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June 14, 2016

VIA ECF AND FEDEX

Honorable Kevin McNulty
United States District Judge
Martin Luther King, Jr. Federal Building
& United States Courthouse
50 Walnut Street
Newark, NJ 07102

Re: *United States v. Ravelo*,
Criminal No. 15-576

Dear Judge McNulty:

Please accept this letter in brief reply to the government's opposition, dated May 23, 2016, to defendant Keila Ravelo's brief in support of her motion to suppress evidence. For the reasons set forth below, as well as those included in Ms. Ravelo's original brief and to be argued on June 27, 2016, the Court should find that Ms. Ravelo's motion to suppress is ripe for adjudication at this time and should order the suppression of any and all evidence obtained as a result of the warrantless seizure of her cellular telephone on or about December 22, 2014.

As set forth in Ms. Ravelo's original brief, the evidence at issue was obtained in violation of her Fourth Amendment rights as her cell phone was seized without a warrant and the seizure was not justified by any exception to the warrant requirement. Rather than addressing the arguments raised by Ms. Ravelo with regard to the constitutionality of the seizure, which arguments remain entirely unrebutted, the government has responded that because it has not yet determined whether it "intends to use any of the contents of the Phone in its case-in-chief at trial," "[t]he Court should defer on hearing the defendant's motion as it is not ripe for adjudication." Govt. Br. at 1, 3. In the meantime, the government expects Ms. Ravelo and her counsel to review the 90,000 items that were extracted from her cell phone, identify any privileged information, and create a privilege log detailing those claims. Govt. Br. at 2.

Ms. Ravelo's motion is ripe for adjudication. First, this is so under the pertinent rules. Specifically, the government's February 19, 2016 letter that was appended to the evidence at issue expressly stated that it was producing the evidence "pursuant to Rule 16(a) of the Federal Rules of Criminal Procedure and the Court's Standing Discovery Order," *see* Exhibit A (Govt. Ltr. at 1). And the purpose of the Rule is inextricably intertwined with potential motions to dismiss: that is, "[b]y giving [a] defendant an opportunity to review . . . evidence [discoverable under Fed. R. Crim. P. 16], the government has effectively provided notice to [the] defendant of evidence that may be subject to a motion to suppress." *United States v. Mote*, 2010 U.S. Dist.

LEXIS 57178, at *14-15 (M.D. Pa. June 10, 2010). Ms. Ravelo, then, is doing no more than advancing just such a motion to suppress, as the Rule provides. Moreover, the timing of Ms. Ravelo's motion is, in fact, entirely appropriate. Although the government claims not to know whether it will use the evidence, and argues that as a result of which Ms. Ravelo's motion is "not ripe," it also demands that Ms. Ravelo and her counsel review each of the 90,000 items extracted from her cell phone for privilege, an enormously time-consuming undertaking, which would not be necessary were the search, as it should be, deemed unconstitutional.[1]

In any event, a motion to suppress is traditionally ripe when a defendant alleges a constitutional violation and connects that violation to evidence that, *if admitted*, would cause some harm to the defendant. *United States v. Hines*, 628 F.3d 101, 105-06 (3d Cir. 2010). Here, Ms. Ravelo has sufficiently alleged that her phone was seized in violation of the Fourth Amendment, as a result of which the government has obtained 90,000 separate pieces of potential evidence, which the government has made clear it may use at trial. Nor does the government cite any authority to support its argument that a motion to suppress is not ripe for adjudication until it affirmatively decides whether it intends to use the disputed evidence at trial. Not only do the two cases cited by the government, *see* Govt. Br. at 3 (citing *United States v. Levasseur*, 609 F. Supp. 849 (D. Me. 1985); *United States v. Martin*, 2014 U.S. Dist. LEXIS 102636, 2014 WL 3700917 (D. Minn. July 9, 2014)), address the entirely separate doctrine of mootness, but each address circumstances in which the government affirmatively indicated that it would not seek to introduce the evidence at issue. Thus, in *Levasseur*, the district court held that a defendant's motions to suppress had "become moot by virtue of the Government's notice and representation to the Court" that it would "not utilize or offer in evidence as part of its case-in-chief . . . any evidence or testimony derived directly or indirectly from the circumstances attendant upon the execution of the search warrant in question." 609 F. Supp. at 850. The district court in *Martin* similarly held that the defendant's motion to suppress had been "rendered

[1]As the Court is aware, electronic data is fundamentally distinct from, and normally exponentially larger in volume than, evidence typically seized by the government, which should be accounted for in the context of a motion to suppress. *See Riley v. California*, 134 S. Ct. 2473, 2489 (2014) ("Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. . . . One of the most notable distinguishing features of modern cell phones is their immense storage capacity."); *United States v. Metter*, 860 F. Supp. 2d 205, 213-14 (E.D.N.Y. 2012) ("Computers and electronic information present a more complex situation, given the extraordinary number of documents a computer can contain and store and the owner's ability to password protect and/or encrypt files, documents, and electronic communications."). In this regard, it should be noted that on the same hard drive containing the evidence extracted from Ms. Ravelo's cell phone, the government also produced approximately 7,000 pages of documents that were obtained from Ms. Ravelo's former employer, Hunton & Williams LLP. The defense spent over three months reviewing these documents and assessing them for privilege. Obviously, it will take significantly more time to review and analyze 90,000 additional items, which will occur at Ms. Ravelo's expense.

