UNITED STATES v. VILAR

United States District Court for the Southern District of New York.
2007 WL 1075041
April 4, 2007.

OPINION AND ORDER

KARAS, J.

Defendants Alberto William Vilar ("Vilar") and Gary Alan Tanaka ("Tanaka") are charged with an alleged fraud scheme involving investors' funds. The Superseding Indictment (the "Indictment"), filed on August 15, 2006, charges Defendants with conspiracy to commit securities, mail, wire, and investment advisor fraud and money laundering. They are also charged in separate substantive counts with securities fraud, investment advisor fraud, mail fraud, two counts of wire fraud, and four counts of money laundering. The Indictment also includes forfeiture allegations.
Each Defendant has filed a Motion to Suppress the fruits of two searches--one conducted pursuant to a warrant (the "Warrant" or "Search Warrant") in the United States on May 26, 2005, and one conducted at the Government's request, pursuant to a Mutual Legal Assistance Treaty and two U.K. search warrants, in the United Kingdom on October 13 and 14, 2005 (the "U.K. Search"). Each Defendant also has filed a Motion to Quash a Grand Jury Subpoena (the "Subpoena") issued on May 26, 2005. For the reasons stated herein, the motions to suppress the search in the United States and the motions to quash the Subpoena are granted in part and denied in part. The motions to suppress the U.K. search are denied.

I. Background

A. The Defendants and the Amerindo Entities

Defendants Vilar and Tanaka are principals at three entities which are the subjects of the Indictment, the searches, and the Subpoena. Those entities are Amerindo Investment Advisors Inc. ("Amerindo U.S."), which has its principal offices in San Francisco and New York; Amerindo Investment Advisors, Inc. ("Amerindo Panama"), an off-shore Panamanian investment fund; and Amerindo Investment Advisors (UK) Ltd. ("Amerindo U.K."), which had an office in London. (Indictment ¶¶ 1-3.) Together, Vilar and Tanaka founded Amerindo U.S., and were two of its shareholders, officers, and directors. (*Id.* ¶¶ 4-5.) Vilar and Tanaka were also the only two shareholders, directors, and officers of Amerindo Panama and Amerindo U.K. (*Id.*)

B. The Alleged Schemes to Defraud

The following allegations are taken from the Superseding Indictment which alleges that from July 1986 to May 26, 2005, Defendants perpetrated a scheme to defraud investors by soliciting victims to invest in fraudulent investment products, with promises

of high rates of return with little or no risk. (*Id.* ¶ 6.) The investment products included the Amerindo SBIC Venture Fund LP (the "SBIC Fund") and the Guaranteed Fixed Rate Deposit Account Program (the "GFRDAs"). (*Id.*) The Indictment charges that Victim No. 1, later identified as Lily Cates ("Cates"), began investing funds with Vilar and Amerindo in 1987. (*Id.* ¶ 7.) Her investments peaked at $18 million in September 2000 and then dropped sharply over the next two years. (*Id.* ¶ 8.) From 1987 to 1995, Cates received account statements from Amerindo U.S. with the Amerindo U.K. address. (*Id.*) In October 1995, Cates began receiving account statements from Amerindo Panama with the address of a post office box in Panama. (*Id.*)

Vilar allegedly solicited Cates to invest in the SBIC Fund in June 2002. (*Id.* ¶ 9.) SBIC funds were monitored by the United States Small Business Administration ("SBA") and were designed to promote venture capital investment in small businesses by granting licenses to qualified private venture capital firms. (*Id.*) Obtaining an SBA license was a multi-stage process. Amerindo U.S. made four unsuccessful attempts to obtain a license between 2000 and January 2004. (*Id.* ¶¶ 13-16.) Its fourth and final application was abandoned on May 28, 2004. (*Id.* ¶ 16.) Nevertheless, Vilar allegedly told Cates that he and Tanaka were personally investing in the SBIC, which he asserted had been approved by the government, and that Cates would receive $250,000 quarterly for her investment. (*Id.* ¶ 17.) Cates agreed to invest $5 million. (*Id.*)

Cates' $5 million SBIC investment was deposited on June 20, 2002, in the "Amerindo Management Inc." account (the "AMI Account"), which at that point allegedly had a negative balance of $428,122. (*Id.* ¶ 18.) On June 25 and 26, 2002, Tanaka directed that $1 million be transferred from the AMI Account to an account at Chase Manhattan Bank held in the name of A.W. Vilar (the "Vilar Account"). (*Id.* ¶ 19.) All but $45,000 of that money was allegedly spent by Vilar within two weeks of the transfer on charitable contributions and personal expenses. (*Id.* ¶ 22.) Tanaka also directed that $650,000 be transferred from the AMI Account to an account at Chase Manhattan Bank held in the name of Amerindo U.S. (*Id.* ¶ 19.) That money was allegedly spent on Amerindo U.S.'s business expenses. (*Id.* ¶ 23.) Tanaka further directed that $500,000 be transferred to a trust account at the Bank of New York. (*Id.* ¶ 19.) Approximately $400,000 of the $500,000 was invested on Cates' behalf in another account. (*Id.* ¶ 24.) Finally, the remaining $2.85 million of the SBIC investment was allegedly transferred to a Luxembourg Account and used to redeem another alleged victim's investment. (*Id.* ¶ 25.) In addition, on September 25, 2003, Defendants allegedly directed that $250,000 be transferred from one of Cates' accounts at a New York City brokerage firm (the "Brokerage Firm") to another account at the Brokerage Firm in the name of "Amerindo Technology Growth Fund Inc" ("ATGF I"). (*Id.* ¶ 28.) The letter of authority included Tanaka's signature and an alleged forgery of Cates' signature. (*Id.* ¶ 28.) On September 26, 2003, another letter of authority was signed by Tanaka directing $250,000 to be transferred from ATGF I to one of Vilar's personal accounts. (*Id.* ¶ 29.) This money was allegedly spent on Vilar's personal expenses. (*Id.* ¶ 30.) To execute this scheme, during this period Vilar allegedly made false and misleading statements to Cates concerning her SBIC investment. For example, Vilar allegedly asserted that Cates' funds had been placed in escrow and not spent, that her funds had not been used during a period of declining stock prices, that the SBIC license had been

approved, and that Cates had been accruing interest on her SBIC investment. (*Id.* ¶ 26.) All of these statements are alleged to have been fraudulently made.

Defendants are also alleged to have used Amerindo's GFRDA products to defraud investors. Beginning in 1986, Defendants allegedly solicited investments in these GFRDAs, describing the instruments as primarily low-risk, short-term debt funds, with a fixed interest rate of return substantially above the prevailing rates. (*Id.* ¶ 31.) Defendants allegedly prepared and distributed offering circulars in 1986, 1988, 1998, and 2002, which contained false and misleading statements about the GFRDAs. (*Id.* ¶ 32.) Among the misrepresentations allegedly included in these offering circulars were false statements about the identities of the offeror and the guarantor of the GFRDA investment products, as well as about the rates of return and liquidity of the investments. (*Id* .) Defendants are alleged to have intentionally misled GFRDA investors as to which Amerindo entity controlled their investments. (*Id.* ¶ 33.) For example, through September 1995, Amerindo's GFRDA account statements contained Amerindo U.S. letterhead. But beginning in October 1995, the statements were printed on Amerindo Panama letterhead. (*Id.*) Moreover, when investors sought to redeem their GFRDA investments, Defendants allegedly changed the terms of the GFRDA program, discouraged investors from redeeming, and diverted funds from other Amerindo clients to pay the GFRDA investors. (*Id.* ¶ 34.)

The Indictment identifies, as "Victim No. 3," a group of investors who were allegedly defrauded as part of Defendants' GFRDA scheme. (*Id.*) These investors were later identified as the Mayer family. According to the Indictment, the Mayer family made repeated attempts to redeem their GFRDA investments, but were discouraged from redeeming and were informed that redemption was impossible. In January 2003, Defendants allegedly also unilaterally and retroactively lowered the interest rate on the Mayer family's GFRDA investment. (*Id.*)

C. The U.S. Search
1. Supporting Affidavit

On May 25, 2005, the Government applied for a warrant to search the New York offices of Amerindo U.S. at 399 Park Avenue, 22nd floor. The supporting affidavit (the "Affidavit") was sworn to by United States Postal Inspector Cynthia Fraterrigo ("Inspector Fraterrigo"), the case agent. In addition to the facts set forth directly in the document, the Affidavit also "incorporates by reference" the criminal complaints filed against Tanaka and Vilar (the "Complaints"). (Affidavit ¶ 6.) The Affidavit further states: "Because this affidavit is submitted for the limited purposes of establishing probable cause to search the premises described below ... I have not included the details of every aspect of the investigation." (*Id.* ¶ 2.) Probable cause in the Affidavit is based primarily on three allegations wrongdoing. These allegations are summarized below.

a. The Mayer Family's Investments in GFRDAs

Inspector Fraterrigo attests in the Affidavit that she interviewed Lisa Mayer, "an individual who has known Alberto Vilar for approximately two decades, who dated him on and off over the course of approximately a decade, and who, along with her family, invested millions of dollars with Vilar and Amerindo beginning in or about 1987." (*Id.* ¶ 6.A.) Among their other investments with Amerindo, the Affidavit states that the Mayer family invested in GFRDAs, which Vilar "described in correspondence as being ... 'absolutely safe and liquid." ' (*Id.*) The Affidavit further states that in 2003, according to Lisa Mayer, "Amerindo, Vilar, Tanaka, and Tanaka's wife ... refused to release [the Mayers'] funds" invested in GFRDAs, and instead "threatened to create tax problems for the Mayers ... and dribbl[ed] out to them as little money ... as possible." (*Id.*) According to the Affidavit, "Mayer described years of begging Vilar to release some of their investment," to little or no effect. (*Id.*)

b. Lily Cates' Investments

The Affidavit and the incorporated Vilar Complaint also discuss two investments made by Cates. According to the Affidavit, in 1988, Cates invested $1 million through Amerindo in an entity called Rhodes Capital. In connection with this investment, "[Cates] received a stock certificate for two shares of stock, which was signed by Vilar and Tanaka. Although her account statements, which she received up until approximately 2002, reflected growth in the Rhodes investment, the investment was never described to her, she never has received a private placement memorandum, nor has she signed a subscription agreement for Rhodes, and her efforts to learn more about the investment were ignored or rejected by Vilar." (*Id.* ¶ 6.B.) In February 2005, Cates tried to redeem her investment in Rhodes Capital, but "Amerindo and Vilar ... refused to move her investment portfolio to Bear, Stearns & Co ... as requested." (*Id.*)

The Vilar Complaint also describes the alleged SBIC scheme discussed above. According to the Complaint, in June 2002, Vilar advised Cates to invest $5 million in the Amerindo SBIC fund, representing that Cates would earn approximately $250,000 per quarter through this investment. (Vilar Compl. ¶ 9.) The Vilar Complaint alleges in detail that within a week of receiving Cates' June 2002 investment, Vilar transferred much of the $5 million into accounts held for his personal use, including a $1 million transfer to a Chase Manhattan Bank checking account held in the name "A.W. Vilar." (*Id.* ¶ 13.) According to the Complaint, at no point did Cates authorize Vilar or Amerindo to use any of her funds to pay for Vilar's personal expenses. (*Id.* ¶ 24.) From 2000 through 2004, the Affidavit alleges that Amerindo was repeatedly denied a license from the SBA, and therefore did not make, and indeed was never legally entitled to make, the promised SBIC investment. (*Id.* ¶ 12.)

