IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL SEGAL,

Defendant.

No. 02 CR 0112
Judge Ruben Castillo

DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION TO RECONSIDER ORDER REQUIRING GOVERNMENT TO RETURN PRIVILEGED MATERIAL SEIZED DURING EXECUTION OF SEARCH WARRANTS

I. INTRODUCTION

The government has moved the Court to reconsider its order granting Mr. Segal's motion for the return of privileged material seized during separate but simultaneous searches executed on the day of Mr. Segal's arrest at Near North Insurance Brokerage, Inc. ("NNIB"), NNIB's off-site storage facility, and Mr. Segal's residences. In multiple discussions surrounding the parties' Local Rule 16.1 Pretrial Discovery Conference, and in its written submissions to this Court opposing Mr. Segal's motion the first time around, the government offered the defense and the Court no information about its execution of the searches and no explanation of its treatment of privileged material seized during the search. Similarly, the government never challenged Mr. Segal's standing to assert privilege over communications with corporate counsel or to contest searches of company property. Instead, the government baldly asserted that the attorney-client privilege is merely "an evidentiary privilege" and that the government had every right to peruse privileged documents as it pleased and to make any investigative use of privileged material it wished, short of introducing it in evidence at trial.

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Only after the Court indicated that it was "troubled" by the government's apparent treatment of privileged material and ordered its return did the government provide any information regarding its seizure of privileged materials. The Court even gave the government an opportunity at the February 5, 2003 status conference to shed light on what its agents had done to protect privileged materials, but the government still did not offer a straightforward explanation, and instead pressed in its oral argument that it had a right to use the documents in any way it saw fit in its investigation.

Now, for the first time in its Motion to Reconsider, the government contends that it has treated potentially privileged material with "extreme caution" and that it "has not permitted the prosecution team or the case agents to be exposed to any materials seized that appear to give rise to potential attorney client privilege issues."[1] (Mot. to Recons. at 2, n.1.) All of these arguments and assertions could and should have been raised with the defense in discovery conferences, and at the very latest with the Court in the government's response or when the Court gave the government an opportunity to address the issue at the February 5 status conference. However, apparently for its own tactical reasons, the government chose not to do so. Accordingly, the Court would be fully justified in rejecting the government's belated arguments and denying its motion to reconsider as untimely raising new matters.[2]

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[1] The government's Motion to Reconsider makes the accusation that "the defense (in its motion) incorrectly left the Court with the impression that the government had accessed and viewed potential attorney/client privileged material pertaining to the defendant's representation in this matter." (Mot. to Recons. at 2.) However, it was the government's complete failure to even hint that the government had pointedly employed procedures to prevent it from viewing privileged documents, and its strident arguments that it had an absolute and unfettered right to view such documents, that led both the defense and the Court to assume that the government felt free to access privileged documents.

[2] Motions to reconsider serve a limited function of correcting manifest errors of law or fact, or presenting newly discovered evidence or an intervening change in the law. *United States ex rel. Smith v. Briley*, No. 98 C 5450, 2002 WL 31804053, at *1 (N.D. Ill. Dec. 13, 2002); *see Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996). A motion to reconsider cannot be used, as the government has done here, to introduce new legal theories for the first time, to raise legal arguments that could have been heard during the pendency of the previous motion, or to present evidence that could have been adduced during the

The government's newly raised arguments and evidentiary submissions do not merit reversal of this Court's previous order. Taken as a whole, the government's submissions demonstrate that there is abundant room for an abuse of Mr. Segal's attorney-client privilege with the government's search and post-search procedures employed here, as evidenced by the government's failure to comply with Justice Department guidelines regarding searches of privileged materials, particularly the substantial amounts of privileged electronic information contained on laptops, personal computers, and servers seized by the government. Indeed, the government's failure to apprise the issuing court in its search warrant affidavit about the likelihood of seizing privileged material, and its failure to have an independent third-party review the seized electronic information for privilege before allowing the prosecution team to access it, both run afoul of Department of Justice policies. (*See* p. 11 *infra*.)

