No. 24A___

IN THE

Supreme Court of the United States

RACHEL CHERWITZ, *et al.*,

Applicants,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPLICATION FOR STAY

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TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

INTRODUCTION

Pursuant to 28 U.S. Code § 2101 and Supreme Court Rule 23, Petitioner-Defendants Rachel Cherwitz and Nicole Daedone respectfully request an emergency stay pending their concurrently filed petition for a writ of certiorari (the "Petition") from the Second Circuit's order (the "Order") denying defendants' petition for a writ of mandamus, dated April 10, 2025 in *In re Rachel Cherwitz and Nicole Daedone*, No. No. 25-553. Defendants' mandamus petition requested that the Second Circuit reverse the September 27, 2024 and February 26, 2025 orders (the "District Court Orders") of the U.S. District Court for the Eastern District of New York (Gujarati, J.). Because trial is scheduled to begin on May 5, 2025, defendants also respectfully request expedited review of the Petition.[1]

The district court is on the cusp of permitting the government to use stolen and privileged corporate material against defendants at their upcoming May 5, 2025 trial, as well as evidence derived therefrom. Not only will that ruling cause irreparable harm to defendants and their prior company—which cannot be rectified through a post-trial appeal—but it also will broadly chill privileged communications in the corporate context, due to the ever-present risk of corporate theft and data breaches.

[1] "DE," "CDE," "A," "SEA," "SA," and "APP" mean district court docket entry, circuit court docket entry, circuit court appendix, circuit court sealed *ex parte* appendix, circuit court sealed appendix, and appendix filed with this Court, respectively. "Dkt. No." means this Court's docket entry. Unless otherwise noted, case text quotations omit all internal quotation marks, citations, alterations and footnotes.

Because this Court's decision will have significant implications on the trial preparation and the trial itself, a stay is warranted to allow this Court to consider and rule on this dispositive issue. Furthermore, given that the district court has ruled that the stolen privileged corporate material is not privileged and the Second Circuit denied defendants' mandamus petition, a failure to stay the proceedings could also result in further dissemination of the stolen privileged documents at issue and, thus, cause further damage to defendants. Accordingly, defendants will suffer irreparable harm if a stay is not granted.

STATEMENT OF THE CASE

I. The One-Count Indictment

In approximately 2018, the Federal Bureau of Investigation ("FBI"), led by SA Elliot McGinnis, initiated an investigation into the wellness company OneTaste, Inc. ("OneTaste" or "the Company"). Defendant Nicole Daedone served as OneTaste's Chief Executive Officer from approximately 2004 to 2017. Defendant Rachel Cherwitz was OneTaste's leading salesperson from approximately 2009 to May 2018. Five years after starting its investigation, on April 3, 2023, the government obtained a single-count indictment charging a forced labor conspiracy under 18 U.S.C. § 1594(b). DE:1.

II. The Theft of OneTaste's Privileged Documents

Years before indictment, in June 2017, at the direction of outside counsel Davis Goldberg & Galper, PLLC ("DGG"), OneTaste prepared a document to aid in a legal risk assessment in anticipation of potential litigation. A:62–63 ¶¶8–10; A:70 ¶¶6–8; A:43 ¶3. This internal review related to false allegations circulating at that time

against the Company and senior executives, including defendants. A:63 ¶¶10–11. The goal was to gather any allegations that could be made by persons associated with OneTaste to be assessed by outside counsel, regardless of their credibility or veracity. *Id.* ¶¶11–13. OneTaste's then-CEO asked a small team to gather the information counsel requested, and told them the Privileged Risk Assessment was privileged and confidential; indeed, an early outline (the "Privileged Outline"), screenshots of a draft (the "Privileged Screenshots"), and the final document (the "Privileged Risk Assessment"; collectively, the "Stolen Privileged Documents") were clearly marked privileged. *Id.* ¶¶11–15; A:43–44 ¶¶4–6; A:66 ¶¶6–7; SEA:1–2 ¶¶4–6; SEA:4–43.

OneTaste took significant precautions to keep these documents confidential, including limiting access to senior management, maintaining them in a location on OneTaste's servers with limited access, and prohibiting the documents from being emailed. A:63 ¶15; A:43–44 ¶¶4–8; A:66 ¶7; SEA:1–2 ¶¶4–8. On July 17, 2017, members of OneTaste's senior management met with DGG and hand-delivered a single, hard copy of the Privilege Risk Assessment. A:64 ¶16. In other words, the Privileged Risk Assessment was considered so highly sensitive and confidential that OneTaste executives would not even email it to their own outside counsel.

Mitch Aidelbaum, OneTaste's former IT contractor, stole the highly sensitive and confidential Privileged Outline and Privileged Risk Assessment from OneTaste's servers. Aidelbaum entered into a consulting agreement with OneTaste on February 22, 2015 to provide IT services, which he provided until his contract was terminated in January 2016. A:67 ¶¶10–11. Upon his contract's termination, Aidelbaum was no

longer authorized to access OneTaste's servers, cloud services, records or documents. *See id.* ¶¶12–13. But sometime after OneTaste finalized the Privileged Risk Assessment in July 2017, Aidelbaum accessed OneTaste's servers—without authorization—and stole the Privileged Outline and the Privileged Risk Assessment, along with numerous other confidential OneTaste documents. *See id.* ¶¶12–14.

Based on the location and nature of the cache of stolen documents, Aidelbaum's theft appears to have been an act of corporate espionage. Aidelbaum stole the documents from Yia Vang's computer, who was OneTaste's curriculum director and content producer. A:82; A:44 ¶7. In addition to the Privileged Outline and Privileged Risk Assessment, Aidelbaum stole over 61,000 files. *See* A:81–82; DE:33; DE:34; DE:39. Some of these documents were OneTaste's confidential and proprietary information, which competitors could use to directly compete with OneTaste. *See* DE:33; DE:34; DE:39.

Aidelbaum's corporate espionage violated federal law. *See* 18 U.S.C. §§ 1030(a)(2), 1832(a). The FBI agents should have investigated and prosecuted Aidelbaum for his crimes, as the FBI has done in similar cases. *See, e.g.*, *United States v. Calonge*, 74 F.4th 31, 33 (2d Cir. 2023). But that is not what they did here. Instead of investigating and prosecuting him or at least notifying OneTaste—the victim of his crimes—it helped Aidelbaum cover them up.

III. The FBI Takes Possession of the Stolen Privileged Documents and Uses Them to Build Its Case

On January 26, 2021, several years after Aidelbaum's crimes against OneTaste, the FBI case agents visited Aidelbaum's home, without prior notice. A:74

¶1; A:80; A:83. Aidelbaum told the agents he had the document identified herein as the Privileged Risk Assessment, as well as other OneTaste documents. A:74–75 ¶¶2, 5. He specifically informed the agents the electronic file (1) was entitled "Attorney Client Privilege"; (2) was marked "Attorney Client Privilege"; (3) had been created *after* he left the Company; and (4) was taken without OneTaste's knowledge. A:74 ¶3. SA McGinnis's notes and interview report further reflect Aidelbaum told the agents the document was authored by Yia Vang and came from her laptop. A:82; A:85. In short, he told the agents he stole the Privileged Risk Assessment from OneTaste and it was marked attorney-client privileged.

The FBI agents then gave Aidelbaum a thumb drive, to which he saved the Privileged Risk Assessment, and returned it to the agents. A:74 ¶4. The agents did not give Aidelbaum a property receipt for this thumb drive containing the Privileged Risk Assessment. *See id.* Subsequently, on February 1, 2021, the United States Attorney's Office ("EDNY") issued a grand jury subpoena to Aidelbaum for the remaining non-privileged OneTaste documents in his possession, which he then copied to an FBI-provided hard drive. *See* A:75 ¶¶5–6. This time, the agents gave him a property receipt for the non-privileged OneTaste documents, whereas they left no record of taking any privileged documents. *See id.*

In addition to Aidelbaum's sworn declaration he told the agents the Privileged Risk Assessment was marked attorney-client privileged, the case agent's own handwritten notes from the meeting clearly reflect the same. A:84. Thus, it is crystal clear the agents were on notice as of that date that they possessed privileged material.

Tellingly, though, the FBI agents left that fact out of their official interview report. That appears to have been their first step in covering up Aidelbaum's crimes, so they could use the Privileged Risk Assessment to build this entire prosecution.

Indeed, as described further below, the agents did not immediately segregate this privileged material and put in place a taint team, per DOJ policy. *See* DOJ Manual 9-13.420(E)–(F); *see also SEC v. Rajaratnam*, 622 F.3d 159, 183 n.24 (2d Cir. 2010); *United States v. Landji*, No. (S1) 18 Cr. 601, 2021 U.S. Dist. LEXIS 222729, at *68–69 (S.D.N.Y. Nov. 18, 2021). Nor did they notify the privilege holders, which the government has acknowledged is the proper protocol to follow when it obtains privileged material. *See* A:157. Instead, the agents immediately began to rely on the Privileged Risk Assessment.

Five days after taking the material, SA McGinnis wrote an email summarizing the information contained in the Privileged Risk Assessment and sent it to at least one other agent. The government has refused to produce this email or describe how the agents used the privileged information circulated by email. Despite the government's stonewalling, though, the evidence the agents improperly used the Privileged Risk Assessment goes far beyond that one email. A review of the government's 18 U.S.C. §3500 material produced to the defense on November 18, 2024, as well as other information the defense has gathered, demonstrates the government directly used the Privileged Risk Assessment not only to identify witnesses to interview, but also to determine which topics to ask them about.

