

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

UNITED STATES OF AMERICA,

v.

No. 1:17-CR-0229-AT-CMS

JARED WHEAT, JOHN  
BRANDON SCHOPP, and HI-  
TECH PHARMACEUTICALS,  
INC.,

Defendants.

**DEFENDANTS JARED WHEAT AND HI-TECH PHARMACEUTICALS,  
INC.’S RENEWED MOTION TO SUPPRESS EVIDENCE SEIZED  
PURSUANT TO THE INITIAL SEARCH WARRANTS EXECUTED AT  
HI-TECH’S PREMISES**

COME NOW Defendants Jared Wheat and Hi-Tech Pharmaceuticals, Inc., by and through their undersigned counsel, and pursuant to Fed. R. Crim. P. 41(h), move to suppress evidence seized under six search warrants executed on October 4, 2017 at Hi-Tech’s business premises, all based on identical applications and affidavits. The warrants violated Defendants’ reasonable expectation of privacy and

Defendants' property interest in the items seized under the Fourth Amendment.<sup>1</sup> Accordingly, all evidence seized in and derived from these searches should be suppressed. Additionally, pursuant to Fed. R. Crim. P. 41(g), Hi-Tech's property seized pursuant to these unlawful warrants should be returned.<sup>2</sup> In support of this request, Defendants respectfully show this Court the following:

### **Introduction**

Federal agents arrived at Hi-Tech's business premises on the morning of October 4, 2017 with facially overbroad and insufficiently particular search warrants and seized enormous amounts of ESI, hard-copy documents, and Hi-Tech products. The Government's execution of these warrants, on that day and during the ensuing 17 months, was unreasonable under the Fourth Amendment and not in good faith.

### **Statement of Facts**

Magistrate Judge Russell Vineyard authorized the warrants for the initial search on September 28, 2017.<sup>3</sup> Doc. 51-1 at 1. S/A Kriplean wrote an affidavit in

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<sup>1</sup> See *Carpenter v. United States*, 138 S.Ct. 2206, 2224 (2018) (Kennedy, J., dissenting) (recognizing property-based concepts as grounding analytic framework for Fourth Amendment analysis).

<sup>2</sup> In order to simplify the record in this case, Defendants adopt all of the exhibits in the previously filed pleadings on this issue and will refer to those exhibits by their respective document numbers.

<sup>3</sup> Defendants adopt the summary of Hi-Tech's dietary supplement business and the lengthy history of litigation between Hi-Tech and the Government set out in their

support of the warrant application, Doc. 51-2. It identified six “subject locations” at Hi-Tech that the Government wanted to search. *Id.* at 2. The affidavit claimed there was probable cause to believe that Hi-Tech was “manufacturing, marketing and distributing misbranded foods and/or drugs, some of which contain Schedule III controlled substances, namely anabolic steroids.” *Id.* at ¶¶ 3, 11, 46. As support, it described two covert purchases of five “prohormone” products from Hi-Tech (one in September 2016 and the second in August 2017) that allegedly contained anabolic steroids. *Id.* at ¶¶ 20-28.<sup>4</sup> The affidavit described surveillance of Hi-Tech's business premises and types of evidence the Government wanted to seize. *Id.* at ¶¶ 28-45. It specified five Hi-Tech products that Kriplean suspected contained anabolic steroids: 1-AD; 1-Testosterone; Androdiol; Superdrol; and Equibolin. *Id.* at ¶¶ 22, 26.

But the warrants neither attached nor incorporated Kriplean's affidavit. Doc. 51-1. The warrants incorporated just two documents: Attachment A-1 (describing the locations to be searched, *id.* at 3); and Attachment B (describing the property, information, and data to be seized, *id.* at 4-10).

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previously filed Motion to Amend Bond Conditions. Doc. 45 at 6-16. A copy is attached as EXHIBIT S for this Court's convenience.

<sup>4</sup> The truthfulness of Kriplean's allegation relating to anabolic steroids is the subject matter of Defendants' still pending Motion for *Franks* Hearing. Doc. 191.

Kriplean and at least 40 other agents executed these warrants in the early morning hours of October 4, 2017. *See* Doc. 51-5 (Operational Plan). Their seizures were both massive and indiscriminate. Agents imaged the entire contents of 35 computers, servers, and external storage devices, netting them a total of 12 terabytes (“TB”) of data.<sup>5</sup> Doc. 51-3 at 5-6; *see* Declaration of David Marck, EXHIBIT P, at ¶ 15. Agents also seized 159,801 hard-copy documents, *id.* at ¶ 38; 109,227 bottles of 243 different Hi-Tech products; 5,063 boxes of products; 5,614 blister packs of products; and 38 drums of raw materials. *See* Declaration of Michelle Harris, EXHIBIT T, at ¶ 6.

AUSA Kitchens has responded incompletely to Defendants’ questions about the Government’s subsequent handling of the seized property. Thus, the only reliable way to determine critical facts concerning the review and ultimate seizures is through an evidentiary hearing on this motion, as the following summary shows.

According to AUSA Kitchens, the Government’s privilege review began on-site, where an IRS-CI agent at the main search locations identified and segregated

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<sup>5</sup> Twelve terabytes of data comprises approximately 900 million sheets of paper. <https://ediscovery.co/ediscoverydaily/electronic-discovery/ediscovery-best-practices-perspective-on-the-amount-of-data-contained-in-1-gigabyte/> (last visited September 18, 2019). In other words, if printed on paper, the stack of electronic documents seized from Hi-Tech on October 4, 2017 would stretch from the Atlanta courthouse to the Gainesville courthouse, with a mile to spare.

likely privileged hard-copy documents. In at least one instance searching agents themselves conducted this on-site review (Satellite Boulevard). Off-site, the Government's private vendor, Madison & Associates, conducted multiple searches of the ESI for privileged material, and a varying cast of characters (a paralegal and multiple AUSAs, including AUSA Brian Pearce) reviewed the ESI and hard-copy documents for privileged materials. The Government states that the only responsiveness review on the hard-copy documents occurred on-site, and 179,000 pages were seized after the subsequent off-site privilege review. EXHIBIT P at ¶ 32.

