer-generated (as opposed to printed to paper and then imaged) in order to produce a higher-quality searchable text which will enable the files to be more easily searched and cost-effectively utilized.¹⁵

¹⁴ An example of "format of production" might be TIFF images, OCR text files, and load files created for a specific software application. Another "format of production" would be native file production, which would accommodate files with unique issues, such as spreadsheets with formulas and databases.

¹⁵ For guidance on making computer generated version of investigative reports and witness interview reports, *see* the description of production of TIFF, PDF, and extracted text format in paragraphs 6(b)(ii)(1) and (ii).

- j. **Redactions.** ESI and/or images produced should identify the extent of redacted material and its location within the document.
- k. **Photographs and video and audio recordings.** A party producing photographs or video or audio recordings that either were originally created using digital devices or have previously been digitized should disclose the digital copies of the images or recordings if they are in the producing party's possession, custody or control. When technically feasible and cost-efficient, photographs and video and audio recordings that are not already in a digital format should be digitized into an industry standard format if and when they are duplicated. The producing party is not required to convert materials obtained in analog format to digital format for discovery.
- l. **Test runs.** Before producing ESI discovery a party should consider providing samples of the production format for a test run, and once a format is agreed upon, produce all ESI discovery in that format.
- m. **Access to originals.** If the producing party has converted paper materials to digital files, converted materials with color content to black and white images, or processed audio, video, or other materials for investigation or discovery, it should provide reasonable access to the originals for inspection and/or reprocessing.

7. Transmitting ESI Discovery

- a. ESI discovery should be transmitted on electronic media of sufficient size to hold the entire production, for example, a CD, DVD, or thumb drive.¹⁶ If the size of the production warrants a large capacity hard drive, then the producing party may require the receiving party to bear the cost of the hard drive and to satisfy requirements for the hard drive that are necessary to protect the producing party's IT system from viruses or other harm.
- b. The media should be clearly labeled with the case name and number, the producing party, a unique identifier for the media, and a production date.
- c. A cover letter should accompany each transmission of ESI discovery providing basic information including the number of media, the unique identifiers of the media, a brief description of the contents including a table of contents if created, any applicable bates ranges or other unique production identifiers, and any necessary passwords to access the content. Passwords should not be in the cover letter accompanying the data, but in a separate communication.
- d. The producing party should retain a write-protected copy of all transmitted ESI as a preserved record to resolve any subsequent disputes.
- e. **Email Transmission.** When considering transmission of ESI discovery by email, the parties' obligation varies according to the sensitivity of the material, the risk of harm

¹⁶ Rolling productions may, of course, use multiple media. The producing party should avoid using multiple media when a single media will facilitate the receiving party's use of the material.

from unauthorized disclosure, and the relative security of email versus alternative transmission. The parties should consider three categories of security:

- i. Not appropriate for email transmission: Certain categories of ESI discovery are never appropriate for email transmission, including, but not limited to, certain grand jury materials; materials affecting witness safety; materials containing classified, national security, homeland security, tax return, or trade secret information; or similar items.
- ii. Encrypted email transmission: Certain categories of ESI discovery warrant encryption or other secure transmission due to their sensitive nature. The parties should discuss and identify those categories in their case. This would ordinarily include, but not be limited to, information about informants, confidential business or personal information, and information subject to court protective orders.
- iii. Unencrypted email transmission: Other categories of ESI discovery not addressed above may be appropriate for email transmission, but the parties always need to be mindful of their ethical obligations.¹⁷

8. Coordinating Discovery Attorney

Coordinating Discovery Attorneys (CDA) are AOUSC contracted attorneys who have technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple defendant cases. The CDAs may be appointed by the court to provide additional in-depth and significant hands-on assistance to CJA panel attorneys and FDO staff in selected multiple-defendant cases that require technology and document management assistance. They can serve as a primary point of contact for the US Attorneys Office to discuss ESI production issues for all defendants, resulting in lower overall case costs for the parties. If you have any questions regarding the services of a CDA, please contact either Sean Broderick (National Litigation Support Administrator) or Kelly Scribner (Assistant National Litigation Support Administrator) at 510-637-3500, or by email: sean_broderick@fd.org, kelly_scribner@fd.org.