For example, in the first two weeks after clandestinely receiving the Privileged Risk Assessment on January 26, 2021, the agents contacted at least seven persons listed in the Privileged Risk Assessment. The first person the FBI interviewed after taking the Privileged Risk Assessment from Aidelbaum is listed on its first page. By July 2021, the agents had contacted at least 15 people listed in the Privileged Risk Assessment. By the end of 2021, they had contacted at least 20 people listed therein, none of whom they contacted prior to taking the documents from Aidelbaum. Some of these people had not been associated with OneTaste for years, and by no means would have been obvious interview candidates. Moreover, during many of these interviews, the agents asked individuals about specific, non-public incidents that were discussed in the privileged material.

In November 2021, another former OneTaste customer, Kara Cooper, also emailed screenshots of a draft of the Privileged Risk Assessment—identified herein as the Privileged Screenshots—to SA McGinnis. Defendants learned from the government that Cooper obtained the screenshots or accessed the Privileged Risk Assessment draft via a former OneTaste employee, who in turn received unauthorized access from Aidelbaum. A:46 ¶6. Again, although the Privileged Screenshots are clearly marked attorney-client privileged, the FBI agents did not put in place a taint team or notify the privilege holders.

IV. The Prosecution Team Takes Possession of the Stolen Privileged Documents

At some point, the Privileged Outline, Privileged Risk Assessment, and Privileged Screenshots all came into EDNY's possession. As discussed below, the first two documents were located in EDNY's *Cherwitz* case file in 2024 and never produced

in discovery. EDNY produced the third document in discovery on September 18, 2023. The government has refused to disclose when these documents came into EDNY's possession; however, it is clear it did not implement appropriate taint procedures whenever it obtained the documents. In fact, in the government's discovery letter disclosing the Privileged Screenshots, it failed to describe them as potentially privileged, even though they were clearly marked as such and the government had reviewed them closely enough to describe them and their provenance. It described them only as "[s]creenshots of a document provided by [Kara Cooper]." DE:43 at 3.

In total, during 29 discovery productions, the government produced over 2.6 terabytes of data, containing more than 710,700 files, which includes over 10,000 videos, 8,000 audio files, and 171,100 images. Not surprisingly, given the government's ongoing and voluminous discovery productions—including almost 160,000 pages in September and October 2024 alone—and that it had not flagged this document as potentially privileged, it took defendants time to identify this document as potentially privileged. *See*, *e.g.*, A:46 ¶2; A:72–73 ¶¶12–14; DE:41; DE:43; DE:50; DE:52; DE:58. On April 20, 2024, the Company identified the potentially privileged nature of the document, *see* A:46 ¶3; on April 24, 2024, after verifying it was privileged, the Company demanded its return from the government, *see* A:49. The government put in place a filter team for the first time. A:46 ¶5. In response to a later follow up inquiry, the filter team represented it had no other versions of the Privileged Screenshots—a representation that was wrong. A:46–47 ¶¶6–7.

V. Defendants' Motion to Dismiss Based Upon the Privileged Screenshots

In short order, defendants and the Company filed appropriate motions. A:52–60 (pre-motion letter); SA:1–43 (motion to dismiss); *In re Petition of One Taste, Inc.*, 24-MC-2518(DG), DE:1 (petition for return of the materials under Federal Rule of Criminal Procedure 41(g)). In support of their motion, defendants sought to submit affidavits without waiving their Fifth Amendment right against self-incrimination. *See* SA:34; SA:99–101. In response, among other things, the government claimed waiver, arguing defendants had not found the Privileged Screenshots fast enough, even though it is the government's policy and practice to notify privilege holders, rather than to misidentify and bury a privileged document in a mountain of discovery. *See, e.g.*, *United States v. Nejad*, 487 F.Supp.3d 206, 218–27 (S.D.N.Y. 2020) (discussing government conduct warranting dismissal, including burying *Brady* material among other documents).

The government also specifically reserved the right to use the Privileged Screenshots at trial, stating: "[T]he government reserves the right to do so should, for example, a court—or OneTaste—determine[] the Document is not privileged and/or is subject to an exception to the attorney-client privilege, and defendants assert a defense or testify inconsistently with the Document." SA:55.

Meanwhile, defendants and the Company conducted their own investigation regarding the Privileged Screenshots and learned from Aidelbaum that he had turned over the final version of the Privileged Screenshots (the Privileged Risk Assessment) to FBI agents in January 2021. Thus, with their September 6, 2024 reply, defendants

filed a declaration from Aidelbaum and incorporated the material Aidelbaum had provided the FBI into their privilege assertion, even though neither they nor the Company had yet received the material from the government. A:74–76.

In its September 20, 2024 response, the government suddenly admitted it had the Privileged Outline and the Privileged Risk Assessment—*since January of 2021*, which it located at the FBI. These two versions were located in a folder *with Aidelbaum's name on it*, *where they were both saved with "file names [including] the words 'Attorney Client Privilege: Confidential and Privileged.'*" SA:112 (emphasis added). It also conceded the agents had accessed, reviewed and disseminated information from the Stolen Privileged Documents. As noted above, it admitted that, five days after the Aidelbaum interview, an agent sent an email containing a "bullet point list of information…associated with [Aidelbaum]," which appeared to be derived from the Privileged Risk Assessment. *Id.*

The government also claimed the documents were "not sent to the [EDNY] until they were provided to a member of the Privilege Review Team in September 2024." *Id.* By October 7, though, the government was forced to admit it was wrong again, disclosing the Privileged Outline and the Privileged Risk Assessment, in fact, had been located in its *Cherwitz* case file. A:115–16. The government also reserved the right to use these documents at trial. *In re Petition of OneTaste, Inc.*, 24-MC-2518(DG), DE:17 ("[T]he government is preparing for trial against the *Cherwitz* defendants and the Challenged Materials could be necessary or relevant for a number of legitimate purposes at trial, including in re-direct examinations, for potential cross

examination of defense witnesses, or in the government's rebuttal case to respond to unanticipated defense arguments."). The Company filed a second motion for return of all Stolen Privileged Documents on November 12, 2024.[2]

VI. The District Court Denies Defendants' Motions to Dismiss Based on the Privileged Screenshots

Defendants asserted privilege over the Privileged Outline and the Privileged Risk Assessment as soon as they learned of their existence. *See* SA:83–109. The court directed the government to submit those two documents on September 23, 2024. DE:158. Subsequently, at the September 27, 2024 status conference, the court specifically declined to rule on those two documents, directing the parties to meet and confer regarding them before bringing any additional motion. *See* A:93 ("The issues raised about those other documents in the additional filings should be addressed by the parties with each other in the first instance, including, as appropriate, with the Filter Team rather than the Trial Team. I have considered the entirety of the record, but will address only the two bases raised in the instant motion, one of which relates to the [Privileged Screenshots]."). The court set no deadline.

The court then made a brief oral ruling on defendants' motion to dismiss pertaining to the Privileged Screenshots. *See* A:104–12. Notably, it concluded defendants had not shown good cause as to why they had not filed their motion to dismiss based on the Privileged Screenshots by the district court's January 16, 2024,

[2] The government has said the documents will remain segregated with the Filter Team pending resolution of the Rule 41(g) motion. A hearing is scheduled for April 23, 2025.

motion deadline, even though the uncontroverted record shows defendants were not aware of this document's privileged nature until April 20, 2024. A:105–06. The court attributed no fault to the government for failing to put in place a taint team, failing to notify the privilege holders it had taken possession of the Privileged Screenshots, failing to describe the document as potentially privileged in its discovery letter, or for burying the document in a mountain of other evidence. *See id.* Rather, the court deemed the motion untimely, because defendants did not seek an extension to file its motions—which almost certainly would have been denied—to look for a document they did not know existed and had no reason to believe would be in discovery. *See id.* Similarly, the court concluded defendants waived privilege by "having waited so long to assert privilege," A:111, even though the Company asserted privilege immediately after verifying the document's privileged nature and defendants sought leave to file a motion to dismiss within weeks.

The district court also rejected defendants' request for an evidentiary hearing. Instead, it ruled the Privileged Screenshots were not privileged and defendants lacked standing to assert the privilege. It further held defendants were not permitted to submit affidavits to support their privilege claims in a manner that addressed their concerns about waiving their Fifth Amendment right against self-incrimination. *See* A:110–11; SA:34. Finally, without shifting the burden to the government to show an independent source for its evidence, the court concluded the record did not support the claim that but-for the use of the Privileged Screenshots, the indictment would not exist. A:111. Regardless, if it had found a constitutional violation, the court held the

only appropriate remedy would have been to preclude the government from using the Privileged Screenshots at trial, not dismissal. *See id.* at 111–12.

VII. The District Court Denies Defendants' Motion to Dismiss Based on the Privileged Outline and Privileged Risk Assessment

As noted above, the government disclosed the FBI possessed the Privileged Outline and Privileged Risk Assessment on September 20, 2024. SA:112. On October 7, 2024, the government disclosed EDNY also possessed them. A:115–16. Subsequently, on November 18, 2024, the government disclosed its 3500 material. Thereafter, the defense reviewed it and conducted a painstaking comparison between the Stolen Privileged Documents and the 127 sets of witness reports to develop the record the court had demanded at the previous status conference, establishing the agents had used the Stolen Privileged Documents to build this case and secure the indictment. On December 25, 2024, an issue arose with Ms. Cherwitz's prior counsel that ultimately led to their disqualification on January 8, 2025. She retained new counsel, who appeared on January 15, 2025. As such, little work was done by Ms. Cherwitz's prior counsel during this time period. Moreover, the government declined to meet and confer with Ms. Daedone's counsel pending Ms. Cherwitz's retention of new counsel. Just over one week after appearing, new counsel requested leave to file a renewed motion to dismiss the indictment on January 24, 2025. A:117.

