UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. JENNIFER SHAH, Defendant.	S4 19 CR 833 (SHS)

DEFENDANT JENNIFER SHAH'S MEMORANDUM OF LAW IN OPPOSITION TO NON-PARTY ATTORNEY SAMIDH GUHA'S MOTION TO QUASH

Priya Chaudhry
Seth J. Zuckerman
Beth Farber
Shaelyn Gambino Morrison

ChaudhryLaw PLLC
45 West 29th Street, Suite 303
New York, New York 10001
(212) 785-5550

Attorneys for Defendant
Jennifer Shah

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Defendant Jennifer Shah, through her undersigned attorneys, respectfully submits this Memorandum of Law in Opposition to Non-Party Attorney Samidh Guha's Motion to Quash. For the reasons stated below, non-party attorney Samidh Guha's motion should be denied.

INTRODUCTION

On February 8, 2022, the defense served subpoenas on attorneys for eight individuals, each of whom is a cooperating witness in the above-captioned matter or in *United States v. Ketabchi*, 17 CR 243 (SHS). As written, the subpoenas requested three categories of documents: (1) all documents and communications between [counsel] and any member of the United States Attorney's Office concerning this Matter ("Category 1"); (2) all documents and communications between [counsel] and any law enforcement agent concerning this Matter ("Category 2"); and (3) all attorney notes or other documents prepared by [counsel] from each proffer session attended by [counsel's client] in connection with this Matter ("Category 3"). But after several meet-and-confers, defense counsel agreed to limit the scope of Category 1 and 2 requests to substantive factual discussions with prosecutors regarding this matter, including, most notably, any revisions to the plea allocution (and *not* any communications regarding scheduling or other procedural matters). Regarding Category 3, defense counsel made clear that the subpoena does not seek any attorney opinions or impressions, but rather only seeks any notes that were transcriptions of the statements made by either the government or the witness during the proffer sessions.[1]

Therefore, the issue before this Court is whether to grant the Joint Movants' motion to quash subpoenas which only seek:

[1] Ms. Shah's counsel also had similar discussions with some of the other attorneys for the Joint Movants.

(1) documents and communications between [counsel] and any member of the United States Attorney's Office concerning this Matter **regarding substantive factual discussions, including any revisions to the plea allocution** ("Category 1");

(2) documents and communications between [counsel] and any law enforcement agent concerning this Matter **regarding substantive factual discussions, including any revisions to the plea allocution** ("Category 2"); and

(3) attorney notes or other documents prepared by [counsel] from each proffer session concerning this Matter **that were transcriptions of the statements made by either the government or the witness during the proffer sessions (excluding any attorney opinions or impressions)** ("Category 3").

Though issuance of Rule 17(c) subpoenas to the counsel of cooperating witnesses is rare, it is not without precedent. In fact, between 2020 and 2022 alone, there have been at least four high-profile instances of governmental failures to properly disclose vital and exculpatory evidence to the defense in the Southern and Eastern Districts of New York. At least one of these instances involved revelations—first brought to light by a Rule 17(c) subpoena to a cooperator's attorney—of the government's failure to honor its disclosure obligations and additional prosecutorial misconduct.

In *United States v. Ahuja*, *et al.*, 18 CR 328 (KPF), defense counsel issued Rule 17(c) subpoenas to cooperating witnesses and their attorneys, which revealed that the government had rewritten the plea allocution of at least one cooperating witness, failed to disclose this fact to the defense, and subsequently was not forthcoming about it to the Court. In issuing an admonishment, the transcript of which is attached hereto as Exhibit 1, Judge Failla began by recognizing the vital role that the defense had played in uncovering the concealed information

through Rule 17(c) subpoenas and FOIA requests. Ex. 1, 20:17-22. Had it not been for the defense's dogged pursuit of the information to which it was entitled, the truth would not have been revealed. *Id*. ("despite repeated questioning from defense counsel and the Court, certain materials were only revealed as a result of heroic defense efforts" referring to the Rule 17(c) subpoenas and the FOIA request).