The government's Motion to Reconsider devotes only a single paltry paragraph to what little the government has done to safeguard privileged information in electronic form, and offers only sketchy details about how the government is accessing the electronic data it has seized.[3] The government indicates that it has "excluded" the names of three lawyers from its electronic search queries of the NNIB system, which includes among its hundreds of thousands of e-mails more than 11,000 e-mails to or from Mr. Segal, and at least 1,300 between Mr. Segal and a number of attorneys representing his company and/or himself. However, the government fails to explain precisely what the practical effect of "excluding" names from its queries is and how any

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pendency of the original motion. *Briley*, 2002 WL 31804053, at *1; *see Caisse Nationale*, 90 F.3d at 1269-70. The government's new arguments and evidentiary submissions do not constitute "newly discovered evidence" or "intervening change[s] in the law," and its motion can therefore be denied on that basis alone.

[3] The affidavits from FBI agents submitted with the government's motion do not offer a single word about how the prosecution team and case agents are handling post-seizure review and searches of electronic data.

search term's "exclusion" affects results of its queries.[4] Most importantly, the government does not explain what safeguards, if any, it has in place to deal with arguably privileged communications turned up in its electronic searches of thousands of e-mails, a significant number of which involve Mr. Segal and lawyers.

Even the government's carefully crafted statement in its brief about post-search reviews of electronic data is qualified and ambiguous. The government states that "[a]s to computer correspondence, the government team assigned to this case has not reviewed correspondence that may have occurred between the defendant and his personal attorneys relating to this or other matters." (Mot. to Recons. at 8 (emphasis added).) From its brief, it is clear that the only lawyer the government views as Mr. Segal's "personal" attorney (as of the date electronic data was seized) is Harvey Silets. (Mot. to Recons. at 5.) Therefore, it is difficult to ascertain from the government's brief exactly what other potentially privileged materials the government has accessed and reviewed from the universe of electronic materials it seized from Mr. Segal and NNIB. For example, if the government's searches produced an e-mail between Mr. Segal and Zachary Stamp (counsel who gave advice to NNIB and to Mr. Segal about PFTA issues), the government may feel free to utilize that document because it may not view Stamp as a "personal attorney" to Mr. Segal. This risk is particularly acute given the government's stated view that it

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[4] Based on our own experience in electronic searches and on the government's sketchy description in its Motion to Reconsider, we assume that the government means that it has "excluded" the names Lipton, Silets, and Stanton from its various search commands. We also assume that exclusion of these names from its search terms does nothing to prevent the search from identifying communications (1) between Mr. Segal and any of the several additional attorneys who represented NNIB and/or Mr. Segal during the relevant time period, or (2) between Mr. Segal and Lipton, Silets, or Stanton which would result from word searches of the e-mail or other relevant database utilizing search terms other than the three attorneys' names. For example, e-mails or memos between Mr. Segal and an NNIB and/or personal attorneys (including Lipton and Silets) might well be produced using "attorney neutral" search terms, such as "Segal," "PFTA," "credit," etc. Moreover, even if the exclusion of "Silets," "Lipton," and "Stanton" from its search terms means that any document with either of those names within it is excluded from the search results, searches using "attorney neutral" terms could be expected to yield communications involving Mr. Segal and the several other attorneys who represented NNIB and/or Mr. Segal, such as outside regulatory counsel Zachary Stamp who represented Mr. Segal and NNIB on PFTA issues in the months preceding Mr. Segal's arrest (*see* partial additional list of relevant attorneys at p. 10 *infra*.)

is not legally required to avoid viewing attorney client privilege material even if personal to Mr. Segal, and its view that Mr. Segal has no standing to object to communications between the then CEO of the company and NNIB's inside and outside lawyers.

Finally, the new legal arguments that the government has raised for the first time in its Motion to Reconsider also miss the mark. For instance, in challenging Mr. Segal's ability to assert privilege over his communications with various inside and outside corporate counsel, the government fails to recognize the law in this circuit regarding the attorney-client privilege. Indeed, where the interests of a company and its sole shareholder are linked in the way they are here, an individual attorney-client relationship between Mr. Segal and NNIB's inside and corporate counsel can be inferred if Mr. Segal had only a "minimally reasonable" subjective belief that he was receiving legal advice in an individual capacity. Moreover, contrary to the government's contention that Mr. Segal lacks standing to challenge the seizure of NNIB's records, courts have found that owners and high-ranking officers have standing to challenge searches of corporate offices and computers in circumstances like those presented here.