Prior to doing so, defense counsel met and conferred with the government on January 23, 2025, as the court had previously directed. During the meeting, the government specifically refused to agree that, under *Simmons v. United States*, 390 U.S. 377 (1968), defendants were permitted to file *ex parte* affidavits in support of

their motions, which the government could not later use against them. Thus, in its request for leave, defendants requested a ruling from the court under *Simmons* to file such affidavits and also sought a hearing pursuant to *United States v. Kastigar*, 406 U.S. 441 (1972). A:129, 138.

On February 26, 2025, in a brief oral ruling, the court denied defendants' renewed motion. A:153–56. Although (1) the facts necessary for defendants' motion were disclosed between September 20, 2024 and November 18, 2024, including voluminous 3500 material the defense had to subsequently review, (2) Ms. Cherwitz thereafter obtained new counsel, and (3) there was no deadline for the renewed motion, the court found it untimely because defendants did not file it by January 16, 2024. *See id.* Yet again, the court attributed no fault to the government for its purposeful reliance on privileged material, its failure to put in place a taint team, and its failure to disclose the documents for nearly *four years*. *See id.* The court summarily denied defendants' motion, including rejecting defendants' argument that the two documents are privileged. *See* A:156.

VIII. The Second Circuit Proceedings

Given the gravity of the constitutional rights at stake, the risk of improper disclosure of privileged material, the court's incorrect rulings, and the broad implications thereof, defendants sought mandamus and to stay the district court proceedings. On March 27, 2025, the Second Circuit issued an order denying defendants' request for a stay, to the extent it sought a temporary stay pending review by a three-judge panel, and referred the mandamus petition to a three-judge

panel. APP:B. Notably, in its response to defendants' stay motion, the government continued to reserve the right to use the Stolen Privileged Documents at trial to cross-examine defense witnesses or in its rebuttal case. CDE:23.1.

On April 10, 2025, the Second Circuit issued an order denying defendants' mandamus petition, stating defendants "ha[d] not demonstrated that exceptional circumstances warrant the requested relief." APP:A. It also denied the stay. *Id.*

REASONS FOR GRANTING THE STAY

I. Legal Standard

To obtain a stay, "an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). In close cases, "it may be appropriate to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009). Defendants meet all three factors required. Furthermore, the balance of equities favor Ms. Cherwitz and Ms. Daedone.

II. There is Reasonable Probability That Four Justices Will Consider the Issue Sufficiently Meritorious to Grant Certiorari

First, defendants have made a strong showing that at least four Justices will consider the issue here is sufficiently meritorious to grant defendant's Petition. "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. As detailed in defendants' Petition, this Court has "repeatedly and expressly

reaffirmed that mandamus…remains a 'useful safety valve' in some cases of clear error to correct 'some of the more consequential attorney-client privilege rulings.'" *In re Kellogg Brown & Root*, Inc., 756 F.3d 754, 761 (D.C. Cir. 2014) (Kavanaugh, J.) (quoting *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106-13 (2009)). This case involves such an attorney-client privilege ruling.

Not only did the government intentionally rely on stolen privileged corporate material, but the district court failed to adhere to the basic procedural protections that would have permitted the defendants to vindicate their rights and protect the attorney-client privilege. Namely, it did not permit the defendants to submit affidavits under the protections of *Simmons*, and it did not hold a *Kastigar* hearing. Mandamus is appropriate in these extraordinary circumstances where the defendants did not have the opportunity to appropriately protect their rights before the district court, the government has said it will expose the privileged materials at trial, and the district court's ruling will set a broad precedent undermining the attorney-client privilege. *See Cheney v. U.S. Dis. Court*, 542 U.S. 367, 381 (2004). These issues have "broad applicability and influence," and their resolution will "forestall future error in trial courts" and "provide guidance for courts…in an important, yet underdeveloped, area of law." *In re City of New York*, 607 F.3d 923, 942 (2d Cir. 2010).

Further, a stay is warranted here because the Petition presents a novel and significant issue, and it is appropriate for appellate review on mandamus. *See In re The City of New York*, 607 F.3d 923, 939 (2d Cir. 2010) ("To determine whether

mandamus is appropriate in the context of a discovery ruling, [the Court] look[s] primarily for the presence of a novel and significant question of law…and…the presence of a legal issue whose resolution will aid in the administration of justice." (internal quotation marks omitted)). The Petition presents the novel question of whether the government can use stolen and privileged corporate material to prosecute a company's executives, without notifying the company and/or over the company's objections and refusal to waive privilege.

For the foregoing reasons, there is a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari.

III. There Is a Fair Prospect That a Majority of the Court Will Vote to Reverse the Judgment Below Because the Arguments Advanced Are Plausible

Second, there is a "fair prospect" that a majority of the court will vote to reverse the judgment below because the arguments advanced in the courts below are plausible. *See, e.g.*, *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1310 (1989). As set forth above, the documents at issue are indisputably privileged. Defendants have submitted sworn affidavits establishing a small group of OneTaste's senior management created the Stolen Privileged Documents at outside counsel's direction as part of an internal review of false allegations against the Company and members of senior management, including defendants; that review's primary purpose was to obtain legal advice in anticipation of potential litigation; the documents were treated as highly sensitive and confidential; the Company secured the documents by limiting access to them and not emailing them; and the Company hand-delivered the Privileged Risk Assessment to counsel.

There is also no dispute that the government has accessed the Stolen Privileged Documents. Indeed, the government admits that the FBI agents have accessed, reviewed, and disseminated information from the Stolen Privileged Documents. Specifically, it noted that five days after interviewing Mitch Aidelbaum—a former OneTaste IT contractor from whom the FBI obtained the Privileged Risk Assessment and Privileged Outline—an agent sent an email containing a "bullet point list of information…associated with [Aidelbaum]," which appeared to be derived from the Stolen Privileged Documents. SA:112. Moreover, in October 2024, EDNY admitted that its *Cherwitz* case file contained the Privileged Outline and the Privileged Risk Assessment. *See* A:115–16.

Because the Stolen Privileged Documents are indeed privileged, and the government in fact accessed these privileged materials, the burden shifts to the government to show an independent source for its evidence. *See United States v. Hoey*, 725 Fed. App'x 58, 61 (2d Cir. 2018) (imposing only the minimal burden to show the government had access to privileged materials pertaining to the prosecution's subject matter before shifting the burden). The government has not made such a showing, nor did the district court order it to do so. Instead, the opposite occurred: the § 3500 material produced in November 2024 revealed that the FBI used the Stolen Privileged Documents to guide its investigation and build its case.

Based on the record before the district court, dismissal of the indictment is warranted, because the government violated defendants' rights to counsel and due process. *See United States v. Schwimmer*, 924 F.2d 443, 447 (2d Cir. 1991). But even

if the record was not fully developed, defendants had the right to submit *ex parte* affidavits in support of their motion that could not be used against them, *see, e.g.*, *Simmons*, 390 U.S. at 394; *Fero v. Excellus Health Plan, Inc.*, No. 6:15-CV-06569-EAW-JJM, 2019 U.S. Dist. LEXIS 207871, at *11–12 (W.D.N.Y. Dec. 3, 2019), and the district court was required to hold a *Kastigar* hearing, after shifting the burden to the government. *See Hoey*, 725 Fed. App'x at 61; *United States v. Schwimmer*, 892 F.2d 237, 244–45 (2d Cir. 1989).

Defendants had standing to assert privilege under the common-interest and co-client doctrines, especially given that neither OneTaste nor defendants have waived the privilege. *See, e.g.*, *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 215–16 & n.3 (2d Cir. 1997); *Schwimmer*, 892 F.2d at 243; *United States v. Dennis*, 843 F.3d 652, 657 (2d Cir. 1988); *Youngblood v. Menard, Inc.*, No. 3:22-cv-02822-SMY-GCS, 2024 U.S. Dist. LEXIS 148033, at *9–15 & n.5 (S.D. Ill. Aug. 19, 2024); *Supreme Forest Prods., Inc. v. Kennedy*, No. 3:16-cv-0054 (JAM), 2017 U.S. Dist. LEXIS 4421, at *4–10 (D. Conn. Jan. 12, 2017); *HSH Nordbank AG N.Y. Branch v. Swerdlow*, 259 F.R.D. 64, 71 (S.D.N.Y. 2009). The opportunity to submit *ex parte* affidavits would have further established standing; if the trial continues without allowing defendants to submit such affidavits under the protections of *Simmons*, their ability to do so will be lost.

Defendants did not waive the privilege. *See, e.g.*, *In re Parmalat Sec. Litig.*, No. 04 MD 1653 (LAK) (HBP), 2006 U.S. Dist. LEXIS 88629, at *28 (S.D.N.Y. Dec. 1, 2006); *see Dukes v. Wal-Mart Stores, Inc.*, No. 01-cv-2252 CRB (JSC), 2013 U.S. Dist.

LEXIS 42740, at *15 (N.D. Cal. Mar. 26, 2013). Furthermore, defendants' motions were timely. *See, e.g.*, Fed. R. Crim. P. 12(c); *United States v. Milton*, 621 F. Supp. 3d 421, 426 (S.D.N.Y. 2022); *United States v. Shine*, No. 17-CR-28-FPG-JJM, 2019 U.S. Dist. LEXIS 98619, at *8 (W.D.N.Y. June 12, 2019); *United States v. Beras*, No. 99 CR. 75(SWK), 2004 U.S. Dist. LEXIS 11559, at *2 n.2 (S.D.N.Y. June 23, 2004).

