

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

BERKELEY PREMIUM	:	Case No. 1:06-CV-234
NUTRACEUTICALS, INC. and	:	
STEVEN WARSHAK,	:	Chief Judge Sandra S.
	:	Beckwith
Plaintiffs	:	
	:	
vs.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

**ORDER**

Plaintiff Berkeley Premium Nutraceuticals (BPN) is a corporation, and Steven Warshak is its CEO and sole shareholder. On April 24, 2006, Plaintiffs filed their complaint (Doc. 1) demanding the return of materials and files seized by the Government in March 2005, pursuant to warrants issued by a magistrate judge. The complaint also seeks a temporary restraining order and injunctive relief, prohibiting the Government from reviewing any of the seized documents and files that are or may be protected by the attorney-client or work product privileges.

On April 26, 2006, Paul Kellogg, a lawyer who is BPN's in-house counsel, sought to intervene in this action as a plaintiff (Doc. 6). Kellogg's motion was granted on May 24, 2006 (Doc. 11).

The parties quickly reached a stipulation that the Government would suspend any and all review of the disputed documents and files until May 27, 2006, and Plaintiffs withdrew their motion for a temporary restraining order (Doc. 8). When Plaintiffs requested an extension of the stipulated arrangement, the Government objected and filed a response to the Complaint, and a memorandum opposing Plaintiffs' request for injunctive relief (Doc. 14). Plaintiffs have filed a reply (Doc. 15).

This Court held a telephone hearing on Plaintiffs' motion for injunctive relief on June 6, 2006 with counsel for all parties present. Additional post-hearing memoranda were filed by both parties on June 8.

After careful consideration of the Complaint, the memoranda filed by the parties and the arguments of counsel presented at the hearing, the Court denies Plaintiffs' prayer for an injunction prohibiting the Government from proceeding with its proposed "taint team" review of the documents and files at issue.

#### **BACKGROUND**

On March 16, 2005, the Government executed several warrants, issued by a magistrate judge upon a finding of probable cause, to search BPN's business office, a BPN warehouse, and a BPN call center. Seizure warrants were also issued for many documents, files, and other information from those locations. BPN obtained an emergency hearing before the Magistrate Judge on March 18,

2005, seeking the return of some of that property and the release of some bank accounts that had apparently been frozen.

On March 25, 2005, the Government filed a complaint for forfeiture against various properties and accounts of BPN and/or Steven Warshak, as well as Warshak's family members and other persons. The forfeiture matter (Case No. 1:05-cv-0196-SJD) is currently pending in this district. According to a motion filed in that matter by BPN and Mr. Warshak (see Doc. 6), government agents seized the contents of the BPN safe, the laptop computers of BPN's "top executives," all of the corporate accounting department documents, and many other vital papers and items. It is undisputed that the quantity of materials seized is quite large.

According to the Complaint filed in this case, BPN became the subject of a Federal Trade Commission investigation starting in November 2003. BPN was also the subject of an FDA inspection in May of 2004, an Ohio Attorney General investigation, and has been named as a defendant in civil class action consumer litigation. Plaintiffs allege that the subject matter of these various proceedings are related, or perhaps even identical, to the subject matter of the ongoing criminal investigation out of which the search warrants were issued. Thus, Plaintiffs contend that the Government certainly knew that confidential and privileged communications between BPN and/or Warshak and various

attorneys (both external law firms and in-house counsel) representing them were included in the documents, files and materials seized pursuant to the warrants. Plaintiffs also allege that the government failed to "enlist judicial oversight of the seizures" to protect against the seizure of privileged materials and the invasion of Plaintiffs' privileges.

On March 22, 2006, current counsel for Mr. Warshak (Mr. Feinberg) wrote to the prosecuting AUSAs, requesting that the government disclose to Plaintiffs' counsel the procedures the government was using to protect Plaintiffs' privileged materials. Plaintiffs also objected to any review of any potentially privileged document or communication by "any executive branch prosecutor or law enforcement agent" and requested that any such privilege review be conducted by a judicial officer or court-appointed special master. (Doc. 1, ¶14).

Plaintiffs allege they were told that the seized materials were screened for privileged material by unidentified government agents; that the screened materials would be reviewed by a "taint team" comprised of individuals who are not members of the prosecution/investigation team; and that when the "taint team" had made its determination of the status of the materials, Plaintiffs' counsel could review those materials and seek judicial intervention prior to any disclosure of these materials to the prosecution/investigation team. (See Doc. 1, ¶15)

Plaintiffs allege that the government's seizure and continued retention of these materials are unlawful, because (a) the warrants failed to require judicial review of seized materials prior to any governmental review of those materials, and the government has not sought judicial review to date; and (b) the warrant violated the Fourth Amendment because it was insufficiently particularized.