According to AUSA Kitchens, Madison reviewed the 12 TB of ESI in May of 2018 using 80 search terms, which are attached as EXHIBIT Q. This search, possibly in conjunction with, but likely *before* the completion of the Government's privilege review, resulted in a 120 GB subset of documents. EXHIBIT P at ¶ 24.

According to the Government, on March 1, 2019, Kriplean searched this subset again, using a list of 55 additional search terms. *See* EXHIBIT R. This search produced a new subset of ESI containing 37,476 documents, which the Government represents are the Hi-Tech documents finally seized from the ESI following the initial seizure on October 4, 2017. *Id.* at ¶ 24. This Court's Order allows the Government to maintain a copy of all the ESI obtained from the warrants, but only

to access the subset of the combined seized ESI and seized hard-copy documents it provided to Defendants on March 7, 2019. Doc. 251 at 2.

Based on an independent analysis of these documents, Defendants believe that 79% percent of the seized ESI and 95% percent of the seized hard-copy documents are beyond the scope of the warrants. EXHIBIT P at ¶¶ 51, 58. Examples of these documents are found at *id.*, Attachments 6 and 7.

## **ARGUMENT AND CITATION OF AUTHORITIES**

### **I. THESE WARRANTS WERE BOTH INSUFFICIENTLY PARTICULARIZED AND FATALY OVERBROAD.**

The Fourth Amendment demands that a warrant must “particularly describ[e] the place to be searched, and the persons or things to be seized.” U.S. Const. Amend. IV. Properly established probable cause must support the scope of the search and seizure the warrant authorizes. *Payton v. New York*, 445 U.S. 573, 584 (1980). Any one deficiency – an inadequate description of the place to be searched; an inadequate description of the persons or things to be seized; the absence of probable cause to support the search and seizure – renders the warrant invalid and the subsequent search and seizure unreasonable. *See Groh v. Ramirez*, 540 U.S. 551, 563 (2004) (when warrant did not particularly describe things to be seized, “proceeding with the search was clearly ‘unreasonable’ under the Fourth Amendment.”). *See also*

*Steagald v. United States*, 451 U.S. 204, 212 (1981) (magistrate’s probable cause finding is essential “checkpoint between the Government and the citizen.”).

A warrant is insufficiently particular if lacks “precise language [that] informs officers how to separate properly seized items from irrelevant items.” *Tillis v. Blanks*, 2017 WL 89570 \*12 (D. Ala. Jan. 10, 2017). *See also United States v. Khanani*, 502 F.3d 1281, 1290 (11th Cir. 2007) (“A warrant, and its corresponding search, violates the Fourth Amendment if it fails to specify with particularity the place to be searched and the items to be seized[.]”) (internal quotation marks and citations omitted). A warrant is overbroad if it authorizes the seizure of evidence beyond that supported by the probable cause set forth in the application. *United States v. Lebowitz*, 647 F.Supp.2d 1336, 1351 (N.D. Ga. 2009).

The warrants used to justify the massive seizures in this case were both insufficiently particular and overbroad. The seized evidence should be suppressed.

#### **A. These Warrants Violated the Particularity Requirement.**

The Fourth Amendment’s particularity requirement prevents “general, exploratory rummaging in a person’s belongings.” *United States v. Wuagneux*, 683 F.2d 1343, 1348 (11th Cir. 1982) (internal quotation marks and citations omitted). Particularity “makes general searches ... impossible, and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left

to the discretion of the officer executing the warrant.” *Marron v. United States*, 275 U.S. 192, 196 (1927). These requirements “are not ‘formalities.’” *United States v. Voustianiouk*, 685 F.3d 206, 210 (2d Cir. 2012) (quoting *McDonald v. United States*, 335 U.S. 451, 455 (1948)). “The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.” *Massachusetts v. Shepherd*, 468 U.S. 981, 988 n. 5 (1984).

**1. The unincorporated affidavit cannot provide particularity for these warrants.**

Both Attachment A-1 (describing the place to be searched) and Attachment B (describing the things to be seized) were incorporated by specific reference in the warrants. But the warrants did not incorporate and include Kriplean’s affidavit at all. As a result, the affidavit’s contents are irrelevant to the constitutional analysis of the warrant’s particularity. Absent attachment and proper incorporating language, “[t]he fact that the *application* adequately described the ‘things to be seized’ does not save the *warrant* from its facial invalidity.” *Groh*, 540 U.S. at 557 (emphasis in original).<sup>6</sup> “The Fourth Amendment by its terms requires particularity in the

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<sup>6</sup> To properly incorporate an affidavit by reference, a warrant must use phrases such as “see attached affidavit” or “as described in the affidavit.” *United States v. Curry*,

warrant, not in the supporting documents.” *Id.* Without a recitation of the particular items to be seized (whether in the warrant or in an attached and properly incorporated affidavit), there is no basis to conclude that the issuing magistrate “agreed that the scope of the search should be as broad as the affiant’s request.” *Id.* at 561.<sup>7</sup>

**2. The warrants did not particularly describe the products agents were authorized to search and seize.**

Attachment B gave agents no meaningful guidance to determine which products they were authorized to seize. While the unincorporated affidavit named five Hi-Tech products suspected of being misbranded, Doc. 52-1 at ¶¶ 22, 26, Attachment B does not mention any of those five – or any of Hi-Tech’s 557 other – products by name. Doc. 51-1 at 3. Instead, it authorizes agents to seize any and every product and related items on the premises. Attachment B consists only of overly broad, boilerplate categories:

- Any misbranded and/or adulterated foods and/or drugs, including but not limited to products purportedly labeled as dietary supplements;
- Any Schedule III controlled substances in whatever form present;

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911 F.2d 72, 77 (8th Cir. 1990) (cited in *Groh*, 540 U.S. at 558). *See also United States v. Crabtree*, 2015 WL 631364 at \*1 (S.D. Ala. Feb. 13, 2015).