Unfortunately, and as Judge Failla recognized, by the time the prejudicial information came to light post-trial, the damage had already been done.[2] As a result, the court was left in the unfortunate position of recognizing that defendant Ahuja did not receive a fair trial, and the court set aside the verdict. Ex. 1, 9:25-10:5. The facts of the *Ahuja* case are instructive here—not as a preemptive insinuation of government misconduct—but rather in analyzing the importance of exhaustive pre-trial disclosures, including the use of Rule 17(c) subpoenas to ensure that Ms. Shah receives a fair trial.

PROCEDURAL BACKGROUND

Here, upon receipt of the defense's subpoena, attorney Samidh Guha conferred with counsel for Ms. Shah on two occasions. During the meet-and-confer, defense counsel agreed to limit the scope of Category 1 and 2 requests to substantive factual discussions with prosecutors regarding this matter, including, most notably, any revisions to the plea allocution (in reference to *Ahuja*), and made clear that the defense was *not* requesting any communications regarding scheduling or other procedural matters. During the meet-and-confer, Mr. Guha was also informed that the defense was not seeking any attorney opinions or impressions as to Category 3,

[2] This is precisely the outcome that Ms. Shah aims to avoid. The subpoenas have been issued pre-trial, not as an improper end-run around normal discovery procedures, but in an attempt to address as many issues as possible at the pre-trial stage and prevent precisely the sort of prejudice suffered by defendant Ahuja and others.

but rather was only seeking any notes that were transcriptions of the statements made by either the government or the witness during the proffer sessions.

Notwithstanding these discussions, Mr. Guha filed a Motion to Quash on February 22, 2022. Dkt. No. 469. Mr. Guha's motion has been joined by attorneys for Stuart Smith (Dkt. 470, 477), Anthony Cheedie (Dkt. 471), Joseph Minetto (Dkt. 472), Ryan Hult (Dkt. 479), William Sinclair (Dkt. 483), and Jason Sager (Dkt. 484) (together with Mr. Guha, the "Joint Movants"). The Joint Movants argue that the subpoenas are burdensome and improper as they seek (1) information protected by the attorney work-product privilege; and (2) non-evidentiary and inadmissible material that should properly be sought from the government through discovery. The subpoenas issued by Ms. Shah seek information that is both relevant and admissible, has been requested with the requisite specificity (including the narrowing of the scope in subsequent conversations with Mr. Guha and other Joint Movant counsel), and is not protected by the work-product privilege. Accordingly, the Joint Movants' motion should be denied.

ARGUMENT

I. THE SUBPOENA SATISFIES THE REQUIREMENTS OF RULE 17(c)

A. Standard for Granting a Rule 17(c) Subpoena

Rule 17(c) authorizes the issuance of subpoenas for production of documents prior to trial. *See* Fed. R. Crim. P. 17(c)(1). Subpoenas issued pursuant to Rule 17(c) are intended "to facilitate the trial by designating a time and place prior to trial to obtain and inspect evidentiary material." *United States v. Pena*, No. 15-CR-551 (AJN), 2016 WL 8735699, at *2 (S.D.N.Y. Feb. 12, 2016). In keeping with the intention of Rule 17(c), "in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that

they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" *United States v. Nixon*, 418 U.S. 683, 699-700 (1974). Essentially, the Supreme Court in *Nixon* adopted a standard requiring that a party establish that the subpoena at issue requests, with specificity, information that is both relevant and admissible. *Id*. at 700.