The government's response (Doc. 14) explains the methods by which the government contends it attempted to protect Plaintiffs' privileges. For example, the searching agents cordoned off the offices of BPN's in house counsel, and did not search their offices or their laptop computers. Folders on BPN's computer servers were initially reviewed, and copied only if they appeared to contain material responsive to the warrants. User folders on the server labeled with in-house counsels' names were segregated and put on a separate CD by non-case agents. Email files were subjected to keyword searches by non-case agents. The keywords included all known attorneys for Plaintiffs. All email that included any of those names was segregated and "burned" to a separate CD, placed in a password protected file, and then provided to the taint team AUSA. The rest of the electronic files, with these segregated and potentially privileged materials omitted, are in the possession of the prosecution/investigation team.

Hard-copy documents seized were "briefly viewed" on-site by agents before being seized. Later on, invoices from BPN attorneys were discovered in these materials. The government states that these invoices were immediately segregated, placed in a taped box, and maintained by the Postal Inspection Service. The prosecution team has not had access to those documents.

The government also explains its "taint team" protocol. An experienced AUSA from another office, with no connection to or responsibility for the ongoing investigation and/or potential prosecution, would perform the review. A copy of all the material would be made for his use, and a copy made for Plaintiffs' counsel. (Based on statements made at the June 6 hearing, Plaintiffs' counsel has received copies of some, if not all, of the segregated materials, including approximately 2,500 hard copy pages and a number of discs of electronically stored information. The latter includes information seized during the BPN searches, as well as information obtained from various internet service providers.)

Documents the "taint team" AUSA found to be privileged would be segregated, the originals returned to Plaintiffs and copies placed in a sealed envelope. These sealed copies would be provided to the prosecution team only if and when the holder of a privilege that attached to any of those documents waived that privilege. The "taint team" AUSA would also determine if any

privileged document could be redacted, permitting its use in that fashion, and whether any exception to the privilege applied to a particular document. Those documents would then be provided to BPN, and negotiations would presumably ensue over these initial "taint" determinations. At that point, any disagreements about the applicability of a privilege, or an exception to a privilege, would be submitted to the court for resolution.

As Plaintiffs phrase the issue, the heart of the current dispute is not whether presumptively privileged material can be used by the government in a prosecution, or whether Plaintiffs would prevail in suppressing the use of such material in a prosecution. The question is whether **any** government agent may review this material **at all**, given the government's awareness of the existence of presumptively privileged materials among the seized items and in the face of Plaintiffs' assertion of privilege. (See Doc. 1, p. 15.)

## **DISCUSSION**

### Jurisdiction

Initially the Court must address the propriety of its jurisdiction. The government notes that, in general, motions under Fed. R. Crim. P. 41(g) should not be entertained by the district court prior to an indictment or information. See, e.g., White Fabricating v. United States, 903 F.2d 404, 408 (6<sup>th</sup> Cir. 1990). There is a genuine question as to whether Plaintiffs'

complaint is premature, as a motion in limine and/or to suppress in any later prosecution may be an appropriate remedy.<sup>1</sup>

Nevertheless, Plaintiffs' complaint is premised not only on Rule 41(g), but also upon 28 U.S.C. §2201 and §2202. The Court has jurisdiction under these statutes to determine Plaintiffs' claims for injunctive and declaratory relief, prohibiting the proposed invasion by the government of their privileged materials.

#### Seizure of Potentially Privileged Materials

The attorney-client privilege and the protections of the related work product doctrine are firmly rooted in our jurisprudence. See, e.g., Upjohn Co. v. United States, 449 U.S. 383 (1981). The privilege is not absolute, however. The Sixth Circuit has noted that the privilege "applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice." In re Antitrust Grand Jury, 805 F.2d 155, 162 (6<sup>th</sup> Cir. 1986).

Plaintiffs argue that any search or seizure of materials from a place which may contain materials protected by the attorney-client privilege must be conducted with special care. They argue that "special care" requires the government to

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<sup>1</sup> The same is true for Plaintiff's claim that the warrant was overbroad. Plaintiffs do not have access to the affidavits filed in support of those warrants, and the warrants must be measured by the totality of the circumstances, and not simply the description of items to be seized.

voluntarily adopt, or for the court to order, procedures to ensure the least possible intrusion into privileges, while permitting the government to achieve its goals in the search or seizure.