moot by the Government's express representation in its written briefing to this Court that it will not use the disputed evidence in its case-in-chief." 2014 U.S. Dist. LEXIS 102636, at *7-8. The government's assertion here – that it is "in the process of determining whether it intends to introduce any of the contents of the Phone," Govt. Br. at 3 – is far from such an affirmative representation. *See Levasseur*, 609 F. Supp. 849; *Martin*, 2014 U.S. Dist. LEXIS 102636; *see also United States v. Da-Chuan Zheng*, 1984 U.S. Dist. LEXIS 16470 (D.N.J. May 23, 1984) ("Defendant Yeung has moved to suppress items seized from his suitcase, which was being stored at the home of defendant Tsai. The government has, however, agreed not to use such evidence at trial, rendering this motion moot."); *United States v. Pees*, 645 F. Supp. 697, 701 (D. Colo. 1986); *United States v. Reyes*, 2012 U.S. Dist. LEXIS 142197 (E.D. Pa. Sept. 28, 2012); *United States v. Ranke*, 2010 U.S. Dist. LEXIS 115352 (E.D. Mich. Oct. 29, 2010); *United States v. Restrepo*, 2001 U.S. Dist. LEXIS 21760 (S.D.N.Y. Dec. 27, 2001). And in the absence of such a representation, Ms. Ravelo's motion is entirely appropriate.

Indeed, deferring consideration of Ms. Ravelo's motion, as the government advocates, would require courts to abstain from considering motions to suppress until the government makes a decision one way or the other. But courts simply do not rely on the government to this extent when considering motions to suppress evidence. *See, e.g.*, *United States v. Nieves-Cortez*, 401 Fed. App'x. 263, 264 (9th Cir. 2010) (although the district court denied the defendant's motion to suppress, "the government did not introduce any evidence seized [pursuant to that search warrant] at trial" (internal quotation marks omitted)); *United States v. Timmann*, 741 F.3d 1170, 1184 n.8 (11th Cir. 2013) ("As described above, although the court denied Timmann's motion to suppress the 3:33 PM call, the Government did not introduce the call into evidence."). Even more fundamentally, the government's position is at odds with the system set forth in the Federal Rules of Criminal Procedure. That is, the plain language of Rule 12(b)(3)(C) mandates that a motion to suppress evidence be made before trial. *See United States v. Burnett*, 773 F.3d 122, 131 (3d Cir. Pa. 2014); *United States v. Vasquez-Rodriguez*, 2015 U.S. Dist. LEXIS 82984 n.5 (D.N.J. June 25, 2015). But that schedule would be impossible to meet if defendants were precluded from filing motions to suppress until the government affirmatively decided on the particular evidence it intended to use in its case-in-chief, which often occurs within a matter of days before trial. Notwithstanding that obvious reality, reflected in the caselaw cited above, the Federal Rules require that motions to dismiss be filed and litigated before trial. The government's argument ignores Congress's express directive in this regard.

Finally, the government's opposition brief mischaracterizes its burden at this stage. In particular, it is undisputed that Ms. Ravelo's cell phone was seized without a warrant, meaning that the seizure was "*per se* unreasonable" under the Fourth Amendment. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). Accordingly, it is the government's burden to establish that the seizure was justified by an exception to the warrant requirement. *Id.*; *United States v. Katzin*, 769 F.3d 163, 169 (3d Cir. 2014); *United States v. Johnson*, 63 F.3d 242, 245 (3d Cir. 1995). The government seeks to relieve itself of that burden because it does not know whether it will use the evidence at issue. As set forth above, the government's position is wrong. And now, with the government having entirely relied upon its unmeritorious "ripeness" argument, and thus

having failed to bear its burden with regard to any possible justification for its warrantless seizure, the Court is left with no choice: the motion to suppress must be granted.[2]

Thank you, once again, for your kind consideration of this matter.

Respectfully submitted,

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[2] For the reasons set forth in Ms. Ravelo's original brief, in order so that the defense can determine the full scope of the challenges that should be filed with regard to the search here at issue, the Court should also Order the government to provide defense counsel with a copy of the warrant it claims to have secured prior to searching the contents of Ms. Ravelo's cell phone, as well as the affidavit which purportedly supported it. Those documents are, as noted, routinely provided to defense counsel and should be in this case as well, particularly in the absence of any showing to the contrary. Here, as the government notes in its brief, it has provided the contents of Ms. Ravelo's phone to defense counsel; it is inexplicable, and extraordinary, that it will not also provide the basis for the seizure of those records.