The Vilar Complaint further alleges that on September 25, 2003, a brokerage firm at which Cates held an account received a wire transfer instruction, purportedly signed by

Cates, instructing the brokerage firm to transfer $250,000 from Cates' account into the ATGF I account described above. (*Id.* ¶ 22.) Cates claims never to have authorized this transfer. (*Id.* ¶ 24.) The following day, the money was wired from the ATGF I account into a personal account controlled by Vilar. (*Id.* ¶ 22.)

c. Tanaka's Alleged Purchases of Thoroughbred Horses

The Tanaka Complaint, which is incorporated by the Affidavit, alleges, among other things, that Tanaka "convert[ed] investor funds to his own personal use for the purchase of thoroughbred horses." (Tanaka Compl. 1.) Specifically, the Complaint identifies six letters of authorization ("LOAs"), signed by Tanaka, that authorize the transfer of as much as $1 million into overseas banks from Amerindo client accounts in which Tanaka had no "direct or indirect ... beneficial interest." (*Id.* ¶¶ 9, 15.) Indeed, the Complaint alleges that Tanaka signed a document submitted to the Securities and Exchange Commission in which he claimed that neither he, his wife, nor any Amerindo employee had any interest, other than fees, in any client account managed by Amerindo. (*Id.* ¶ 9.) As identified in the Tanaka Complaint, the Amerindo accounts from which the funds were transferred were ATGF I, Amerindo Technology Growth Fund II ("ATGF II"), and the AMI Account. (*Id.* ¶¶ 8, 15.) Each of the LOAs includes a reference to the name of a race horse allegedly owned by Tanaka. (*Id.* ¶ 15.) The earliest LOA identified in the Complaint is dated June 29, 2001. (*Id.*)

d. Nonspecific Allegations of Broader Malfeasance

In addition to the three alleged schemes discussed above, the Affidavit makes passing reference to other Amerindo investors who may have been injured by Vilar and Tanaka, stating that "Cates told me about other individuals who she believed to be investors with Amerindo, some of whom may have had trouble redeeming all or part of their investments, including Brian Harvey, Joy Urich, and Paul Marcus." (Affidavit ¶ 6.E.) No other information is provided in the Affidavit or the incorporated Complaints about these other investors and the Affidavit makes no particularized allegations regarding these investors. However, the resulting warrant specifically authorized the seizure of documents "reflecting all investments in which ... Brian Harvey, Joy Urich, or Paul Marcus have a beneficial interest...." (Warrant, Attach. A ¶ 6.)

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3. The Warrant

Magistrate Judge Frank Maas signed the Warrant on May 25, 2005, at 10:30 p.m. The Warrant included a three-page rider (the "Rider"), which identified in separate, numbered paragraphs the material to be seized. Among the items whose seizure the Warrant authorized were documents concerning the individuals and investments specifically identified in the Affidavit, including the Rhodes Capital investment, the

SBIC investment, and the GFRDAs, as well as documents related to Cates, the Mayer family, Brian Harvey, Joy Urich, and Paul Marcus. The Warrant also authorized the seizure of less narrowly defined categories of documents, including corporate records, client files, communications with clients, documents related to the movement of funds in Amerindo accounts, address books, photographs, and travel documents. Additionally, the Warrant authorized the seizure of electronic material, including "[c]omputers, hard drives, and other devices ... capable of storing data or text in any format." (Warrant Rider ¶ 17.) Nowhere in the Warrant or the attached Rider are the seizures limited in any way to a specific time frame.

Postal Inspector Feiter, a supervisor who participated in the search, testified that he interpreted the Warrant to grant the power to seize extremely broad categories of documents. According to Inspector Feiter, the Warrant permitted the Postal Inspectors to seize any business-related document as "long as it had writing on it and it wasn't just blank." (Tr. 162, Dec. 14, 2005.) Inspector Fraterrigo, who also took part in the search, testified that she understood the Warrant to contain absolutely no time-frame restriction on the material that could be seized. (Tr. 142, July 4, 2006.)

4. Execution of the Search

The search was executed at the New York offices of Amerindo U.S. on May 26, 2005, beginning at 8:15 a.m. (Tr. 79, Dec. 14, 2005.) The search was conducted pursuant to the Warrant issued on May 25, 2005, which Inspector Feiter, the team leader and supervisor for the Church Street fraud team, and Inspector Fraterrigo presumed to be valid based on the fact that it was signed by Magistrate Judge Maas. (*Id.* at 91.) Neither Inspector Feiter nor Inspector Fraterrigo believed it was their responsibility to review the Affidavit and Warrant to make an independent determination as to whether they were supported by probable cause. (*Id.* at 126.) The search lasted approximately twelve hours. (*Id.* at 85.) Inspector Feiter was present during the entire search. (*Id.* at 119.) The Postal Inspectors seized approximately 170 cartons, taking sixty to seventy percent of the materials that were searched and were not slated to be addressed by the Subpoena. (*Id.* at 89.) The items that were to be addressed by the Subpoena were generally inventoried. (*Id.* at 102.)

On the morning of the search, at approximately 6 a.m., Inspectors Feiter and Fraterrigo briefed the inspectors who would be conducting the search on the allegations in the case and search protocol. (*Id* . at 79, 93.) Prior to the search, the inspectors were given and instructed to review the Affidavit and the Warrant Rider, which listed the items to be seized. (*Id.* at 77, 79.) The inspectors assigned to the arrest team were also given the Complaints which comprised part of the Affidavit. The arrest team was present at the search after carrying out their assigned arrests. (*Id.* at 78, 160.) The inspectors assigned to the search team were not given the Complaints, nor was Inspector Feiter. (*Id.* at 78, 123.) Therefore, to the extent there was information in the Complaints which was not contained in the Affidavit, the search team would not have learned that information from reading the Affidavit. (*Id.* at 129.) Indeed, Inspector Feiter conceded that it was possible that members of the search team would believe there were additional people involved in the

alleged fraud scheme beyond Vilar and Tanaka as a result of the language of the Affidavit. (*Id.* at 133.) However, Inspector Feiter testified that he read the names of some of the victims to the inspectors at the briefing as well as the names Vilar and Tanaka. (*Id.* at 95, 131.) The names of Lisa Mayer, Lily Cates, Brian Harvey, Joy Urich, and Paul Marcus were included in the Affidavit. (*Id.* at 139.) He also testified that Inspector Fraterrigo was present during some of the search and had the Complaints in her possession. (*Id.* at 134.) The search team was instructed to ask questions of Inspectors Feiter and Fraterrigo. (*Id.* at 79.) They were also instructed that if they encountered potentially privileged documents, they were to isolate them in an envelope identifying them as privileged. (*Id.*) Finally, the search team was instructed to keep the Search Warrant Rider with them as a reference throughout the search. (*Id.*) Inspector Feiter could not recall whether the inspectors asked any questions during the briefing. (*Id.* at 95.) *9 Upon arriving at the premises, the search team secured and labeled the areas to be searched. Each room and each item within a room was assigned an identifying label. (*Id.* at 80.) The rooms were labeled A through V. (*Id.* at 98.) A videotape was taken of the premises before and after the search was conducted. (*Id.*) Members of the search team were assigned areas to search. Inspector Feiter, who arrived with the search team in the morning, supervised the process, coordinated with Eugene Licker, Amerindo's lawyer, and answered questions from inspectors. (*Id.* at 80-81.) Additionally, Inspector Feiter served as an "inventory person," clearing each room once it had been searched and making an inventory of items seized from each location. (*Id.* at 82.) Inspector Feiter observed the inspectors searching the items within the rooms and referencing the Rider to determine which items to seize. (*Id.* at 81.) He also recalls referring questions to Inspector Fraterrigo and seeing her fielding questions from other inspectors. (*Id.* at 120.) However, Inspector Feiter does not recall any answers that Inspector Fraterrigo may have given. (*Id.* at 156.)

Each inspector was given the Search Warrant Rider to assist them in determining which items to seize. Inspector Feiter interpreted the Rider to cover any Amerindo stationery with writing on it, business cards, and "all official business records." (*Id.* at 162.) According to Inspector Feiter, it would not cover blank paper or employees' personal items such as personal correspondence or family pictures unrelated to the investigation. (*Id.* at 104.) Because there was no time frame identified in the Rider, Inspector Feiter interpreted it to mean that any documents from any date could be seized, so long as the subject matter of those documents fell within the scope of the Rider. (*Id.* at 117-18.) Moreover, Inspector Feiter interpreted the Rider to include documents from all of the Amerindo entities. (*Id.* at 136.)

D. The Grand Jury Subpoena

At some point during the search, a discussion ensued between Marc Litt, the Assistant United States Attorney assigned to the case, Eugene Licker, counsel to Amerindo U.S., Inspector Feiter, and Inspector Fraterrigo regarding the use of a grand jury subpoena to seize some documents. (*Id.* at 86.) Licker had been counsel to Amerindo U.S. since May 2003. (Tr. 24, May 31, 2006.) On the day of the search he had resigned from Kirkpatrick & Lockhart and was moving to Loeb & Loeb. (*Id.* at 28.) Licker had

arrived at the premises between 10 and 11 a.m. (*Id.* at 12; Tr. 96, Dec. 14, 2005.) He observed the Postal Inspectors searching the premises, reviewed the Warrant, and satisfied himself that they had authority to be there. (Tr. 13, 29, May 31, 2006.) Licker had several conversations with Litt throughout the day. According to Litt, the first conversation occurred at 10:30 a.m. and the second around 10:50 a.m. (*Id.* at 89.) They discussed the fact that Tanaka had been arrested earlier that morning, whether Amerindo employees could call Vilar, which Litt indicated he would prefer they did not do, and various conflict issues arising from Kirkpatrick & Lockhart's representation of Amerindo U.S. (*Id.* at 30-31, 90.) Licker indicated that he would cooperate fully with the Government in its investigation and offered to put into place a preservation policy for Amerindo U.S. documents. (*Id.* at 14, 16, 19, 31, 92.) He testified that he would have issued a preservation notice regardless of whether a subpoena had been issued. (*Id.* at 46.) *10 Prior to returning to his office at 1 p.m., however, Licker had another conversation with Litt during which the subpoena was discussed. Because Inspector Feiter did not believe that the search would be completed in one day, it was suggested, as an alternative, that Amerindo agree to accept service of a grand jury subpoena. (*Id.* at 14, 53.) Licker does not remember who first suggested issuing a subpoena (*id.*), but Litt credibly testified that the suggestion of a subpoena was initially raised by Licker. (*Id.* at 92-93.) Licker, on his own initiative, also agreed to preserve relevant documents, whether hard copy or electronic. (*Id.* at 14, 16, 19.) The testimony of Litt and Licker regarding the execution of the search and the issuance of the subpoena was largely consistent. However, to the extent that there were inconsistencies, the Court found Litt's testimony to be the more credible of the two, owing in large part to Licker's acknowledgment during his testimony that his memory of the day's events was less than clear. (*Id.* at 53.) At 1:37 p.m. on May 26, 2005, the Grand Jury Subpoena was faxed to Licker at his office. (*Id.* at 15.) Licker testified that the Subpoena was similar to the Rider that was attached to the Warrant. (*Id.*) In return for accepting service of the Subpoena, the Postal Inspectors agreed to cease their search. (*Id.* at 16.) Licker left the premises shortly after the Postal Inspectors, and he arrived at his office approximately one block from the premises at 9:30 p.m. (*Id.* at 16.)

To this date, Amerindo U.S. has not complied with the Subpoena. Licker testified that he was under the impression from Litt that the return date on the subpoena, which was June 16, 2005, was not binding. (*Id.* at 19.) However, Licker and his team spent several months reviewing documents and identifying those which were responsive to the Subpoena. (*Id.* at 34.) They have reviewed approximately half of the documents remaining on the premises. (*Id* . at 50.) At no point did Licker indicate to Litt that the Subpoena was overly broad or that he needed clarification on the scope of the Subpoena. (*Id.* at 35.)

Licker spoke with Vilar's counsel throughout the day on May 26, 2005. Although he did not recall whether he informed them that a search was being conducted at the premises, he would be "shocked if [he] didn't." (*Id.* at 37-38.) Licker also could not recall whether he discussed the Subpoena with Vilar's counsel. (*Id.* at 41-42.) However, in June or July 2005, Licker met with Tanaka's attorneys and discussed the Subpoena with them. (*Id.* at 36-37.) Licker and his team stopped reviewing documents when they learned that a motion to quash the Subpoena had been filed, reasoning that it would be unwise to

expend the resources of a defunct company complying with a subpoena that might be moot. (*Id.* at 51.)