Mandamus is appropriate to resolve these significant issues and to prevent the Stolen Privileged Documents and evidence derived therefrom from being disclosed at trial. *See, e.g.*, *United States v. Prevezon Holdings Ltd.*, 839 F.3d 227, 238 (2d Cir. 2016) (noting "liberal use of mandamus" to protect privilege); *In re Kellogg Brown*, 756 F.3d at 760–61 (Kavanaugh, J.) (granting writ to protect privilege); *In re von Bulow*, 828 F.2d 94, 98-99 (2d Cir. 1987). Defendants have no other adequate means of relief. *See, e.g.*, *Prevezon Holdings Ltd.*, 839 F.3d at 238; *In re City of New York*, 607 F.3d at 933–38; *In re Kellogg*, 756 F.3d at 761; *In re von Bulow*, 828 F.2d at 98–99. For the aforementioned reasons, defendants have shown a "fair prospect" that a majority of the court will vote to reverse the judgment below.

IV. Defendants Will Be Irreparably Injured Absent a Stay

Third, as also detailed in the Petition, defendants will be irreparably injured absent a stay in proceedings pending this Court's decision. In the District Court's Orders, it concluded that the Stolen Privileged Documents are not privileged. And the government has indicated that, if the Stolen Privileged Documents are deemed not privileged, it very well may use the documents at trial. *See* SA:55; *In re Petition of OneTaste, Inc.*, 24-MC-2518 (DG), DE:17 at 9; CDE:23.1 at 28. Once those documents are revealed during trial preparation and trial and relied upon by the

government, it will be too late to protect defendants' constitutional rights. *See, e.g.*, *In re Roman Catholic Diocese of Albany, New York*, 745 F.3d 30, 33, 35–37 (2d Cir. 2014) (disclosure of potential sexual abuse by priests was harm not adequately remediable after final judgment); *In re City of New York*, 607 F.3d at 934 (disclosure of confidential police reports could not be remediated after final judgement); *In re von Bulow*, 828 F.2d at 98–99 (mandamus necessary to prevent revelation of attorney-client privileged information); *see* also *In re Kellogg*, 756 F.3d at 761 ("[A]ppeal after final judgment will often come too late because the privileged materials will already have been released. In other words, the cat is out of the bag.").[3]

Furthermore, without a stay in the proceedings, the parties will be forced to prepare for trial with the assumption that the Stolen Privileged Documents may be admissible. This will potentially cause further dissemination of the privileged documents within the government, and thus irreparable injury to defendants. It also will result in additional motion practice on the admissibility of the documents based on other evidentiary issues, causing unnecessary litigation and further exposure the Stolen Privileged Documents. It further may impact the defendants' decision to present a defense case and whether the defendants take the stand at trial. Therefore, without a stay for the Supreme Court to rule on this issue, defendants will be irreparably harmed.

[3] The defense has requested that the government keep the Stolen Privileged Documents segregated pending resolution of its petition and OneTaste's pending Rule 41(g) motion. In response, the government has said that the documents remain segregated with the Filter Team pending resolution of the Rule 41(g) motion.

Moreover, even if the prosecution does not present to the jury the Stolen Privileged Documents themselves, presenting evidence derived therefrom is just as damaging as presenting the privileged material itself. *See Prevezon Holdings Ltd.*, 839 F.3d at 238 ("Adverse use of confidential information is not limited to disclosure. It includes knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue, what settlements to accept and what offers to reject, and innumerable other uses." (quoting *Ulrich v. Hearst Corp*, 809 F. Supp. 229, 236 (S.D.N.Y. 1992))). Because the FBI had access to these documents for *four years* and built their case upon them, information derived from these documents will undoubtedly be presented at trial.

Thus, if this Court were to find that the Stolen Privileged Documents are indeed privileged without dismissing the indictment, it would alter the course of the trial because any evidence derived therefrom could be suppressed. *See United States v. Reyes*, 934 F. Supp. 546, 553 (S.D.N.Y. 1996) (suppressing evidence derived from violation of right to counsel); *People v. Joly*, 970 N.W.2d 426, 435 (Mich. Ct. App. 2021) (finding manifest corruption and suppressing evidence where government agent inadvertently came across a privileged email containing key incriminating evidence, but then intentionally "used the privileged information to further his investigation of defendant"). Further, any government personnel who have accessed the Stolen Privileged Documents or any information derived therefrom—such as the FBI agents or prosecutors who reviewed the documents or spoke to witnesses who were selected based on the documents—could be dismissed or recused as a result of

this Court's ruling. *See, e.g.*, *State v. Robins*, 164 Idaho 425, 437 (2018); *State v. Robinson*, 209 A.3d 25, 59–60 (Del. 2019).

Accordingly, because this Court's decision will have significant implications on the trial preparation and the trial itself, a stay is further warranted to prevent irreparable injury to defendants.

V. While This Is Not a "Close Case," the Balance of Equities Favors Ms. Cherwitz and Ms. Daedone

Lastly, comparing the relative harms to the defendants against the harm to the government as well as the public's interest, favors the defendants. It is in the public's interest to resolve the important question of whether the government can use stolen, privileged company documents to prosecute a company's executives, as opposed to the company itself, over the company's and executives' objections and refusal to waive privilege. This Court has emphasized the importance of the attorney-client privilege. Designed "to encourage full and frank communication between attorneys and their clients," this rule of confidentiality "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It also recognizes that a lawyer's "assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470, 32 L. Ed. 488, 9 S. Ct. 125 (1888); *see Schwimmer*, 892 F.2d at 243 (stating that privilege "provides essential support for the constitutional right to the assistance of counsel" and that "[w]ithout the attorney-

client privilege, that right and many other rights belonging to those accused of crime would in large part be rendered meaningless.").

If the government is permitted to access, disseminate and use a company's stolen privileged material to develop its prosecution against a company's executives, absent waiver, it will have a far-reaching chilling effect on corporate employees and counsel. If employees recognize that whatever privileged communications they have with company attorneys may be stolen and readily used to prosecute them, they will be disinclined to seek advice from the company's attorneys and participate in privileged legal discussions for the company's benefit. Further, company counsel will be disinclined to provide written legal advice. "A client cannot fully and candidly discuss its situation with counsel if the client must worry that such confidences could be used to implicate him in the very crimes for which he hired that attorney to defend him, significantly undermining the lawyer-client relationship." *Prevezon Holdings Ltd.*, 839 F.3d at 238; *see also In re City of New York*, 607 F.3d at 942 ("[W]e have recognized that, for a privilege to serve its intended function, potential litigants must be able to predict which of their materials will be protected by the privilege…. Otherwise, potential litigants may become overly cautious in creating materials so as to not risk disclosing sensitive information in future litigation."). Therefore, it is in the public's interest that this issue be resolved to prevent uncertainty in the protections afforded to privileged communications in the corporate context.

Corporate theft is ever-present, so the Court's ruling in this case stands to have broad implications for the attorney-client privilege in the corporate context.

Corporate data breaches continue to rise.[4] Targeted corporate espionage for anti-competitive purposes—like the theft that occurred in this case—also remains a constant threat to companies.[5] And, recent DOJ policy has encouraged corporate whistleblowers to come forward and has prioritized the prosecution of executives over companies.[6] Corporate executives, therefore, are keenly aware of the possibility that their companies' most sensitive data, including privileged material, may end up in the hands of hackers, thieves, and claimed whistleblowers, who may publicly disclose it or directly turn it over to authorities. If courts permit the DOJ, absent waiver, to use stolen privileged information to prosecute corporate executives, few executives will take the risk of gathering and memorializing sensitive communications and information that is necessary for company counsel to render legal advice.

Moreover, the issuance of a stay will not substantially injure the prosecution. Indeed, in granting a stay pending appeal of a privilege ruling, courts have held that "[a] mere assertion of delay does not constitute substantial harm." *United States v.*

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[4] Stuart Madnick, *What's Behind the Increase in Data Breaches?*, Wall St. J. (March 15, 2024), https://www.wsj.com/tech/cybersecurity/why-are-cybersecurity-data-breaches-still-rising-2f08866c.

[5] *Combating Economic Espionage and Trade Secret Theft: Hearing Before the Subcomm. on Crime & Terrorism, S. Judiciary Comm.*, 113th Cong. (2014) (statement of Randall C. Coleman, Assistant Director, Counterintelligence Division, Federal Bureau of Investigation), available at https://www.fbi.gov/news/testimony/combating-economic-espionage-and-trade-secret-theft.

[6] *See, e.g.*, Memorandum from U.S. Dep't of Just., Department of Justice Corporate Whistleblower Awards Pilot Program (Aug. 1, 2024); Lisa Monaco, Deputy Att'y Gen., Keynote Remarks at the ABA's 39th National Institute on White Collar Crime (Mar. 7, 2024).

Philip Morris Inc., 314 F.3d 612, 622 (D.C. Cir. 2003). Granting the stay would simply maintain the status quo existing before the district court's orders. *SEC v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 168 (2d Cir. 2012) (finding that no risk of injury to the interested parties existed because the stay had the effect of maintaining the status quo prior to the district court's order).

In addition, if the stay is not granted and the government continues to prepare for trial before the Supreme Court's ruling, it will be a waste of resources. The government will not only prepare its case without knowing this Court's ruling, but it will also have to litigate the admissibility of the Stolen Privileged Documents on other grounds. Furthermore, it was the government's slow drip of information in this case that dragged this issue out and did not allow defendants to raise this issue earlier. The government concealed the Stolen Privileged Documents for years; indeed, the government did not disclose that the FBI and EDNY had the Privileged Outline and Privileged Risk Assessment in their possession until September 2024 and October 2024, respectively. And, in fact, the government had the § 3500 material in its possession for years that demonstrated that the Stolen Privileged Documents were used as a guide to investigate and build the prosecution. That material was not disclosed until November 2024.

