



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

April 29, 2021

TO BE FILED UNDER SEAL

BY EMAIL

The Honorable J. Paul Oetken
United States District Judge
Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: In re Search Warrant dated April 21, 2021, 21 Mag. 4335
In re Search Warrant dated April 28, 2021, 21 Mag. 4591

Dear Judge Oetken:

The Government respectfully writes to request that the Court appoint a special master to conduct the filter review of potentially privileged materials seized pursuant to the above-captioned warrants. The Government has conferred with counsel for both Rudolph Giuliani and Victoria Toensing. Counsel for Giuliani intends to file a response upon reviewing the Government's letter. Toensing is in the process of securing permanent counsel, and her interim counsel is copied on this letter.

A. Relevant Background

In connection with an ongoing grand jury investigation, this Court has supervised and authorized searches and related applications, including applications authorized by this Court on April 21, 2021 pursuant to Federal Rule of Criminal Procedure 41 to search premises belonging to Rudolph Giuliani and Giuliani Partners LLC, and to seize and search electronic devices (21 Mag. 4335). On April 28, 2021, the Government seized [REDACTED] belonging to Giuliani and [REDACTED] Giuliani Partners pursuant to those warrants. On April 22, 2021, the Government sought and obtained warrants in the District of Maryland, pursuant to Rule 41, to search premises belonging to Victoria Toensing and seize certain electronic devices. On April 28, 2021, the Government seized [REDACTED] belonging to Toensing pursuant to those warrants. On April 28, 2021, [REDACTED] seized from Toensing was transported to the Southern District of New York and the Government sought and obtained a warrant to search [REDACTED] for evidence of enumerated offenses (21 Mag 4591).¹ The warrants authorize the seizure of materials responsive to the Warrants [REDACTED]

¹ The search warrants assigned numbers 21 Mag. 4335 (the "Giuliani Warrants") and 21 Mag 4591 (the "Toensing Warrant") are collectively referred to herein as the Warrants.

—was “as fair as one done by a special master,” *id.* (Dkt. 38, Apr. 26, 2018 Tr. at 8), appointment of a special master was nonetheless appropriate to promote the “perception of fairness, not fairness itself” due to the public nature of the premises searches, *id.* (Dkt. 104, Apr. 16, 2018 Tr. at 88).

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When courts have appointed special masters, the appointment has typically been based on a defendant's motion, after a criminal case has been charged, or pursuant to a return of property motion or a temporary restraining order. *See id.* (denying Cohen's request for a temporary restraining order, but appointing a special master); *Stewart*, 2002 WL 1300059 (granting defense motion for a special master); *United States v. Grant*, No. 04 Cr. 207 (BSJ), 2004 WL 1171258, at *2-3 (S.D.N.Y. May 25, 2004) (entertaining but denying defense motion for a special master). Consistent with a court's supervisory authority, however, the court may also appoint a special master where, as here, there is no pending criminal case against the subjects of the search. *See In re the Matter of Search Warrants Executed on April 9, 2018*, No. 18 MJ 3161 (S.D.N.Y. Apr. 27, 2018) (Dkt. 30) (appointing a special master pursuant to Fed. R. Civ. P. 53(a)(1)(C) and the court's "inherent equitable powers and authority"); *see also* 18 U.S.C. § 3626(g)(8) (defining "special master" as "any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court." (emphasis added)); *Benjamin v. Fraser*, 343 F.3d 35, 46 (2d Cir. 2003) (noting that section 3626(g)(8) "implicitly incorporates the long-recognized principle that Article III courts may appoint agents to engage in a variety of activities essential to the performance of judicial responsibilities." (citations omitted)).

2. Discussion

³ While the

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Government believes that its use of a filter team to conduct a review pursuant to established protocols is sufficient to protect applicable privileges and that [REDACTED] given that the searches [REDACTED] were done in an overt manner [REDACTED] as well as the unusually sensitive privilege issues that the Warrants may implicate, the Government considers it appropriate for the Court to appoint a special master to make the privilege determinations as to materials seized pursuant to the Warrants. In particular, the overt and public nature of these warrants necessitates, as Judge Wood observed, the appointment of a special master for the “perception of fairness, not fairness itself.”

In light of the parallels to this matter, the Government respectfully suggests that the Court adopt the procedures adopted by Judge Wood for the appointment of a special master in *In re the Matter of Search Warrants Executed on April 9, 2018*, No. 18 MJ 3161 (S.D.N.Y. Apr. 16, 2018), specifically:

- Direct the parties to confer and submit proposed candidates for a special master and, if they cannot reach agreement on a list of candidates, submit their own candidates.
- Appoint a special master from the list of candidates proposed by the parties or another suitable candidate identified by the Court.
- Require the special master to submit a declaration regarding any bases for potential disqualification. (Dkt. No. 29.)
- Issue an order identifying the duties, reporting and judicial review requirements, and other provisions relating to the appointment of a special master. (Dkt. No. 30.)
- Require the parties and special master to complete the review of the seized materials on an expedited schedule set forth by the Court.

[REDACTED]

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Finally, the Government respectfully requests that this letter be filed under temporary seal until May 3, 2021, to allow counsel for Giuliani and Toensing to make any redaction or sealing requests during that time. The Government has simultaneously transmitted a proposed redacted version of this letter, which redactions are narrowly tailored to protect the Government's ongoing investigation, including with respect to matters that remain under seal. To the extent it later becomes appropriate for the letter to be filed without redactions, the Government will so move.

Respectfully submitted,

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