<sup>7</sup> Should the Government contend that the affidavit was present at the search, this contention – if true – is meritless. *Wuagneux* cannot be read to support relying on an affidavit present at the search to satisfy the Fourth Amendment’s particularity requirement. *See Crabtree, supra* at \*3. *See also Groh, supra*.

- Raw materials and bulk powers used to distribute controlled substances and/or manufacture misbranded and/or adulterated foods and/or drugs;
- All labels, labeling, and advertisements pertaining to misbranded and/or adulterated foods and/or drugs, including magazines, videotapes, handouts, inserts, flyers, and other promotional material;
- Paraphernalia for manufacturing, packaging, weighing, or distributing controlled substances or misbranded and/or adulterated foods and/or drugs. *Id.* at 4, ¶¶ 1-5.

Without the unincorporated affidavit, there is no effective implicit or explicit limitation on the scope of the permissible search and seizure. Only chemical analysis can determine if a product is misbranded in violation of 21 U.S.C. §§ 331. That is why, prior to naming them in his affidavit, Kriplean asked FDA scientists to do just that with regard to the five products the FDA covertly purchased from Hi-Tech. *See* Doc. 51-2 at ¶¶ 22-23. But the warrants contained nothing – not even the names of the five Hi-Tech products laboratory testing allegedly gave Kriplean reason to believe were adulterated – to guide the executing agents as to what seizures they authorized. Directing law enforcement to seize any misbranded items in warehouses holding over 800,000 bottles of dietary supplements invites the sort of wholesale, indiscriminate seizure that happened here, because only laboratory analysis can determine whether a product is misbranded: visual observation alone is meaningless. Attachment B’s incantatory, repetitive reliance on the generic classification of

“misbranded and/or adulterated” does not magic the warrant into compliance with the Fourth Amendment’s particularity requirement, because nothing in the warrant provided any guidance to allow executing agents to identify these products. A reasonable agent could have concluded that all of them – or none of them – qualified for seizure under the warrants’ terms.

A warrant aimed at such a broad category of items “is not sufficient to provide any guidance to an executing officer. [Such a clause results in] an indiscriminating rummage of the” entirety of the premises. *United States v. LeBron*, 729 F.2d 533, 539 (8th Cir. 1984) (warrant invalidated for lack of particularity). Given that the executing agents were searching six industrial locations totaling over 200,000 square feet, which housed over 800,000 bottles of dietary supplements and 1.3 million pounds of raw materials, *see* EXHIBIT T at ¶ 4, Attachment B’s “purportedly labeled as dietary supplements” language was no description at all, because all the products at each of the premises were dietary supplements and labeled accordingly. Unless a warrant is “sufficiently specific to permit the rational exercise of judgment [by the executing officers] in selecting what items to seize[,]” it is an illegal general warrant. *United States v. Shi Yan Liu*, 239 F.3d 138, 140 (2d Cir. 2000) (internal quotation marks and citations omitted).

Nowhere in his affidavit did Kriplean claim that he had reason to believe *other* Hi-Tech dietary substances were misbranded, nor did he allege that any circumstances of the investigation prevented him from learning this information. When an affiant has “actually developed a specific list [of items to be seized] that he included in the affidavit and application but mistakenly omitted from the warrant[,]” the warrant is facially invalid because it does not satisfy the Fourth Amendment’s particularity requirement. *United States v. Morris*, 2017 WL 5180970 \*6 (S.D. Ga. Oct. 19, 2017).

Regarding the seizure of physical items, the probable cause in the affidavit was limited to the five products that the Government claimed contained anabolic steroids. The most generous possible reading of the affidavit establishes probable cause to believe Hi-Tech products sold as “prohormones” could be misbranded. The affidavit established no probable cause to support the seizure of raw materials, but Attachment B nonetheless authorized seizing them. A review of the Inventory of Items Seized, Doc. 51-6, shows that the Government seized tens of thousands of bottles of Hi-Tech products that were completely unrelated to the five products listed in the affidavit or prohormone products of any kind. For instance, the agents seized approximately \$2 million of eight lawful dietary products, as set out in Defendants’ previously filed Motion for Return of Seized Assets, Doc. 72. The agents seized

thousands of bottles of these products even though nine months before the October 4, 2017 seizures, the Government's Forensic Chemistry Lab confirmed it could not identify any illicit drugs or steroids in three of the eight products (Arimiplex, Dianabol, and Decabolin). *Id.* at 6-7. The Government's inventory also shows tens of thousands of bottles of other Hi-Tech products, none related to prohormone products. *See* Docs. 51-3, 51-6; EXHIBIT T at ¶ 6.

General warrants offer no “practical tool to guide the searching agents in distinguishing meaningfully between materials of potential evidentiary value and those obviously devoid of it[.]” *United States v. Wey*, 256 F.Supp.3d 355, 385 (S.D. N.Y. 2017) (warrant invalidated for lack of particularity). Like the doomed warrant in *Wey*, these warrants did not include any timeframe-based criteria governing seizure of either the ESI or the physical items, despite the fact that Kriplean’s affidavit made it clear his probable cause was confined to Hi-Tech’s purported activities between September 2016 and August 2017. Nor did it specify what crimes were being investigated. *See Wey*, 256 F.Supp.3d at 365, 384 (warrant lacking such substantive limitations does not comport with the Fourth Amendment’s particularity requirement).