Accordingly, the government cannot now argue that a stay of the proceedings will prejudice it when its delay in disclosing this issue has irreparably harmed defendants. The defendants' constitutional rights must outweigh the public right to

a speedy trial, and there is no indication that the government will be prejudiced by a stay for this issue to be resolved.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition, this Court should grant the emergency stay and expedite the Petition. Defendants are on bond and remain in full compliance with the terms and conditions of their pretrial release. Any time this Court spends considering the petition for a writ of mandamus is excludable time under 18 U.S.C. § 3161(h)(c).

RESPECTFULLY SUBMITTED,

Date: April 21, 2025

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APPENDIX

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United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of April, two thousand twenty-five.

Present:

Dennis Jacobs,
Denny Chin,
Raymond J. Lohier, Jr.,
Circuit Judges.

In Re: Rachel Cherwitz,

Petitioner, 25-553

****

Rachel Cherwitz, Nicole Daedone,

Petitioners,

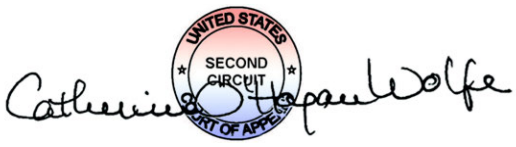
v.

United States of America,

Respondent.

Petitioners request a writ of mandamus and move to stay the district court proceedings pending resolution of the mandamus petition. OneTaste, Inc. moves to intervene. Upon due consideration, it is hereby ORDERED that the motion to intervene is DENIED. It is further ORDERED that the mandamus petition is DENIED because petitioners have not demonstrated that exceptional circumstances warrant the requested relief. *See Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004). The motion to stay the district court proceedings pending resolution of the mandamus petition is DENIED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of March, two thousand twenty-five.

Before: Maria Araújo Kahn,
Circuit Judge.

In Re: Rachel Cherwitz,

Petitioner,

****

Rachel Cherwitz, Nicole Daedone,

Petitioners,

v.

United States of America,

Respondent.

ORDER

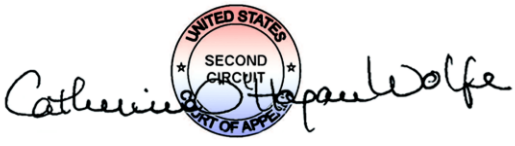
Docket No. 25-553

Petitioners move to stay district court proceedings pending a decision on their petition for a writ of mandamus and to expedite decision on the petition.

IT IS HEREBY ORDERED that, to the extent the motion seeks a temporary stay pending review by a three-Judge panel, the stay is DENIED. The motion is REFERRED to a three-Judge panel. The motion to expedite is GRANTED. The petition will be submitted to a three-Judge panel as early as the week on April 7, 2025.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	23-CR-146(DG)
-against-	:	United States Courthouse Brooklyn, New York
RACHEL CHERWITZ and NICOLE DAEDONE,	:	February 26, 2025 10:30 a.m.
Defendants.	:	

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TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE DIANE GUJARATI
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S: (Cont'd)

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Official Court Reporter
kristi.edny@gmail.com

Proceedings recorded by computerized stenography. Transcript produced by Computer-Aided Transcription.

* * * * *

(In open court.)

THE COURTROOM DEPUTY: All rise. The Honorable Diane Gujarati is now presiding.

You may be seated.

United States of America v. Rachel Cherwitz and Nicole Daedone.

Is the Government ready?

MS. KASSNER: Yes. Good morning, Your Honor.

Gillian Kassner, Kayla Bensing, Nina Gupta, Sean Fern, joined by paralegal Specialists Liam McNett and Marlane Bosler for the Government.

THE COURT: Good morning, everyone.

MS. COHEN: Good morning, Your Honor.

Celia Cohen and Mike Robotti on behalf of Ms. Cherwitz.

THE COURT: Good morning to all three of you.

MS. BONJEAN: Good morning, Your Honor.

Jennifer Bonjean, B-O-N-J-E-A-N, of the Bonjean Law Group, on behalf of Ms. Daedone.

THE COURT: And good morning to both of you, as well.

In the past, you guys have all been sitting at the same table. It's actually a little bit hard for me to sort of be able to see and sometimes hear people who are hanging off the end of the table, so we're going to have you at the two tables. If during this proceeding the attorneys need to consult with each other, just tell me that or just do it.

MS. BONJEAN: Okay. Thank you, Your Honor. That was our only concern.

THE COURT: Yes, of course. Trial is a different story. I don't want people really wandering around, but I have no problem, of course, with the two different parties consulting with each other as needed today.

MS. BONJEAN: Thank you.

THE COURT: I had not intended to have another conference before trial, but there are issues to address in light of recent filings. I'll start with some procedural background to reorient everyone.

As the parties will recall, this case had progressed to the point of being within five days of trial before attorney disqualification issues led to an

adjournment. The trial was scheduled for January 13th, and it was adjourned at a conference held on January 8th. Trial was not adjourned for any reason other than attorney disqualification.

Notably, at a conference held on January 7th, the Court denied the motion for a trial adjournment that had been brought by defendants on grounds separate from the attorney disqualification ground. The Court noted at the time that the record before the Court largely undercut defendants' arguments.

Also notably, at the January 8th conference where the Court adjourned trial, the Court explicitly noted that this case was at a relatively advanced stage, and the Court pointed out that the case was past the pretrial motion stage and past the motions *in limine* stage; that requests to charge had been filed; and that what remained was for the parties to continue to prepare for trial and for there to be a trial. The Court also explicitly noted that it did not intend to issue additional rulings in advance of trial based on what had been presented to that point.

Defendants now seek leave to file additional motions.

The first motion for leave is defendant Cherwitz's January 24, 2025 motion for leave, which is filed publicly in redacted form at ECF No. 261, and filed under seal in

unredacted form at ECF No. 262. The Government's opposition is at ECF No. 269. The reply is at ECF No. 270.

In general terms, defendant Cherwitz seeks leave to file a motion (1) to compel the Government to turn over the entirety of Ms. Blanck's hard drive; and (2) for a *Kastigar* hearing and to dismiss the indictment.

The second motion for leave is defendant Cherwitz's January 30, 2025 motion for leave, which was filed under seal in unredacted form at ECF No. 265. A redacted version was filed publicly on January 31, 2025, at ECF No. 267. Defendant Cherwitz represents that defendant Daedone joins in this motion for leave. The Government's opposition is at ECF No. 275. The reply is at ECF No. 277.

Defendants seek leave to file a motion to compel the Government to disclose the grand jury minutes for three reasons. Defendants' descriptions of those reasons are as follows: (1) to ensure that the grand jury was not deceived with respect to the evidence before it; (2) to ensure that the grand jury was not presented with information based upon stolen attorney-client privileged documents; and (3) to ensure that the grand jury was properly instructed that the conspiracy statute under which the defendants were charged did not exist until June 2009. Defendants assert that if the grand jury minutes reveal what defendants believe they will reveal, the indictment should be dismissed.

Collectively, and in summary, the topics addressed in the two requests for leave are: The timing of the charged conspiracy; the Blanck journals; the Blanck hard drive; and the Aidelbaum Word Documents.

Defendant Daedone also filed a letter on February 17, 2025 relating to the Blanck journals, which is at ECF No. 280. By letter dated February 17, 2025, which is at ECF No. 281, defendant Cherwitz states that she joins in defendant Daedone's February 17, 2025 letter. The arguments in defendant Daedone's February 17, 2025 letter overlap with those in the motions for leave.

Yesterday, defendants filed a subpoena request. The unredacted version is filed under seal at ECF No. 284, and the redacted version is filed publicly at ECF No. 285. Given the timing of the filing of the request, I will not be addressing it today.

Although the motions for leave contemplate the filing of motions seeking a variety of relief, including a hearing and disclosure of grand jury minutes, the contemplated motions appear primarily to be ultimately aimed at obtaining dismissal of the indictment.

In opposing the motions for leave, the Government advances various arguments. The Government notes that defendants have already unsuccessfully brought multiple motions to dismiss, both timely and untimely motions, and

the Government argues that defendants should not be permitted to bring yet another untimely motion. The Government highlights that the topics defendants raise are not new. The Government further argues that even setting aside any untimeliness, the bases now proffered by defendants do not support dismissal of the indictment or any of the other contemplated relief.

As the parties know, and as I've previously noted, the Second Circuit has stated that dismissal of an indictment is an extraordinary remedy reserved only for extremely limited circumstances implicating fundamental rights. See *United States v. De La Pava*, 268 F.3d 157, at 165, Second Circuit 2001.

As the parties also know, the deadline for filing pretrial motions has long since passed. Motions to dismiss were filed, both timely and untimely motions to dismiss. A motion to dismiss at this point on the bases evidently contemplated by defendants would be untimely. And based on the record to date, such untimeliness would be without good cause.

To the extent that defendants seek leave to bring yet another untimely motion to dismiss, such leave is denied.

A couple of things in defendants' filings were particularly notable to the Court on the issue of timing.

First, it was notable to the Court that at the September 27, 2024 conference, the parties were told, in substance, to address the Aidelbaum Word Documents with each other in the first instance and yet according to defendant Cherwitz, defendants did not confer with the Government on this topic until January 23, 2025. That was four months after the September conference and was even after the original trial date had passed.

Second, it was notable to the Court that defendants represent that information they learned while the parties were working on the joint requests to charge in November 2024 underlies defendants' request for relief now with respect to the time period of the charged conspiracy. Given that until January 8th, trial was scheduled to start on January 13th, it is telling that defendants did not seek leave earlier.