9. Informal Resolution of ESI Discovery Matters

No additional commentary.

10. Security: Protecting Sensitive ESI Discovery from Unauthorized Access or Disclosure

See sections 5(f) - Confidential and personal information, 5(p) - ESI security, and 7(e) - Email Transmission of the Strategies for additional guidance.

¹⁷ Illustrative of the security issues in the attorney-client context are ABA Op. 11-459 (Duty to Protect the Confidentiality of E-mail Communications with One's Client) and ABA Op. 99-413 (Protecting the Confidentiality of Unencrypted E-Mail).

11. Definitions

To clearly communicate about ESI, it is important that the parties use ESI terms in the same way. Below are common ESI terms used when discussing ESI discovery:

- a. **Cloud computing.** With cloud computing, the user accesses a remote computer hosted by a cloud service provider over the Internet or an intranet to access software programs or create, save, or retrieve data, for example, to send messages or create documents, spreadsheets, or databases. Examples of cloud computing include Gmail, Hotmail, Yahoo! Mail, Facebook, and on-line banking.
- b. **Coordinating Discovery Attorney (CDA).** An AOUSC contracted attorney who has technological knowledge and experience, resources, and staff to effectively manage complex ESI in multiple-defendant cases, and who may be appointed by a court in selected multiple-defendant cases to assist CJA panel attorneys and/or FDO staff with discovery management.
- c. **Document unitization.** Document unitization is the process of determining where a document begins (its first page) and ends (its last page), with the goal of accurately describing what was a “unit” as it was received by the party or was kept in the ordinary course of business by the document’s custodian. A “unit” includes attachments, for example, an email with an attached spreadsheet. Physical unitization utilizes actual objects such as staples, paper clips and folders to determine pages that belong together as documents. Logical unitization is the process of human review of each individual page in an image collection using logical cues to determine pages that belong together as documents. Such cues can be consecutive page numbering, report titles, similar headers and footers, and other logical cues.
- d. **ESI (Electronically Stored Information).** Any information created, stored, or utilized with digital technology. Examples include, but are not limited to, word-processing files, e-mail and text messages (including attachments); voicemail; information accessed via the Internet, including social networking sites; information stored on cell phones; information stored on computers, computer systems, thumb drives, flash drives, CDs, tapes, and other digital media.
- e. **Extracted text.** The text of a native file extracted during ESI processing of the native file, most commonly when native files are converted to TIFF format. Extracted text is more accurate than text created by the OCR processing of document images that were created by scanning and will therefore provide higher quality search results.
- f. **Forensic image (mirror image) of a hard drive or other storage device.** A process that preserves the entire contents of a hard drive or other storage device by creating a bit-by-bit copy of the original data without altering the original media. A forensic examination or analysis of an imaged hard drive requires specialized software and expertise to both create and read the image. User created files, such as email and other electronic documents, can be extracted, and a more complete analysis of the hard drive can be performed to find deleted files and/or access information. A forensic or mirror image is not a physical duplicate of the original drive or device; instead it is a file or set of files that contains all of the data bits from the source device. Thus a forensic or mirror

image cannot simply be opened and viewed as if you were looking at the original device. Indeed, forensic or mirror images of multiple hard drives or other storage devices can be stored on a single recipient hard drive of sufficient capacity.