E. The U.K. Search

1. Detective Sergeant Shaw's Perception of U.K. Law Regarding Search Warrants

The Court also heard testimony from Detective Sergeant Shaw, whose testimony the Court found to be credible. Detective Sergeant Shaw is a 23-year veteran of the Metropolitan Police in London, England, who has spent much of his law enforcement career investigating white collar crime. In this capacity, Detective Sergeant Shaw has received training in financial investigations, as well as in obtaining and executing search warrants. In fact, the Detective Sergeant has taken many courses on search warrant law in England and has received training regarding "special procedure material." Also, during his career, Detective Sergeant Shaw has participated in approximately 30 major fraud investigations, has supervised approximately 100 other major fraud cases, and has applied for and/or executed approximately 100 search warrants. Many of the searches executed pursuant to these warrants involved business premises.
At the time of the contested search, Detective Sergeant Shaw was assigned to the International Assistance Unit. Among other things, this Unit processes foreign evidence requests made of the United Kingdom through a Mutual Legal Assistance Treaty ("MLAT"). It is pursuant to such a treaty, for example, that a foreign government agency can request that United Kingdom law enforcement officials conduct a search of a business premises. According to Detective Sergeant Shaw, any such request must come from the proper authority and otherwise comport with the terms of the particular MLAT. Among other such terms, the U.K.'s MLATs require that the requested search be part of an investigation of conduct that is a crime under British law. A MLAT request to search a premises is first reviewed by the United Kingdom Central Authority ("UKCA"), which vets the request to determine if it comports with the MLAT and British law. If the request is satisfactory, it then is assigned to the appropriate U.K. law enforcement agency.
Detective Sergeant Shaw testified that when he receives a MLAT request to conduct a search from the UKCA, he first reviews the request to determine if the request, in his view, is based on sufficient information to justify a warrant. In his experience, he has rejected many requests for a search at this stage of the process. If, however, the request appears to be substantiated, Detective Sergeant Shaw then conducts a background inquiry by, for example, investigating the target premises. [FN4] Once Detective Sergeant Shaw determines that the request is in order and completes his own inquiry, Detective Sergeant Shaw then awaits a "direction" from the Home Office specifically authorizing him to conduct the search. From there, U.K. law requires Detective Sergeant Shaw to submit his search warrant request to a senior police officer unconnected to the investigation. This is yet another stage where the request can be rejected. If, however, the senior officer approves the search request, then Detective Sergeant Shaw formally applies for the search warrant through the "clerk of the Court," a court staff person who advises his view of the validity of the warrant. According to Detective Sergeant Shaw, it is not uncommon for the court clerk to recommend rejecting a search warrant request. If, however, the clerk

recommends approval of the warrant, the clerk will initial the request and make arrangements for the Detective Sergeant to formally apply for the warrant before the duty judge.

> FN4. In the course of his own investigation, Detective Sergeant Shaw does not have direct contact with the requesting law enforcement agency. Instead, he communicates with the foreign government officials only through the UKCA.

Detective Sergeant Shaw testified that there are three different types of search warrants under U.K. law. One category involves warrants for contraband, which includes narcotics, firearms and the like. A second category includes warrants to search for evidence of a "serious arrestable offense," which covers, among other offenses, fraud. This is known as a "Section 8 warrant," as it derives from Section 8 of U.K. legislation passed in 1984. The final category is known as a Schedule I warrant, also from the same 1984 legislation, and involves circumstances where the law enforcement officer expects to seize, among other things, "special procedure material." According to Detective Sergeant Shaw, "special procedure material" includes records created in the ordinary course of business and held (by law) in confidence. One example of special procedure material is personal banking records. [FN6] According to Detective Sergeant Shaw, all warrants can be authorized by magistrates, except Schedule I warrants and/or production orders, which must be approved by the Crown Court. An investigator does not have a duty to obtain more than one type of warrant or order to search one premises. Rather, an investigator is required to obtain a warrant or production order which is proper for the materials which are primarily sought. According to Detective Sergeant Shaw, if during the search, an investigator unexpectedly finds materials that are within the scope of the warrant that turn out to be special procedure materials, the investigator is not required to obtain a warrant to review or even to seize them.

> FN6. Detective Sergeant Shaw testified that he has experience in applying for all three types of search warrants and estimates that approximately 50 of the searches in which he has participated involved contraband warrants; 40 involved section 8 warrants; and less than 10 involved Schedule I warrants. He also stated that he also has obtained information from approximately 100 Schedule I orders. Also, Detective Sergeant Shaw testified that he has been turned down only once on a request for a Schedule I order and that he has never been turned down for a Schedule I warrant.

2. The Warrant Application

Detective Sergeant Shaw testified that he was the Metropolitan Police official who was assigned the American government's request to conduct a search of Amerindo U.K.'s premises. According to Detective Sergeant Shaw, he received a telephone call from the UKCA in July 2005 regarding an urgent request from American law enforcement officials to search the business premises of Amerindo, U .K. Following the procedure he had described, Detective Sergeant Shaw reviewed the MLAT request to determine if

there was a valid basis to apply for a search warrant of Amerindo's business premises. In his words, he believed the request to be "comprehensive and sound." (Tr. 228, May 31, 2006.) As a result, he conducted some background inquiries, including some research on Amerindo and the individuals named in the request. His research about the premises revealed that it was a converted house which appeared to be occupied by a number of different companies. Eventually, Detective Sergeant Shaw spoke to an individual on the premises who advised him that Amerindo U.K. had moved.

Subsequent investigation revealed that the materials in Amerindo's office had been moved in late August to the Cadogan Tate Warehouse ("Cadogan Tate"). Further digging by Detective Sergeant Shaw revealed that there were eight crates of materials from the Amerindo U.K. office premises that consisted of approximately 320 boxes. Detective Sergeant Shaw subsequently informed the Home Office that he had located the sought-after material and asked the Home Office to inform the American authorities of the results of his investigation and request that they correct the address in their MLAT request.

Detective Sergeant Shaw learned that the American officials had supplemented their MLAT request in late September 2005. At the time, however, British law enforcement resources were strained due to the investigation into the July 2005 terrorist attacks directed at the London Underground. Notwithstanding these resource limitations, Detective Sergeant Shaw conducted a follow-up investigation and determined that he was ready to proceed with the application for the warrant. He then requested the necessary direction to proceed from the Home Office, which he received in draft. Subsequently, Detective Sergeant Shaw prepared the search warrant application. (*Id.* at 238.) Because of manpower limitations, Detective Sergeant Shaw requested, through the UKCA, that law enforcement officials from the United States come to England to assist in the search. (*Id.* at 236.) In fact, Detective Sergeant Shaw testified that he regularly invites the officials from the requesting country to assist in the execution of a search, as they are in the best position to provide advice on which materials to seize. (*Id.* at 237; Tr. 318, June 1, 2006.) However, had American authorities been unable to attend, Shaw would have executed the search with the manpower available to him, as he has done on past occasions. (Tr. 320, June 1, 2006.) Moreover, American authorities could not have gained access to the Cadogan Tate facility on their own with only a U.S. warrant. (*Id.* at 433.) Detective Sergeant Shaw had earlier made an arrangement with one of the managers at Cadogan Tate to provide seventy-two-hour notice before executing a search warrant. (Tr. 239, May 31, 2006.) This would permit the staff to move Amerindo U.K.'s crates to the viewing area where the search could be conducted. (*Id.*) Shaw recognized in making this arrangement, that he risked tipping off the suspects. (Tr. 363, June 1, 2006.) As a client of Cadogan Tate, Amerindo U.K. could have requested access to its crates during normal business hours. (*Id.*) Because the American authorities sought to have the search executed as soon as possible, Detective Sergeant Shaw scheduled the first available viewing date at Cadogan Tate for Monday, October 10, 2005. He also reserved Tuesday, October 11. (Tr. 240, May 31, 2006.) Detective Sergeant Shaw then asked the Home Office to inform the American authorities of the dates of the search. (*Id.*) When he received no response for several days, Detective Sergeant Shaw contacted the Home Office again on approximately October 3, 2005. (*Id.*) At that point he discovered that the Home Office

had neglected to forward the information to the American authorities. (*Id.* at 241.) The Home Office stated that it would inform the Americans that day, but Detective Sergeant Shaw assumed that the American authorities would be unable to make their travel arrangements in time to conduct a search on October 10. Consequently, he canceled the reservations at Cadogan Tate for October 10 and 11. (*Id.* at 242.) *14 During the week of October 3, 2005, Detective Sergeant Shaw traveled to Leeds for work and did not have access to email. (*Id.* at 241.) He returned to London on Sunday October 9 and went to work at approximately 6 a.m. on October 10. Upon arriving at the office, to his considerable surprise, he had an email informing him that the American authorities had arrived in London on October 9. (*Id.* at 242.) Detective Sergeant Shaw immediately prepared the search warrant application so that he could present it to a judge that day. He was concerned that the judge would reject the application and the Americans would have made a wasted trip. (Tr. 314, June 1, 2006.) In determining which type of warrant he would seek, Detective Sergeant Shaw relied primarily upon the MLAT request itself and his background research. (Tr. 242, May 31, 2006.) He also relied to some extent upon the direction from the Home Office, which he had received in final form on October 10, instructing him to seek a search warrant. [FN8] (*Id.* at 243.) However, based on his understanding of the case law, Detective Sergeant Shaw felt that he must make a determination as to which type of warrant to seek independent of the Home Office direction. (*Id.* at 245.) Prior to making his decision, Detective Sergeant Shaw had not had any conversations with American authorities regarding the substance of the U.S. investigation or what types of documents they expected to find at Cadogan Tate because he felt that he had sufficient information from the MLAT request. (*Id.* at 244.) Detective Sergeant Shaw decided to seek a Section 8 warrant. (*Id.* at 245.)

FN8. The transcript reads that Detective Sergeant Shaw was instructed to obtain a warrant "under Section 16 of the Crimes National Corporation Act and Section 8 of the Police Riders Act." (Tr. 243, May 31, 2006.) The transcript appears inaccurate to the extent it reflects that it was Section 8 of the "Police Riders Act," and probably should read the "Police and Criminal Evidence Act." First, in his answer to the next question, Detective Sergeant Shaw confirmed that what he meant was a warrant pursuant to Section 8 as he had described earlier. (*Id.*) Indeed, every other time he referred to Section 8, Detective Sergeant Shaw was referring to the Police and Criminal Evidence Act. Second, the phrase "Police Riders Act" does not make sense on its face.

Detective Sergeant Shaw rejected seeking a Schedule I order or warrant because he was not primarily looking for special procedure material. (*Id.* at 246.) Nor did Detective Sergeant Shaw expect there to be legally privileged materials at Cadogan Tate. In explaining how he reached this decision, Detective Sergeant Shaw referenced a well-known quote from a case discussing special procedure material--"there is no confidence in iniquity." (*Id.* at 247.) He explained that, in layman's terms, the quote means that "there is no lawful client confidentiality in material held for the purpose of criminal conduct." (*Id.*) By way of example, Detective Sergeant Shaw discussed two search warrants he had sought earlier in the year. They involved a lawyer who was allegedly acting unlawfully in

the U.K. and in Italy. The Italian government requested that the British authorities search the lawyer's London home and office. (*Id.* at 248.) Detective Sergeant Shaw obtained a Section 8 warrant to search the lawyer's home because it was controlled by him and because the Detective was looking for evidence of the lawyer's criminal conduct. (*Id.*) After careful consideration and discussion with the Home Office, however, Detective Sergeant Shaw sought a Schedule I warrant for the lawyer's business premises. (*Id.* at 249.) This was because the lawyer shared the business premises with another company which was not implicated in any unlawful activity. (*Id.*) They shared a computer server and filing cabinets. Detective Sergeant Shaw anticipated that he would be searching the documents of a legitimate business not engaged in criminal conduct which had an expectation of confidentiality. (*Id.*) Therefore, in his view, a Schedule I warrant was called for in that instance. (*Id.*)