For all these reasons and those set forth in more detail below, the Court should deny the government's Motion to Reconsider. If the Court does reconsider the nature of the relief granted Mr. Segal, perhaps it should hold an evidentiary hearing on the methods used by the government to safeguard privileged materials in both paper and electronic form, or perhaps otherwise cause the government to (1) disclose all communications seen by the prosecution team or case agents involving Mr. Segal and any attorney for NNIB and/or him; and (2) explain in detail what procedures have been and will be employed to prevent future viewing of such documents.

II. PROCEDURAL HISTORY

On November 22, 2002, Mr. Segal filed a motion for the return of privileged information seized by the government (hereinafter, the "privilege motion"). On January 7, 2003, the

government responded to the privilege motion and asserted, without citation to authority, that the attorney-client privilege is merely "an evidentiary privilege" and that the government could make whatever investigative use of privileged information seized pursuant to a search warrant that it desires. (*See* Gov't Consol. Resp. to Def.'s Pretrial Mots., at 22.) The government made the remarkable assertion that "information conveyed to an attorney is not itself protected from discovery," and that "what is protected by the privilege is the introduction of the communication itself into evidence." *Id.* The government further argued that an investigator's review and use of privileged material is not "impermissible" and that Fed. R. Evid. 501 "simply does not apply to an investigator reviewing appropriately seized documents that contain evidence of a crime." *Id.*

The government revealed nothing to the defense or to the Court in its response brief about the existence of a "privilege team" to segregate potentially privileged material seized during the search. The government made no representation that it had segregated six boxes of material from NNIB's corporate general counsel's office.[5] Further, the government never challenged Mr. Segal's ability to claim privilege over his communications with corporate counsel, or his standing to contest the seizure of documents at NNIB's corporate offices.

On February 5, 2003, the Court held a status conference and ruled in part on Mr. Segal's privilege motion. The Court indicated that it was "concerned with the manner in which documents were recovered from Mr. Segal in the course of this search," and initially ordered the government to return all privileged information. (*See* Trans. of Proceedings, Feb. 5, 2003, attached as Ex. 1, at 6.) The government immediately moved the Court to reconsider its order, and in doing so argued that it was "not aware" of any personal attorney-client privileged material

[5] In fact, in the parties' Rule 16.1 conference, the government instead asserted that it was "unaware of whether the government has in fact read or used Mr. Segal's privileged communications," but that it was "free to do so." (Def. Mem. in Supp. of Mot. for the Return of Privileged Information at 2, n.1.)

seized during the search. *Id.* at 7. After the Court heard additional argument on the government's request for reconsideration, the Court ordered the government to return to Mr. Segal all privileged information seized during the search or, alternatively, to submit a log of the privileged material and reasons why the government believes it is entitled to keep the material. *Id.* at 13-14.

III. ARGUMENT

A. The Government Has Demonstrated An Insensitivity to Privilege Concerns and Not Complied With Department of Justice Guidelines Involving Search and Seizure of Privileged Materials.

The government has demonstrated an insensitivity to safeguarding potentially privileged material from the outset of its planning and execution of searches in this case. The government knew in advance that it would be searching NNIB's in-house counsel's office, and also knew that it would be seizing voluminous privileged materials from NNIB's servers and Mr. Segal's laptop and personal computers. Nevertheless, the government failed in its search warrant affidavit to apprise the issuing court that it was likely to encounter privileged material, and also failed to identify procedures to protect such material from review. Both of these factors are required to be laid out in a search warrant affidavit under Department of Justice guidelines. (*See* p. 11 *infra.*) In addition, it is impossible to tell from the government's submissions whether searching agents were briefed adequately on the identity of the many lawyers who counseled Mr. Segal and NNIB, and that might give rise to a claim of privilege as to documents and materials encountered in the search. Two FBI agents (of the five who submitted affidavits and the approximately 50 who participated in the search) now attest to being instructed to segregate potentially privileged material. However, none of the affidavits offer details about these instructions or whether searching agents were given the names of *any* of the many lawyers who provided legal advice to NNIB and to Mr. Segal during the relevant time period.

