SHER TREMONTE LLP

March 9, 2023

BY ECF AND EMAIL

The Honorable Eric R. Komitee
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *United States v. Carlos Watson*, 23-CR-82 (EK)

Dear Judge Komitee:

We represent Carlos Watson. We write in brief response to the government's opposition to Mr. Watson's motion for modification of the bond, Dkt. No. 31, and in furtherance of the oral applications made at the March 6, 2023 status conference concerning (a) the U.S. Attorney's press statements regarding this matter; and (b) our request for the return of Mr. Watson's devices pursuant to Federal Rule of Criminal Procedure 41(g). We also write in brief response to the government's letter concerning Ozy Media's representation filed on March 8, 2023. Dkt. No. 26. We apologize for the flurry of filings in this matter in advance of tomorrow's court conference, but the issues are time-sensitive and the government's letters on these topics contain material omissions, innuendo, and downright confusion as to the facts.

The Government's Letter in Opposition to Mr. Watson's Motion for Modification of the Bond

We will be prepared to discuss the motion to modify Mr. Watson's bond at the conference tomorrow. However, in seeking to justify the factual basis for Judge Pollak's ruling, the government advances several misleading arguments.

First, under the section entitled "Defendant's Use of Employees to Further His Fraud," the government claims that on several occasions between 2018 and 2020, Mr. Watson "push[ed] employees up to and past their ethical boundaries." Dkt. No. 31, at 6. Putting aside that Mr. Watson is presumed innocent of the charges and that no evidence has been presented to substantiate these claims, it is notable that two of the three employees in the cited examples have, since leaving Ozy Media, reached out to Mr. Watson on their own accord and on friendly terms. Indeed, Employee-1, who left Ozy in 2018 and to whom Mr. Watson allegedly made threats to ruin her "life," *id.* at 5, including by calling the dean of a prestigious business school, later contacted Mr. Watson thanking him for providing letters of recommendation that assisted her admission to the business schools at Stanford University and University of Chicago. Employee 2, who resigned in 2020, has also reached out to Mr. Watson on several occasions after departing Ozy, complimenting him on Ozy's Emmy-award and other television appearances.

Second, the government persists in its extraordinarily serious – yet completely baseless – claim that Mr. Watson has used Ozy to "obstruct justice." *Id.* at 6. Its claim is twofold: (1) that both Mr. Watson and Ozy have not complied with their production obligations and that both have improperly withheld incriminating documents; and (2) that Mr. Watson and Ozy cut off attorney's fees to witnesses he believed to be cooperating. *Id.* There is no factual support for either proposition.

As to the document production, the government claims that incriminating emails were either deleted or not produced. Even assuming that bald assertion is true, it is of no moment unless the government has evidence that Mr. Watson withheld such emails deliberately and with an intent to thwart the government's investigation. It has proffered no such evidence. Indeed, all the evidence points to the opposite conclusion. The very substantial document productions in this case were handled by a large team of legal professionals, including Dechert LLP (Mr. Watson's counsel through November 2022), Ford O'Brien Lander LLP (Ozy Media's counsel through November 2022) and Blackstone Discovery (a vendor retained to assist with document collection). And, given that this investigation has been pending since the Fall of 2021, the government could have brought motions to enforce compliance with the subpoenas if indeed there were legitimate grounds to believe that the subpoena productions were incomplete. But it did not. Beyond that, in the weeks leading up to arrest, the government engaged in discussions with successor counsel for Mr. Watson and Ozy, Covington and Steptoe & Johnson, who had agreed to review prior counsel's production and supplement it as needed. Rather than wait for that production, the government returned an indictment and complained about the alleged production failures in its detention letter.