Detective Sergeant Shaw also provided an example of the type of scenario that would call for a Schedule I order. According to the Detective Sergeant, a Schedule I order might be called for if the British authorities wanted access to a suspect's bank records. If there were no allegation that the bank was involved in the alleged criminal conduct, in Detective Sergeant Shaw's view, British authorities would need a Schedule I order before inspecting the records of an innocent, legitimate business. (*Id.*) Because he was searching materials belonging to a company controlled by Defendants for evidence of their criminality, he did not think he needed a Schedule I order or warrant. (*Id.* at 246.) Although Amerindo U.K. had shared office space within a building with other companies, Detective Sergeant Shaw did not believe that there would be materials belonging to those companies within the crates at Cadogan Tate that were to be searched. (Tr. 367-68, June 1, 2006.) Detective Sergeant Shaw had spoken with representatives at Cadogan Tate who stated that they had moved the boxes of materials from Amerindo U.K.'s offices under the direction of Mrs. Tanaka. (*Id.* at 368.) Detective Sergeant Shaw assumed that Mrs. Tanaka would not have moved materials belonging to other businesses. (*Id.*) Moreover, although Detective Sergeant Shaw anticipated that there would be documents containing private client information among the crates at Cadogan Tate, he did not consider them to be special procedure materials. (*Id.* at 386.) Because Detective Sergeant Shaw was looking for evidence of Amerindo U.K.'s fraud against its clients, neither Amerindo U.K. nor its clients could have any expectation that those materials would be held in confidence. (*Id.*)

Prior to making the warrant application, Detective Sergeant Shaw had been in contact with Matthew Fann of the Financial Services Authority ("FSA"). (*Id.* at 325.) Fann had informed Shaw that the FSA had provided banking records to the Securities and Exchange Commission ("SEC") pursuant to a bilateral agreement. (*Id.* at 326.) He also informed Shaw that the SEC had served notice on the lawyers for Amerindo U.K. to preserve their documentation and that lawyers for Amerindo U.K. had moved its documents to Cadogan Tate. (*Id.* at 327, 333.) The FSA sought permission to be present at the search, but it was ultimately decided that they did not have a legal entitlement to be present. (*Id.* at 335.) Shaw also knew, from the MLAT request, that Defendants had been arrested and were currently under house arrest, although he did not recall if he knew that a search warrant had been executed at Amerindo U.S. (*Id.* at 329, 331.) After preparing the application, Detective Sergeant Shaw presented it to a senior police

officer, Detective Inspector Fuller, for consideration. (*Id.* at 243.) Detective Inspector Fuller asked logistical questions regarding manpower for the search, but Detective Sergeant Shaw did not recall him expressing any concerns regarding the application. (*Id.* at 256.) Detective Inspector Fuller wrote a few paragraphs at the end of the application expressing his views and then signed it. (*Id.* at 256.) Detective Sergeant Shaw did not show the application to any American authorities prior to or immediately after presentation of it to a U.K. judicial officer. (*Id.* at 275.) Thereafter, Detective Sergeant Shaw went to Bow Street Magistrate's Court. He chose that court because it is the premier magistrate's court for MLAT requests and it is close to his office. (*Id.* at 255.) *16 The search warrant application consisted of a template application that Detective Sergeant Shaw filled in, a typed rider that came directly from the MLAT request, and the information in support of the warrant application which Shaw typed himself. (*Id.* at 261-62.) In the application, Detective Sergeant Shaw swore under oath that he was "satisfied that the material [at Cadogan Tate] does not consist of or include items of legal privilege, excluded material, or special [procedure] material." (*Id.* at 259, 262.) This statement was based on the fact that he was not searching for those three types of materials, and if he found any documents that fell into those categories, they would be ancillary to the search. (*Id.* at 262-63.)

Upon arriving at Bow Street Magistrate's Court, Detective Sergeant Shaw handed the application to Mrs. Elizabeth Franey, a senior legal adviser at the court with approximately twenty years of experience. (*Id.* at 264-66.) Detective Sergeant Shaw left the application with Mrs. Franey after requesting that he be permitted to make the application to a judge later that day. (*Id.* at 266.) Approximately five hours later, Detective Sergeant Shaw returned to the Bow Street Magistrate's Court hoping to be able to make his application to a judge. (*Id.*) Mrs. Franey informed him that she had reviewed the application and passed it to a judge, thereby indicating her approval of the application. (*Id.* at 267.) Then Detective Sergeant Shaw made his application to the senior district judge at the court, Timothy Workman, who was the "duty judge" that day. (*Id.* at 268.) Judge Workman is the most senior district judge in England and Whales, with the power to issue Schedule I orders and warrants. (*Id.* at 269-70.) Judge Workman asked Detective Sergeant Shaw a series of questions including questions about the nature of the premises, whether the search would extend beyond Amerindo U.K.'s eight crates, the anticipated length of the search, the nature of the property where the materials had previously been located, and whether that property had been shared. (*Id.* at 271-73.) Detective Sergeant Shaw responded to these questions under oath for approximately ten minutes. (*Id.* at 271, 274.) The Judge did not ask specific questions about special procedure materials, but Detective Sergeant Shaw inferred that several of the Judge's questions were designed to satisfy the Judge that there was no need for a Schedule I order. (*Id.* at 272-73.) Judge Workman then stated that he was satisfied with the application, which was kept at the court, and signed the warrant. (*Id.* at 274, 277.) Detective Sergeant Shaw believed he was then in possession of a lawfully-obtained, lawfully-issued warrant. (*Id* . at 274-75.)

After obtaining the warrant, Detective Sergeant Shaw met with the American authorities, including Inspector Fraterrigo. While he had the warrant with him, he does not recall showing it to the Americans. However, Detective Sergeant Shaw doubted that

he would have shown it to them because it is unnecessary and not his normal practice. (*Id.* at 278.) At that meeting, Detective Sergeant Shaw explained that the warrant had been granted, and consequently that the Americans had not wasted their trip over. (*Id.* at 276.) He also explained that the search had been postponed until October 13 as a result of the earlier miscommunication. (*Id.*) They then discussed their respective roles during the execution of the search. Detective Sergeant Shaw explained that the Americans were entitled to assist in the search, but that they remained under British supervision and that the ultimate decision regarding whether to seize particular items would rest with the British authorities. (*Id.* at 278.)

3. The Cadogan Tate Search

The warrant signed by Judge Workman was executed on Thursday, October 13, 2005. Detective Sergeant Shaw was not present during the October 13 search because he had a prior commitment to attend a conference. (*Id.* at 279.) In his stead, Detective Constable Bonafont was responsible for making the final determination on what to seize. (*Id.* at 285.) However, Detective Constable Bonafont could consult the American authorities on what was relevant. (*Id.* at 285-86.) Detective Constable Durrant was the exhibits officer. (*Id.* at 280.) Detective Constable Bonafont and Detective Constable Durrant each had approximately seven years of experience on white collar crime investigations. (*Id.* at 281.) Prior to the execution of the warrant, Detective Sergeant Shaw briefed them on their roles and responsibilities, and instructed them to follow normal search method. (*Id.*)

During the course of the search, Detective Sergeant Shaw checked in with Detective Constable Bonafont and Detective Constable Durrant to see if there were any difficulties. (*Id.* at 284.) Although he did not inquire specifically as to whether they had encountered special procedure or legal privilege material, he assumed that they would interpret his general question to include that specific question as well. (*Id.;* Tr. 390, June 1, 2006.) When it became apparent that the search would not be completed in one day, Detective Sergeant Shaw determined that they would secure the crates and return the next day. (Tr. 283, May 31, 2006.) To do so, he was required under U.K. law to secure a second search warrant, which he did the next day. (*Id.* at 283, 286.) Detective Sergeant Shaw did not show the application for the second search warrant to the American authorities prior to presenting it at Bow Street Magistrate's Court on October 14. (*Id.* at 288.) The second warrant application was presented to Mrs. Franey and then to Judge Nicholas Evans. (*Id.* at 289.) Judge Evans approved the second warrant. (*Id.* at 291.) Once again, Detective Sergeant Shaw believed he was in possession of a lawfully-obtained, lawfully-issued warrant. (*Id.* at 292.)

After obtaining the second search warrant, Detective Sergeant Shaw picked up the three U.S. Postal Inspectors and Detective Constable Durrant and went to Cadogan Tate where they resumed the search. (*Id.* at 292.) During the course of the search on the second day, the U.S. Postal Inspectors identified to Detective Sergeant Shaw items that they believed were relevant to their investigation. (*Id.* at 293.) If Detective Sergeant Shaw was satisfied that an item identified fell within the scope of the warrant, he would

approve its seizure and Detective Constable Durrant would mark it in the exhibits book. (*Id.* at 294.) Then the items would be sealed in exhibit bags and replaced in the crates. (*Id.* at 301.) Detective Sergeant Shaw admits that he did not review every single piece of paper in making his determinations. (*Id.* at 296.) Indeed, some documents that did not fall within the scope of the warrant were inadvertently seized. (Tr. 381-82, June 1, 2006.) Detective Sergeant Shaw also recalled refusing to seize items that the Postal Inspectors believed were relevant, such as banking ledgers which did not fall within the scope of the warrant. (Tr. 301, May 31, 2006.)

Detective Sergeant Shaw also testified about judicial review--the process by which someone may challenge police conduct. Judicial review may be sought at any stage of the conduct--in anticipation of the conduct, in the course of the conduct, or up to three months thereafter. (*Id.* at 304-05.) He had informed a private investigator in mid-October that the search had been executed and was later informed by Inspector Fraterrigo that the Defendants were aware that a search had been conducted. (Tr. 414, June 1, 2006.) Detective Sergeant Shaw was surprised that Amerindo U.K.'s lawyers never contacted him to request copies of the inventory sheets. (*Id* .)

F. Procedural History

The two omnibus motions that are addressed by this Opinion relate to the Subpoena and the searches conducted in the United States and the United Kingdom. The many complex issues set forth in those motions were unfortunately raised by the Parties piecemeal, often months apart, over the course of more than a year. It is not surprising, then, that the relevant factual record was only fully developed after multiple hearings and voluminous submissions to this Court. For this reason, before addressing the merits, it is helpful to briefly outline the relevant procedural history of the case. On August 12, 2005, both Defendants filed motions to suppress the materials seized in the May 26, 2005 search of Amerindo U.S., and Vilar filed a motion to suppress his post-arrest statements. A hearing was held on these suppression motions on December 14, 2005. Among others, Inspector Feiter testified at this hearing. On December 15, 2005, Defendants filed a motion to quash the May 26, 2005 subpoena. On January 19, 2006, the Court denied Vilar's motion to suppress his post-arrest statements. On March 9 and March 13, 2006, Defendants filed motions to suppress evidence seized during the U.K. search of the materials stored at Cadogan Tate. On March 10, 2006, over Defendants' opposition, the Government moved to reopen the suppression hearing as to the materials seized in the U.S. search in order to call additional witnesses. The Court granted this motion on April 4, 2006, and additional suppression hearings on the U.K. and U.S. searches were held on May 31, June 1, July 7, July 10, August 8, and August 9, 2006, on which dates the Court heard extensive testimony from Eugene Licker, Marc Litt, Detective Sergeant Shaw, and Inspector Fraterrigo.

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II. Discussion

A. The U.S. Search

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B. Electronic Material

Defendants also challenge the constitutionality of the seizure and subsequent search of the Amerindo computers. Though not entirely clear, Defendants appear to object to the absence of a sufficiently specific search protocol in the Warrant, and repeat their overbreadth/lack of particularity objections to the Warrant. A number of courts and academic commentators have suggested that searches of computers raise unique Fourth Amendment issues. *See, e .g., United States v. Carey,* 172 F.3d 1268 (10th Cir.1999); *United States v. Tamura,* 694 F.2d 591 (9th Cir.1982); Orin S. Kerr, *Searches and Seizures in a Digital World,* 119 Harv. L.Rev. 531 (2005). For example, a single computer is capable of storing immense amounts of information: "Computer hard drives sold in 2005 generally have storage capacities of about eighty gigabytes, roughly the equivalent to forty million pages of text--about the amount of information contained in the books on one floor of a typical academic library." Kerr, *supra,* at 542. Computers also often contain significant "intermingling" of relevant documents with "documents that the government has no probable cause to seize." *In the Matter of the Search of: 3817 W. West End, First Floor Chicago, Illinois 60621,* 321 F.Supp.2d 953, 958 (N.D.Ill.2004); *see also* Ralph Winick, *Searches and Seizures of Computers and Computer Data,* 8 Harv. J.L. & Tech. 75, 104 (1994). Increasingly, even office computers are used as "postal services, playgrounds, jukeboxes, dating services, movie theaters, daily planners, shopping malls, personal secretaries, virtual diaries, and more," Kerr, *supra,* at 569, a phenomenon that is only compounded in a networked world, where a "single physical storage device can store the private files of thousands of different users." *Id.* at 556.