Plaintiffs then analogize the search of BPN to searches of a lawyer's office. Many courts have noted the grave dangers inherent in such a search, and the need for sensitivity and minimization of any unnecessary intrusion into attorney-client relationships. See, e.g., National City Trading Corp. v. United States, 635 F.2d 1020 (2d Cir. 1980); In re Grand Jury Subpoenas, 926 F.2d 847, 856 (9<sup>th</sup> Cir. 1991). This heightened sensitivity is all the more acute when a criminal defense lawyer's files are the subject of search. See, e.g., United States v. Stewart, 2002 U.S. Dist. LEXIS 10530, 2002 WL 1300059 (S.D.N.Y. 2002). There, the United States obtained a warrant to search the law office of Ms. Stewart following her indictment on various criminal charges. At her arraignment, Ms. Stewart requested the appointment of a special master to review the materials that had been seized from her office, both for privilege and responsiveness. The government agreed in that case that it was highly likely some of the seized documents were privileged materials, relating to Ms. Stewart's criminal defendant clients who had nothing to do with the government's case against Ms. Stewart. In addition, the documents likely contained information about clients of the other

lawyers who shared Ms. Stewart's office space and who were completely uninvolved in the charges. The government's affidavit stated that the initial search and seizure of the law office was conducted by a special team of officers "who had been walled off from the prosecution team in this case in order to prevent the prosecution from viewing any privileged materials or learning any privileged information that was uncovered on-site during the search." Questions concerning privilege determinations were to be made by a special AUSA, who was also "walled off" from the prosecution team.

The district court determined that, given the exceptional circumstances presented by the type of materials seized and the office-sharing arrangements between the affected lawyers, a special master should be appointed to perform the privilege and responsiveness review. One rationale relied upon by the district court was the importance of a procedure that not only is fair, but also appears to be fair, because "the appearance of fairness helps to protect the public's confidence in the administration of justice and the willingness of clients to consult with their attorneys." Id., 2002 U.S. Dist. LEXIS at \*23.

A search of a corporate business office does not, standing alone, raise the exceptional circumstances involved in a search of an attorney's office. The government persuasively points out that accepting Plaintiffs' argument would mean that any search of

a business or corporation of any reasonable size would automatically trigger Sixth Amendment concerns, as most such businesses at some time consult with attorneys for some purpose. Plaintiffs emphasize that the fact that BPN was involved in an FTC investigation and other civil litigation was well known to the government. Because of that, Plaintiffs urge that exceptional circumstances not unlike those involving law office searches exist here, which counsel in favor of heightened concern for documents seized, and the use of a special master.

Use of a Government "Taint Team."<sup>2</sup>

The Court notes that two district courts within this Circuit have discussed (and both approved) the use of a governmental "taint team," composed of government prosecutors or agents not involved in the investigation or prosecution of the charges in question. See United States v. Skeddle, 989 F.Supp. 890 (N.D. Ohio 1997), and In Re Grand Jury Subpoenas, 2005 U.S. Dist. LEXIS 21081 (E.D. Mich. September 27, 2005).

In Skeddle, several corporate officer defendants who had been previously indicted moved to suppress attorney-client communications seized by warrant from a law firm, of which

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<sup>2</sup> In U.S. v. Segal, 313 F.Supp.2d 774, 776-777 (N.D. Ill. 2004), the district court quoted Department of Justice guidelines for searching seized electronic materials containing legally privileged files, stating that "a trustworthy third party" must perform the privilege review and identifying a prosecution "taint team" as one of the DOJ's preferred methods for this process.

another two of the indicted defendants were members. The motion was supported by a privilege log. The district court had issued the warrant for the law firm, which directed the agents to produce to the court any seized documents for which the lawyer defendant asserted a privilege; eleven boxes of such material were brought to the court without prior inspection by the agents. The district court, a week later, permitted a government "taint team" to inspect the eleven boxes, rather than undertaking the inspection itself. The court had already determined that probable cause supported the warrant. Because the corporate officer defendants had been aware of the search and seizure and had not asked to be heard concerning the court's planned review of the eleven boxes, nor raised any privileges at that time, the court relinquished the initial review to the government taint team.