As demonstrated below, the government's steps taken to segregate potentially privileged information are inadequate, and in violation of the Department of Justice's ("DOJ") policy for seizure of electronic data in a criminal investigation. And all of the following points must be considered against the backdrop of the government's strenuously urged positions, which it has not abandoned in its Motion to Reconsider, (1) that the attorney-client privilege is merely an "evidentiary privilege," and (2) that the government has free reign to use privileged material in its investigation.

1. The Government's Efforts To Safeguard Potentially Privileged Electronic Communications Are Inadequate and Do Not Comply With Department of Justice Guidelines.

The minimal steps that the government has taken to segregate potentially privileged material in its post-search review of electronic data seized from Mr. Segal's laptop, personal computers, and NNIB's servers run afoul of Department of Justice guidelines. (*See* p. 11 *infra*.) Moreover, based upon the sketchy description of its post-seizure queries of seized electronic data, the government's ambiguously-defined search techniques of "excluding" only certain lawyers' names from its queries in fact allows the government to access privileged communications with a larger universe of lawyers who have counseled Mr. Segal and NNIB.

Like most other modern-day businesses, NNIB utilized and maintained a substantial and ever-increasing amount of electronic data and communications in the ordinary course of its business. Not surprisingly, Mr. Segal also relied extensively on computers and electronic data transmission and storage for his communications with business colleagues, advisors, and in-house and outside counsel. Indeed, the defense estimates that the government seized more than 11,800 of Mr. Segal's e-mails and faxes. Over 1,300 were communications with either in-house or outside counsel, and more than 300 of them were expressly denoted as "privileged." The government similarly seized approximately 9,400 e-mails and faxes belonging to Sherri

Stanton, NNIB's in-house counsel at the time of the search, half of which were directed either to Mr. Segal, internal legal staff, or outside counsel.

Despite the vast volume of electronic information that was seized in the government's search, and the complex technology and software issues involved in seizure and review of electronic data, the government's motion devotes a single paragraph in its Motion to Reconsider to its attempt to "segregate" privileged materials seized in electronic form. The government asserts that it seized from NNIB a "mirror image" of NNIB's network computer drives, and then transferred those drives to a snap server. (Mot. to Recons. at 5.) In conducting searches on this snap server, the government further asserts that it has "always excluded" the names of three lawyers: Harvey Silets (outside counsel whose firm represented Mr. Segal personally and NNIB); Dick Lipton (outside counsel who has represented Mr. Segal and NNIB); and Sherri Stanton (who served as general counsel at NNIB from April 2000 to June 2002). The government fails to identify any other precautionary measures it took to segregate privileged electronic information seized during the searches.[6]

The three names "excluded" from the government's "snap-server" searches are far from an exhaustive list of attorneys who have represented Mr. Segal and NNIB during the relevant time period. For instance, the government has failed to exclude the names of any lawyers who preceded Ms. Stanton as NNIB's general counsel, a position Ms. Stanton did not hold until April 2000. The government seized electronic data that predates April 2000, yet has apparently failed

[6] The government's failure to describe the mechanics and procedures of its post-search queries, or the software or applications it used to conduct its queries, makes it nearly impossible to understand or assess the effect of "excluding" certain names. For instance, by saying it has "always excluded" these three names from its searches, does that mean that the government has never retrieved and reviewed a document from its "snap server" searches that contained any of those three names? Similarly, using the government's technique and technology, does "excluding" the name "John Smith" exclude an e-mail from jsmith@lawfirm.com? If not, how can the government be sure that e-mail communications involving the "excluded" individuals were not retrieved? These are just a sampling of the issues raised by the government's vaguely-described and patently inadequate techniques to avoid retrieval and review of privileged materials.

