

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-20549-CR-LENARD/OTAZO-REYES(s)(s)
CASE NO. 16-23148-CV-WILLIAMS

UNITED STATES OF AMERICA, :
 :
 Plaintiff, :
 :
 v. :
 :
 PHILIP ESFORMES, *et al.,* :
 :
 Defendants. :
 :

**DEFENDANT ESFORMES’ REPLY IN SUPPORT OF DEFENDANT’S
MOTION FOR A PROTECTIVE ORDER RE: CONDITIONS OF
VIEWING AND COPYING RULE 16 DISCOVERY**

Defendant Philip Esformes requested two separate reliefs in his motion: (1) that the Court order the government to move the *Delgado* discovery to the FBI’s main Miramar warehouse¹; and (2) that the Court order the government to assign at least one attorney-prosecutor and one or more federal agents who *are not* members of the United States Department of Justice Fraud Division, the United States Attorney’s Office for the Southern District of Florida, or the Federal Bureau of Investigation’s Miami field office *and* who have not had any involvement in the

¹ The defense proposes the FBI’s main Miramar warehouse because the facility has tables, chairs, and is sufficiently spacious to work; however, any other arrangement where the defense team would have sufficient space, a clean, mold-free working environment with the appropriate accommodations would suffice.

case to assume custody and control over all the discovery at the warehouse that is not turned over to a Special Master or Magistrate Judge.

A. The *Delgado* Boxes Should be Moved to a Location Appropriate for Lawyers and Paralegals to Conduct Discovery Review.

Although there are ancillary issues regarding the common areas of the storage facility,² the defense team's primary complaints stem from the individual storage closets in which the *Delgado* boxes are stored. These closets are designed for members of the public to merely store their personal belongings. They are not meant to be used as office space to conduct intensive document review for hours at a time in preparation for trial.

The three combined storage closets the government is using to store the *Delgado* discovery are filled to the brim with boxes and miscellaneous electronic equipment. The government had one collapsible, plastic picnic table available at the facility and a few chairs. Once the defense saw the inadequate work space, the defense team brought another collapsible table and several plastic folding chairs. Because the storage closets were so full with boxes and other items and the lighting inside the storage closets was so poor, the two fold-up picnic tables and few chairs had to be set up in the common hallway, which is approximately three

² For example, a contractor of the storage facility told one of the members of the defense team that the facility refused to replace moldy pipes so they were spray painting the pipes to hide the mold.

feet wide. Members of the public walk up and down this common hallway to access their own storage closets.



And, precisely because the storage unit is so full of boxes and electronic equipment, no one would be able to go inside to adequately clean the space; hence, there is *dust, black mold, silverfish, spiders and dead lizards* in the storage closet amongst the records that the defense team needs to review. Members of the public may leave positive reviews on Yelp and Google because they are not (1) storing their belongings in the overcrowded, dirty storage closets that contain the 1,300 bankers boxes of documents in *Delgado* and are therefore able to keep their belongings free of the *dust, black mold, silverfish, spiders and dead lizards* that are among the *Delgado* boxes; and (2) they are not using their storage closets as a space to conduct document review – a purpose for which it was never intended or designed.

Regardless of whether the agents re-boxed the evidence prior to moving it to the current storage closets, many boxes are falling apart leaving the evidence strewn on the floor. The government's contention that an agent needs to be present during discovery reviews to ensure that records are kept inside the same box from which they are removed for chain of custody purposes is disingenuous given the current storage conditions. As the court can see in the pictures embedded in this Reply and in the video of the storage unit that was filed separately, many of the boxes are falling apart or lacking box tops, leaving the loose documents inside unsecured. The boxes are also piled so high and in such a haphazard manner that

they have fallen over spilling the contents on more than one occasion. Not only is there a risk of the records being torn and altered because they are falling out of the boxes, but a member of the defense team could become injured as many of these boxes weigh more than 40 pounds.