The corporate officers claimed that their Fourth Amendment rights were violated by this procedure, an argument the district court firmly rejected. The district court also rejected defendants' due process claim, noting that even if its own change of mind on the review process "collided" with some Fifth Amendment principle, total exclusion of the evidence was not a proper remedy. Rather, the remedy would be to return any privileged materials. In a footnote, the court stated that in hindsight, "a safer course would have been to have given notice

to the [corporate] defendants and the lawyers whose offices were searched to show cause within a specified period why the materials should not be released to the government." Id. at 898 n.6.

The district court also reviewed in camera the defendants' privilege log, documents and legal arguments in support of their position on the crime-fraud exception. The district court permitted the "taint team" to respond to defendants' arguments on these grounds, noting that disclosure of the defendant's legal arguments on this subject to the prosecution team would contravene defendants' Sixth Amendment rights and the doctrine of Simmons v. United States, 390 U.S. 377 (1968) [defendant may assert one right without sacrifice of another]. The district court obviously concluded that use of the "taint team" in the proceedings would adequately protect defendants' assertion of privilege, and not trample on their constitutional rights.<sup>3</sup>

In Re Grand Jury Subpoenas, 2005 U.S. Dist. LEXIS 21081 (E.D. Mich. September 27, 2005) involved grand jury subpoenas for documents from a bankrupt corporation, whose trustee waived all attorney-client privileges on behalf of the corporation. The

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<sup>3</sup> A later unpublished Sixth Circuit decision concerning a subsequent tax prosecution against the corporate defendants indicates that the jury acquitted them of all charges discussed in the case involving use of the "taint team." See U.S. v. Skeddle, 44 Fed. Appx. 443, 2002 U.S. App. LEXIS 18153 (2002). This Court is unable to locate any Sixth Circuit authority approving or disapproving of the concept.

corporation's former CEO and sole shareholder intervened and asserted a personal privilege for some of the documents. The district court ordered submission of the documents to a government taint team for an initial determination of the intervenor's personal privilege claims, with any selected documents to be submitted to the court for final determination. The district court relied on United States v. Grant, 2004 U.S. Dist. LEXIS 9462 (S.D.N.Y. May 25, 2004), which approved the use of a government "privilege team" to conduct an initial review of documents segregated from those seized pursuant to a warrant covering the defendant's nightclub and his apartment.

In Grant, agents performing the search seized approximately 40 boxes of documents, segregating several boxes identified as "legal in nature." Defendants requested that the review be conducted by a special master or by the court. The district court found that defendants would not be prejudiced by using a privilege team, because the defendant would have the right to have his objections concerning any of the documents heard by the court before any of the documents would be given to the prosecution team. The district court also rejected use of a special master because the defendant's proposal would not permit the government any access to the documents, severely hampering government efforts to establish the lack of a privilege or the crime-fraud exception as to any document. In addition, the court

noted that no Sixth Amendment concerns were present, as the seized documents related to civil litigation involving the defendants that preceded the indictment. The district court observed that the privilege team and the trial prosecutors are entitled to a presumption that they would conduct themselves ethically and with integrity during the process of reviewing and later utilizing any of the seized documents.

Other courts have treated the concept of a "taint team" more equivocally. See, e.g., U.S. v. Kaplan, 2003 U.S. Dist. LEXIS 21825 (S.D.N.Y., December 8, 2003), involving a motion to suppress documents seized from a law office with a pre-indictment warrant, where the government used an "ethical wall" attorney to screen out potentially privileged documents from any review by the prosecution team. While the government cited several recent cases using "ethical wall" procedures, the district court was troubled by some suggestions that case agents involved in the prosecution had access to some of the presumptively privileged documents in question. The court disapproved use of an ethical wall team if the documents and materials at issue are accessible by the prosecution before a full review and opportunity for the defendant to be heard. Id. at \*\*36-37. The court also noted the critique of "taint teams" from In re Search Warrant, 153 F.R.D. 55, 59 (S.D.N.Y. 1994). In dicta there, the court discouraged the use of such "Chinese walls" in criminal prosecutions:

It is a great leap of faith to expect that members of the general public would believe that any such Chinese Wall would be impenetrable; this notwithstanding our own trust in the honor of an AUSA. Furthermore, in a case such as this, the Chinese Wall attorney to perform the search required the physical assistance of agents, laborers, truckmen and others not bound by the ethical considerations which affect a lawyer. Those on the Mongol side of the Wall may well access the same information from other sources, and have difficulty convincing a defendant or the public that the information did not pass over or through the Wall.