to account for any potentially privileged communications involving Ms. Stanton's predecessors as NNIB's in-house counsel. In addition, and by way of a selective sample, the government does not appear to have excluded any of the following lawyers or legal personnel, all of whom Mr. Segal and/or NNIB had privileged communications with during the relevant time period (and *before* the date of the searches):

LAWYER	NATURE OF REPRESENTATION
Zachary Stamp	Regulatory counsel who represented both Mr. Segal and NNIB on PFTA issues and assisted in NNIB's self-reporting to the Illinois Department of Insurance in the summer of 2001
Thomas Rakowski	Civil litigation counsel in alleged "retaliatory litigation" case involving former employees' violation of non-compete agreements and hacking into NNIB computer network
Kim Matthei	NNIB General Counsel from 1994 to 1999
Carl Fasig	NNIB General Counsel in 1999
Allen Jackson	NNIB Senior Legal Assistant from 1998 to present
Stewart Shulruff	Outside counsel to Mr. Segal in connection with loans made by Mr. Segal and other entities to NNIB, with proceeds directed to PFTA

The government seized electronic communications that involved Mr. Segal and each of the above lawyers, among numerous others.[7] The government has not identified any safeguard that would have prevented these communications between Mr. Segal and the above-listed

[7] The government was not the only outside party seizing privileged material from Mr. Segal and NNIB around the time of the government's search. A former employee has admitted to hacking into NNIB's network on a daily basis for several months both before and after the government executed its search warrant in January 2002. During these intrusions, the hacker reviewed personal, confidential, and privileged communications involving Mr. Segal and his lawyers, including Mr. Silets, and forwarded at least a small number of these communications to former NNIB executives who left NNIB to work for competitors and whom the defense anticipates will testify against Mr. Segal in this prosecution. Shortly after discovering the intrusions, NNIB reported the illegal activity to the state's attorney offices in Cook and Lake Counties. Soon thereafter, a member of the prosecution team in this case contacted NNIB's general counsel and advised that the U.S. Attorney's office would investigate the hacking. The federal government ultimately obtained the hard drives that contained the hacked e-mails, including Mr. Segal's privileged e-mails. However, the prosecution team in this case has represented that it has not seen any of the hacked data or hard drives recovered by the FBI in the matter, which is being handled by a different Assistant United States Attorney. As mentioned at our last Court appearance, the defense in this case has had some technical difficulty accessing the information on the copies of hard drives and servers seized by the government from NNIB. However, a fraction of the thousands of hacked e-mails (including many e-mails from or to Mr. Segal) has been review and most, if not all, of the hacked materials would also be on the NNIB hard drives seized by the government.

lawyers from being reviewed by its prosecution team. In light of the foregoing, the government's exclusion from its search terms of a mere three names is a woefully inadequate method of screening out potentially privileged electronic information seized during the search.

Separate from its minimal exclusion techniques, the government has not demonstrated that it complied with DOJ guidelines regarding the seizure of electronic data in criminal investigations. The DOJ guidelines instruct that "[w]hen agents seize a computer that contains legally privileged files, a trustworthy third party must comb through the files to separate those files within the scope of the warrant from files that contain privileged material. After reviewing the files, the third party will offer those files within the scope of the warrant to the prosecution team." *See Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations, Department of Justice*, July 9, 2001, Sec. 7(b). The government's submissions do not establish that the government ever arranged for such an independent review by a "trustworthy third party" before the prosecution team or case agents began reviewing the electronic data seized during the searches here.[8]

The government's failure to say anything about safeguarding privileged material in its search warrant affidavit is also contrary to DOJ guidelines, as well as the United States Attorney's Manual. *See id.* ("agents contemplating a search that may result in the seizure of legally privileged computer files should devise a post-seizure strategy for screening out the privileged files and should describe that strategy in the affidavit"); *see also* United States

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Therefore, it is from e-mails hacked out of the NNIB system that the defense knows of the existence of e-mails between us and various lawyers existing on the NNIB system taken by the government.