Notably, courts in this district have also applied a less stringent standard where, as here, a criminal defendant's subpoena seeks materials from a third party, in which case a defendant "need only show that the request is (1) reasonable, construed as 'material to the defense,' and (2) not unduly oppressive for the producing party to respond." *United States v. Tucker*, 279 F.R.D. 58 (S.D.N.Y. 2008); *see also United States v. Rajaratnam*, 753 F. Supp. 2d 317 n.1 (S.D.N.Y. 2011) (applying the *Nixon* test in denying motion to quash, but analyzing the reasons why application of the *Tucker* standard to third-party subpoenas in a criminal case is preferable and more equitable to the defense); *United States v. Stein*, 488 F. Supp. 2d 350, 365, 367 (S.D.N.Y. 2007) (finding that although courts have applied the standard in *Nixon* "almost without exception," it is "vitally important never to let the frequent repetition of a familiar principle obscure its origins" and refusing to apply *Nixon* standard in denying motion to quash); *United States v. Nachamie*, 91 F. Supp. 2d 552, 563 (S.D.N.Y. 2000) ("the judicial gloss that the material sought must be evidentiary—defined as relevant, admissible and specific—may be inappropriate in the context of a defense subpoena of documents from third parties"). The subpoenas here at issue meet the standards articulated by both *Nixon* and *Tucker*.

B. The Materials Sought by the Subpoena are Relevant, Admissible, and Specific

a. The Subpoenas Request Relevant Information

The Joint Movants are incorrect in their assertion that the information sought by the subpoenas is of no relevance to Ms. Shah's case. The Indictment charges Ms. Shah with conspiracy to commit wire fraud and conspiracy to commit money laundering. In view of the conspiracy counts, statements of alleged co-conspirators are relevant to Ms. Shah's defense at trial. It is virtually certain that the government will rely heavily on the testimony and credibility of its cooperating witnesses at trial. Equally relevant are any exculpatory statements by individuals implicated in the alleged conspiracy, such as statements that Ms. Shah was not involved, or complete omissions of any reference to Ms. Shah in the context of the alleged conspiracy. This second category, complete omissions of any reference to Ms. Shah, may not be deemed by the Government to be *Brady* material, but is exculpatory, nonetheless.

The Joint Movants each represent individuals who are cooperating witnesses in this matter or who were cooperating witnesses in *Ketabchi,* a conspiracy which the government asserts is connected to the trial in this case. These individuals are expected to play key roles in the government's case-in-chief and the details of these individuals' statements to the government about Ms. Shah, including whether they failed to say anything about Ms. Shah at all, and what the government has said about Ms. Shah to the individuals, all constitute relevant information that is material to Ms. Shah's defense.

b. The Subpoenas Request Admissible Evidence

At the pretrial stage, and before having reviewed the documents that are responsive to the subpoena, it is not possible to determine the exact manner in which evidence that may be revealed by reviewing these materials will be admissible. The documents and communications

may be relevant evidence and admissible as statements of co-conspirators, as impeachment,[3] or for other reasons. *United States v. Orena*, 883 F. Supp. 849, 869 (E.D.N.Y. 1995).

Additionally, documents such as those requested by the subpoenas, which may bear on "a witness's decision to "cooperate with the government" or any bias towards the defendant […] can be proper subjects of a Rule 17(c) motion because those types of documents may themselves be admissible into evidence." *United States v. Skelos*, No. 15-CR-317 (KMW), 2018 WL 2254538, at *2 (S.D.N.Y. May 17, 2018), *aff'd*, 988 F.3d 645 (2d Cir. 2021); *United States v. Cavollo*, No. 10 CR 654 (HB), 2012 WL 1195194, at *2 (S.D.N. Y. Apr. 9, 2012) (finding that evidence of "bias or a motive on the part of [the witness] to cooperate with the government" is proper subject of Rule 17(c) subpoena). For these reasons, too, the documents requested by the subpoenas are evidentiary as required by *Nixon*.

c. The Subpoenas are Sufficiently Specific

Nixon's specificity requirement does not mandate a perfectly parsed recitation of the information requested. The exact specificity of information simply cannot be known to a person ahead of time, and in recognition of this fact, courts "will not place the defendant in the impossible position of having to provide exquisite specificity as a prerequisite to enforcement of the subpoena by the Court, while he is denied access to the documents in question, thus making