**3. The warrants did not particularly describe the ESI or hard-copy documents agents were authorized to search and seize.**

Particularity requires even greater vigilance in the digital age. *See Carpenter*, 138 S.Ct. at 2214. Attachment B’s ostensible parameters for the ESI and hard-copy documents are so broad that they are virtually a blank check. Examples of Attachment B’s sweeping language in this respect include “all electronic devices”; “all business records and related correspondence”; “all tax records”; “all records relating to property, both real and personal”; “indicia of occupancy, residency and/or ownership”; “any computer device and storage device”; and “any computer equipment”. Doc. 51-3 at 4-10. *See Wey*, 256 F.Supp.3d at 385 (finding a warrant lacked particularity where it set forth “expansive categories of often generic items subject to seizure – several of a ‘catch-all’ variety – without, crucially, any linkage to the suspected criminal activity.”)

The only arguable limitation is that the data and documents must relate to the manufacture or distribution of “controlled substances and/or misbranded and/or adulterated foods and/or drugs,” but this mere recitation is insufficient to satisfy the Fourth Amendment. *See United States v. Galpin*, 720 F.3d 436, 447 (2d Cir. 2013) (warrant to search electronics for “evidence of violations of NYS Penal Law or Federal Statutes” violated particularity requirement). Attachment B does not describe the allegedly misbranded or adulterated products. It does not provide a

limiting timeframe based on the alleged criminal activity. It does not identify the names of individuals or entities whose data or correspondence might be involved, apart from Hi-Tech itself. Attachment B's complete absence of context for the suspected criminal conduct provides insufficient guidance to the array of law enforcement responsible for executing the warrants. The warrants violate the Fourth Amendment's particularity requirement.

**4. The warrant's statutory citations do not provide sufficient particularity.**

The warrant cited four provisions of Title 21: §§ 331(a); 331(k); 333(a)(2);<sup>8</sup> and 841(a)(1). But these bare citations do not satisfy the particularity requirement. A warrant that both cited sections of the Georgia Code and included a description of the scope and focus of those provisions was held sufficiently particular to satisfy the Fourth Amendment in *United States v. Carroll*, 2015 WL 13741254 (N.D. Ga. Nov. 3, 2015). That warrant cited some of Georgia's child pornography statutes and also described the specific conduct each statute prohibited (possession and distribution of child pornography and sexual exploitation of children). The court emphasized that the words "child pornography" "need no expert training or experience to clarify and

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<sup>8</sup> 21 U.S.C. § 333(a)(2) simply describes potential penalties for violations of 21 U.S.C. § 331 and so contributes nothing to the required particularity.

limit their meaning”; accordingly, “[a]ny rational adult person can recognize sexually explicit conduct engaged in by children under the age of 16 when he sees it[.]” *Id.* at \*7 (internal quotation marks and citations omitted).

But purportedly “misbranded and/or adulterated foods and/or drugs” are not like child pornography: their illicit status is not readily apparent to any rational adult person. Kriplean himself needed the specialized knowledge and expertise of the scientists at the FDA’s Forensic Chemistry Center before concluding that the five products his affidavit specified contained an illegal substance.

The Eleventh Circuit found warrants that referred to specific statutes were sufficiently particular in *United States v. Santarelli*, 778 F.2d 609, 614 (11th Cir. 1985) and *Signature Pharmacy, Inc. v. Wright*, 438 Fed.Appx. 741, 745 (11th Cir. 2011). But in both those cases, the court emphasized that the nature of the suspected crimes – loansharking and fraudulent pharmacy sales, respectively – were so complex that more specific information about what was to be seized was unavailable. *Santerelli*, 778 F.2d at 614 (broad, generic description of items to be seized permissible only if it is “as specific as the circumstances and the nature of the activity under investigation permit”); *Signature Pharmacy*, 438 Fed.Appx. at 745-46 (same). *See also Voss v. Bergsgaard*, 774 F.2d 402, 405 (10th Cir. 1985) (reference to specific sections of United States Code without more “does not

constitute a constitutionally adequate particularization of the items to be seized.”); *United States v. Leary*, 846 F.2d 592, 601 (10th Cir. 1988) (“While some federal statutes may be narrow enough to meet the fourth amendment’s requirement, [reference to those] that cover a broad range of activity ... does not sufficiently limit the scope of the warrant.”); *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982) (“‘limiting’ the search to only records that are evidence of the violation of a certain statute is generally not enough.”).

The agents who conducted this search acted unreasonably, because they did not possess a warrant “particularly describing the things [they] intended to seize[.]” *Groh*, 540 U.S. at 563. The ESI and physical items obtained from these unreasonable searches must be suppressed.

#### **B. The Warrants Were Overbroad.**

“Overbroad warrants authorize the seizure of things for which there is no probable cause.” *United States v. Rubinstein*, 2010 WL 2723186 \*8 (S.D. Fla. June 24, 2010). In this case, the overbreadth analysis is “an intersection point for probable cause and particularity principles: it recognizes, in pertinent part, that a warrant’s unparticularized description of the items subject to seizure may also cause it to exceed the scope of otherwise duly established probable cause.” *Wey*, 256 F.Supp.3d at 382. Here, Attachment B failed to limit the scope of the warrants to

the specific things for which there was arguably probable cause to search and seize.