[8] In responding to submissions in the government's Motion to Reconsider regarding the segregation of privileged materials, Mr. Segal does not concede that the use of a "segregating agent," or "taint" or "privilege" team renders the government's intrusion into his privileged materials permissible in any way. Rather, it is Mr. Segal's position that any review of his privileged materials by the government is a per se intentional intrusion into his attorney-client privilege. (*See* Deft.'s Cons. Reply at 6, n.6.)

Attorney's Manual, § 9-13.420 (the affidavit in support of a search warrant should "at a minimum . . . generally state the government's intention to employ procedures designed to ensure that attorney-client privileges are not violated).[9]

In light of the government's non-compliance with DOJ policy and its failure to exclude from its electronic search commands the names of numerous attorneys who provided legal advice to Mr. Segal and NNIB during the relevant time period, the Court cannot be bound to accept the government's broad statement that it "has not permitted the prosecution team or the case agents to be exposed to any materials seized that appear to give rise to potential attorney client privilege issues." (Mot. to Recons. at 2, n.1.).

2. The Government Made Only Minimal Efforts to Segregate Potentially Privileged Written Documents Seized From NNIB

The government asserts that Special Agent Douglas Seecombe segregated a certain number of boxes of documents from the office of Sherri Stanton, NNIB's general counsel at the time of the search.[10] However, based on the government's submissions and briefs, it appears the government failed to segregate material seized from *any* other offices in NNIB's legal department, including the offices of Patrick Muldowney, NNIB's Associate Legal Counsel, or Allen Jackson, NNIB's Senior Legal Assistant. In addition, the government identifies no steps

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[9] The DOJ guidelines regarding the seizure of electronic evidence are not limited to law firm or lawyer searches, but apply whenever agents are "contemplating a search that may result in the seizure of legally privileged computer files." Moreover, the government erroneously argues in its Motion to Reconsider that § 9-13.420 of the United States Attorney's Manual applies only to "searches of *subject* attorney's offices." (Motion to Reconsider at 2, n.1.) On the contrary, the introductory paragraph of § 9-13.420 makes clear that the section also applies to "searches of business organizations where [as here] such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization."

[10] As the court noted at the February 28, 2003 status conference, three of the agents who submitted affidavits have law degrees and have passed the bar exam, while two have not. For reasons that are unclear, the government apparently assigned the two agents without law degrees to segregate potentially privileged material. While the government's brief asserts that Special Agent Seecomb alone segregated privileged materials seized from NNIB's offices and Mr. Segal's Chicago residence (without explaining how he could be in two places at one time), the affidavits submitted with its motion reflect that both Special Agents Smith and Seecomb segregated privileged materials.

that were taken to segregate potentially privileged documentary material found in the offices of non-lawyers. By segregating only material seized from the office of NNIB's general counsel, the government apparently ignored the fact that privileged communications were also maintained in Mr. Segal's office and in the offices of other NNIB executives and non-lawyers.

B. Mr. Segal May Properly Assert a Personal Privilege Over Communications with Inside and Outside Corporate and Regulatory Counsel.

The government's motion also raises untimely legal arguments challenging Mr. Segal's ability to assert a privilege over communications with corporate counsel. Yet in arguing that Mr. Segal cannot assert a privilege over such communications, the Government misstates the law in this Circuit. The government asserts that "most circuits" apply the test adopted by the Third Circuit in *In re Bevill, Bresler, & Shulman Inc.*, 805 F.2d 120 (3d Cir. 1986). (*See* Mot. to Recons. at 9.) The Seventh Circuit, however, has never discussed, adopted, or even cited the legal propositions stated in *Bevill* in determining whether a corporate officer can properly assert a privilege over communications with corporate counsel.[11]

In fact, when presented with the very issue of whether corporate employees can assert a personal privilege over communications with corporate counsel, the Seventh Circuit adopted a

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[11] In *Resolution Trust Corp. v. Aetna Casualty & Surety Co. of Illinois*, 25 F.3d 570 (7th Cir. 1994), the Seventh Circuit refers to *Bevill* only because the parties involved in the *Resolution Trust Corp.* case were affected by the bankruptcy of the securities dealer at issue in *Bevill*; the Seventh Circuit did not cite any legal authority from *Bevill* in *Resolution Trust Corp.*

