UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457 (GLS/DRH)

TIMOTHY M. McGINN and DAVID L. SMITH,

Defendants.

APPEARANCES:

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DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Presently pending is the motion of defendants Timothy M. McGinn and David L. Smith ("defendants") for an order compelling plaintiff Securities and Exchange Commission ("SEC") to (i) cease and desist using documents and information in its possession, custody, and control which were obtained through the execution of search warrants, and (ii) return

such documents and information to criminal law enforcement authorities. Dkt. No. 190. The SEC opposes the motion. Dkt. No. 204. For the reasons which follow, defendants' motion is denied.

I. Background

As relevant to the pending motion,[1] beginning on April 19, 2010, federal law enforcement authorities executed a series of search warrants at business locations, residences, and other premises related to defendants. See In re Sealed Search Warrants Issued April 19 and 20, 2010, No. 10-M-204 (N.D.N.Y. dec. June 3, 2010) (Dkt. No. 38) (denying motion by media to unseal search warrant documents). The SEC commenced this action on April 20, 2010. Dkt. No. 1. The criminal investigation which gave rise to the search warrants has not resulted in the filing of any criminal charges to date, although over thirteen months have now passed since the first search warrants were executed. However, criminal law enforcement authorities have provided the SEC with certain documents obtained from the execution of the search warrants and, during pretrial proceedings and discovery in this case, the SEC has provided copies of those documents to defendants. It is these documents which are the subject of defendants' motion.

II. Discussion

Defendants contend that under the decision by the United States Court of Appeals

[1]For a fuller description of the background of this case and motion, see Dkt. Nos. 86 (decision on SEC motion for a preliminary injunction), 321 (district court's decision on defendants' motions to dismiss).

for the Second Circuit in S.E.C. v. Rajaratmam, 622 F.3d 159 (2d Cir. 2010), the relief they request is required. In Rajaratmam, a hedge fund manager and others came under criminal investigation for insider trading. That investigation included electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, ("Title III"), 18 U.S.C. §§ 2510-22. The SEC filed a civil enforcement action against the defendants alleging the same conduct at issue in the criminal investigation and, two months later, the defendants were indicted. Id. at 164-65. The defendants were provided with copies of the intercepted communications in the criminal case and, during discovery in the civil case, the SEC demanded production of those communications. The defendants opposed production, the district court granted the SEC's motion to compel, and the defendants appealed. Id. at 165-67.

On appeal, the Second Circuit balanced the privacy interests of those whose communications had been intercepted against the SEC's need for discovery of the communications, granted the defendants a writ of mandamus, and vacated the order to compel. 622 F.3d at 188. The Second Circuit found that in entering the order to compel, the district court had abused its discretion in two ways. First, Title III accords the subjects of intercepted communications the right to seek suppression of those communications as evidence on the ground that they were unlawfully obtained. Id. at 185-86 (citing 18 U.S.C. §§ 2518(10)(a), 2511(1)(c), 2515, and Gelbard v. United States, 408 U.S. 41, 46 (1972)). Because the defendants had not yet had an opportunity to have such a motion decided, the order to compel was premature. Second, the electronic surveillance in that investigation included the interception of a vast number of communications both of the defendants and of third parties and concerning subject matter both relevant to the criminal charges and only to

the personal matters of participants to the communications. 622 F.3d at 187.[2] The order to compel did not limit production only to communications which were relevant to the claims or defenses of the parties in the civil action as required by Fed. R. Civ. P. 26. Id.

Defendants contend that Rajaratmam precludes the SEC from utilizing any evidence obtained by law enforcement authorities pursuant to search warrants and mandates return of any such evidence obtained by the SEC to those authorities. For at least three reasons, this contention must be rejected. First, the unusual facts which gave rise to Rajaratmam differ materially from those of this case. Rajaratmam concerned wiretap evidence obtained pursuant to Title III. Although wiretaps constitute searches, unlike the issuance and execution of search warrants, they are governed by the statutory provisions of Title III. Reflecting a heightened interest in protecting the privacy of electronic communications, those provisions, inter alia, limit to whom law enforcement authorities may disclose evidence obtained from wiretaps. See 18 U.S.C. § 2517; see also Fed. R. Crim. P. 6(e) (limiting disclosure of grand jury information in light of the heightened interest in maintaining the secrecy of those proceedings).

