

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against -

ABRAXAS J. DISCALA,
also known as "AJ Discala,"
IRA SHAPIRO,
CRAIG JOSEPHBERG,
also known as "Jobo,"
KYLEEN CANE,
DARREN GOODRICH,
DARREN OFSINK and
MICHAEL MORRIS,

14 Cr. 399 (ENV)

Defendants.

STIPULATION AND ORDER

WHEREAS, the parties jointly request that this Court issue an order, pursuant to Federal Rule of Evidence 502(d) and the Court's inherent authority, which will permit review of the documents and information provided as Rule 16 discovery in this action without resulting in the automatic waiver of Defendant Kyleen Cane's ("Cane") privilege in this or any other proceeding; and

WHEREAS, as part of its investigation of this matter, the government has seized Cane's smartphone; and

WHEREAS, Cane's smartphone contains more than 44,000 discrete items containing data; and

WHEREAS, Cane, her attorneys and a taint team from the United States Attorney's Office have reviewed the items on Cane's smartphone to the best of their ability, in

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order to determine whether data on Cane's smartphone is subject to a claim of attorney client privilege; and

WHEREAS, Cane and her attorneys will authorize the taint team from the United States Attorney's Office to release to the trial team in this matter the data on Cane's smartphone that they have, to the best of their ability, determined is not subject to a claim of attorney client privilege.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties, as follows:

1. **No Waiver by Disclosure.** Subject to the provisions of this Stipulation and Order, Cane reserves her right to assert a claim of attorney client privilege with respect to information included in the data on her smartphone that is released to the trial team in this case, and her claim of attorney client privilege shall not be waived by virtue of the release of said data to the trial team or the other parties in this case or any other federal or state action. Provided, however, that the burden of demanding the return of any data from the parties in this action because said data is attorney client privileged shall be on Cane.

2. **Notification Requirements; Obligations of Receiving Party.** In the event that Cane discovers that attorney client privileged data from her smartphone has been disclosed to the United States Attorney's Office or any other party to this action, in order to preserve the privilege, she must notify the Government or any co-defendant (a "Receiving Party") in writing that data (the "Protected Material") as to which she asserts an attorney client privilege has been disclosed and demand that it be returned (the "Clawback Demand"). Upon receiving a Clawback Demand, the Receiving Party shall – regardless of whether the Receiving Party agrees with the assertion of privilege or protection – (i) within five (5) business days after receipt of the Clawback Demand, provide to counsel for Cane with written assurance that it will cease further

review, use and/or dissemination of the identified Protected Material. The Receiving Party shall, however, continue to retain custody of its copy of the Protected Material, until such time as the Court determines that the Protected Material is attorney client privileged. Counsel for Cane must identify on a privilege log any Protected Material with particularity (*i.e.* provide the Bates numbers or sufficient information to identify the data), as well as the basis for her claim of privilege.

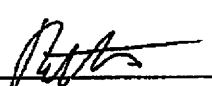
3. **Timing of the Clawback Demand; Not a Precondition to Litigation.** A Clawback Demand shall be made promptly, but no later than 10 days, absent good cause for additional delay, after either (i) Cane is notified by a Receiving Party of a possible inadvertent disclosure of potentially Protected Material, or (ii) Cane discovers that potentially Protected Material was produced. If at any point during the proceedings, any party seeks to introduce into evidence or into the record any potentially Protected Material that has not yet been the subject of a Clawback Demand, counsel for Cane upon timely objection may litigate whether such data is protected prior to its admission into evidence or prior to such data being made part of the record of this case.

March 21, 2016
Dated: ~~December 1, 2015~~
New York, New York

ROBERT CAPERS
United States Attorney

By: 

Shannon Jones
Assistant United States Attorney


Patrick Helm
Assistant United States Attorney

CHARLES A. ROSS & ASSOCIATES LLC

By: 

Charles A. Ross

Attorney for Defendant Abraxas J. Discala

NEWMAN & GREENBERG LLP

LAW OFFICE OF DAVID USHER GOUREVITCH, P.C.

By: _____

Richard A. Greenberg

Steven Y. Yurowitz

David U. Gourevitch

Attorneys for Defendant Ira Shapiro

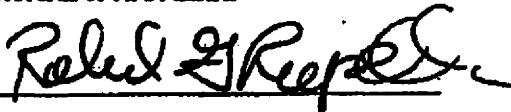
MORVILLO LLP

By: _____

Amy Walsh

Attorney for Defendant Craig Josephberg

SERCARZ & RIOPELLE

By: 

Roland Riopelle

Attorney for Defendant Kyleen Cane

BRUNO & DEGENHARDT

By: _____

Christopher Bruno

Attorney for Defendant Darren Ofsink

CHARLES A. ROSS & ASSOCIATES LLC

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David U. Gourevitch
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Amy Walsh
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SERCARZ & RIOPELLE