*See Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

**1. The warrants failed to limit the scope of the search and seizure to the timeframe for which the magistrate found probable cause.**

The unincorporated affidavit covers a limited timeframe (September 2016 to August 2017), but Attachment B has no corresponding restrictions, rendering it overbroad. Although the Fourth Amendment’s language does not require a warrant to specify a timeframe, when a warrant uses broad descriptions of the things to be seized, failing to limit those descriptions by dates available to the police will render the warrant overbroad. *United States v. Ford*, 184 F.3d 566, 576 (6th Cir. 1999). When, as here, the affidavit establishes probable cause for a period of only months, “the authorization to search for evidence irrelevant to that time frame could well be described as ‘rummaging.’” *United States v. Abboud*, 438 F.3d 554, 576 (6th Cir. 2006); *c.f.*, *United States v. Maali*, 346 F.Supp.2d 1226, 1242-43 (M.D. Fla. 2004) (warrant with language that limited its scope to “time, offense, and subject matter” was not overbroad).<sup>9</sup>

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<sup>9</sup> As a result of the absence of any date restriction, over 14 % of the documents in the seized ESI were from 2011 or earlier. EXHIBIT P at ¶ 41 n. 4

Because Agent Kriplean's affidavit was not incorporated, the warrant is missing any temporal limitation on the digital or physical evidence the Government may search and seize. Absent a date range, the warrant authorizes a nearly boundless search of Hi-Tech's products, papers, and private data on 35 electronic devices. Such an open-ended intrusion is plainly unsupported by probable cause and facially overbroad. *See, e.g., Wey*, 256 F. Supp. 3d at 387 (finding warrant lacked particularity for failing to include a date range, despite "rather precise timeframes" identified in an unincorporated affidavit).

**4. The warrant failed to limit the search and seizure to the products, data, and documents for which the magistrate found probable cause.**

Based on his investigation, Kriplean suspected that five Hi-Tech products contained illegal anabolic steroids. He gave the magistrate judge no information of any criminal activity unrelated to those five products. However, the warrant authorized the seizure of hundreds of Hi-Tech products unrelated to the five named products. *See* discussion at Section I-A-2, *supra*. Examples of these beyond the scope documents are found at *id.*, Attachments 6 and 7.

Attachment B to the warrants permitted agents to seize all of Hi-Tech's computer infrastructure, despite the absence of any supporting probable cause for this wholesale seizure. And, as Defendants' review reveals, 79% of the ESI

documents the Government ultimately seized were beyond the scope of the search warrants. EXHIBIT P at ¶ 51. This overbroad seizure included thousands of documents pertaining to issues neither the warrant nor the affidavit even mentioned: 12,182 documents related to Cholodrene/red yeast rice issues; 723 documents related to GMP or Certificate of Free Sale issues; 20,045 sales documents; 5,679 manufacturing documents; 3,217 DMAA documents; 90 HR/personnel documents; and 42 personal documents. *Id.* at ¶¶ 52-53 and Attachment 6.

A random sample of 5,000 of the 159,801 hard-copy documents seized by the Government demonstrates that 95% of them were beyond the scope of the warrants. *Id.* at ¶ 58. Specifically, 1,500 of the 5,000 randomly sampled documents were sales documents; 170 related to DMAA; 149 related to Cholodrene; 36 were HR/personnel documents; 33 were marketing documents; 4 related to GMP or Certificates of Free Sale; and 2 were personal documents. *Id.* at ¶¶ 59-60 and Attachment 7.

Similar to these facts, the Ninth Circuit invalidated a warrant based on an affidavit that alleged an art gallery was selling forged artworks by Salvador Dali because it authorized the seizure of all items constituting “evidence of violations of federal law” in *Central Art Gallery-Hawaii, Inc. v. United States*, 875 F.2d 747, 749 (9th Cir. 1989) (*superseded by statute on other grounds*, *J.B. Manning Corp. v.*

*United States*, 86 F.3d 926, 927-28 (9th Cir. 1996)). That warrant was fatally overbroad because it failed to limit the seizure “to items pertaining to the sale of Dali artwork despite the total absence of any criminal activity unrelated to Dali[.]” *Id.* at 750.

The five products Kriplean identified in his affidavit were like the suspected forged Dalis in *Central Art Gallery-Hawaii*. Because the warrants did not limit the seizure to things pertaining to those five products, they were overbroad and the evidence they yielded is inadmissible.

No reasonable law enforcement agent could have relied upon these unparticularized and overbroad warrants. *Cf. United States v. Leon*, 468 U.S. 897 (1984). Search and seizure pursuant to an obviously deficient warrant is, like a warrantless search and seizure, presumptively unreasonable. *Groh*, 540 U.S. at 558-59; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 469 (1971). Because no exceptions to this presumption justify reliance on these obviously overbroad and unparticularized warrants, this evidence must be suppressed.

## **II. THE EXECUTION OF THE SEARCH WARRANTS VIOLATED THE FOURTH AMENDMENT'S REASONABLENESS REQUIREMENT.**

“[T]he ultimate touchstone of the Fourth Amendment is ‘reasonableness[.]’” *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). This governs both Fourth

Amendment analysis and acceptable execution of a search warrant. *United States v. Ramirez*, 523 U.S. 65, 71 (1998).

These search warrants were executed unreasonably at multiple stages and resulted in the seizure of copious amounts of ESI, hard-copy documents, and physical items that were beyond their scope. The Government's course of conduct shows that it is not entitled to *Leon's* good faith exception absent a showing at an evidentiary hearing. In light of all the facts, suppression is required to deter the conduct of the agents and Government. Finally, this Court should hold an evidentiary hearing to determine the facts relating to these searches and seizures.

**A. The Government's Subsequent Searches of the ESI Were Unreasonable.**

After its initial seizure of 12 TB of ESI, the Government was required to process that data to identify, and finally seize, only data within the scope of the warrants. The Government acted unreasonably at virtually every phase of this process.