By contrast, the acquisition and disclosure of information obtained pursuant to search warrants is governed by the provisions of Fed. R. Civ. P. 41. That rule provides procedures for the application for, issuance, and execution of search warrants as well as for post-execution procedures such as motions to suppress or for the return of seized property. Unlike Title III, however, it places no limitations on the ability of law enforcement authorities

[2]It appears that "the wiretapped conversations . . . spanned sixteen months, included 18,150 communications involving 550 separate individuals, [and] were intercepted from ten separate telephones . . . ." 622 F.3d at 165.

to disclose any evidence or information seized pursuant to a warrant. Thus, unlike the Title III limitations in Rajaratmam, it does not appear that law enforcement authorities or the SEC here were under any limitation precluding those authorities from disclosing search warrant evidence to the SEC or the SEC from disclosing that evidence to defendants. Defendants have cited no case in which any court found that such disclosure was precluded by Rule 41.[3]

Second, the issue decided in Rajaratmam arose from a discovery demand by the SEC for production of wiretap evidence by the defendants in which the Second Circuit considered the need for "informational equality" in civil actions. 622 F.3d at 182. It was the need of the SEC for the information and not that of the defendants which was considered. Here, there exists no issue of informational equality since the SEC has provided what evidence it received from law enforcement authorities to defendants. It presents the rare case where defendants complain of too much disclosure, not too little. The issue presented, therefore, is one of suppression, not disclosure, since defendants seek to preclude the SEC from using certain evidence in this case.[4] Defendants have offered no

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[3]It appears that law enforcement authorities here disclosed some but not all of the evidence seized pursuant to the search warrants to the SEC which in turn disclosed the evidence it received to defendants. Defendants contend that they are prejudiced by such partial disclosure. First, no specific prejudice has been demonstrated. Second, Rule 41(g) affords defendants the right to seek the return of the property seized under the warrants, a right which defendants have not yet exercised. Therefore, if defendants believe that they have been prejudiced in this respect, it is within their power to seek a remedy.

[4]A motion to suppress evidence is typically made in a criminal case rather than a civil one. See Fed. R. Crim. P. 41(h). No parallel criminal proceedings have been initiated concerning the matters at issue here as yet, however, but nothing prevents defendants from moving to suppress evidence in this civil action at the appropriate time if grounds for such a motion are found to exist. See Rajaratmam, 622 F.3d at 187 n.28 ("[W]e express

sufficient basis for suppression and, indeed, have yet even to obtain disclosure of the applications and affidavits underlying the search warrants.[5]

Third, defendants have not demonstrated any privacy interests sufficient to warrant the relief they seek. Only those with a reasonable expectation of privacy in the premises searched may challenge the lawfulness of a search warrant. See United States v. Simmonds, No. 3:09-CR-446, 2009 WL 376234, at *6 (N.D.N.Y. Nov. 9, 2009) (McAvoy, J.) (holding that defendant had failed to demonstrate a reasonable expectation of privacy in the premises searched to suppress the fruits of that search). Moreover, the SEC could have obtained the documents from defendants during discovery in this case within the limits of Fed. R. Civ. P. 26.

Accordingly, defendants have failed to demonstrate any sufficient basis for the requested relief.

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no view as to whether there may be circumstances in which a judge in a civil case may himself appropriately address the legality of electronic surveillance in connection with discovery litigation. We note only that in this case, with such motions already pending in the criminal cases, there is no need or warrant for such proceedings in the civil case.").

[5]Those documents remain sealed. A newspaper reporter moved to unseal the documents shortly after thee warrants were executed, but that application was denied. Defendants arguably have different and potentially stronger arguments to assert to unseal the documents but have never sought such relief. In their motion here, defendants make passing reference to unsealing these documents, but the documents were sealed at the motion of the United States, which is not a party to this action. Therefore, to the extent that defendants move to unseal the search warrant documents as part of this motion, that request is denied without prejudice to renewal in the miscellaneous action concerning the warrants themselves which would provide adequate notice to the United States of that application.

III. Conclusion

For the reasons stated above, it is hereby **ORDERED** that defendants' motion for an order compelling the SEC to (i) cease and desist using documents and information in its possession, custody, and control which were obtained through the execution of search warrants, and (ii) return such documents and information to criminal law enforcement authorities (Dkt. No. 190) is **DENIED** in all respects.

IT IS SO ORDERED.

DATED: May 16, 2011
Albany, New York

David R. Homer
U.S. Magistrate Judge