The government's argument as to Ozy's refusal to advance Samir Rao's attorneys' fees leaves out important and material facts. Ozy Media advanced $300,000 to Mr. Rao's attorneys on the day they were retained.[1] However, that retainer was somehow depleted within a few months, and when Ozy could not continue to advance those fees (Mr. Rao in fact had hired a second firm to assist in the matter), Mr. Rao sued under Delaware law. While the litigation that ensued is complex, and the chancery court ultimately ruled in Mr. Rao's favor, there is nothing in the litigation that suggests that Mr. Watson or Ozy in any way sought to retaliate against Mr. Rao because he was cooperating. Rather, the controversy between the parties appears to have centered on the extent to which the standard language in the undertaking – that Mr. Rao "acted in good faith" and in a matter that was "lawful" – was consistent with the company's bylaws relating to indemnification and advancement of legal fees, and whether any subsequent admission of wrongdoing by Mr. Rao *(i.e.* a guilty plea) would terminate his right to ongoing advancement of fees. Throughout the litigation, Mr. Watson and Ozy were represented by Armstrong Teasdale LLP, and, in an effort to settle the matter, paid Mr. Rao's attorneys over $400,000. Given the enormous fees that were in fact advanced, and

[1] The company also advanced $200,000 to pay for the legal fees of Suzee Han, but the government does not appear to take issue with those fees.

the involvement of experienced and able legal counsel at every step of the proceedings, it is baffling how the government could presume this conduct to be obstructionist.

The government's description of the current operations at Ozy is similarly incorrect and misconceived. There is no question that the company's output is significantly below what it was prior to the Fall of 2021, when the article by Ben Smith in the *New York Times* caused a seismic disruption at the company. Nonetheless, in the face of this challenging environment, Mr. Watson, with the help of outside professionals, was working steadily to bring the company back, and – against all odds – had relaunched programming across four of its five platforms in 2022. This included:

- Four newsletters (two produced daily) – the Presidential Daily Brief; The Drop; Weekender; and Sunday Magazine;
- Two shows on YouTube that aired in 2022 – The Carlos Watson Show and Sneaker Fiends; with new seasons of each and two new shows in development – Rick Ross Car Show and HBCU Med;
- A new podcast – Sheroics – premiered in 2022, with a new season in development for 2023, along with two new podcasts – Juneteenth Podcast and Rising Tides;
- Season 5 of the Ozy Genius Awards, which had been awarded to twelve recipients, with a Season 6 scheduled for this Fall.

Ozy was also beginning work on relaunching Ozy Fest, work that would have progressed – including with updating Ozy Fest's internet presence – had the government not destroyed the company overnight by indicting it. Now that the company has suspended operations, Mr. Watson is working with counsel to determine the best legal course of action. Far from the government's inflammatory description, Mr. Watson is actively and diligently trying to manage the company's winddown responsibly and in full compliance with Delaware law and the company's bylaws.

Press Statements of U.S. Attorney Peace

As discussed in court on March 6, the U.S. Attorney's Office issued a press release on the day of Mr. Watson's arrest on February 23, 2023, which contained a statement by the U.S. Attorney, Breon Peace, that crossed the line from permissible description of the allegations in the indictment to improper commentary on Mr. Watson's character and statements of opinion regarding his guilt. In order not to give the statements additional airtime, we will not repeat them here, but we refer the Court to the press release, which is still publicly available.[2]

[2] Following the court conference, we provided the Assistant U.S. Attorneys assigned to this matter with authority on this issue and asked them to refer our request to take the statement down to the front office. As of this writing, the press release remains up on the U.S. Attorney's Office website.

The statements of U.S. Attorney Peace in the press release run afoul of three independent but related rules: *First*, they are improper under the New York Rules of Professional Conduct. Rule 3.6(a) prohibits a lawyer who is participating in a criminal or civil matter from making an extrajudicial statement that the lawyer "knows or reasonably should know" will be disseminated publicly and that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Rule 3.6(b)(1) further provides that a statement ordinarily is likely to materially prejudice an adjudicative proceeding when it refers to "the character, credibility, reputation or criminal record of a party." And Rule 3.6(b)(4) similarly provides that a statement is likely to materially prejudice an adjudicative proceeding when it comprises "any opinion as to the guilt or innocence of a defendant or suspect in a criminal matter that could result in incarceration."