[3] The defense submits these subpoenas seek documents which are not solely for impeachment purposes and are admissible on the defense case. However, if the Court believes the subpoenas seek only impeachment materials, then Ms. Shah requests that the Court hold its decision on the instant motion in abeyance until the government provides its 3500 material; after the defense receives the 3500 material, it will be clear that the information requested by the defense has not been produced. Alternatively, the subpoenas issued to the attorneys of individuals whom the government intends to call as trial witnesses could also be modified to make them returnable at the time that the witness testifies at trial. Courts in this District have found that trial subpoenas that are returnable during trial and seek evidence for impeachment are permissible under Rule 17(c). *United States v. Cole*, No. 19 CR. 869 (ER), 2021 WL 912425, at *4 (S.D.N.Y. Mar. 10, 2021).

it impossible for him to be more specific." *United States v. Poindexter*, 727 F. Supp. 1501, 1510 (D.D.C. 1989). *See also Rajaratnam*, 753 F. Supp. 2d at 320 n.1 ("It is extraordinarily difficult for a defendant, who has limited ability to investigate, to know enough about the discovery he is seeking such that he can comply with the *Nixon* requirements" and "in the context of a subpoena to a third party to whom Rule 16 does not apply, requiring the defendant to specify precisely the documents he wants without knowing what they are borders on rendering Rule 17 a nullity"); Robert G. Morvillo *et al., Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation,* 42 Am. Crim. L. Rev. 157, 160 n.12 (2005) ("[C]ourts have interpreted 17(c) so narrowly that it is rarely useful to criminal defendants, and instead serves as an additional tool for the prosecution").

The subpoenas at issue request communications specifically related to the instant matter or *Ketabchi*, between counsel and government and law enforcement agents. Although the subpoenas request "all documents" and "all communications," the requests are limited to very specific categories of documents. *See United States v. Bergstein*, No. 16-CR-746 (PKC), 2017 WL 6887596, at *5 (S.D.N.Y. Dec. 28, 2017) (stating that there "may be circumstances in which a request for 'all documents' or 'all communications' in certain categories is appropriate under Rule 17(c)"). Regardless, the proposal by Ms. Shah's counsel to Mr. Guha to limit the scope of Categories 1 and 2 to only *substantive factual discussions*, including any revisions to the plea allocution, and only *fact-based* notes from his client's proffer sessions with the government, renders this argument moot.

Contrary to Joint Movants' contentions, these requests are not all encompassing or hopelessly overbroad. If the defense had the power to know on which dates the cooperating witnesses met with the government or law enforcement agents, it most certainly would have

included this information in the subpoenas. The defense does not intend to embark on a fishing expedition of any kind, and this was communicated clearly to Mr. Guha during his meet-and-confer with defense counsel. The subpoenas are specific: they request information that is limited in time and scope to the discrete occasions on which Joint Movants met with government attorneys or law enforcement agents. The subpoenas do not include *all* communications with the government, such as scheduling discussions or other irrelevant procedural matters. Though Joint Movants claim production of such limited documents would create an "unwarranted burden," they have not explained how production of the documents is overly burdensome. Defense counsel is very familiar with the process of witness cooperation with the government and can attest from experience that producing the communications and documents connected with cooperation should be neither onerous nor burdensome.

C. The Documents are not Otherwise Procurable

Ms. Shah has a substantial interest in and need for a complete account of prior statements made against her by cooperating witnesses and any other potentially exculpatory documents. This right has historically been addressed by the government's various disclosure obligations under *Brady*, *Giglio*, and 18 U.S.C. § 3500. Given the recent spate of instances in which the Offices of the U.S. Attorneys in both the Southern and Eastern District of New York have improperly withheld precisely the sort of information that the defense requests, she has no confidence that the government's disclosures will provide the information to which she is entitled, in a complete manner.[4] The defense's effort to obtain the information requested by the subpoenas is also motivated by a desire to address disclosure issues before trial and to prevent

[4] Joint Movants incorrectly claim that the subpoenas request documents that should properly be requested from the government. The defense has not requested in these subpoenas *any* documents that have already been produced to the government.

the undue prejudice that would be visited upon Ms. Shah were this information left unrequested, or worse, purposely withheld.