Although several Northern District of Illinois cases cite *Bevill*, none of them adopts the multi-step test outlined in *Bevill* and cited by the government in its Motion to Reconsider. *See National Trade Corp. v. Cherry*, 76 B.R. 646 (Bankr. N.D. Ill. 1987) (citing *Bevill* for the proposition that "[a] corporate officer may . . . assert a personal attorney-client privilege for communications he made to his own counsel concerning personal liability unrelated to the corporation or his role as a corporate officer"); *see also Ocean Atlantic Dev. Corp. v. Willow Tree Farm*, 2002 WL 649043 (N.D. Ill. Apr. 19, 2002) (citing *Bevill* in reference to joint defense privilege); *Stopka v. Alliance of Am. Insurers*, 1996 WL 204324 (N.D. Ill. Apr. 25, 1996) (stating that privileges existing as to a corporate officer's role within a corporation belong to the corporation, citing *Bevill*); *Cadillac Ins. Co. v. American Nat. Bank of Schiller Park*, 1992 WL 58786 (N.D. Ill. Mar. 12, 1992) (citing *Bevill* in reference to joint defense privilege); *In re McDonald Bros. Const., Inc.*, 114 B.R. 989 (Bankr. N.D. Ill. 1990) (citing *Bevill* in discussing secured parties commingling fungible collateral).

much different standard than the one outlined in *Bevill*. In *United States v. Keplinger*, 776 F.2d 678, 699-701 (7th Cir. 1985), certain employees of a laboratory company were convicted of mail fraud, wire fraud, and making false statements in connection with lab studies. Before trial, the defendants moved to suppress selected testimony and materials from outside counsel for the company, contending that the defendants each held personal privileges with the company's outside counsel. The defendants asserted that their communications with outside company counsel were still privileged as to the defendants, even though the company had already waived its privilege. *Id.* at 699. After a six-day long hearing on the issue, the trial court found that the defendants had no personal privilege with company counsel. The trial court based its ruling, in part, on evidence that the defendants never asked questions relating to personal representation and that the company's counsel did not believe that they represented the defendants individually. *Id.*

On appeal, the Seventh Circuit focused on the reasonableness of the defendants' beliefs that they were being represented individually. The Seventh Circuit cautioned that an individual's "mere subjective belief that he is represented individually" will not always be sufficient to demonstrate such a personal attorney-client relationship. *Id.* at 701. The Court held that "in the absence of any relatively clear indication by the potential client to the attorney that he believed he was being individually represented, we think no individual attorney-client relationship can be inferred without some finding that the potential client's subjective belief is minimally reasonable."[12] *Id.* The Seventh Circuit reasserted this "minimally reasonable subjective belief" standard in *United States v. Evans*, 113 F.3d 1457, 1465 (7th Cir. 1997).

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[12] In its motion to reconsider, the government cites *Keplinger* but omits the word "minimally" in purporting to describe the relevant test set out in *Keplinger*. (*See* Motion to Reconsider, at 10 "(An individual attorney-client relationship cannot be inferred from employee seeking advice from corporate attorney absent showing of implied or express agreement showing that employee's reliance on attorney was [sic] reasonable).")

Applying the complete *Keplinger* standard here, Mr. Segal can establish that he had much more than a minimally reasonable subjective belief that the various in-house and outside corporate and regulatory counsel represented him in both an individual and corporate capacity. Mr. Segal is the 100% sole shareholder of NNIB, and has been since the 1980's. At the time of his arrest, he was the President and Chief Executive Officer of the corporation. Thus, Mr. Segal's legal interests were essentially in lock-step with NNIB's. Moreover, all of the alleged misconduct with which Mr. Segal has been charged in this case allegedly occurred by and through the operation of NNIB. Mr. Segal's subjective belief about his individual attorney-client relationship with corporate or regulatory counsel is thus much more than "minimally reasonable," and Mr. Segal's assertion of privilege over his communications with inside and outside counsel is entirely valid.[13]