**1. The language in Attachment B authorized seizure of both misbranded *and* adulterated products and related ESI and hard-copy documents, but the affidavit contained no probable cause as to adulteration.**

The word “adulterated” is wholly absent from Kriplean’s 28-page affidavit, which only alleges probable cause to believe Hi-Tech “is manufacturing, marketing,

and distributing misbranded foods and/or drugs.” Doc. 51-2 at 4, ¶ 3. Yet Kriplean inserted “adulterated” in Attachment B. Doc. 51-2 at 4. To constitute an adulterated product, the Government must show that it is “injurious to health.” 21 U.S.C. § 342(a)(1). Even if the affidavit had been properly incorporated, adding “adulterated” products to Attachment B without supporting probable cause improperly expanded the scope of seizures permitted under the warrants.

**2. The affidavit established no probable cause to justify taking Hi-Tech's tax records, but these documents were included in Attachment B's shotgun list of items to be seized.**

Paragraph 8 of Attachment B listed “all tax records, including summaries and schedules” in its seven-page, broad-gauge catalog of purported “[e]vidence, fruits, and instrumentalities of violations of federal law, including 21 U.S.C. § 331 and 21 U.S.C. § 841(a)(1).” Doc. 51-1 at ¶ 8. But, as Kriplean was well aware, no mention of the phrase “tax records” appears in the affidavit, much less facts amounting to probable cause to believe that Hi-Tech’s tax records, summaries and schedules constituted evidence, fruits, and instrumentalities of violations of federal law. Since Kriplean drafted Attachment B, his inclusion of tax records within it, despite knowing his affidavit did not provide supporting probable cause, further evinces a lack of good faith and reasonableness. *See Wey*, 256 F.Supp.3d at 376 (seizure of tax records beyond scope of warrant that did not refer to “any active investigation

... pertaining to tax evasion or tax fraud.”). “An otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause on which the warrant is based.” 2 LaFave, *Search and Seizure*, § 4.6(a) (4<sup>th</sup> ed. 2004).

**3. The keywords used by Madison to search the ESI were beyond the scope of the warrants.**

Rule 41(e)(2)(B) permits an incidental initial overseizure of ESI (step one) if the Government then segregates data that is within the scope of the search warrant (step two). Here, the Government conducted multiple, flawed step two searches that allowed it to ultimately seize considerable materials unauthorized by the warrant.

The first step two search of the ESI was apparently performed by Madison prior to May 11, 2018, using 80 keywords to filter the data for responsiveness to the warrant.<sup>10</sup> The Government has not revealed the origin of these 80 keywords. Their genesis is important to the determination of this motion because many of them are

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<sup>10</sup> The Government used Madison, a private entity under contract, to search the 12 TB ESI dataset on at least three occasions. But nothing suggests that any Government agent was present when Madison conducted the instant searches. Title 18 U.S.C. § 3105 provides that a search warrant may not be served by anyone other than an authorized officer “except in aid of an officer on his requiring it, he being present and acting in its execution.” *United States v. Martin*, 600 F.2d 1175, 1182 (5th Cir. 1979), *overruled on other grounds*, *United States v. McKeever*, 905 F.2d 829, 833 (5th Cir. 1990).

clearly beyond the scope of both the warrants and the probable cause set out in the Kriplean Affidavit.<sup>11</sup> A number of the keywords relate to substances in Hi-Tech products that were not in any way mentioned in either the warrants or Kriplean's affidavit (e.g., “DMAA;” “DMHA;” “Geranium;” “statin;” “Lovastatin;” “red yeast;” “Cholodrene;” “Heladrol”). Other keywords name individuals that have no apparent connection to the seizures authorized under the warrant or to the probable cause in the affidavit (e.g., “James Hu;” “Amy Gao;” “amy@genabolix.com;” “Hu\_changchun@yahoo.com;” “Glenn Godfrey”).<sup>12</sup> *See* EXHIBIT Q.

Before searching the ESI for products, substances, activities, or individuals beyond the probable cause established in the affidavit, the Government had to obtain warrants that authorized this additional scrutiny. Its failure to do so demonstrates that Madison’s keyword search was intentionally designed to identify and segregate

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<sup>11</sup> To the extent that any of these keywords were the product of Kriplean's evolving investigation, *i.e.*, information developed subsequent to the September 28, 2017 application for these warrants, this is the functional equivalent of a general warrant, and further evidence of the Government’s bad faith. *See* discussion *infra*, at Section II-A-5.

<sup>12</sup> Defendants believe that some of these keywords were selected to attempt to locate evidence the FDA wanted to use in an unrelated federal prosecution in Houston, Texas. *See* <https://www.justice.gov/usao-ndtx/pr/five-chinese-citizens-and-four-chinese-companies-indicted-scheme-sell-mislabeled> (last visited September 20, 2019). The use of the Hi-Tech warrants here to obtain evidence for another case is yet another bad faith abuse of these warrants.

documents beyond the scope of the warrants. Seizure of items outside the scope authorized by a search warrant is unconstitutional. *Horton*, 496 U.S. at 140 (inadvertence of such seizure irrelevant). As such, this search was not conducted in good faith and resulted in the seizure of thousands of documents and ESI beyond the scope of the search warrants.<sup>13</sup>

**4. All searches of the seized ESI should have been conducted by a “clean team” independent of the prosecution team.**

According to the Government, after Madison searched the ESI and a privilege review was completed, a 120 GB subset of data was provided to Kriplean, who then searched the data at least one more time, on March 1, 2019, employing a list of 55 new keywords, many of which were unrelated to the allegations in his affidavit, EXHIBIT R. It is not clear whether this was the only search Kriplean performed on the 120 GB subset.