Rule 16 (a)(1)(C) obligates the government to permit the defendant to inspect and copy or photograph records that are within the possession, custody or

control of the government and which are material to the preparation of his defense. Implicit in that obligation is the government's responsibility to maintain the integrity of the records. As shown in the pictures embedded in this Reply, the records are being so poorly stored that they are in danger of being destroyed. The government cites *United States v. Freedman*, 688 F.2d 1364 (11th Cir. 1982), for the proposition that the "discovery provided under Rule 16, while not expressly stated, should be read and applied with a limitation of reasonableness." Rule 16 requires the government to make these records available to defense counsel, so it is reasonable to require the government to store the records in a manner that will adequately preserve them, to make them available to counsel in a manner that will not endanger their health, and to allow defense counsel to inspect them (especially when there are 1,300 boxes of records) in an environment conducive to discovery review as opposed to the hallway of a storage facility open to the public.

B. Members of the Prosecution Team Cannot be Involved in the Defense Team's Preparation for Trial.

The government insists that it needs to be involved in the defense team's discovery review for chain of custody purposes; but any agent, including one that is not involved in the case, can keep track of boxes. It is necessary to have an uninterested agent coordinating the defense team's access to the boxes of discovery in the government's possession because, contrary to the government's contention, the segregating of boxes to send them out for scanning would reveal defense

strategy. Records are regularly grouped together and stored in boxes by topic. For example, offices usually keep tax returns together in the same filing cabinet and are boxed for storage in that same manner. Employee personnel files are often located in the same bankers' box. Sign-in sheets for particular types of meetings will be kept together. If the defense team were to send out for scanning boxes containing these types of records, the government would know that the defense team is focusing their time on examining tax returns, employee personnel files, and sign-in sheets for particular meetings. Because the prosecution team is intimately aware of the legal and factual issues in the case, it will be able to determine why the defense team is studying these records and tailor its case in chief accordingly. The prosecution is not entitled to a sneak preview of the defense team's strategy.

In *In re Trasyol Products Liability Litigation*, 2009 WL 936597 (S.D. Fla. Apr. 7, 2009), the court ordered a corporate party to produce the documents its attorneys had selected for their corporate witness to review before being deposed because the corporation had not come forward with some evidence that disclosure of the requested documents would create a real danger of revealing counsel's thoughts. Mr. Esformes's counsel is prepared to discuss with the court outside the presence of any members of the prosecution team specific examples of boxes at the warehouse or at the storage facility that would reveal defense strategy if sent out for copying under the supervision of a prosecution agent. Moreover, the court's

concern in *Trasylol* was that a practice of withholding discoverable information under a blanket work product assertion would interfere with the essential function of the discovery process. That concern does not exist under the circumstances presented here because Mr. Esformes is not seeking to withhold discovery. To the contrary, he is seeking meaningful access to the discovery that will allow members of his defense team to adequately prepare for his trial within the zone of privacy that is paramount to the adversarial process. *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (“Preserving the privacy of preparation that is essential to the attorney’s adversary role is the central justification for the work product doctrine”).

The government’s claim that it would be an onerous burden to provide the defense an assigned taint agent to coordinate the defense’s discovery review is also disingenuous as these agents are free to work on their cases while assisting the defense. After greeting the defense upon arrival, the agents do not have to interact with the defense team at all. Many of the taint agents who have assisted the defense team so far have brought their case files and computers with them so that they can work while the defense team reviews the discovery.

Lastly, the government cannot deny the defense team adequate access to the boxes of discovery and then allege that the defense has failed in its obligation to turn over trial exhibits. The defense has not been able to prepare trial exhibits from these records because the government has in effect conditioned the defense team’s

review of the boxes of discovery on the defense's waiver of their work product privilege. The government has thus denied the defense meaningful access to these boxes. The defense team has visited the warehouse and/or the *Delgado* storage facility approximately 41 times to conduct an overview of the available information – a process that does not disclose to the government any of the defense team's mental impressions. A more thorough, particularized review where documents are segregated for analysis and scanning cannot be conducted in the government's presence without revealing work product and trial strategy. Access to Rule 16 discovery cannot be conditioned on a waiver of the work product privilege.

CONCLUSION

The Court should order the government to move the *Delgado* boxes to a location that is appropriate for intensive document review. The Court should also order that a non-interested prosecutor and non-interested agents coordinate the defense team's discovery review so as not to run afoul of Mr. Esformes' Due Process rights.

CERTIFICATE OF SERVICE

CM/ECF served all counsel of record on the date stamped above.

Respectfully submitted,

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