- g. **Image of a document or document image.** An electronic "picture" of how the document would look if printed. Images can be stored in various file formats, the most common of which are TIFF and PDF. Document images, such as TIFF and PDF, can be created directly from native files, or created by scanning hard copy.
- h. **Load file.** A cross reference file used to import images or data into databases. A data load file may contain Bates numbers, metadata, path to native files, coded data, and extracted or OCR text. An image load file may contain document boundary, image type and path information. Load files must be obtained and provided in software-specific formats to ensure they can be used by the receiving party.
- i. **Metadata.** Data that describes characteristics of ESI, for example, the author, date created, and date last accessed of a word processing document. Metadata is generally not reproduced in full form when a document is printed to paper or electronic image. Metadata can describe how, when and by whom ESI was created, accessed, modified, formatted, or collected. Metadata can be supplied by applications, users or the file system, and it can be altered intentionally or inadvertently. Certain metadata can be extracted when native files are processed for litigation. Metadata is found in different places and in different forms. Some metadata, such as file dates and sizes, can easily be accessed by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Note that some metadata may be lost or changed when an electronic copy of a file is made using ordinary file copy methods.
- j. **Native file.** A file as it was created in its native software, for example a Word, Excel, or PowerPoint file, or an email in Outlook or Lotus Notes.
- k. **OCR (Optical Character Recognition).** A process that converts a picture of text into searchable text. The quality of the created text can vary greatly depending on the quality of the original document, the quality of the scanned image, the accuracy of the recognition software and the quality control process of the provider. Generally speaking, OCR does not handle handwritten text or text in graphics well. OCR conversion rates can range from 50 to 98% accuracy depending on the underlying document. A full page of text is estimated to contain 2,000 characters, so OCR software with even 90% accuracy would create a page of text with approximately 200 errors.
- l. **Parent - child relationships.** Related documents are described as having a parent/child relationship, for example, where the email is the parent and an attached spreadsheet is the child.
- m. **PDF.** "Portable Document Format." A file format created by Adobe that allows a range of options, including electronic transmission, viewing, and searching.
- n. **TIFF.** "Tagged Image File Format." An industry-standard file format for storing scanned and other digital black-and-white, grey-scale, and full-color images.

ESI Discovery Production Checklist

- ☐ Is this a case where the volume or nature of ESI significantly increases the case's complexity?
- ☐ Does this case involve classified information?
- ☐ Does this case involve trade secrets, or national security or homeland security information?
- ☐ Do the parties have appropriate technical advisors to assist?
- ☐ Have the parties met and conferred about ESI issues?
- ☐ Have the parties addressed the format of ESI being produced? Categories may include:
 - ☐ Investigative reports and materials
 - ☐ Witness statements
 - ☐ Tangible objects
 - ☐ Third party ESI digital devices (computers, phones, etc.)
 - ☐ Photos, video and audio recordings
 - ☐ Third party records
 - ☐ Title III wire tap information
 - ☐ Court records
 - ☐ Tests and examinations
 - ☐ Experts
 - ☐ Immunity and plea agreements
 - ☐ Discovery materials with special production considerations
 - ☐ Related matters
 - ☐ Discovery materials available for inspection but not produced digitally
 - ☐ Other information
- ☐ Have the parties addressed ESI issues involving:
 - ☐ Table of contents?
 - ☐ Production of paper records as either paper or ESI?
 - ☐ Proprietary or legacy data?
 - ☐ Attorney-client, work product, or other privilege issues?
 - ☐ Sensitive confidential, personal, grand jury, classified, tax return, trade secret, or similar information?
 - ☐ Whether email transmission is inappropriate for any categories of ESI discovery?
 - ☐ Incarcerated defendant's access to discovery materials?
 - ☐ ESI discovery volume for receiving party's planning purposes?
 - ☐ Parties' software or hardware limitations?
 - ☐ Production of ESI from 3rd party digital devices?
 - ☐ Forensic images of ESI digital devices?
 - ☐ Metadata in 3rd party ESI?
 - ☐ Redactions?
 - ☐ Reasonable schedule for producing party?
 - ☐ Reasonable schedule for receiving party to give notice of issues?
 - ☐ Appropriate security measures during transmission of ESI discovery, *e.g.*, encryption?
 - ☐ Adequate security measures to protect sensitive ESI against unauthorized access or disclosure?
 - ☐ Need for protective orders, clawback agreements, or similar orders or agreements?
 - ☐ Collaboration on sharing costs or tasks?
 - ☐ Need for receiving party's access to original ESI?
 - ☐ Preserving a record of discovery produced?
- ☐ Have the parties memorialized their agreements and disagreements?
- ☐ Do the parties have a system for resolving disputes informally?
- ☐ Is there a need for a designated discovery coordinator for multiple defendants?
- ☐ Do the parties have a plan for managing/returning ESI at the conclusion of the case?