The U.S. Attorney's statements fall squarely within this prohibition because they plainly comment on Mr. Watson's character and that of Ozy, and they would be construed by a reasonable person as expressing an opinion on the defendants' guilt. To the extent that there is any ambiguity in the statements, the commentary to the Rules of Professional Conduct encourages a broad reading of the Rules with respect to criminal cases. *See* Rule 3.6, Comment [6] ("Criminal jury trials will be most sensitive to extrajudicial speech"); Rule 3.8, Comment [5] ("Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium against the accused.").[3]

Second, the statements are similarly improper under EDNY Local Criminal Rule 23.1. Rule 23.1(c) prohibits counsel for parties from giving extrajudicial statements which "a reasonable person would expect to be disseminated by means of public communication" if "there is a substantial likelihood that such dissemination will interfere with a fair trial." Statements concerning "the character or reputation of the accused" or "[a]ny opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case" are presumed substantially likely to interfere with a fair trial. Rule 23.1(d)(2), (7). Any lawyer who violates these terms may be disciplined. Rule 23.1(i). The Court may also impose an order governing extrajudicial statements that involves the following remedies: "change of venue, postponing the trial, a searching voir dire, empathic jury instructions, and sequestration of jurors." Rule 23.1(h).

Third, the statements at issue are improper under the DOJ's guidelines covering public statements. The DOJ guidelines are similar in structure to the rules previously

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[3] The Rules permit attorneys to respond to a prejudicial statement: "Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." Rule 3.6(d).

mentioned. They prohibit statements that "could reasonably be expected to be disseminated by means of public communication" if such a statement "may reasonably be expected to influence the outcome of a pending or future trial." 28 CFR 50.2(b)(2). The release of "[o]bservations about a defendant's character" or "[a]ny opinions as to the accused's guilt" "generally tend[] to create dangers of prejudice without serving a significant law enforcement function." 28 CFR 50.2(6)(i), (vi).

The statements at issue here pose special risks not only for a potential petit jury pool for Mr. Watson's trial, but because the government has recently issued a grand jury subpoena, indicating there is a risk of taint for any grand jury considering a superseding indictment. This is similar to the ethical issue that arose in *United States v. Silver*, 103 F. Supp. 3d 370 (S.D.N.Y. 2015). In that case, on the day that the defendant surrendered to federal authorities, the U.S. Attorney for the Southern District of New York and the FBI Special Agent-in-Charge held a press conference. *Id.* at 374. During this press conference, the U.S. Attorney made several statements about the defendant's character or guilt, including comments that he "earn[ed] millions of dollars in outside income" while "deeply compromising his ability to honestly serve his constituents" and that he "practiced" the "greedy art of secret self-reward" with "particular cleverness and cynicism." *Id.* The U.S Attorney's press release, tweets, and other public statements following the conference were similar. *Id.* at 374-375 (detailing an assertion that defendant "sold his office to line his pockets" and like comments that emphasized "greed," "cronyism," "self-dealing," "wealthy special interests," and a "culture of corruption"). Following these statements, the grand jury returned an indictment charging the defendant with mail fraud, wire fraud, and extortion. *Id.* at 375.

Although Judge Caproni ultimately declined to dismiss the superseding indictment, she noted that "it would not be unreasonable for members of the media or the public to interpret [these] statements . . . as a commentary on the character or guilt of the Defendant," *id.* at 379, and criticized the U.S. Attorney for "stray[ing] so close to the edge of the rules governing his own conduct that Defendant . . . has a non-frivolous argument that he fell over the edge to the Defendant's prejudice." *Id.* at 373. Moreover, Judge Caproni rejected the argument that use of the words "[a]s alleged" in a public statement, as here, cures the impropriety of that statement. *See id.* at 378 & n.7 (noting that the use of "[a]s alleged" was a "particularly odd circumlocution[]" that "appear[ed] to be designed only to 'check the box' of saying the word 'alleged'").