The first in a recent string of cautionary tales from the Southern District was the *Jain* case, before Judge Castel. On February 13, 2020, despite making numerous representations to the Court and defense counsel that the production of discovery materials was complete, prosecutors in *United States v. Niket Jain*, No. 19 CR 59 (PKC), revealed that they had failed to produce five terabytes worth of data, associated with a cooperating witness, to defense counsel. In response to this failure, Judge Castel issued an order castigating the U.S. Attorneys and stating:

> The Court directs the Acting United States Attorney and the SAC and members of their senior staff to meet and confer on the corrective actions they will undertake to ensure that this sorry chapter cannot be repeated. A report of their corrective actions shall be publicly filed on the docket by December 18, 2020. This must not happen again.

Jain, No. 19 CR 59 (PKC), Dkt. 143.

Unfortunately, a few months later it did happen again. On June 5, 2020, prosecutors in the Southern District of New York moved to dismiss *United States v. Ali Sadr Hashemi Nejad*, 18 CR 224 (AJN) after it was revealed that prosecutors had intentionally withheld exculpatory material from the defense. In that case, the government's misconduct played out in two parts. First, two weeks into the *Sadr* trial, the government turned over exculpatory documents that had not previously been disclosed, requiring an additional instruction to the jury and the striking of testimony. Second, after the conclusion of trial, prosecutors revealed that there were *additional* exculpatory documents that had not been disclosed to the defense, despite the fact that the prosecutors received those materials before the trial began. In an order dated September 16, 2020, attached hereto as Exhibit 2, the court required that prosecutors file declarations regarding

the apparent prosecutorial misconduct and stated that the prosecutors "by their own admission repeatedly violated their disclosure obligations and, at best, toed the line with respect to their duty of candor. …[They] made countless belated disclosures …. And when the Court pressed for more information about one of these failures, the Government made a misrepresentation to the Court." Ex. 2, pp. 1-2.

Just one month after the government's highly-publicized misconduct in *Sadr*, in July 2020, defense counsel in *United States v. Anilesh Ahuja*, *et al.*, 18 Cr. 328 (KPF), discovered post-trial that the government *again* withheld exculpatory documents in violation of its *Brady* obligations; this time, the government heavily edited the cooperator's plea allocution and did not reveal this fact. This was only uncovered by defense counsel's use of Rule 17(c) subpoenas to the cooperator's attorney and FOIA requests. In December 2021, Judge Failla found that the government deprived Mr. Ahuja of a fair trial by withholding exculpatory evidence and making misleading or erroneous statements to the court that were later disproved by internal government memos. *See* Ex. 1. As a result of the court's prior reliance on the truthfulness of the government's assurances about complete disclosure, Judge Failla had precluded defense counsel from cross-examining witnesses at trial on certain topics and took other action that, according to her admonishment, she otherwise would not have taken. Ex. 1, 26:11-27:1. This matter is ongoing and the full extent of the harm to the defendants is yet to be determined. In response to this pattern of malfeasance, the United States Attorney's Office for the Southern District of New York has instituted discovery and disclosure trainings for its entire New York field office.

But yet these sorts of deliberate misconduct by federal prosecutors in New York continue. Most recently, on February 23, 2022, it was revealed, in the middle of trial, that AUSAs from the Eastern District of New York had failed to turn over approximately 15,000

emails and personal documents to the defense concerning their key cooperating witness in *United States v. Low Taek Jho*, 18 CR 538 (MKB), Dkt. 149. That trial continues, the prosecutors there have acknowledged that their conduct is inexcusable, and the full impact on the defendant remains to be determined.