This process is obviously flawed: Kriplean, the Government's lead investigator, had unfettered access to the entire 120 GB subset, the Government has

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<sup>13</sup> Additionally, it is apparent that information in Kriplean's affidavit, and many of these search terms, originated from the previous searches of Hi-Tech and Wheat's email accounts. Defendants have pending before this Court a Motion to Suppress those searches. Doc. 44. Should this Court grant suppression as to those searches, the instant searches on October 4, 2017 would be fruit of the poisonous tree, and subject to suppression on this independent ground. *Wong Sun v. United States*, 371 U.S. 471 (1963).

admitted contained over 100 GB of data outside the already overbroad scope of the warrants. This allowed Kriplean to scabble around for information in that 120 GB subset far beyond what was authorized by the warrants. *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1179 (9th Cir. 2010) (“*CDT*”) (en banc) (Kozinski, C.J. concurring) (only specially trained computer personnel independent of investigation should review and segregate nonresponsive data; access by agents involved in investigation should be strictly limited to responsive data) (*overruled in part on other grounds, Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2018)). Thus, the Government should have employed a taint team to conduct the original responsiveness review, but it did not.

**5. The keywords used by Kriplean to search the ESI were beyond the scope of the warrants.**

The Government admits that Kriplean searched the 120 GB subset of the ESI on March 1, 2019. But, critically, it is still not clear if this was the only time that Kriplean or other members of the prosecution team searched this subset. According to the Government, Kriplean used 55 additional keywords to search the 120 GB subset, at least on March 1, 2019. *See* EXHIBIT R. The Government has not explained why Kriplean used these 55 additional keywords or whether he conducted yet other searches of this subset.

There are two fundamental problems with Kriplean's actions in this regard. First, many of these keywords appear to be unconnected to the approved search warrants: they relate to substances, individuals, and documents that are objectively outside the scope of the warrants and absent from Kriplean's affidavit. *See, e.g.*, “armiplex” (estrogen limiter); “cystine” (antioxidant); “Choat;” “stacy alexander;” “schneeman;” “fda audit;” “gmp logo;” “gmp statement;” “hi-tech gmp cert.”<sup>14</sup> Seizure of items outside the scope authorized by a search warrant is a violation of the Fourth Amendment. *Horton*, 496 U.S. at 140. Keyword searches for terms outside the scope of the warrants are akin to a general warrant. *Marron*, 275 U.S. at 196. And the Government's actions to ferret out and seize materials in excess of the warrant's authorization are strong evidence of bad faith.

Second, supplementing the keywords Madison used with 55 additional keywords shows that Kriplean was not focused on executing the warrants for responsiveness. Instead, in March of 2019 Kriplean conducted an additional, warrantless search of the ESI that exceeded even the scope of the unincorporated

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<sup>14</sup> Some of the keywords were repeats of the Madison keywords, with the only difference being capitalization. Unless the Government's document review platform requires case-specific inquiries, it is unclear why Kriplean would have to repeat these searches, or how that would help him determine what is responsive to the warrants.

affidavit. Kriplean had no authority to revisit the ESI subset to sift for new documents to fuel his evolving investigation in 2019. He was only authorized to review the ESI with respect to its responsiveness to the 2017 warrant. His search violated both the Fourth Amendment and the two step process authorized by Rule 41(e)(2)(B).

In *Wey*, 256 F.Supp.3d at 405, the Government revisited previously seized ESI to indulge in “expanding searches as its investigation and charging theories developed over months and years following the Initial Searches...” While not reaching the question of whether this conduct was independently violative of the Fourth Amendment, the court concluded:

[I]f nothing else, it constitutes further evidence of the agents’ culpability in making affirmative choices to treat the Warrants as though they were the functional equivalent of general warrants. Such conduct can and should be deterred.

*Id.* at 406. *See also CDT*, 621 F.3d at 1177 (“The process of segregating electronic data that is seizable from that which is not must not become a vehicle for the government to gain access to data which it has no probable cause to collect.”).

**6. The Government's failure to complete the step two seizure of ESI in a timely fashion renders the ESI search and seizure unreasonable.**

The Government's original seizure of Hi-Tech's ESI occurred on October 4, 2017. It did not complete its step two seizure of the ESI until March of 2019, over 17 months later. This unreasonable delay was contrary to the Fourth Amendment.

“[T]he Fourth Amendment requires the Government to complete its review, *i.e.*, execute the warrant, within a ‘reasonable’ period of time.” *United States v. Metter*, 860 F.Supp.2d 205, 215 (E.D. N.Y. 2012) (granting suppression of all ESI due to 15-month delay in commencing review of ESI for materials responsive to search warrant). *See also United States v. Debbi*, 244 F.Supp.2d 235, 237-38 (S.D. N.Y. 2003) (suppressing all nonresponsive data seized based on Government's failure to identify, segregate and return materials unresponsive to search warrant within eight months and setting evidentiary hearing to determine if blanket suppression was required). *But cf. United States v. Jarman*, 847 F.3d 259, 266-67 (5th Cir. 2017) (23-month delay reasonable due to complexity of search and time-consuming privilege review process);<sup>15</sup> *United States v. Lee*, 2015 WL 5667102

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<sup>15</sup> Should the Government seek to rely on its privilege review to justify this delay, the Court should consider that the August 31, 2018 evidentiary hearing on Defendants' Email Motion to Suppress revealed a disorganized and deeply flawed privilege review. It appears that the privilege review of the ESI here took place somewhere between October 4, 2017 and about February 2019. Defendants know very little about what actually occurred in regard to this review. If the Government seeks to rely on this process to justify its 17-month delay, it should provide evidence of the details in an evidentiary hearing on the motion.

(N.D. Ga. Sept. 25, 2015) (failure to complete review for over three years does not mean that Government acted unreasonably).

**B. This Court Should Require Return of Defendants' Property that is Not Responsive to the Warrants.**

Defendants renew their previous request for return of property pursuant to Rule 41(g), Doc. 51 at 24, and ask the Court to return all of Defendants' seized property (including ESI, hard-copy documents, and physical items) that was beyond the scope of the search warrant.