Courts have broad supervisory authority to remedy violations of these rules. *See United States v. Nunan*, 236 F.2d 576, 593 (2d Cir. 1956) (contemplating that trial judges have power to "mitigate or remove" the "effect" of inappropriate pre-trial publicity). Indeed, in *United States v. Perryman*, No. 12-CR-0123 ADS, 2013 WL 4039374 (E.D.N.Y. Aug. 7, 2013), Judge Spatt, pursuant to Local Criminal Rule 23.1, ordered a government agency to remove inflammatory statements about the defendant from the agency's website. The court considered this request by the defendant a "relatively modest" one in light of the fair trial rights at stake. *Id*. at *11. Accordingly, here, if the

government will not voluntarily remove the U.S. Attorney's statement from its press release – as it should – the Court should direct it to do so.

Rule 41(g) Motion[4]

I. Relevant Facts

On February 23, 2023, Mr. Watson was arrested in a hotel in Manhattan and, during the arrest, agents seized two cellphones and a laptop from the hotel room. None of the devices were on Mr. Watson's person at the time of his arrest, and the agents directed him to leave his other possessions in the room while he was taken into custody. As noted at the March 6, 2023 court conference, the government advised defense counsel earlier that day that it had not yet obtained a warrant for the devices. We asked the government on March 9 whether it had obtained a warrant and, as of this writing, have not received a response. Nor has the government returned the devices despite the requests of predecessor counsel and now the undersigned.

II. The Devices Should Be Returned Pursuant to Rule 41(g)

To prevail on a Rule 41(g) motion, a defendant must demonstrate that she is (1) "entitled to lawful possession of the seized property; (2) the property is not contraband; and (3) either the seizure was illegal or the government's need for the property as evidence has ended." *Ferreira v. United States*, 354 F. Supp. 2d 406, 409 (S.D.N.Y. 2005). Here, each of these factors is met.

First, the government has given no indication that Mr. Watson was not in lawful possession of the devices when he was arrested on February 23.

Second, cellphones and a laptop are not contraband. To the contrary, such devices are common possessions containing what the Supreme Court has described as "the privacies of life." *Riley v. California*, 573 U.S. 373, 403 (2014) (internal quotation marks and citations omitted). Cellular telephones and laptops typically house information related to every aspect of an individual's life: communications with loved ones, family

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[4] While the government is correct that the text of Rule 41(g) states that the motion must be brought in the judicial district in which the property was seized, the Second Circuit has held that the court that had jurisdiction over the defendant's criminal case has ancillary jurisdiction to consider a motion for return of property – albeit in the post-trial context. *Mora v. United States*, 955 F.2d 156, 158 (2d Cir. 1992). Mr. Watson has no objection to this Court exercising ancillary jurisdiction over the motion, and indeed it would preserve judicial economy to do so, since the seizure issues relating to the devices may well be the subject of pretrial motions to suppress that would be litigated in this forum. Alternatively, the Court could deem the seizure as having taken place in this district because counsel asked for the return of the phones at arraignment, but the government refused.

members, unrelated business partners, friends, neighbors, and doctors, as well as all manner of records relating to the defendants' personal lives, habits, political and religious affiliations, all wholly unrelated to the allegations in the Indictment. That such devices *could* also contain evidence of criminal conduct (though it is not clear what probable cause existed to believe they did), does not render them contraband. Judge Rakoff recently rejected precisely this kind of argument, holding:

> The Government argues that Mr. Dennis's phone is derivative contraband because Mr. Dennis used it to cyberstalk his alleged victims. If Mr. Dennis committed the crimes of which he is accused, his phone is indeed an instrumentality of a crime. However, a phone is not contraband simply when it was used in the commission of a crime.