Another potential complication regarding computer searches is the fact that often, because of time restraints and insurmountable technical limitations, such searches cannot be carried out at the time the warrant is executed at the premises. *See United States v. Hill,* 459 F.3d 966, 974-75 (9th Cir.2006) (observing that "there is a serious risk that the police might damage the storage medium or compromise the integrity of the evidence by attempting to access the data at the scene," and that taking the time needed to search a computer at the scene "would not only impose a significant and unjustified burden on police resources, it would also make the search more intrusive"). Instead, "it is frequently the case with computers that the normal sequence of 'search' and then selective 'seizure' is turned on its head," as computer hardware is seized from a suspect's premises before its content is known and then searched at a later time. *3817 W. West End,* 321 F.Supp.2d at 958; *see also Hill,* 459 F.3d at 974 (holding that "the police were not required to bring with them equipment capable of reading computer storage media and an officer competent to read it"). Moreover, as was the case here, computer searches are often not executed on a seized computer itself, but rather on a government computer that contains a "mirror-image" copy of a target machine, copies that can generally be made without

exposing the underlying data to the eyes of government agents. *See* Kerr, *supra,* at 560. [FN22] Thus, the fear of some is that law enforcement officers, unencumbered by the type of time pressures attendant to doing a search of a physical premises, might be tempted to rummage through a computer's files well beyond the scope of a warrant. *See id.* at 571 ("Many computers may contain a wealth of evidence of low-level crimes, and probable cause to believe a person has engaged in a minor offense may justify an exhaustive search of his hard drive that will expose a great deal to government observation.").

FN22. A "mirror image," also known as a "bitstream copy," duplicates every "bit and byte on the target drive including all files, the slack space, Master File Table, and metadata in exactly the order they appear on the original." Kerr, *supra,* at 541. This copy is saved as a "read only" file so that analytical work on the drive will not change it. *Id.*

On the other hand, the computer has become the modern criminal's best friend. It is used to communicate to cohorts, ensnare victims, and generally to prepare and orchestrate criminal conduct. The computer facilitates the terrorist organization's ability to train its members, spread propaganda and case its targets, just as it helps the identity thief locate his victims, the pornographer to collect and view child pornography, and the fraudster to generate fake documents. And, it is precisely because computer files can be intermingled and encrypted that the computer is a useful criminal tool. Nefarious documents can be given innocuous names, or can be manipulated, hidden or deleted with great ease. *See Hill,* 459 F.3d at 978 ("Criminals will do all they can to conceal contraband, including the simple expedient of changing the names and extensions of files to disguise their content from the casual observer."); *United States v. Hunter,* 13 F.Supp.2d 574, 583 (D.Vt.1998) ("Computer records are extremely susceptible to tampering, hiding, or destruction, whether deliberate or inadvertent."). It therefore is unsurprising that some of the most important evidence of criminal conduct is often found buried in computers. As a result, it also should not be surprising that a person who uses a computer, or any electronic device, as an instrumentality of crime might discover that a magistrate judge would find probable cause to search that computer, just as it should not shock the user of a telephone that a judge would approve interceptions of calls over that telephone or the home owner that a judge would approve a search throughout a house believed to contain evidence of a crime. *See United States v.. Gray,* 78 F.Supp.2d 524, 528 (E.D.Va.1999) (noting that "agents authorized by warrant to search a home or office for documents containing certain specified information are entitled to examine all files located at the site to look for the specified information").

The Second Circuit has yet to comprehensively address the unique issues raised by computer searches, and few district courts in this circuit have had occasion to address the topic. Nevertheless, some guiding precepts have emerged in this circuit and others. As an initial matter, although searches of computers present unique constitutional challenges, the ultimate Fourth Amendment standard is the same for both computer and hard-copy searches: reasonableness. *See Hill,* 459 F.3d at 974 ("As always under the Fourth Amendment, the standard is reasonableness."). At bottom, then, there is neither a heightened nor a reduced level of protection for information stored on computers, as there

is "no justification for favoring those who are capable of storing their records on computer over those who keep hard copies of their records." Hunter, 13 F.Supp.2d at 584; *accord* Gray, 78 F.Supp.2d at 529.

The cases and commentary also draw a distinction between the electronic storage device itself and the information which that device contains. Thus, when the government seeks to seize the information stored on a computer, as opposed to the computer itself, that underlying information must be identified with particularity and its seizure independently supported by probable cause. *See* Carey, 172 F.3d at 1275 ("Officers [should] specify in a warrant which type of files are sought."); *United States v. Riccardi,* 405 F.3d 852, 862- 63 (10th Cir.2005) (holding that warrant which "permitted the officers to search for anything--from child pornography to tax returns to private correspondence," was "precisely the kind of wide-ranging exploratory search that the Framers intended to prohibit" (internal quotations omitted)); Hunter, 13 F.Supp.2d at 584-85 (invalidating a warrant for failure to identify with particularity the underlying information to be seized); *In re Grand Jury Subpoena Duces Tecum Dated Nov. 15, 1993,* 846 F.Supp. 11, 12 (S.D.N.Y.1994) (holding, in the context of a grand jury subpoena, that specificity is required with respect to the categories of information requested, not merely the storage devices). This is consistent with the Government's own published practices, as set forth in a 2002 manual issued by the United States Department of Justice, Criminal Division. *See* Computer Crime and Intellectual Prop. Section, Crim. Div., U.S. Dep't of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations (2002), available at *www.cvbercrime.gov/s & smanual2002.htm,* (hereinafter "DOJ Manual"). The DOJ Manual instructs agents that "[i]f the probable cause relates only to the information ... the warrant should describe the information, rather than the physical storage devices which happen to contain it." *Id.* at 42.

This is not a new rule, but merely an application of the traditional Fourth Amendment requirement that the Government establish that there is probable cause that the materials sought will contain evidence of crime, and then specify with reasonable particularity the materials to be seized. *See* *United States v. Brooks,* 427 F.3d 1246, 1253 (10th Cir.2005) (upholding warrant "that authorized officers to search through computer files for particular items specifically related to child pornography"). In meeting this burden, the Government obviously will need to persuade an issuing magistrate judge that there is reason to believe that the target computer was used to facilitate the crime, or otherwise will contain evidence of that crime. *See* Hill, 459 F.3d at 975 ("Although computer technology may in theory justify blanket seizures for the reasons discussed above, the government must still demonstrate to the magistrate *factually* why such a broad search and seizure authority is reasonable in the case at hand."). However, this does not require the Government to establish that a majority of the computer files are related to the suspected criminal conduct, as long as what is to be seized is set forth with sufficient particularity. *See* Gray, 78 F.Supp.2d at 528; Hunter, 13 F.Supp.2d at 583. Indeed, given all the operating software and other basic files stored on most computers, it should not be expected that most files will be suspicious. *See* Hill, 459 F.3d at 974 (noting that "computers in common use run a variety of operating systems--various versions of Windows, Mac OS and Linux, to name only the most common").

Relatedly, to "withstand an overbreadth challenge, the search warrant itself, or materials incorporated by reference, must have specified the purpose for which the computers were seized and *delineated the limits of their subsequent search." Hunter,* 13 F.Supp.2d at 584 (emphasis added). Thus, for example, a warrant to search a computer for evidence of narcotics trafficking cannot be used as a blank check to scour the computer for evidence of pornographic crimes. *See Carey,* 172 F.3d at 1276. While a law enforcement officer might, in the course of a search for certain itemized categories of materials, inadvertently find evidence of other crimes, that officer is required to procure a second warrant to continue searching the computer for additional evidence of that other crime. *See id.*

However, while the warrant must state with particularity the materials to be seized from a computer, the warrant need not specify *how* the computers will be searched. This is the view of the vast majority of courts to have considered the question. *See, e.g., Hill,* 459 F.3d at 978 ("[T]here is no case law holding that an officer *must* justify the lack of a search protocol in order to support issuance of the warrant."); *Brooks,* 427 F.3d at 1251 ("At the outset, we disagree with [defendant] that the government was required to describe its specific search methodology."); *United States v. Upham,* 168 F.3d 532, 537 (1st Cir.1999) ("The ... warrant did not prescribe methods of recovery or tests to be performed, but warrants rarely do so. The warrant process is primarily concerned with identifying *what* may be searched or seized--not how--and *whether* there is sufficient cause for the invasion of privacy thus entailed."); *United States v. Cartier,* No. 2:06-cr-73, 2007 WL 319648, at *3 (D.N.D. Jan. 30, 2007) ("[T]he warrant is not defective because it did not include a computer search methodology."); *United States v. Kaechele,* 466 F.Supp.2d 868, 889 (E.D.Mich.2006) (rejecting claim that warrant was overbroad because it lacked a search protocol); *United States v. Shinderman,* No. CRIM. 05-67-P-H, 2006 WL 522105, at *19 (D.Me. Mar. 2, 2006) ("[T]here is no Fourth Amendment requirement that search warrants spell out the parameters of computer searches where the warrant provides particularity as to what is being searched for."); *United States v. Lloyd,* No. 98 Crim. 529, 1998 WL 846822, at *3 (E.D.N.Y. Oct. 5, 1998) (rejecting claim that warrant should have described computer search method). *But see 3817 W. West End,* 321 F.Supp.2d at 960-62 (requiring that computer search warrant include a search protocol). Indeed, outside the computer context, the Supreme Court has held that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant." *Dalia v. United States,* 441 U.S. 238, 257 (1979). The majority view rejecting a protocol requirement makes good sense as there is no principle in the law that requires law enforcement officers to limit their investigative techniques *ex ante,* before conducting any kind of search. *Id.* ("Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that ... search warrants also must include a specification of the precise manner in which they are to be executed."). Nor does such a rule give investigators free reign, as their conduct will always be subject to a subsequent reasonableness review. *See Hill,* 459 F.3d at 978 ("The reasonableness of the officer's acts both in executing the warrant and in performing a subsequent search of seized materials remains subject to judicial review."). *38 Moreover, a rule that does not require a computer search protocol avoids the courts

getting into the business of telling investigators how to conduct a lawful investigation, something the courts are ill-equipped to do. *See* *Hill,* 459 F.3d at 978 ("Forcing police to limit their searches to files that the suspect has labeled in a particular way would be much like saying police may not seize a plastic bag containing a powdery white substance if it is labeled 'flour' or 'talcum powder." '); Kerr, *supra,* at 575 ("[M]agistrate judges are poorly equipped to evaluate whether a particular search protocol is the fastest and most targeted way of locating evidence stored on a hard drive."). Searching a computer for evidence of a crime "can be as much an art as a science." *Brooks,* 427 F.3d at 1252. This is particularly true in a complex, white collar case such as this one. *See* *United States v. Wuagneux,* 683 F.2d 1343, 1349 (11th Cir.1982) ("[I]n cases ... involving complex financial transactions and widespread allegations of various types of fraud, reading the warrant with practical flexibility entails an awareness of the difficulty of piecing together the 'paper puzzle." '); *Shinderman,* 2006 WL 522105, at *18 ("There can be little doubt that the electronic puzzle in a so-called white collar crime is even more puzzling than the proverbial paper puzzle of old."). Thus, for example, it seems manifestly obvious that any requirement that a computer search be confined by a key-word search protocol would inevitably immunize criminals. Such a simplistic search paradigm would of necessity leave out any encoded documents, or any documents that used acronyms or other abbreviations in place of the "key words." Moreover, there may be numerous "documents" that are not word-searchable and would therefore not be discovered in a search restricted to key-word inquiries.

It bears noting that the Affidavit in support of the Warrant here *does* contain a list of methods, albeit not an exhaustive one, that the Government told the magistrate judge that it might use to search computers. Defendants argue that this list is insufficient because it is not exhaustive, and because it permits agents to search for electronically-stored materials that are "related to the subject matter of the investigation." The search protocol is largely irrelevant because the Warrant did not incorporate the Affidavit, but it is significant because it at least provided some information to the magistrate judge about the types of methods the Government contemplated using. Thus, while the suggested protocol is not perfect, it is comprehensive and is far more than the Constitution required. Accordingly, the Court finds no infirmity in the Warrant on the basis of an inadequate computer search protocol.