EXHIBIT 5



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

MKP/TH
F. #2017R01840

*271 Cadman Plaza East
Brooklyn, New York 11201*

August 28, 2018

By FedEx and Email

Marc A. Agnifilo
Brafman & Associates
767 Third Avenue
New York, NY 10017

Re: United States v. Keith Raniere, et al.
Criminal Docket No. 18-204 (S-1) (NGG)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED] [REDACTED]	[REDACTED] [REDACTED] [REDACTED]
[REDACTED]	[REDACTED]	[REDACTED] [REDACTED]	[REDACTED] [REDACTED] [REDACTED]
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[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED] [REDACTED]	[REDACTED] [REDACTED] [REDACTED]
[REDACTED]	[REDACTED]	[REDACTED] [REDACTED]	[REDACTED] [REDACTED] [REDACTED]
[REDACTED]	[REDACTED]	[REDACTED] [REDACTED]	[REDACTED] [REDACTED] [REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Very truly yours,

RICHARD P. DONOGHUE
United States Attorney

By: /s/ Moira Kim Penza
Moira Kim Penza
Tanya Hajjar
Assistant U.S. Attorneys
(718) 254-7000

Enclosure

EXHIBIT 6



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

MKP/TH
F. #2017R01840

*271 Cadman Plaza East
Brooklyn, New York 11201*

August 30, 2018

By Email

Marc A. Agnifilo
Brafman & Associates
767 Third Avenue
New York, NY 10017

Re: United States v. Keith Raniere, et al.
Criminal Docket No. 18-204 (S-1) (NGG)

Dear Counsel:

The government writes to inform you that due to an objection by counsel for another defendant, discovery copies of the materials identified in the government's August 28, 2018 letter to you are being held from production to all defendants in the above-captioned case.¹ The government will inform you when the objection is addressed and when the materials will be released for production to counsel for all defendants pursuant to the protective order entered by the Court.

Very truly yours,

RICHARD P. DONOGHUE
United States Attorney

By: /s/ Tanya Hajjar
Maira Kim Penza
Tanya Hajjar
Assistant U.S. Attorneys
(718) 254-7000

¹ By letter dated August 3, 2018, the government notified you that such objections to the disclosure of discovery copies of materials to all defendants may delay the production of discovery.

EXHIBIT 7

HAFETZ & NECHELES LLP

ATTORNEYS AT LAW

10 EAST 40TH STREET, 48TH FLOOR
NEW YORK, N.Y. 10016
TELEPHONE: (212) 997-7400
TELECOPIER: (212) 997-7646

September 3, 2018

VIA EMAIL

AUSA Moira Penza
AUSA Tanya Hajjar
United States Attorney's Office
Eastern District of New York
271 Cadman Plaza East
Brooklyn, NY 11201

Re: *United States v. Raniere, et al.*, 18-cr-204 (NGG)

Dear AUSAs Penza and Hajjar:

We write in response to your letter dated August 30, 2018 stating that the discovery you had made available to us by letter dated August 28, and that we had asked Dupe Coop to produce, is being held from production due to an objection by another defendant's counsel. Based on your letter, it is apparent that you were planning to provide us with numerous electronic storage media seized from 3 Oregon Trail, without having first searched that media for material responsive to the warrant.

We are concerned by and object to your statement in the August 30 letter that "such objections [as made by counsel related to the 3 Oregon Trail materials] to the disclosure of discovery copies of materials to all defendants may delay the production of discovery" because (1) it demonstrates a fundamental misunderstanding of the government's obligations with respect to materials seized pursuant to search warrants, and (2) it suggests that there are likely to be significant delays in producing discovery to defendants.

The warrant application for the premises of 3 Oregon Trail anticipated that as in most cases involving seizure of electronic storage media, the search would "require[] the seizure of the physical storage media and *later off-site review consistent with the warrant.*" Search Warrant Affidavit, p. 22 (NXIVM00002042) (emphasis added). The agent seeking the magistrate's permission to search 3 Oregon Trail specifically noted that the warrant he was seeking would "permit seizing, imaging, or otherwise copying storage media that reasonably appear to contain some or all of the evidence described in the warrant, and would authorize a later review of the media [f]or information consistent with the warrant." Search Warrant Affidavit, p. 23 (NXIVM00002043).

HAFETZ & NECHELES LLP

The search of 3 Oregon Trail was conducted on March 27, 2018, more than five months ago. It was the government's decision to indict defendants before completing the required later off-site review of these materials – the suggestion that it is *defendants* who are delaying the discovery production in this case is perverse.