Throughout the pendency of this case, I have given defendants considerable leeway. Indeed, I have considered on the merits numerous of their untimely requests. I have done so in light of the nature of some of the issues raised. But defendants are operating as though they may, even at this late stage, continue to raise issues that could have and should have been raised earlier.

Defendants also seem to be operating as though they may relitigate issues previously decided. For example,

in a footnote to her motion for leave at ECF No. 261, defendant Cherwitz indicates that the defense "reserves its right" to renew its motion to dismiss based on the Purportedly Privileged Document; and we have defined that document before. "Reserves its right" is a curious choice of words. The Court will not be revisiting its denial of defendants' prior motion to dismiss based on the Purportedly Privileged Document. That issue was extensively litigated and was decided.

As I said months ago, a change in counsel does not give a criminal defendant a restart or redo of the proceedings. To the extent that defendant Cherwitz or her lawyers believe otherwise, they are mistaken.

Turning back to the requests for leave. Although the requests related to the Aidelbaum Word Documents and the timing of the charged conspiracy and, more generally, disclosure of grand jury minutes, appear to largely be aimed at obtaining information in order to bring another motion to dismiss the indictment, which as I have said would be untimely without good cause, I note for record completeness that defendants' arguments on these issues also lack merit.

Defendants have not demonstrated that the extraordinary relief of disclosure of grand jury minutes is warranted on any of the bases proffered by defendants. Defendants have not met their burden of showing a

particularized need that outweighs the interest in secrecy, as required under the applicable law. The Government's arguments, supported by caselaw, are persuasive on the record here.

Defendants' arguments with respect to the Aidelbaum Word Documents are not persuasive. As the parties will recall, I discussed the applicable law with respect to privilege and authority to assert privilege in the context of the Purportedly Privileged Document. I won't repeat that now, but I incorporate that discussion of the law here. Defendants' arguments with respect to the Aidelbaum Word Documents, including the due process argument they now assert, are not persuasive based on the record before the Court. I distinguish, of course, between the factual record and any party's characterization of the record or speculation.

Defendants' arguments about the timing of the charged conspiracy also are not persuasive based on the record before the Court, substantially for the reasons set forth by the Government.

I'll turn now to those requests for relief that appear to be aimed at least in part at obtaining relief short of dismissal of the indictment.

The briefing on the requests for leave is detailed and lengthy. Indeed, each motion for leave is approximately

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	23-CR-146(DG)
-against-	:	United States Courthouse Brooklyn, New York
RACHEL CHERWITZ and NICOLE DAEDONE,	:	September 27, 2024 10:30 a.m.
Defendant.	:	

TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE DIANE GUJARATI
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S: (Cont'd)

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Proceedings recorded by computerized stenography. Transcript produced by Computer-Aided Transcription.

* * * * *

(In open court.)

THE COURTROOM DEPUTY: All rise. The Honorable Diane Gujarati is now presiding.

You may be seated.

United States of America versus Rachel Cherwitz and Nicole Daedone.

Is the Government ready?

MS. KASSNER: Yes.

THE COURT: State your appearances for the record, please.

MS. KASSNER: Good morning, Your Honor.

We have a full house today. Gillian Kassner, Kayla Bensing, Devon Lash, Sean Fern, and Paralegal Specialist Anna November, Marlane Bosler, and Liam McNett, for the Government.

THE COURT: Good morning, everyone.

THE COURTROOM DEPUTY: Are the defendants ready?

MS. BONJEAN: Good morning, Your Honor.

Jennifer Bonjean, B-O-N-J-E-A-N, of the Bonjean Law Group, on behalf of Ms. Daedone.

MR. ANSARI: Good morning, Your Honor.

Imran Ansari, A-N-S-A-R-I, for the defendant Rachel Cherwitz.

MR. AIDALA: Good morning, Your Honor.

Arthur Aidala. How are you?

THE COURT: Good.

DEFENDANT CHERWITZ: Rachel Cherwitz.

THE COURT: Yes.

Good morning to all of you. Welcome to new counsel. Everyone may be seated.

I just want to make sure, you're all at one table, which is fine with me. I'm looking at the defense side here. But the clients are sort of hanging off the end of the table. If they're comfortable there, I'm fine with it. If you want to spread out and use another table, you can do that as well.

MS. BONJEAN: Thank you.

THE COURT: We're convened for a conference. I will begin by taking up defendants' pending joint motion to dismiss which was filed by defendants on August 1, 2024 and which is opposed by the Government.

As the parties are aware, the motion to dismiss is

the second motion seeking dismissal of the indictment. The first such motion, which was brought on different grounds than the instant motion, was denied on May 3, 2024.

I permitted the filing of the instant motion with the understanding, set forth on the record at the July 3, 2024 conference, that the Government would be able to argue that the motion should be denied for untimeliness. I am prepared to give the parties my ruling on the instant motion to dismiss.

Before I give you my ruling, I will set forth the submissions that I've considered.

I have considered the defendants' filings at ECF No. 113. There was no notice of motion, but there was a memorandum of law, exhibits, and a letter regarding, inter alia, sealing and redaction.

I note as to the filings at ECF No. 113 that certain portions were redacted so that the Government Trial Team did not have access to those portions but that the documents in full were provided to the Government's Filter Team. The Court also has the full, non-redacted versions and, via the Filter Team, the Court also has the defense redactions.

I've considered the Government's memorandum in opposition to the motion to dismiss, which, along with its exhibits, is at ECF No. 118.

I've considered the Filter Team's supplement to the Government's memorandum in opposition to the motion to dismiss, which is filed at ECF No. 127 and consists of a letter and three exhibits. The first two exhibits are declarations, and the third exhibit is the Filter Team's proposed redactions to the defense motion papers, which the Filter Team believes were over-redacted by the defense. The Government Trial Team does not have access to the documents filed at ECF No. 127, but the defendants do.

I've also considered the PDF that defendants contend is privileged, which has been provided to the Court by the Filter Team. It consists of 27 pages. Defendants have the PDF as well. The PDF was provided to the Court on September 10, 2024 at the Court's direction. The cover letter documenting that it was provided to the Court is publicly filed at ECF No. 145. The PDF is not publicly filed.

A note about terminology.

The parties refer to the 27-page PDF at issue as a "document." What makes up the PDF is not one discrete document, but rather multiple JPEGs provided by an individual referred to as Individual 13, which were then combined into one PDF by the Government for production to defendants.

Have I correctly described the PDF, the 27-page

PDF at issue?

MS. KASSNER: Yes, Your Honor.

THE COURT: Counsel for defendants, do you agree with that?

MS. BONJEAN: I'm just a little confused. You said Individual 13?

THE COURT: Yes.

MS. BONJEAN: Okay. I am doing the calculation in my head of who Individual 13 is, but I think that's correct. I think I understand.

THE COURT: Okay.

And counsel for Ms. Cherwitz?

MR. ANSARI: Yes, we join in that.

THE COURT: Okay.

Because the parties refer to the 27-page PDF as a "document," I will use the parties' terminology for record clarity. I will refer to the 27-page PDF as the Purportedly Privileged Document.

I've considered the defendants' reply, which, along with its exhibits, is at ECF No. 141. The exhibits include two declarations and a transcript of a proceeding in the Superior Court of the State of California. One of the declarations has documents attached to it that are referenced in the declaration. Defendants' reply addressed both the Government Trial Team's opposition and the Filter

Team's supplement.

There were also letters raised in advance of the filing of the instant motion previewing the nature of the motion, and, as I referenced earlier, the then-anticipated motion was discussed at the July 3rd conference.

After defendant's reply was filed, there were additional filings that raise some issues relating to documents other than the Purportedly Privileged Document that is the subject of the instant motion, namely certain Word documents. The Word documents were provided to the Court on September 23, 2024 at the Court's direction. The cover letter documenting that they were provided to the Court is publicly filed at ECF No. 158. The Word documents are not publicly filed.

The issues raised about those other documents in the additional filings should be addressed by the parties with each other in the first instance, including, as appropriate, with the Filter Team rather than the Trial Team. I have considered the entirety of the record, but will address only the two bases raised in the instant motion, one of which relates to the Purportedly Privileged Document.

After I give the parties my ruling on the pending motion to dismiss, I will address certain other recent filings by the defense in which defendants seek a variety of

relief, including as to certain materials and as to schedule and deadlines. Defendants raise some issues that I take very seriously. But again, I'm going to be starting by addressing the pending motion to dismiss.

Now, I don't think any of the defense counsel were here then, but as I did when I ruled on the first motion to dismiss brought by defendants, I will begin by briefly summarizing the parties' arguments. And in the interest of full disclosure, maybe not so briefly. My summaries are not intended to be verbatim, except where I indicate that I am quoting, or to be exhaustive. Rather, they are intended to provide background and context. I have considered each of the arguments made by the parties, whether I specifically reference a particular argument or not.

The briefing is currently under seal and will remain so until certain issues implicating redactions are resolved. I will, however, be referencing the briefing today. I will not be explicitly mentioning those parts that are likely to ultimately be redacted. I note, however, that defendants appear to have over-redacted their briefing.

Defendants argue that the indictment should be dismissed for two reasons.

First, defendants argue that the indictment should be dismissed because the Government used privileged information in developing the charges, in violation of the

defendants' due process rights. The document that defendants point to as being privileged is the Purportedly Privileged Document.

Second, defendants argue that the indictment should be dismissed because the Government directed the destruction of exculpatory evidence, namely emails of a particular individual. As the parties are aware, there is a separate motion pending that Judge Levy is addressing with respect to the individual, and at least until that motion is decided, we will not be using the individual's name.