By: Roland Riopelle
Roland Riopelle
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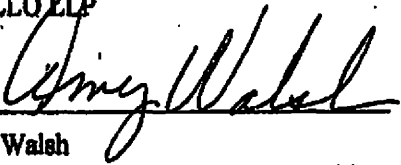
By: _____

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Steven Y. Yurowitz

David U. Gourevitch

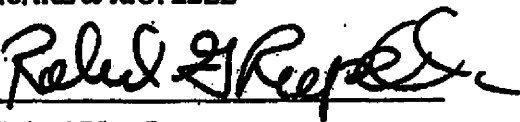
Attorneys for Defendant Ira Shapiro

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By:  _____

Amy Walsh
Attorney for Defendant Craig Josephberg

SERCARZ & RIOPELLE

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Roland Riopelle
Attorney for Defendant Kyleen Cane

BRUNO & DEGENHARDT

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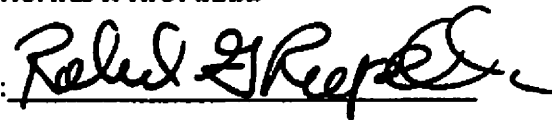
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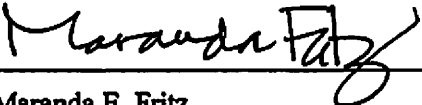
Roland Riopelle
Attorney for Defendant Kyleen Cane

BRUNO & DEGENHARDT

By:  _____

Christopher Bruno
Attorney for Defendant Darren Ofsink

THOMPSON HINE LLP

By: 
Maranda E. Fritz
Attorney for Defendant Michael Morris

DLA PIPER, LLP

By: _____
Patrick Smith, Esq.
Attorney for Defendant Darren Goodrich

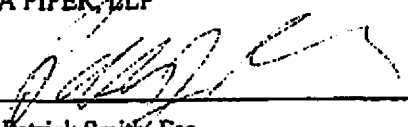
SO ORDERED:

HON. ERIC N. VITALIANO
U. S. D. J.

THOMPSON HINE LLP

By: _____
Maranda E. Fritz
Attorney for Defendant Michael Morris

DLA PIPER LLP

By:  _____
Patrick Smith, Esq.
Attorney for Defendant Darren Goodrich


SO ORDERED: 1

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HON. ERIC N. VITALIANO
U. S. D. J.

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*ADMITTED IN NY & NJ

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US DISTRICT COURT E.D.N.Y.

★ MAR 22 2016 ★

BROOKLYN OFFICE

June 1, 2015

BY ECF

Hon. Eric N. Vitaliano
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: U.S. v. DiScala, et al., 14 CR 399 (ENV)

Dear Judge Vitaliano:

I write to submit the enclosed stipulation and order for the Court's signature. The enclosed stipulation has now been signed by all parties, and I respectfully request that the Court "So Order" this stipulation at the signature line provided, and then instruct the Court's Deputy to file it. The reasons for this request are as follows.

As the Court is well aware from last Friday's conference, the document seizures and productions in this case are massive. My client Ms. Cane is an attorney, and her cellphone was seized during the investigation of this case. Its contents include approximately 55,000 different items, including stored texts and emails. At least some of these items are privileged, because they relate to communications between my client and her clients, in connection with transactions that had nothing to do with the transactions at issue in the above-referenced indictment.

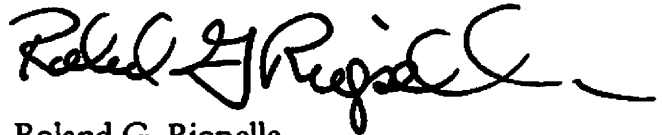
To date, the government has been reviewing the contents of Ms. Cane's cellphone through a "taint team," and Ms. Cane and I have been reviewing the contents of Ms. Cane's cellphone for the purpose of identifying privileged items that should not be disclosed to Ms. Jones and the other members of the government's trial team. While everyone has been working diligently, I'm sure the Court can understand

that Ms. Cane and I are concerned that, despite our best efforts, we might fail to identify a privileged communication as we sift through the enormous amount of material – much of it the typical flotsam and jetsam of life – stored on Ms. Cane's cellphone.

For this reason, we asked the government and counsel to our co-defendants to enter into the enclosed proposed stipulation and order. The enclosed stipulation and order simply provides in substance that Ms. Cane will not waive her right to object to any evidence derived from her cellphone on the grounds of privilege, provided that she makes her objection in a timely manner.

The government and all of Ms. Cane's co-defendants have signed this stipulation, and it is submitted to the Court for it to "So Order," and file. Once the Court has signed and filed the enclosed stipulation, Ms. Cane and I will be in a position to complete our review of the materials stored on her cellphone and authorize the government's "taint team" to disclose the bulk of the materials on the cellphone to the government's trial team.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roland G. Riopelle", with a long horizontal flourish extending to the right.

Roland G. Riopelle

Enc.

Cc: All Counsel (By ECF)