Regarding the Defendants' claims of lack of particularity and overbreadth as to paragraph 17, the Court notes that this paragraph can be read to restrict the search of computers to the "information described above [i.e., the other paragraphs in the Warrant], as well as drafts and final versions of documents and correspondence prepared in connection with the running and supervision of the operations of the investment advisory business." The latter phrase is too broad, but is easily excised. The remaining portions of the paragraph survive to the extent they are limited to the items adequately particularized in the other paragraphs, including those severed as described above, in the Warrant. Accordingly, the motion to suppress, in their entirety, all electronic materials described in paragraph 17 is denied.

[. . . .]

D. The U.K. Search

As outlined above, in addition to the material that was seized in the United States, a search was conducted in the United Kingdom. Defendants move to suppress the evidence obtained in this search on three grounds. First, Defendants claim that the U.K. search violated the Fourth Amendment because it was not supported by a warrant issued by an American judicial official, and because it otherwise was unreasonable. Second, Defendants argue that the same misrepresentations and omissions that tainted the U.S. search invalidate the U.K. search. Third, Defendants contend that the U.K. search is the fruit of the poisonous tree, claiming that a substantial amount of the allegations submitted to U.K. officials in support of the search request derived from the illegal U.S. search.

1. The U.K. Warrant Complied with the Fourth Amendment

a. The Applicability of the Warrant Clause to Extraterritorial Searches

Defendants claim that the U.K. search was invalid because it was not executed pursuant to a valid warrant issued by a United States judicial officer, and was otherwise unreasonable. Defendants' train of logic is as follows: (1) American officials are required to comport their investigative activities with the Bill of Rights; (2) the Bill of Rights governs the conduct of American officials even when they operate abroad; (3) there is caselaw applying the Bill of Rights and the Fourth Amendment to extraterritorial conduct by or on behalf of American officials; and (4) because there was no warrant signed by an American judicial officer based on an individualized showing of probable cause that Defendants violated American laws, the U.K. search executed by Metropolitan Police officers at the American Government's request was "warrantless," even though it was conducted pursuant to two warrants signed by U.K. judicial officials. The missing link in Defendants' chain is any authority holding that the Warrant Clause of the Fourth Amendment applies to extraterritorial searches conducted by, or at the request of, American Government officials. While neither the Supreme Court nor the Second Circuit has squarely addressed the issue, the Supreme Court has strongly hinted that it takes a dim view of the suggestion that the Warrant Clause applies to extraterritorial searches. In fact, the Supreme Court discussed the reach of the Fourth Amendment to extraterritorial searches while reversing the very case cited by Defendants in support of their claim. The Defendants cite to the Ninth Circuit's opinion in *United States v. Verdugo-Urquidez,* 856 F.2d 1214, 1230 (9th Cir.1988), which stated that "we cannot relieve the government from its obligation to obtain a search warrant simply because the place to be searched by the government is outside this country. To do so would be to treat foreign searches differently from domestic searches just because they are foreign." While Defendants acknowledge that the Supreme Court reversed the Ninth Circuit in *Verdugo-*

Urquidez, they claim that the Supreme Court did not address the above-quoted conclusion of the Ninth Circuit.

But Defendants reading of *Verdugo-Urquidez* is off the mark. While the Court split on whether the Fourth Amendment applied to extraterritorial searches involving non-citizens, seven of the nine Justices expressly stated or implicitly agreed that the *Warrant Clause* did not apply to extraterritorial searches. Chief Justice Rehnquist, writing for the four-Justice plurality, specifically observed that an American warrant "would be a dead letter outside the United States." *Verdugo-Urquidez,* 494 U.S. at 274. In his concurrence, Justice Kennedy similarly noted that the "absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country." *Id.* at 278 (Kennedy, J., concurring).

Holding the same view as the Chief Justice and Justice Kennedy, Justice Stevens, in his concurring opinion noted that he did "not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches." *Id.* at 279 (Stevens, J., concurring). Finally, in dissent, Justice Blackmun commented that he "agree[d] with the Government ... that an American magistrate's lack of power to authorize a search abroad renders the Warrant Clause inapplicable to the search of a noncitizen's residence outside this country." *Id.* at 297 (Blackmun, J., dissenting). What all of these comments share in common is the belief that the reach of the Warrant Clause stops at the border because American magistrates lack the power to issue extraterritorial warrants. While sometimes couched in terms of the issue presented in that case, there is not a hint in these comments that the power of magistrates to issue warrants to permit extraterritorial searches somehow exists when the search would be of an American citizen's property. *See Bin Laden,* 126 F.Supp.2d at 276 ("Despite El-Hage's assertions to the contrary ... the language employed by the Justices in *Verdugo-Urquidez* who challenged overseas application of the warrant requirement does not suggest that the criticisms were limited to cases involving noncitizens. The Justices' skeptical remarks were universally critical of the impotence of American warrants overseas and were not explicitly limited to application to noncitizens."). [FN32]

FN32. Similarly off target is Defendants' claim that, in *Bin Laden,* Judge Sand "ruled that the Warrant Clause of the Fourth Amendment *applied* to searches executed by the U.S. Government against an American citizen living in Kenya." (Mem. of Law In Support of Tanaka's Motion to Suppress Evidence Seized From The U.K. 10 ("Tanaka Mem. to Suppress U.K. Search").). In fact, Judge Sand held that "even though the searches at issue in this case occurred in Kenya, El-Hage can bring a Fourth Amendment challenge. However, the extent of the Fourth Amendment protection, in particular, the applicability of the Warrant Clause, is unclear." *Bin Laden,* 126 F.Supp.2d at 270-71.

Defendants further claim that while Judge Sand held that the Government was "not required to obtain a warrant from a U.S. magistrate before searching the defendant's [Kenyan] residence," he "agreed with the defendant that the Government *was required to obtain a warrant* before conducting electronic surveillance of the defendant's telephone calls because the Government had failed to obtain authorization from the President or Attorney General." (Tanaka Mem. to Suppress U.K. Search 10- 12.)

The actual holding in *Bin Laden* was that because the Government knew its electronic surveillance would target a U.S. citizen, it was required to obtain the prior approval of the President or the Attorney General for the search to be lawful. 126 F.Supp.2d at 281-82. In other words, it was the failure to secure the approval of the President or the Attorney General

(and not a magistrate judge) that made the electronic surveillance unreasonable under the Fourth Amendment. The failure to get such prior approval, contrary to Defendants' claim, did not require the Government to get a warrant. Thus, the absence of a warrant in support of the electronic surveillance simply was not dispositive. Also, it bears noting that even though the Government was deemed to have been required to get prior approval from the President or the Attorney General for the electronic surveillance, Judge Sand did not suppress the fruits of that surveillance, in part on the finding that the officials acted in the good faith belief that their actions were legal. *Id.* at 283-84.

Since *Verdugo-Urquidez,* the Ninth Circuit has observed, "foreign searches have neither been historically subject to the warrant procedure, nor could they be as a practical matter." *United States v. Barona,* 56 F.3d 1087, 1093 n. 1 (9th Cir.1995). The Court agrees. First, as other courts have observed, there is no statutory basis for a magistrate judge in the Southern District of New York to issue a search warrant in a non-terrorism case targeting property even in the Eastern District of New York, let alone to issue such a warrant to be executed in London, England. *See Bin Laden,* 126 F.Supp.2d at 275 n. 13 (noting that Rule 41(a) limits a magistrate judge's authority to issue domestic warrants, and that the Supreme Court considered but did not adopt an amendment to Rule 41 that would have permitted extraterritorial searches). [FN33] Second, even if a magistrate judge took the view that he or she had such authority, as Detective Sergeant Shaw made quite clear, an American law enforcement officer would not be permitted under British law to waltz into a London premises and execute the search authorized by the American magistrate judge. Indeed, it takes little to imagine the diplomatic and legal complications that would arise if American government officials traveled to another sovereign country and attempted to carry out a search of any kind, professing the authority to do so based on an American-issued search warrant. *See Verdugo-Urquidez,* 494 U.S. at 275 ("If there are to be restrictions on searches and seizures which occur incident to ... American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.").

FN33. Rule 41 was amended by the Patriot Act to permit a magistrate judge in a domestic or international terrorism case to issue a search warrant within or without that district. *See* Fed.R.Crim.P. 41(b)(3). However, nothing in the

> language of that amendment remotely suggests that the power was extended to extraterritorial searches.

Defendants counter by arguing that the impracticality of enforcing a constitutional right is no excuse to permit a violation of that right. In the abstract, there is some strength to that argument. But here we are dealing with the exclusionary rule, which is to be applied only where there is value from deterring conduct that law enforcement officers know or have reason to believe is improper. *See* *United States v. Peltier,* 422 U.S. 531, 542 (1975) ("[E]vidence ... should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."); *Michigan v. Tucker,* 417 U.S. 433, 447 (1974) ("The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct."). Where law enforcement officers act in the reasonable, good-faith belief that their actions are lawful, courts have declined to apply the exclusionary rule as there would be no deterrent purpose in suppression. *See* *Leon,* 468 U.S. at 922. In this case, given the plain language of Rule 41 and the caselaw to date, there can be no serious doubt that the Postal Inspectors here relied, in reasonable good faith, on the legal and practical limitations on their ability to obtain an American warrant to be executed in a foreign nation. Indeed, Inspector Fraterrigo repeatedly testified that she believed she had no authority to obtain a U.S. search warrant for a search abroad. If law enforcement officers may carry out a warrantless search in a good-faith reliance on a statute which is later declared to be unconstitutional, *see* *Illinois v. Krull,* 480 U.S. 340 (1987), then they certainly can be excused for the fact that they neither sought nor obtained a warrant in the United States to be executed in the United Kingdom where there is no clear legal mechanism for such a warrant.

b. The Exclusionary Rule Applied to Foreign Government Searches

Even if the Warrant Clause does not apply to searches conducted by foreign governments, the question remains whether the Fourth Amendment's reasonableness requirement can limit the use of evidence seized by a foreign government from United States citizens. And, even if a foreign search must be reasonable, there is the question of whether there is a remedy in American courts for an unreasonable search. In answer to the latter question, the courts have consistently held that the exclusionary rule does not govern the conduct of foreign government officers. *See* *United States v. Janis,* 428 U.S. 433, 455 n. 31 (1976) ("It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act."); *United States v. Hensel,* 699 F.2d 18, 25 (1st Cir.1983) ("[T]he exclusionary rule does not require the suppression of evidence seized by foreign police agents, for the actions of an American court are unlikely to influence the conduct of foreign police."); *United States v. Cotroni,* 527 F.2d 708, 712 (2d Cir.1975) ("The exclusionary rule is intended to inculcate a respect for the Constitution in the police of our own nation. Since it has little if any deterrent effect upon foreign police, it is seldom used to bar their work product." (citations omitted)).

However, the Second Circuit has recognized two exceptions to this rule. "First, where the conduct of foreign officials in acquiring the evidence is 'so extreme that they shock the judicial conscience' a federal court in the exercise of its supervisory powers can require exclusion of the evidence so seized." ' *United States v. Maturo,* 982 F.2d 57, 61 (2d Cir.1992) (quoting *Stowe v. Devoy,* 588 F.2d 336, 341 (2d Cir.1978)). "Second, where cooperation with foreign law enforcement officials may implicate constitutional restrictions, evidence obtained by foreign officials may be excluded." *Id.* (citing *United States v. Paternina-Vergara,* 749 F.2d 993, 998 (2d Cir.1984)). "Within the second category for excluding evidence, constitutional requirements may attach in two situations: (1) where the conduct of foreign law enforcement officials rendered them agents, or virtual agents, of United States law enforcement officials; or (2) where the cooperation between the United States and foreign law enforcement agencies is designed to evade constitutional requirements applicable to American officials." *Id.* (citations omitted); *accord* *United States v. Restrepo,* No. S101 Crim. 1113, 2002 WL 10455, at *6 (S.D.N.Y. Jan. 3, 2002). [FN34]

FN34. Other circuits, including the Ninth, have framed the second exception as one involving a "joint venture" between American and foreign government officials in conducting the search. *See, e.g.,* *United States v. Peterson,* 812 F.2d 486, 490 (9th Cir.1987) ("If ... United States agents' participation in the investigation is so substantial that the action is a joint venture between United States and foreign officials, the law of the foreign country must be consulted at the outset as part of the determination whether or not the search was reasonable."); *United States v. Vatani,* No. 06-20240, 2007 WL 789038, at *7 (E.D.Mich., Mar. 14, 2007) ("Courts have found American officers' involvement in a search conducted by foreign officers sufficient to satisfy the joint venture exception where the American officers asked or urged the foreign officers to conduct the search, provided back-up protection while the search was conducted, and/or participated in the search itself."); *United States v. Scarfo,* CRIM.A. No. 88-00003-1-19, 1988 WL 15805, at *2 (E.D.Pa. Oct. 26, 1988) (recognizing "joint venture" exception in refusal to apply exclusionary rule to foreign government search). The Second Circuit, however, "has not adopted the 'joint venture' theory advanced by the Ninth Circuit in ... *Peterson." Maturo,* 982 F.2d at 61-62.