In connection with their argument that the indictment should be dismissed because the Government used the Purportedly Privileged Document in developing the charges against them, defendants argue that the document is, in fact, a privileged document; that it was stolen from OneTaste servers; and that there has been no waiver of privilege.

Defendants further argue that defendants have standing to assert privilege over the document.

Defendants argue that they have standing to assert OneTaste's privilege and, in that regard, defendants make certain assertions regarding defendants' roles in OneTaste during a particular time frame. See ECF No. 113-1 at 4 to 5; see also July 3rd transcript at 18, which is ECF No. 125; ECF No. 113-1 at 29, note 10; and ECF No. 141 at 13.

In a footnote in their opening brief, defendants indicate that they are prepared to show that they enjoyed an individual privilege over the Purportedly Privileged Document, but they suggest that they would have to waive their Fifth Amendment privilege in order to do so and they should not be required to do so. They reiterate this point in their reply.

Defendants argue that the Government's investigation went dormant for a period of time until the Government obtained the Purportedly Privileged Document and that the indictment would not have existed but for the Government having obtained and relied on the document.

Defendants further argue that it is on the Government now to demonstrate that the indictment resulted from independent and legitimate sources.

Defendants argue that the government engaged in wrongdoing in connection with obtaining the Purportedly Privileged Document.

The argument that the indictment should be dismissed on the basis of the use of the Purportedly Privileged Document was raised by defendants with the Court well after the deadline the Court had set for the filing of pretrial motions, which was a date jointly proposed by the parties. Indeed, the argument was raised with the Court only after defendants' first motion seeking dismissal of the

indictment was denied. The timing was addressed at the conference on July 3rd and also in the briefing. Defendants argue that their failure to raise this issue earlier should be excused. They assert that the document was "buried" and its nature "concealed" by the Government in its discovery production. But they have also candidly stated that when new counsel came into the case, they reviewed "with more earnestness" the discovery material that had been produced. See July 3rd transcript at 12. And they have asked the Court to exercise its "discretion" to allow the motion because the stakes are high. See July 3rd transcript at 9.

In connection with their argument that the indictment should be dismissed because the Government directed the destruction of exculpatory evidence, defendants focus on the actions of FBI Agent McGinnis. In different parts of their briefing, defendants characterize Agent McGinnis's actions differently, referring, in different places, to Agent McGinnis having directed, guided, counseled, or advised the individual with respect to the account. They also characterize differently in different places what the direction, guidance, counsel, or advice was, referring to disbanding and deleting the account, to canceling the account, and to destroying evidence.

Defendants argue that the email communications had apparent exculpatory value; that defendants have no ability

to obtain the material elsewhere; and that the material was materially exculpatory, and even if not, defendants have shown that the Government acted in bad faith and that the evidence is potentially useful.

Defendants, at various places in their briefing, request a hearing, arguing that a hearing is necessary with respect to such issues as the Government's receipt of the Purportedly Privileged Document and the content of the email account.

The Government opposes the instant motion in its entirety. The Government argues that the instant motion should be dismissed as untimely. The Government notes that a pretrial motion schedule was jointly proposed by the parties and adopted by the Court. The Government further notes that defendants did not claim that they needed additional time to review the discovery before filing pretrial motions. And the Government notes that defendants did not propose a different pretrial motion schedule or seek an extension of the motion deadline. The Government argues that defendants have not shown good cause such that their failure to timely file their motion on the schedule initially set by the Court for the filing of pretrial motions should be excused.

Setting aside the issue of whether the Court should reach the issues raised in the instant motion on

their merits because of the timing of the motion, the Government argues that dismissal of the indictment is not warranted on either of the two bases advanced by defendants.

As to the Purportedly Privileged Document, the Government argues that the document was not buried or its nature concealed. Rather, the document was explicitly identified in a cover letter with a description, and the identity of the individual who provided the document was separately disclosed to defense counsel by email.

The Government notes that the burden is on the party asserting the attorney-client privilege to establish each of its elements, and the Government argues that where a corporation is a privilege holder, the corporation's current management controls the attorney-client privilege; that any privilege with respect to the document at issue here is held exclusively by OneTaste; and that, therefore, defendants lack standing to assert privilege, noting that defendants are not currently employed by OneTaste in any capacity.

The Government argues that the cases defendants rely on do not actually provide support for defendants' argument that they have standing to assert OneTaste's privilege.

The Government also argues that defendants should not be given an opportunity now to try to assert an individual privilege in light of the fact that they were

told at the July 3rd conference that the Court wanted only one motion, raising whatever the defense wanted to raise.

The Government further argues that, in any event, because the document was disclosed in September 2023, defendants have waived any privilege by failing to assert it earlier.

On the issue of timing, the Government notes that OneTaste asserted privilege over the document for the first time on April 24, 2024, via email on which counsel for the defendants were copied, and that counsel for the defendants did not independently assert any privilege with respect to the document at that time.

The Government also argues that defendants have failed to meet their burden of establishing a factual connection between the document and the charges to warrant any further factual showing by the Government. In connection with this argument, the Government asserts, with reference to the record, that the timeline on which defendants rely is inaccurate. The Government argues that defendants have not established any Government misconduct and argues that even if there was a violation here, the remedy is exclusion of the document at trial, not dismissal of the charges.

As to the FBI agent issue, the Government disputes defendants' characterization of Agent McGinnis's conduct and

points to material in the record reflecting the context and content of Agent McGinnis's communication with the individual at issue about the email account at issue.

The Government also argues that defendants have failed to establish any element required for demonstrating spoliation. Specifically, the Government argues that defendants have failed to demonstrate that the purported loss of the email account is chargeable to the Government; that defendants have made no credible showing that the email account possessed exculpatory value that was apparent before the account was canceled; that defendants have not shown that the email account is inaccessible by other means; and that defendants have failed to show any bad faith.

The Government argues that an evidentiary hearing is not warranted on defendants' motion on the record before the Court because defendants have failed to create any disputed issues of material fact. More specifically, the Government argues, as to the privilege claim, that defendants have not established standing to assert privilege over the Purportedly Privileged Document or any factual connection between the document and the pending criminal charges to warrant a hearing. And the Government argues, as to the spoliation claim, that defendants' argument turns on communications that are in the record before the Court and which the Court can read for itself.

I will not reveal the details of the Filter Team's analysis set forth in its submissions, but will state that its conclusion is that on the record as it stands, the burden of demonstrating that any part of the Purportedly Privileged Document is privileged has not been met. Further, as to two of the 27 pages, it appears that OneTaste is no longer asserting privilege. The Filter Team represents this and the Government notes this in its opposition briefing. Of course, any conclusion by the Filter Team with respect to the attorney-client privilege is not binding on the court.

Have I accurately stated the parties' positions and arguments, in general terms, of course? I don't know who is going to take the lead for the Government. Ms. Kassner?

MS. KASSNER: Yes, Your Honor.

And that's correct, it's correctly stated. Thank you.

THE COURT: Okay. And again, these are just summaries.

Counsel for Ms. Daedone?

MS. BONJEAN: Generally, yes, Your Honor. I don't know if the Court referenced the subsequent filings of the Government, the letters, and I'm sorry, I didn't write it down. There was a letter filed by the Filter Team and by

the Prosecution Team. I think the Court --

THE COURT: Yes. I think I referenced that, but to the extent it wasn't clear, I considered everything that's been filed and, of course, everything that has been provided to the Court by the Filter Team that's not publicly filed.

MS. BONJEAN: Okay. And I just want the Court also to be clear, I know there's this 41(g) motion that's also pending before the Court.

THE COURT: Yes.

MS. BONJEAN: Counsel is present here today for that. He's in the gallery, Mr. Pelletier. I just wanted, out of an abundance of transparency, to let the Court know that he is present as well.

THE COURT: Yes, I recognize him. Thank you.

MS. BONJEAN: Okay.

THE COURT: Counsel for Defendant Cherwitz? And again, I recognize you're new, but I know you've done your due diligence and gotten up to speed on the case or you wouldn't be here today. But have I accurately, in general terms, stated your positions and arguments?

MR. ANSARI: Yes, Your Honor.

THE COURT: As I stated at the outset of the proceeding, I am prepared to give the parties my ruling on the instant motion. I'm going to address the two bases for

the motion separately.

But as an initial matter, I note that defendants have not demonstrated that they are entitled to an evidentiary hearing with respect to either basis. On the record before the Court, no hearing is required with respect to the instant motion. The record allows for decision on the instant motion without the need for a hearing.

Turning now to the first basis for the instant motion, namely, the Purportedly Privileged Document.

I find that defendants have failed to demonstrate good cause for their failure to bring their motion on the schedule initially set by the Court and that to the extent that the motion is based on the Purportedly Privileged Document, the motion is subject to dismissal for untimeliness.

By letter dated and filed November 28, 2023, the parties jointly proposed a briefing schedule for pretrial motions. See ECF No. 62. The same day, the Court adopted that schedule. See Order dated November 28, 2023.

Pursuant to the schedule jointly proposed by the parties and adopted by the Court, any pretrial motions were required to be filed by January 16, 2024; any oppositions were required to be filed by February 16, 2024; and any replies were required to be filed by March 1, 2024.

If defendants had felt that they needed more time

to go through the discovery materials or to investigate before bringing their pretrial motions, they could have sought an extension of the deadline for filing pretrial motions. They did not do so. Rather, on January 16th, defendants filed a Joint Motion to Dismiss the Indictment, or, in the Alternative, for a Bill of Particulars, ECF No. 68. In that motion, they challenged the indictment on several grounds. The motion was fully briefed as of March 1st, oral argument on the motion was heard on April 4th, and the motion was denied on May 3rd. Only after the Court had announced its decision on the motion -- indeed immediately after -- did defendants indicate that they intended to bring additional motions.