The government has no legal right to material outside the scope of a lawful search warrant's terms. It is not incumbent upon defendants to "object" to the disclosure to co-defendants of material the government had no right to seize in the first place; nor is it proper to suggest that defendants delay the production of discovery by insisting that the government follow the law rather than indiscriminately releasing to others their private, irrelevant, and constitutionally protected materials without any legal authority to do so.

In addition, the fact that five months after the search the government is still not in a position to produce to defendants a set of materials responsive to this warrant raises concerns about the government's progress on discovery more broadly. We thus reiterate our request for information, whether in the form of a meet-and-confer or an index and schedule, about what Rule 16 discovery the government will be producing and when. In order to understand the anticipated timetable for the progress of this case and to plan for logistics such as discovery vendors and reviewers¹, we need prompt answers to at least the following questions:

- Is any discovery ready to be produced? If so, what does it consist of and what is the size of the production? When will it be produced?
- For which seized materials (from any warrants executed in the course of the investigation) has the government not completed the review process to identify items responsive to search warrants? What is the timetable for finishing that review process? What is the anticipated volume of that data?
- For which seized materials (from any warrants executed in the course of the investigation) is the government undertaking a privilege review process? How long do you anticipate that process will take? What is the anticipated volume of that data?

Please let us know when you can provide the requested information, as we would like to make progress on these issues before the status conference on September 13th.

Sincerely,

/s/

Kathleen E. Cassidy

¹ In part, we need this information in order to be able to get price quotes and select a discovery vendor who can handle the volume and type of data that is expected to be produced in this case. We also need to assess how many staff we need to devote to reviewing the volume of material and when we will need to devote those resources.

EXHIBIT 8

BRAFMAN & ASSOCIATES, P.C.

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ADMITTED IN NY AND CA

MARK M. BAKER
OF COUNSEL

MARC AGNIFILO
OF COUNSEL
ADMITTED IN NY AND NJ

July 18, 2018

Via Email

AUSA Moira Kim Penza [moira.penza@usdoj.gov]

AUSA Tanya Hajjar [tanya.hajjar@usdoj.gov]

United States Attorney's Office

Eastern District of New York

271 Cadman Plaza East

Brooklyn, NY 11201

Re: United States v. Keith Raniere and Allison Mack, 18 Cr. 204 (NGG)

Dear AUSAs Penza and Hajjar:

We represent Keith Raniere in the above-captioned case and write jointly with Kobre & Kim LLP, counsel for co-defendant Allison Mack, to request prompt production of any and all materials in the possession, custody and control of the government pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, including Giglio v. United States, 405 U.S. 150 (1972), and United States v. Bagley, 473 U.S. 667 (1985), the Fifth and Sixth Amendments to the Constitution of the United States and applicable law.

Set forth below are specific examples of documents or information that would constitute materials and information in the possession, custody and control of the government which it is obligated to disclose. We seek prompt production of any and all Brady, Giglio and Bagley materials, including but not limited to the specific examples below in order to (i) have sufficient time to conduct any necessary investigation; (ii) enable the defense to determine what motions are necessary; and (iii) enable counsel to prepare for trial, including the identification of relevant witnesses. We respectfully ask you to produce any and all Brady,

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Giglio and Bagley materials, including but not limited to our specific examples below, by Wednesday, July 25, 2018.

“Documents or Information” means all documents, objections, communications, statements of witnesses, and any other evidence and information (written or unwritten) and/or notes or recordings related thereto in the possession, custody or control of the United States Department of Justice and/or the United States Attorney’s Office for the Eastern District of New York. It includes all Documents or Information in the possession, custody or control of the Federal Bureau of Investigation (“FBI”) and thus requires a search of the FBI’s emails, text messages and documents, including the emails of the case agent and any other agent working on the matter. It also includes Documents or Information in the possession, custody and control of the Internal Revenue Service, Department of Homeland Security, Customs and Border Protection, Immigration and Customs Enforcement, the Mexican authorities, the New York State Police or any other agency considered to be an arm of the prosecution. Each request is of a continuing nature, and we request prompt notice in the event that responsive Documents or Information comes to the government’s attention at any point in the future.