There is no claim here, nor could there be, that the conduct of the Metropolitan Police officials "shocked the conscience." "Circumstances that will shock the conscience are limited to conduct that 'not only violates U.S. notions of due process, but also violates fundamental international norms of decency." ' *United States v. Mitro,* 880 F.2d 1480, 1483-84 (1st Cir.1989) (quoting Stephen A. Salzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States,* 20 Va. J. Int'l L. 741, 775 (1980)). Here, a Metropolitan Police officer sought the permission of two U.K. judicial officials to get a search warrant. This is conduct that soothes, rather than shocks, the conscience. Nor could there be a claim that the American Government's request for the Metropolitan

Police to seek such a warrant was part of an effort to evade American legal restraints. As just noted, given the plain limits on the authority of American judicial officials to issue extraterritorial warrants, and given the limits on Postal Inspectors in unilaterally executing such warrants abroad, there was no basis for the Postal Inspectors here to think that they had any choice other than to make a treaty-based request for U.K. officials to carry out the search in London. Thus, the only question is whether the warrants which the Metropolitan Police officials executed are invalid.

To begin, there is no dispute that the Metropolitan Police officers were acting as the agents of the American Government when they sought the warrants for the search they executed at the Cadogan Tate facility on October 13 and 14, 2005. Indeed, the Government has conceded that in the absence of its MLAT request, British law enforcement officials likely would not have sought a warrant to search and seize the Amerindo U.K. records. Thus, the question is whether the exclusionary rule should be used to suppress the fruits of this American-induced search in the U.K. The answer to this question, as it is with the legality of any search, depends on whether the search was reasonable. *See* *United States v. Juda,* 46 F.3d 961, 968 (9th Cir.1995) (noting that "the Fourth Amendment's reasonableness standard applies to United States officials conducting a search affecting a United States citizen in a foreign country"). While the Second Circuit has not addressed this issue, other courts have held that a foreign search is reasonable if it meets the requirements of the law of the nation in which the search is executed, as long as those requirements do not permit conscious-shocking conduct. *See* *Juda,* 46 F.3d at 968 (noting that "a foreign search is reasonable if it conforms to the requirements of foreign law"); *Peterson,* 812 F.2d at 491 (noting that "local law of the Philippines governs whether the search was reasonable"); *United States v. Castro,* 175 F.Supp.2d 129, 134 (D.P.R.2001) (upholding use of wiretaps, even though they would be illegal in the United States, because they complied with the law in the Dominican Republic). As such, Defendants' claims that the U.K. search was unreasonable under American standards because, for example, it was a general warrant that permitted seizure of virtually all Amerindo U.K. records or because it was not based on a finding of probable cause, are not dispositive. Indeed, Defendants cite to no authority to support this novel position.

As an alternative, Defendants spend a great deal of energy attempting to explain why the Cadogan Tate search contravened British law, but to no avail. [FN35]

FN35. Each side elected to fight the battle over U.K. law with expert opinion. Defendants relied on a thoughtful "Report by English Counsel Instructed on Behalf of Mr. Tanaka." (Decl. of Justin M. Sher, Ex. G.) This report, prepared by English Barrister Clare Sibson, is a synopsis of U.K. law on searches. One obvious and admitted limitation of this report, however, is that Ms. Sibson had "not been made aware of the facts of the matter concerning Mr. Tanaka in New York." Therefore, among other things, Ms. Sibson offers no opinion about the legality of the warrants issued in connection with the Cadogan Tate search, nor does she say anything about the propriety of the statements Detective Sergeant Shaw made in support of the warrant applications. The Government countered by

> offering the testimony of Detective Sergeant Shaw. This testimony was helpful in the sense that it was based on the actual events of this case, but of course is limited by the fact that Detective Sergeant Shaw is neither a solicitor nor a barrister. That said, Detective Sergeant Shaw impressed the Court with his grasp of U.K. search and seizure law. Though foreign law once was treated as an issue of fact, it now is viewed as a question of law and may be determined through the use of any relevant source, including expert testimony. *See Peterson,* 812 F.2d at 490; Fed.R.Crim.P. 26.1.

The crux of Defendants' claim is that because it was likely that the Amerindo U.K. materials at Cadogan Tate would include legally privileged and "special procedure material," Detective Sergeant Shaw should have obtained a "Schedule 1" order or warrant, instead of the "Section 8" warrant he twice obtained from British judges. The provision invoked by Detective Sergeant Shaw can be summarized as follows:

> Section 8 of the Police and Criminal Evidence Act 1984 ["PACE"] empowers magistrates to issue search warrants at the request of the police if certain conditions have been fulfilled. These conditions fall into two categories. The first category, in section 8(1), concerns the nature of the material sought. Generally speaking, the material has to relate to a serious arrestable offence and has to be likely to assist the investigation or to constitute relevant evidence. The second category, in section 8(2), describes the circumstances in which resort to a warrant is justified. They are: either that it is impractical to contact the person in charge of the premises, or that such person is unlikely to allow access without a warrant, or that alerting such person in advance may frustrate the investigation. A search warrant is issued ex parte on the basis of information provided by the police on oath...."

Adrian A.S. Zuckerman, *The Weakness of the PACE Special Procedure for Protecting Confidential Material,* Crim. L.Rev. 472, 472 (1990). The House of Lords has made clear that Section 8 "does not apply where the material consists of or is likely to include items subject to legal privilege, excluded material or special procedure material." *R v. Manchester Stipendiary Magistrate,* [2001] 1 A.C. 300, 307. "Special procedural material," a statutorily defined term, is "material acquired or created in the course of any trade, business, profession or other occupation which is held subject to an express or implied undertaking to hold it in confidence." *Id.; see also* PACE § 14(2)(b). "Most details connected with bank accounts will be 'special procedure material." ' Clive Walker & Christine Graham, *The Continued Assault on the Vaults--Bank Accounts and Criminal Investigations,* Crim. L.Rev. 185, 187 (1989).

"To obtain access to special procedure material the police must make an application in accordance with the terms set out in schedule 1 of the 1984 [PACE] Act." Zuckerman, *supra,* at 472. "An application under Schedule 1 must be made to a circuit judge and it is made inter partes. There are two sets of ... conditions. The first, which is set out in paragraph 2 of the Schedule, is appropriate for applications which involve special procedure material." *R v. Manchester Stipendiary Magistrate,* [2001] 1 A.C. 300, 307. "The circuit judge must be satisfied that there are reasonable grounds for believing that a

serious arrestable offence has been committed, and that there is material on premises specified in the application which is likely to be of substantial value to the investigation in connection with which the application is made." *Id.* If these conditions are met, the circuit judge must then determine whether other methods of obtaining the special privilege material have been tried, and must determine whether it is in the public interest that the police gain access to these materials, balancing the value of the information to the investigation and the "circumstances under which the person in possession of the material holds it." *R. v. Central Criminal Court ex parte Abedbesan and Others,* [1986] 1 W.L.R. 1292, 1295-96 (quoting paragraph 2 of Schedule 1).
*56 Thus, there are some critical distinctions between the means and methods by which the police may obtain evidence under Section 8 and Schedule 1. A Section 8 warrant application is made *ex parte* and hinges on whether the police make a showing that there are "reasonable grounds for belief" that the conditions required by Section 8 have been met, including that the materials sought by the police are "likely to be of substantial value to the investigation of the offence." Under Schedule 1, the police normally do not obtain a search warrant, but rather an order of production requiring the keeper of subject materials (which need not be the target of the criminal investigation) to produce them to the police. *See R (Bright) v. Central Criminal Court,* [2001] 1 W.L.R. 662, 677 (Judgment of Judge, L.J.) (noting that under Schedule 1, "[a] successful application results in an order by the judge which is directed to the person who appears to be in possession of the relevant material. Entry to his premises is not immediately authorised."); Ruth S. Costigan, *Fleet Street Blues: Police Seizure of Journalists' Material,* Crim. L.Rev. 231, 233 (1996) (discussing conditions under which police may obtain a Schedule 1 order of production). Interestingly, notice need only be provided to the keeper of the documents, and not to the person or entity whose documents are to be produced. *See* Zuckerman, *supra,* at 473 (citing *R. v. Crown Court at Leicester, ex parte Dir. of Public Prosecutions,* [1987] 1 W.L.R. 1371). However, British law allows the police, under certain circumstances, to seek, upon *ex parte* application, a warrant under Schedule 1. *See R (Bright) v. Central Criminal Court,* [2001] 1 W.L.R. at 696 (noting that "the warrant procedure may be adopted in situations which might otherwise call for a production order if 'service of notice of an application for an order under paragraph 4 ... may seriously prejudice the investigation." ') (Judgment of Gibbs, J.); Zuckerman, *supra,* at 475 (commenting that police may obtain an *ex parte* warrant if they establish that notice under paragraph 4 of Schedule 1 would "seriously prejudice the investigation"). As Detective Sergeant Shaw testified, under English law, "there is no confidence as to the disclosure of iniquity." *The Queen v. Cox and Railton,* [1884-1885] LR 14 Q.B.D. 153, 169 (Statement of Grove, J.). Thus, while no warrant or production order may issue for legally privileged material, "items held with the intention of furthering a criminal purpose are not subject to legal privilege." Lynne Knapman, *Case Comment,* Crim. L.Rev., 448, 449 (1989); *see also* PACE, § 10(2). Moreover, the English courts have held that Section 8 "does not debar a magistrate from issuing a search warrant because there may be [special privilege] material (or legally privileged or excluded material) on the premises to be searched." *R v. Chief Constable of the Warwickshire Constabulary and Another ex parte,* [1999] 1 W.L.R. 564, 573. It is only when a police officer believes that the special procedure material "forms part of the subject matter of the application that a warrant cannot be issued under section 8(1)." *Id.* Thus, as long as the police officer applying for

the Section 8 warrant in good faith believes that the materials he or she intends to seize are not privileged, the mere possibility that such materials may be on the premises does not invalidate that warrant. *See R v. Chesterfield Justice and Another, ex parte Bramley,* [2000] Q.B. 576, 585 ("[I]t is the knowledge available to the officer which has to be considered, and it will only inhibit his powers of seizure if it constitutes reasonable grounds for believing the item in question to be in fact subject to legal professional privilege. It is not sufficient that it raises that possibility."). From the officer's perspective, a document may not be privileged either on its face or because it is used by its keeper as part of the alleged crime. *Id.* at 583 (noting that materials held to further a criminal purpose are not privileged and may be subject to seizure under a Section 8 warrant). Furthermore, in executing a Section 8 warrant, an officer is permitted to sift through the materials on site to determine both whether they may be seized under the warrant and whether they are privileged. *Id.* 586-87. And, even if a police officer seizes materials that are later determined to be privileged, the officer, assuming that officer made a good-faith mistake about the privileged nature of the document, is merely required to return the privileged document. The whole warrant itself is not invalidated. *Id.* at 588. Whether the officer acted reasonably is a question of fact to be determined in each case. *Id.* at 587.