Besides *Keplinger*, none of the authority cited by the government in this section of its motion is binding on the Court, and at least one case, *In re Grand Jury Proceedings*, 434 F. Supp. 648 (E.D. Mich. 1977), *aff'd* 570 F.2d 562 (6th Cir. 1978), was decided before *Keplinger*. Both *United States v. International Bd. of Teamsters, Chauffers, Warehousemen & Helpers*, 119 F.3d 210 (2d Cir. 1997) and *In re Grand Jury Subpoenas*, 144 F.3d 653 (10th Cir. 1998) come from circuits that have expressly adopted the *Bevill* test. Despite having an opportunity to do so, the Seventh Circuit has declined to adopt the *Bevill* test, and has instead upheld the "minimally reasonable subjective belief" standard enunciated in *Keplinger* as recently

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[13] Although the Seventh Circuit in *Keplinger* ultimately affirmed the trial court's finding that no personal privilege existed between the defendants and company counsel, Mr. Segal's circumstances are readily distinguishable from the defendants in *Keplinger*. For instance, the defendants in *Keplinger* were merely managers and section heads of the laboratory company, while Mr. Segal is the sole shareholder of NNIB, the person whose name appears on NNIB regulatory filings with the state authorities, and, at the time of the searches, the President and CEO of NNIB. In addition, unlike the company in *Keplinger*, NNIB has not waived its attorney-client privilege with respect to company counsel.

as 1997. *See Evans*, 113 F.3d. at 1465. Contrary to the government's motion, Mr. Segal has a valid privilege with respect to his communications with NNIB's internal and outside counsel.

C. Mr. Segal Has Standing To Contest The Seizure of Records from NNIB.

The government also argues that Mr. Segal "has no standing to object to the government's seizure of corporate documents from [NNIB]" and is unable "to move to suppress the documents seized from [NNIB] due to his lack of standing to assert a Fourth Amendment motion to suppress." (*See* Mot. to Recons. at 9.) On the contrary, courts have found that an executive in Mr. Segal's shoes has standing to contest the search of company offices and property. *See, e.g., United States v. Burke*, 718 F. Supp. 1130, 1135 (S.D.N.Y. 1989) (in finding that the president and manager of corporation had standing to contest searches of corporate offices, the court stated "ownership or control of the company, participation in its affairs, and regular presence at its offices are all factors which are relevant to a determination of whether an individual has a reasonable expectation of freedom from governmental intrusion"); *United States v. Schwimmer*, 692 F. Supp. 119, 125 (E.D.N.Y. 1988) (president and sole shareholder or corporation had legitimate expectation of privacy in entire suite of corporation's offices where president participated in corporation's affairs and had office in corporation's suite); *Henzel v. United States*, 296 F.2d 650, 653 (5th Cir. 1961) (organizer, sole stockholder, and president of corporation had standing to move to suppress evidence that had been seized from his corporate office). Tellingly, the government cites no case law to support its proposition that Mr. Segal lacks standing to contest the search of NNIB's office and the seizure of corporate records.

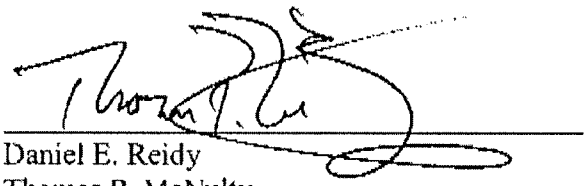
IV. CONCLUSION

For all of the foregoing reasons, Defendant Michael Segal respectfully requests that the Court deny the government's motion to reconsider. If the Court does reconsider the nature of the relief granted Mr. Segal, perhaps it should hold an evidentiary hearing on the methods used by

the government to safeguard privileged materials in both paper and electronic form, or perhaps otherwise cause the government to (1) disclose all communications seen by the prosecution team or case agents involving Mr. Segal and any attorney for NNIB and/or him; and (2) explain in detail what procedures have been and will be employed to prevent future viewing of such documents.

Dated: March 14, 2003

Respectfully submitted,



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