Each of the examples enumerated below specifically includes all statements made by witnesses to law enforcement officials, whether such statements were memorialized or not. See United States v. Rodriguez, 496 F.3d 221 (2d Cir. 2007) (when prosecution is in possession of material information that impeaches its witnesses or exculpates the defendant, it may not avoid its Brady, Giglio and Bagley obligation to disclose such information by not writing it down).

Reserving our rights to provide you with additional examples, we seek all Brady, Giglio and Bagley material, including the following specific examples:

- (i) Documents or Information refuting the government’s contention that DOS is a sex cult or that sexual activity played a role in DOS;
- (ii) Documents or Information indicating that even if women were tasked to “seduce” Raniere, there was nonetheless no requirement or expectation that sexual intercourse or sexual activity would take place;
- (iii) Documents or Information indicating that DOS members and former DOS members did not believe collateral would be released if they left DOS;
- (iv) Documents or Information indicating that sexual intercourse or sexual activity with Raniere was not a tenet or requirement of membership in DOS;

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- (v) Documents or Information indicating that collateral was never released nor threatened to be released if a DOS member or former DOS member failed or refused to perform a task assigned by a “master” within DOS;
- (vi) Documents or Information indicating that having sexual intercourse or engaging in sexual activity with Raniere or anyone else was not a requirement to join or remain in DOS;
- (vii) Documents or Information indicating that no one asked for, expected to, and/or actually received anything of value or otherwise benefited, or expected to benefit, financially in exchange for sexual intercourse or sexual activity with Raniere or anyone else;
- (viii) Documents or Information regarding the voluntariness of branding in connection with DOS and/or the fact that DOS members and former members were permitted to decline to be branded and still remain in DOS;
- (ix) Documents or Information indicating an understanding that refusal to be branded would not result in the release of one’s collateral;
- (x) Documents or Information indicating that DOS members or former members recruited additional members to DOS after being branded, receiving the seduction assignment, and/or engaging in sexual intercourse/activity with Raniere;
- (xi) Documents or Information regarding discussions between Raniere and a witness about keeping sexual relationship secret from other members of DOS;
- (xii) Documents or Information of efforts by a member of DOS or former members of DOS to engage in sexual relations with Raniere and being rebuffed by Raniere;
- (xiii) Documents or Information regarding DOS members or former DOS members coming up with/developing/having discretion over what “acts of kindness” and/or penance should consist of;
- (xiv) Documents or Information indicating that a witness was informed of Raniere’s connection to DOS when she joined DOS;
- (xv) Documents or Information from women who left DOS and their collateral was never released, and/or their understanding that collateral would not be released if/when they left DOS;
- (xvi) Documents or Information that any member of law enforcement stated or suggested to a witness that law enforcement knows facts that the witness does not

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know as a way of compelling, coercing or procuring that witness's testimony for the government;

- (xvii) Documents or Information that any member of law enforcement stated or suggested to a witness that such witness was a victim of some offense as a way of compelling, coercing or procuring that witness's testimony for the government; and
- (xviii) Documents or Information that any member of law enforcement stated or suggested to a witness that such witness was lied to, deceived or otherwise misled by Raniere or someone else as a way of compelling, coercing or procuring that witness's testimony for the Government.

To the extent any witness provided a certain account to the government and then, after being confronted with purported statements of fact or opinion by government personnel, or shown a document by government personnel, changed that account in whole or in part, we request all such statements of that person. In addition, we request all information relative to (xv) through (xvii) above.

In addition, if the government is aware of Documents or Information that would or may be Brady, Giglio and/or Bagley material but believes the material can be obtained by subpoenas duces tecum, please so advise us. Furthermore, if the government declines to provide any of the information we have requested or denies that any of the aforementioned categories of Documents and Information exist, please let us know promptly so that Mr. Raniere and Ms. Mack can make any appropriate motions.

Thank you for your consideration.

_____/s/
Marc Agnifilo
Jacob Kaplan
Teny Geragos
Brafman & Associates, PC
Attorney for Defendant
Keith Raniere

Paul DerOhannesian II
Danielle R. Smith
DerOhannesian &
DerOhannesian

_____/s/
William McGovern
Sean Buckley
Kobre & Kim LLP
Attorney for Defendant
Allison Mack