Applying these principles to this case, the Court rejects the claim by Defendants that the search of the Cadogan Tate facility violated U.K. law, or otherwise was unreasonable. In Detective Sergeant Shaw's view, there are three types of warrants under U.K. law; one permits seizure of contraband, another permits seizure of evidence of a crime, while the third addresses "special procedure material," which can involve, *inter alia,* legally privileged material. The first category was not in play here and there is no claim that it was. The only question, then, is whether Detective Sergeant Shaw should have gone the Section 8 or Schedule 1 route. Detective Sergeant Shaw, a 23-year veteran, knew full well that if he intended to seize "special procedure material," he would need to procure a Schedule 1 order or warrant. In fact, Detective Sergeant Shaw persuasively testified that it would not have been a bother at all to obtain the materials pursuant to Schedule 1. As he put it, "I would have no hesitation and no fear in applying for a Schedule 1 warrant at all. It was only filling out separate pieces of paper and going to the court 10 minutes further down the road. If that was proper--if I honestly believe[d] that to be the proper course of action, that's what I would have done." (Tr. 388, May 31, 2006.) This credible testimony undermines any suggestion by Defendants that Detective Sergeant Shaw chose to obtain a Section 8 warrant as a way to cut corners. Moreover, Detective Sergeant Shaw's choice of obtaining a Section 8 warrant, which he made based on his two decades of experience and which was approved by the U.K. Central Authority, a detective inspector, a senior legal advisor to the Magistrate's Court in London, and two judges, is consistent with English law. Try as they did, Defendants were unable to discredit Detective Sergeant Shaw's testimony that he did not expect to find any legally privileged material at Cadogan Tate. From his vantage point, the search involved records of an investment company, not a solicitor's office. Thus, whatever privilege review was going on in the United States of the materials seized from the Amerindo U.S. office (about which Detective Shaw knew nothing), Detective Sergeant Shaw was never led to believe by the Americans, and himself had no reason to believe, that there were

privileged materials that he would be seizing at Cadogan Tate. This state of mind is fatal to Defendants' claim. *See R v. Chesterfield Justices,* [2000] 2 W.L.R. at 585 (noting that police officer's good faith belief that materials are not privileged permits their seizure under Section 8). Similarly, Detective Sergeant Shaw believed that the financial records Amerindo U.K. had in its possession were not "special procedure materials," as they were being held or used to further the fraud allegedly being committed by Defendants. Thus, under these circumstances, the warrants signed by two different U.K. judges pursuant to Section 8 to search the Cadogan Tate facility were entirely lawful. *See R v. Chief Constable of the Warwickshire Constabulary,* [1999] 1 W.L.R. at 573-74 (in financial fraud case, rejecting special procedure materials objection to broad warrant authorizing seizure of computers, correspondence, diaries, appointment books and banking/financial documentation, and specifically holding that the financial records of the customers were seizable under Section 8). [FN39]

FN39. Defendants offer two other reasons for why the Court should find the U.K. search to be unreasonable. First, Defendants claim that the search was executed "without any restriction." (Tanaka Mem. to Suppress U.K. Search 17.) Yet, as Defendants concede, the officers only seized about 43 out of the 320 Amerindo boxes at the Cadogan Tate facility. While the computers also were seized, English law allows law enforcement officers considerable latitude in the seizure of computers. *See R v. Chesterfield Justices,* [2000] Q.B. at 585 (noting that Section 8 gives law enforcement officers "a wide power to obtain access to relevant information stored in computers"). And, while some irrelevant materials (such as personal items) may have been seized, Defendants have not demonstrated that there was so much of these items to justify suppression. *See R v. Chief Constable of the Warwickshire Constabulary,* [1999] 1 W.L.R. at 579 ("There are clearly some items, e.g., a waistcoat and pens and some family photographs, which could not have been seen to fall within the permitted scope of the search but I would regard these, when seen in context, as de minimis."). Moreover, credible testimony established that the decision of what items to seize was made solely by Metropolitan Police officers and not by U.S. Postal Inspectors. Thus, American law enforcement officials did not act unreasonably.

Second, Defendants assert that Detective Sergeant Shaw made a false representation to the two judges who approved the Cadogan Tate search when he stated in his application that "it would not be practicable to communicate with any person entitled to grant entry to the premises." Defendants, pointing to the fact that local counsel for Amerindo U.K. had been in touch with British authorities to provide information about the location of Amerindo U.K.'s documents, insists that the Detective Sergeant lied in making this statement. The Court is unpersuaded. First, there is no evidence that Detective Sergeant Shaw was aware of local counsel's statements to others in the U.K. government. Second, Detective Sergeant Shaw testified, truthfully in the Court's view, that when he said it was not "practicable" to communicate with Amerindo U.K. officials, he meant that it was not the proper course of action to take. Thus, while it was *possible* to communicate to Amerindo U.K. representatives, Detective Sergeant Shaw believed that it was not *proper* or *advisable* to alert the

> target of a search to the possibility of that search. Third, Detective Sergeant Shaw also accurately represented that entry into the Cadogan Tate premises would not happen in the absence of a search warrant, as he indicated had been made clear to him by Cadogan Tate officials. Thus, Defendants' contention that Detective Sergeant Shaw misled the judges who authorized the Cadogan Tate search is not supported by the record.

Even if the U.K. search somehow contravened British law, however, suppression would be required only if it could be said that the Postal Inspectors could not reasonably and in good faith rely on the representations made to them by Detective Sergeant Shaw that the warrants were lawfully obtained. "Where ... a foreign agent represents to an American official that their activity is lawful, and the American reasonably relies on it, the exclusionary rule does not serve its purpose as a deterrent." *Scarfo,* 1988 WL 115805, at *4. This is just an offshoot of the good-faith exception to the exclusionary rule recognized in *Leon.* In a typical extraterritorial search, as was the case here, "American law enforcement officers [are] not in an advantageous position to judge whether the search was lawful," and "[h]olding them to a strict liability standard for failings of their foreign associates would be even more incongruous than holding [them] to a strict liability standard as to the adequacy of domestic warrants." *Peterson,* 812 F.2d at 492. Moreover, requiring American law enforcement officials to make extensive pre-search inquiries about the legality of a foreign government official's conduct would be diplomatically delicate, to say the least. *See* *Scarfo,* 1988 WL 115805, at *4 (noting the "difficulties inherent in conducting a search in a foreign country"). "[P]ermitting reasonable reliance on representations about foreign law is a rational accommodation to the exigencies of foreign investigations." *Peterson,* 812 F.2d at 492. Here, Detective Sergeant Shaw represented to Inspector Fraterrigo and the other Postal Inspectors in London that he had a court-approved warrant to search the Cadogan Tate facility. There is nothing in the record to establish that Inspector Fraterrigo or any other American official had any reason to question, or in fact did question, this representation. Moreover, there is no basis in the law to have required Inspector Fraterrigo, even if she had the slightest clue as to the difference between "Section 8" and "Schedule I" warrants, to make a potentially undiplomatic inquiry into the propriety of Detective Sergeant Shaw's decision (and that of each judge who approved of his decision) to obtain a "Section 8" warrant, or to demand that she see the application papers. Accordingly, the Court finds that it was objectively reasonable for Inspector Fraterrigo to believe in good faith, which she did, that the U.K. search was lawfully approved by the British courts. *See* *Juda,* 46 F.3d at 968 ("The DEA agent reasonably relied on [the representation of the Australian Federal Police], and accordingly, the good faith exception to the exclusionary rule applies."); *Peterson,* 812 F.2d at 492 (finding it reasonable for American officials to rely on representations from law enforcement authorities that all legal requirements of Philippine law had been met, particularly where "search and seizure law in the Philippine is less than completely clear"); *United States v. Lau,* 778 F.Supp. 98, 101 (D.P.R.1991) ("[T]he evidence was admitted properly because the federal officials reasonably relied [i]n good faith on the representations of Dutch officials as to the requirements of Netherlands Antilles search and seizure law."); *Scarfo,* 1988 WL 115805, at *4 (finding it reasonable for American officials to rely on representations regarding requirements of Dominican

law regarding searches). Thus, the application to suppress the fruits of the U.K. search on Fourth Amendment grounds is denied.

Another statement Defendants claim is an "egregious" misrepresentation is that investors in Rhodes Capital "lost all of their investment funds." Defendants insist that this is demonstrably false as it is contradicted by the fact that Cates received "millions of dollars of profits" on her initial investment in Amerindo, and that, as recently as February 2005, she was able to recover an additional $3 million of her investment funds.
Defendants claim fails for two reasons. First, the statement they quote is taken out of context in that it was preceded by a statement that Vilar had told another investor that Rhodes was a "sound" investment at the same time that Renata Tanaka was informing another investor that Rhodes had "wound down" in 2003. Thus, while Cates might have seen the value of her Rhodes investment grow between 1987 and 2003, it is clear that the MLAT alleges that the investment cratered by 2003. Thus, the statement in context does not appear egregiously false.

Second, the fact that Cates was able, through her own efforts, to recover some of her investment, does not gut the MLAT request. Indeed, as was discussed extensively at the numerous hearings the Court held, the fact that Cates engaged in self-help to recover what she could from her Amerindo investments does not change the fact that Defendants allegedly blocked her efforts to redeem those investments. Thus, at most the statement is a slight exaggeration, but given the many other allegations in the MLAT request, this defect hardly is fatal to the bona fides of the request for the search of Amerindo U.K.'s records.

2. The Fruit of the Poisonous Tree

Defendants also argue that the MLAT request included information obtained through the illegal search of the Amerindo U.S. offices, and that because this request was incorporated into the U.K. warrant application, any evidence obtained as a result of that warrant must be suppressed as the "fruit of the poisonous tree." (Tanaka Post-Hr'g Mem. 40.) [FN41] It is axiomatic that the "exclusionary prohibition extends as well to the indirect as the direct products of" illegal police activity. *Wong Sun v. United States,* 371 U.S. 471, 485 (1963); *accord* *New York v. Harris,* 495 U.S. 14, 19 (1990) (noting the "familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality"). However, "evidence will not be excluded as 'fruit' unless the illegality is at least the 'but for' cause of the discovery of the evidence." *Segura v. United States,* 468 U.S. 796, 815 (1984). Moreover, "[a]lthough the Government bears the burden of proving that illegally obtained evidence is not fruit of the poisonous tree, the defendant bears the initial burden of establishing a nexus between the illegality and the challenged evidence." *United States v. Hall,* 419 F.Supp.2d 279, 289-90 (E.D.N.Y.2005); *see also* *Alderman v. United States,* 394 U.S. 165, 183 (1969) ("[Defendants] must go forward with specific evidence demonstrating taint.").

Here, Defendants fail to meet their initial burden. To begin, Defendants have not identified which allegations in the MLAT request are the fruits of the purportedly poisonous tree. Instead, Defendants only generally allege that the request for the U.K. warrant "was based at least in part on information obtained from the Amerindo U.S. search." (Tanaka Post-Hr'g Mem. 40.) Indeed, the closest Defendants come to identifying the poisonous tree is the statement in the MLAT request that "[b]ased on interviews of current and former Amerindo employees and investors, *as well as documents and files seized from Amerindo U.S.'s New York offices,* the U.S. law enforcement officers have *also* discovered...." (MLAT Request at 5-6 (emphasis added).) But a close reading of the MLAT request reveals that it relies, if at all, on very little information that was derived from the Amerindo U.S. search. First, a vast majority of the allegations supporting the MLAT request also appear in the U.S. warrant application (comprising the Affidavit and the two Criminal Complaints). These include the allegations regarding the SBIC and GFRDA investment vehicles, the AMI, Techno Raquia S.A., and ATGF accounts, the Mayer family, Cates, and the brokerage accounts allegedly used by Defendants to misappropriate funds. Second, and more particularly, the Government represents that the only search-derived information included in the MLAT was that Vilar transferred approximately $19 million into personal accounts at four banks. (Gov't Post-Hr'g Mem. 140.) Without the search information, it has been represented that the Government knew of about $8 million of such transfers to only one personal bank account. Given this representation, which Defendants have not contested and which makes sense given the close temporal proximity between the U.S. search and the submission of the MLAT request (approximately 2 months), it cannot be said that the MLAT request contains fruit from any poisonous tree. At most, there is one piece of bad fruit from a perfectly healthy tree. Thus, Defendants have failed to establish that the allegations in the MLAT request are tainted by the illegal fruits of the Amerindo U.S. search, even assuming the entire U.S. Warrant pursuant to which that search was executed was invalid.

III. Conclusion

Accordingly, for the reasons stated herein, the motions to suppress the search conducted in the United States and the motions to quash the Subpoena are granted in part and denied in part. The motions to suppress the evidence obtained in the United Kingdom search are denied.

SO ORDERED.