See also, United States v. Hunter, 13 F.Supp.2d 574, 583 n.2 (D. Vt. 1998), finding the government's screening process for segregating privileged documents seized in a law office search to be adequate, but noting "[i]t may be preferable for the screening of potentially privileged records to be left not to a prosecutor behind a 'Chinese Wall,' but to a special master or the magistrate judge," and citing the concerns quoted above. And see, United States v. Neill, 952 F.Supp. 834, (D.C. D.C. 1997), describing the case law concerning the "taint team" approach as "equivocal" and noting that when the government chooses that procedure over the traditional in camera review by a judicial officer or court-appointed special master, the government should bear the burden of rebutting a presumption that tainted material was provided to the prosecution team.

Here, Plaintiffs suggest that the "taint team" procedures in this case are already themselves tainted. They note that the

government admits that documents were "briefly viewed" by agents during the search; that the attorney invoices were included in the seized materials and discovered only later by unidentified agents; and that copies of emails that have been returned to them from the government purportedly show that the case agent had materials on "his own" computer.

The Court cannot determine on the pleadings presented whether or not the procedures and protocol that the government has described have been followed to the letter. The Court notes that the initial search apparently did not have a "taint team" in place, and that agents who conducted the search may be members of the prosecution/investigation team. Plaintiffs have remedies in the event that privileged information gained in this way is proffered in any prosecution that might occur. The Court will not bar the government's proposed use of the "taint team" review process because of a possibility that the appropriate protocol will not be followed in the future. If there are breaches that may cause prejudice, Plaintiffs will have remedies.

Plaintiffs argue that they will be irreparably injured by **any** executive department review of the segregated materials, and that they have no adequate remedy at law to redress the alleged violations of their privileges. The Court disagrees with the first argument; privileges are not absolute, as noted above. The Court rejects the second argument, because the Court is not

convinced that their privileges (presuming that some of the documents are in fact privileged) will be violated by the "taint review" procedure, given that a judicial officer will be the final arbiter of any disputes concerning the applicability and scope of the privileges or exceptions thereto.

During the telephone hearing on June 6, Plaintiffs' counsel described the volume of electronic documents contained on the computer discs as "thousands" if not "ten thousand" separate communications. No realistic estimate of the amount of time it will take to review all of this information - whether by a taint team AUSA, by Plaintiffs' counsel, or by a neutral magistrate or special master - has been, or reasonably can be provided at this juncture. The government wants to proceed with its taint review process as part of its ongoing criminal investigation. The Court rejects the government's description of a special master proceeding as a "mini-trial" that would unduly interfere with the grand jury proceedings. The Court is mindful that the materials in question - at least those taken from the BPN facilities - were seized by lawfully issued warrants for which probable cause was judicially determined. Plaintiffs note their grave concern about whether probable cause existed to retrieve the documents from the internet service providers, but that question is not before this Court at this time. (The Court also notes for the record that it has not reviewed the affidavits filed in support of the BPN

warrants, which remain under seal and unavailable to the Plaintiffs.)

There have been legitimate questions raised about the use of the "taint team" procedure for reviewing potentially privileged information included in seized materials. This Court shares some of these concerns, but also has a high degree of confidence in the professionalism and integrity of counsel for all parties in this matter. The Court concludes that under all the circumstances of this case, and given that the documents were seized over a year ago and have not yet been reviewed, the procedure described by the government for the review of the segregated materials in dispute is adequate. Review of these documents by the "taint team" is clearly not a waiver of Plaintiffs' privilege, and the government does not suggest that is the case.

Plaintiffs have been provided with a copy of the segregated documents so that they can prepare their own privilege log. The Court believes the process of winnowing down the materials to those documents truly in dispute is most efficiently conducted by each party independently, but simultaneously, conducting its own review. Counsel for Plaintiffs and the "taint team" AUSA should meet and confer as necessary and as the review process proceeds, to attempt to resolve any differences in the parties' positions as to a specific document. Disputes that cannot be resolved by

agreement will be heard by a judicial officer under appropriate procedures to be determined at a later date.

The Court orders that the documents which have been segregated shall **not** be available to any member of the prosecution and/or investigation teams concerning the Plaintiffs, absent agreement of the parties that the documents are non-privileged or a judicial ruling permitting their release. This includes any copies of privileged documents that the government states will be kept in the event that a holder of a privilege should later waive the privilege pertaining to that document.

For all of the foregoing reasons, the Court denies Plaintiffs' request for injunctive and/or declaratory relief under 28 U.S.C. §§2201 and 2202, barring the government from proceeding with its "taint review" of the segregated portion of the documents previously seized.

DATED: June 9, 2006

s/Sandra S. Beckwith  
Sandra S. Beckwith, Chief Judge  
United States District Court