Notwithstanding the Government claim that it has completed its step two seizures and privilege review, it continues to hold staggering quantities of evidence concededly beyond the scope of the warrants. This includes all the 12 TB of ESI seized on October 4, 2017 minus the 14.5 GB that the Government has identified as finally seized; virtually all of the hard-copy documents; and significant quantities of products and raw materials. Of course, Defendants are also entitled to the return of all privileged documents. *See* Doc. 246, Defendants' Supplemental Brief relating to return of privileged documents found in AOL and Yahoo searches.

This Court has permitted the Government to maintain possession of the nonresponsive ESI, but prohibited it from accessing the nonresponsive data without Court approval. Doc. 205 at 2. Defendants respectfully submit that such an order is insufficient to protect Defendants' property rights in the items seized and insufficient

to protect Defendants' Fourth Amendment rights against use of this material (even pursuant to subsequent court approval). *See CDT*, 621 F.3d at 1179 (Kozinski, C.J. concurring) (Government should return or destroy nonresponsive ESI to party from whom it was seized as soon as practicable).

The Government has made no showing as to its need for the nonresponsive data. Absent a sufficient justification, the Government should be ordered to return all materials that the search warrant did not authorize it to seize, because it has no legal right to keep them.

### **C. Suppression Is Necessary to Deter Government Misconduct.**

While wholesale suppression is an extreme remedy, it is required here. In addition to the facial overbreadth and lack of particularity, a defendant who establishes flagrant disregard of the terms of a warrant is entitled to suppression of everything that was seized. To prove flagrant disregard, a defendant must show that “government agents effect[ed] a widespread seizure of items that were not within the scope of the warrant, and [did] not act in good faith.” *Wey*, 256 F.Supp.3d at 410 (quoting and citing *Liu*, 239 F.3d at 140) (internal quotation marks omitted). “[T]o satisfy the first prong ... the search conducted by government agents must *actually resemble* a general search.” *Liu*, 239 F.3d at 141 (emphasis in original). “The rationale for blanket suppression is that a search that greatly exceeds the bounds of

a warrant and is not conducted in good faith is essentially indistinguishable from a general search.” *Id. Accord Cardwell*, 680 F.2d at 78-79; *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988).

As demonstrated in Section I-B-2, *supra*, the search here greatly exceeded the bounds of the warrant, and "actually resembled" a general search. And, even without an evidentiary hearing, this motion demonstrates the plentiful evidence that the Government and Kriplean did not act in good faith. At a minimum, the Government's actions demonstrate "grossly negligent or reckless disregard of the strictures of the Fourth Amendment, and that is sufficient to infer a lack of good faith.... These are precisely the sort of circumstances, rare or not, that call for blanket suppression.” *Wey*, 256 F.Supp.3d at 410.

**D. The Government Bears the Burden of Demonstrating the Applicability of the *Leon* Good Faith Exception.**

*Leon's* good faith exception does not apply: Kriplean misled the issuing magistrate and the warrants were facially deficient. *Leon*, 468 U.S. at 923. The Government cannot meet its burden to show that, in light of all the circumstances, the officers' actions were objectively reasonable, because they were not.

**E. As an Alternative to Suppression Based on the Facially Deficient Warrants, this Court Should Hold an Evidentiary Hearing on this Motion.**

For purposes of this pleading, Defendants have relied on AUSA Kitchens's representations. However, these do not constitute facts upon which Defendants are required to rely and, more importantly, they are not a sufficient basis for this Court's factual determinations. This is especially true because these searches involve at the outset the seizure of enormous amounts of ESI. As other courts who have struggled with such seizures have concluded, the circumstance surrounding the original seizure of the data and the subsequent processing for both privilege and responsiveness to the terms of the search warrant are complex, may encompass lengthy time periods, and involve many people. *See, e.g., Wey, CDT, and Gantias, supra.*

This Court should require evidence to determine, *inter alia*: (1) how the executing agents determined what to seize on October 4, 2017; (2) how the executing agents conducted their on-site determination as to what hard-copy documents could be seized; (3) how the executing agents conducted their on-site privilege review; (4) how the ESI was collected and processed prior to review; (5) who had access to the data (or any subset of the data) and when they had such access; (6) how, when, and by whom the privilege review was conducted; (7) what off-site searches were

conducted on the data or any subset, when, and by whom; (8) how these searches were conducted, and who was involved; (9) how the keywords were chosen, by whom, and whether those keywords were within the scope of the warrants; (10) the results of each search; and (11) why it took 17 months to determine what was ultimately seizable under the warrants.

Additionally, Defendants submit that they are entitled to an evidentiary hearing pursuant to their pending *Franks* motion, Doc. 191. The issues pertinent to that motion largely overlap the issues in this Motion to Suppress, and the Court could choose to determine the facts relating to both motions simultaneously. Finally, if the Government attempts to rely on *Leon*'s good faith exception, it will have to submit evidence to meet its burden of proof.

Other courts confronting similar issues have concluded that an evidentiary hearing was required. *See, e.g., Wey*, 256 F.Supp.3d at 366; *Ganias*, 824 F.3d at 207-08. This Court should do the same.

WHEREFORE, Defendants respectfully pray that this Court hold an evidentiary hearing to determine the material facts relating to these searches and seizures and, upon good cause shown, issue an Order granting Defendants' Motion to Suppress, and for such other and further relief as this Court deems just and proper.

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\* The NACDL Fourth Amendment Center provides training and direct litigation assistance to defense lawyers in cases involving new technologies and challenges to privacy rights in the digital age. In recognition of the significant search and seizure issues raised by this case, and at the request of defense counsel, the NACDL Fourth Amendment Center has provided pro bono assistance for the limited purpose of preparing of this motion.