United States v. Dennis, No. 20-CR-623 (JSR), 2022 WL 3580315, at *1 (S.D.N.Y. Aug. 19, 2022); *accord United States v. Chierchio*, No. 20- cr-306 (NGG), 2022 WL 523603, at *12 (E.D.N.Y. Feb. 22, 2022) (although defendant may have used his phone in the commission of a crime, requiring the government to return the defendant's phone). Because the devices are not contraband, Mr. Watson has satisfied the second Rule 41(g) factor.

Third, the seizure of the devices was illegal. As the Supreme Court has explained, "In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." *United States v. Place*, 462 U.S. 696, 701 (1983). That the devices were seized at the time of Mr. Watson's arrest does not, by itself, bring the seizure within the "search incident-to-arrest" exception to the warrant requirement. Unlike cases in which a defendant is arrested on the street, here Mr. Watson was arrested in his hotel room, the devices were not in his possession, and they posed no danger to the agents. Further, the government has provided no basis to conclude that the devices constituted evidence, let alone that Mr. Watson was in any position to conceal or destroy such evidence. *See Arizona v. Gant*, 556 U.S. 332, 339 (2009) (search-incident-to-arrest doctrine justified by "protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy").[5] Nor was there probable cause to seize the devices. To date, the government has not provided any explanation of its probable cause and, as noted, as of earlier this week, it had not sought a warrant for the devices.

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[5] The plain view doctrine does not apply under these circumstances. See *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (items in plain view can be seized only if the object's "incriminating character is immediately apparent").

Accordingly, the Court should grant Mr. Watson's Rule 41(g) motion and order the return of the devices.[6]

Representation of Ozy Media

Given the uncertainty about the company's finances and future, the question of representation has not yet been resolved but we hope to have an update for the Court at tomorrow's conference.

We note that the government has objected to counsel for Mr. Watson having any involvement in Ozy related matters, and, in its letter to the Court seeking appointment of counsel for Ozy, the government stated that Mr. Watson's counsel writing to the Court to request the *mandatory* entry of a plea of not guilty for the company under Rule 11(a)(4) raised "a host of conflict-of-interest and ethical concerns." Dkt. No. 26, at 2. Is overblown. Mr. Watson is an officer and director of Ozy; indeed, the government has asserted that it served Ozy with the summons at issue *by giving it to Mr. Watson*. Dkt. No. 17, at 1 ("[Mr. Watson] was served with the summons for Ozy in his role as an officer of Ozy."). If Mr. Watson can be an adequate representative of the company for the government's purposes of serving the company with a criminal summons, it follows that he should be permitted to assist in the process of selecting criminal counsel for the company.

Moreover, the government's statement that "there is no indication that Ozy is any closer to retaining counsel than it was on the date it was served the summons, nearly two weeks ago," Dkt. No. 26, at 3, omits that, prior to the government filing its letter on March 8, a potential attorney for Ozy had already been in touch with the government and advised that he may be coming in to represent the company. The government's request that the Court appoint counsel for the company while omitting this material fact from its application smacks of an effort to interfere with Ozy's right to counsel of its choice. *See United States v. Perez*, 325 F.3d 115, 124 (2d Cir. 2003) ("[W]e have consistently recognized that the right of an accused who retains an attorney to be represented by that attorney is 'a right of constitutional dimension.'" (quoting *United States v. Wisniewski*, 478 F.2d 274, 285 (2d Cir. 1973)).

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[6] Should further factual development be needed to resolve these issues, the Court should—as contemplated by Rule 41(g)—conduct an evidentiary hearing. *See* Fed. R. Crim. P. 41(g) ("The court must receive evidence on any factual issue necessary to decide the motion").

We will be prepared to discuss these matters at tomorrow's court conference.

Respectfully submitted,

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