Thus the defense has a well-founded concern that the government will not provide it with comprehensive, complete disclosures and therefore the defense seeks to address this potential issue before trial begins. In the above cases, the government's intentional failure to disclose was only discovered by defense counsel post-trial or in the middle of trial. Rule 17(c)'s "chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." *United States v. Avenatti*, No. S1 19 CR 373 (PGG), 2020 WL 508682, at *3 (S.D.N.Y. Jan. 31, 2020). The defense seeks to avoid both the waste of resources and the severe prejudice that would result if mid-trial or after trial, the defense discovers that the documents properly sought pre-trial were available and improperly withheld.

D. The Materials Sought by the Subpoenas are not Protected by Privilege

The Joint Movants have the burden of identifying the documents as to which they claim privilege "and, with respect to each, demonstrating 'that [it] was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice.' That burden cannot be met by 'mere conclusory or *ipse dixit* assertions' in unsworn motion papers authored by attorneys." *Stein*, 488 F. Supp. 2d at 367–68. Joint Movants' claims concerning work product are subject to similar principles.[5] Joint Movants have failed to meet this burden with respect to Categories 1 and 2.

[5] To the extent the Court is concerned that that notes of the various attorneys *may* contain opinion work product or mental impressions based on the conclusory assertions by the attorneys, we invite and request that the Court perform an *in camera* inspection of each attorney's notes.

The documents and communications requested by Ms. Shah in Categories 1 and 2 were exchanges with the government. They were not communications between attorney and client, and were not (and were not intended to be) kept confidential. The documents described in Categories 1 and 2 are therefore subject to production.

The documents requested in Category 3 are similarly subject to discovery. The designation of material as attorney work-product does not necessarily make it undiscoverable. Work product may contain two types of documentation: (1) recitation of factual matters such as verbatim notes of a statement, and (2) notes reflecting the attorney's opinions, conclusions, mental impressions or legal theories. The second group is entitled to heightened protection, however, "not every item which may reveal some inkling of a lawyer's mental impressions, conclusions, opinions or legal theories is protected as opinion work product....Whatever heightened protection may be conferred upon opinion work product, that level of protection is not triggered unless disclosure creates a real, nonspeculative danger of revealing the lawyer's thoughts." *In re San Juan DuPont Plaza Hotel Fire Litigation,* 859 F.2d 1007, 1015 (1st Cir. 1988) (citing, *inter alia, Gould, Inc. v. Mitsui Mining & Smelting Co.,* 825 F.2d 676, 680 (2d Cir. 1987)). The defense has only requested the content of the statements by the witness or participants in the meetings – it does not request access to the internal thought processes of counsel. The requested documents "do nothing more than merely relate statements or testimony in paraphrased form, their disclosure will not cause any improper probing of the mind of the attorney." *United States v. Weisman*, No. S1 94 CR. 760 (CSH), 1995 WL 244522, at *11 (S.D.N.Y. Apr. 26, 1995).

Finally, the Court should consider the context in which a discovery demand is made "in striking a balance between a party's need for the information and the attorney's interest in

preventing an invasion into his protected realm…Thus, in a criminal case where the defendant's liberty is at stake ... 'substantial need' as originally contemplated by the civil discovery rules should be defined more flexibly." *Weisman*, 1995 WL 244522 at *6 *(citing United States v. Marcus Schloss & Co.*, No. 88 CR. 796 (CSH), 1989 WL 62729, at *3 (S.D.N.Y. June 5, 1989)).

CONCLUSION

For the reasons stated herein, Defendant Jennifer Shah respectfully requests that this Court deny the Joint Movants' Motion to Quash.

Dated: March 4, 2022
New York, New York

ChaudhryLaw PLLC

By: */s/ Priya Chaudhry*
Priya Chaudhry
Seth J. Zuckerman
Beth Farber
Shaelyn Gambino Morrison

45 West 29th Street, Suite 303
New York, New York 10001
Tel: (212) 785-5550

priya@chaudhrylaw.com
szuckerman@chaudhrylaw.com
farber@chaudhrylaw.com
shaelyn@chaudhrylaw.com

Attorneys for Defendant Jennifer Shah