As is clear from the record before the Court, the Government neither buried nor concealed the nature of the Purportedly Privileged Document. On September 18, 2023, which was approximately four months before the January 16, 2024 deadline set for the filing of pretrial motions, the Government produced the document as part of discovery production and itemized the document in a cover letter, ECF No. 43. The Government also separately provided to defendants the name of the person from whom the Government obtained the document.

It appears to the Court that what happened here in connection with the Purportedly Privileged Document is that

defendants simply decided to try to take another bite at the apple of dismissal after their first motion was unsuccessful. It may be that defendants did not fully appreciate the purported importance of the document at the time they received it, or it may be that defendants simply did not focus on the document for some period of time, for whatever reason. But either way, that is not attributable to the Government here.

It may be that new counsel decided in good faith to try to raise a new basis that prior counsel chose not to raise. But defendants here were represented by able counsel at the time of the filing of the first motion to dismiss and defendants chose to bring the motion on different grounds than on the grounds of the Purportedly Privileged Document. A change in counsel does not give a criminal defendant a restart or redo of the proceedings. Defendants appear to implicitly recognize this, as evidenced by their asking the Court at the July 3rd conference to exercise its discretion and allow the late filing of the motion.

To the extent that the motion to dismiss is based on the Purportedly Privileged Document, the motion is denied as untimely.

Notwithstanding that denial for untimeliness is proper here, I have nevertheless, out of an abundance of caution, considered the first basis for the motion on its

merits and do not find that defendants have met their burden of demonstrating that the extraordinary remedy of dismissal of the indictment would be warranted even if defendants had timely raised that basis.

The Second Circuit has stated that dismissal of an indictment is an extraordinary remedy reserved only for extremely limited circumstances implicating fundamental rights. See *United States versus De La Pava*, 268 F.3d 157 at 165, Second Circuit 2001. No such circumstances exist here.

Defendants have not established that the Purportedly Privileged Document is a privileged communication. As the Second Circuit has stated: "The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice" and the party asserting the privilege "bears the burden of establishing its essential elements." See *United States versus Mejia*, 655 F.3d 126 at 132, Second Circuit 2011.

Although, as defendants note, some of the pages of the document have markings referencing in full or in part the words "attorney client privilege," that is not dispositive, and particularly so in light of other information in the record before the Court.

Defendants assert that there was a particular document that was provided to, and created at the request of, DGG, to facilitate DGG's provision of legal advice, and defendants assert that that document is privileged. And DGG stands for Davis Goldberg & Galper, PLLC. But defendants have failed to demonstrate that the Purportedly Privileged Document is the document they assert was provided to DGG.

Indeed, the evidence before the Court, including evidence relating to chronology and content, reflects that the Purportedly Privileged Document is not the document that defendants assert was provided to DGG. See, e.g., ECF No. 127-1 at paragraphs 12 through 14. And, as noted earlier, OneTaste has acknowledged that two pages of the Purportedly Privileged Document are, in fact, not privileged.

Because defendants have not shown that the Purportedly Privileged Document is the document that they assert was provided to DGG, defendants have not shown that the Purportedly Privileged Document was a communication to DGG.

Even were the Court to have concluded that the Purportedly Privileged Document is the document that defendants assert was provided to DGG, defendants have not established all of the elements of the attorney-client privilege. For example, defendants have not met their burden of establishing that the document constituted a

communication between a client and the client's attorney. Defendants have not established who authored and/or provided the document to DGG. In addition, evidence suggests that at least some portions of the document were created prior to DGG being retained by OneTaste. Further, defendants have not met their burden of establishing that the document was intended to be and was in fact kept confidential.

And in any event, on the facts before the Court, any purported privilege belongs to OneTaste, the corporation, not to the defendants individually, and defendants cannot avail themselves of any privilege held by OneTaste. As courts have recognized, generally when an attorney is employed or retained as a company's lawyer, any privilege that attaches to communications on corporate matters between corporate employees and corporate counsel belongs to the corporation, not to the individual employee, and the employee may not avail herself of the corporation's privilege. See *United States versus International Brotherhood of Teamsters*, 119 F.3d 210 at 215, Second Circuit 1997; *United States versus Piccini*, 412 F.2d 591 at 593, Second Circuit 1969; *Application of Sarrio, S.A.*, 119 F.3d 143 at 147 to 48, Second Circuit 1997; and *United States versus Gentile*, number 21-CR-54, 2024 Westlaw 3343983 at 3, Eastern District of New York, July 8, 2024.

Notably, defendants have not even shown that they

have the authority to assert any purported privilege held by OneTaste. As courts have recognized, when a corporation is solvent, the agent that controls the corporate attorney-client privilege is the corporation's management, and when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. See *Commodity Futures Trading Commission versus Weintraub*, 471 U.S. 343 at 349 and 356, 1985. See also *Ambrose versus City of White Plains*, number 10-CV-4946, 2011 Westlaw 13290651, at 10, Southern District of New York, September 30, 2011.

Further, although an employee of a corporation can under certain circumstances enjoy a personal attorney-client relationship with counsel for the corporation, in order to be able to assert an individual privilege over communications with counsel for the corporation, the employee must make a showing that defendants here have not made. See *Gentile*, 2024 Westlaw 3343983, at 3. And *Teamsters* 119 F.3d, at 215. Indeed, defendants have made clear that they have not attempted to demonstrate that they have an individual privilege. See ECF No. 113-1, at 29, note 10.

The Court was clear at the July 3rd conference that defendants needed to bring one motion raising whatever the defendants wanted to raise and that there would not be

waves of motions. Defendants' suggestion that they have more they could demonstrate is unavailing at this stage.

On the issue of privilege, the caselaw cited by defendants is unavailing in light of the specific facts and relevant relationships here.

The Court has further concluded that even if the Purportedly Privileged Document were privileged and even if defendants had the authority to assert any privilege, neither of which they have established, defendants have waived their right to do so by having waited so long to assert privilege. They had the Purportedly Privileged Document in September 2023 and did not raise any privilege claim until more than seven months later. See, e.g., *United States versus Schulte*, No. 17-CR-548, 2022 Westlaw 1284549, at 2, Southern District of New York, April 29, 2022; and *United States versus Watson*, No. 23-CR-82, 2024 Westlaw 3202765, at 7 to 8, Eastern District of New York, June 27, 2024; see also *Teamsters*, 119 F.3d at 214.

In addition, defendants' argument that the indictment would not exist but for the use of the Purportedly Privileged Document by the Government is not supported by the record.

Finally, with respect to the Purportedly Privileged Document, even were the Court to have concluded that there was a violation by the Government here warranting

a remedy, the extraordinary remedy of dismissal of the indictment, which is the remedy sought by defendants, would not be the appropriate remedy. At most, the Court would preclude the Government from using the document at trial, either in its case in chief or for any purpose at all.

Turning to the second basis for the instant motion, relating to the FBI agent and the email account, defendants' arguments are unavailing. Indeed, defendants' strained reading of the relevant communications, and defendants' evident disregard of relevant context, renders their arguments particularly unavailing.

As I referenced earlier when summarizing the defendants' arguments, defendants describe the actions of the agent differently in different places in their brief. Notwithstanding anyone's characterizations of the communications, it is clear to the Court on the record before it that the agent did not direct the individual at issue to destroy her emails. What he actually said to her, and the inquiry from her that he was responding to, in context, paint a very different picture than the one defendants paint. Those communications are in the record.

To prevail on a spoliation claim, a defendant must show: one, that the evidence possessed exculpatory value that was apparent before it was destroyed; two, that the evidence was of such a nature that the defendant would be

unable to obtain comparable evidence by other reasonably available means; and three, bad faith on the part of the government. See *United States versus Walker*, 974 F.3d 193, at 208, Second Circuit 2020. As a threshold matter, however, a defendant must first show that evidence has been lost and that this loss is chargeable to the Government. See *United States versus Greenberg*, 835 F.3d 295, at 303, Second Circuit 2016.

Defendants do not come close to meeting their burden of demonstrating spoliation on the record here. In addition to failing to establish that any purported loss with respect to the email account is chargeable to the Government, defendants have failed to demonstrate that the email account possessed exculpatory value that was apparent before the account was canceled; have failed to demonstrate that the contents of the account are inaccessible to defendants or that defendants are unable to obtain comparable evidence by other reasonably available means; and have failed to demonstrate bad faith on the part of the government.

Finally, even were the Court to have concluded that with respect to the email account there was a violation by the Government here warranting a remedy, the extraordinary remedy of dismissal of the indictment, which, again, is the remedy sought by defendants, would not be the

appropriate remedy.

Defendants' motion to dismiss, ECF No. 113, is denied in its entirety.

And that concludes my ruling.

Turning now to other matters, I want to advise the parties that I take accusations of misconduct very seriously. A party making such an accusation should take care to be on solid factual ground before doing so. I also take very seriously compliance with discovery and Brady obligations.

Across two submissions recently filed, including the one that was filed at I think 11:34 last night, defendants seek a variety of relief. One request was already denied by the Court. As for the other requests, defendants seek a deadline for expert disclosure. The deadline for expert disclosure is October 4, 2024.

Defendants seek to have the Court order the Government to make more fulsome and complete production of Brady material, including all unredacted 302 Reports of witnesses previously identified as having provided potentially exculpatory information. Defendants seek to have the Court order the Government to make disclosures related to the journals, as detailed in defendants' letter to the Government dated September 23, 2024. I think everyone knows which journals I'm talking about. Defendants