

1 DISTRICT COURT
WELD COUNTY, COLORADO
2 901 9th Avenue
Greeley, CO 80631
3

4 In re Search of Amalia's Translation and
5 Tax Service;
AMALIA CERRILLO, et al.,

6 Plaintiffs,

7 v

8 KENNETH R. BUCK, et al.,

9 Defendants.
10

----- *FOR COURT USE ONLY*
CASE NO. 09 CV 100
DIVISION 1

11 For the Plaintiffs:
12 N. REID NEUREITER
MICHAEL J. GLADE
13 ELIZABETH L. HARRIS

14 For the Defendant Buck:
LISA HOGAN

15 For the Defendant Cooke:
16 DAVID R. BROUGHAM

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18 REPORTER'S TRANSCRIPT MONDAY, APRIL 13, 2009
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20 The matter came on for Ruling On Preliminary
21 Injunction before the HONORABLE JAMES HIATT, Judge of
the District Court.
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1 MONDAY, APRIL 13, 2009

2 (The following proceedings were had in open
3 court.)

4 THE COURT: This is the case of Amalia
5 Cerrillo and others, versus Kenneth Buck and others.
6 The matter's here with regard to the request for the
7 preliminary injunction, and several other motions -- a
8 couple other motions. Specifically the matter's here
9 for the Court's ruling. And it appears that
10 appropriate counsel are here, parties are here. I
11 believe defendant Cook is not here, but that's
12 understood, and accepted. It's not a problem.

13 What I had proposed to do was, we have, in
14 addition to the issue of the requested preliminary
15 injunction, we have the motion to proceed with
16 pseudonyms. We also have the motion regarding
17 certification of a class. I proposed to rule on the
18 psuedonym motion, rule on the issue of the requested
19 injunction, rule on the issue of the requested class to
20 be certified.

21 At the conclusion of that process, I'll ask
22 one side or the other to prepare a written order
23 reflecting the Court's ruling.

24 Is there anything else that counsel believe
25 needs to be addressed, or any -- and there might be

1 some housekeeping things regarding time to file an
2 answer and case management type things, but is there
3 anything significant beyond that either side would wish
4 to bring up?

5 MR. NEUREITER: Not for the plaintiffs, Your
6 Honor.

7 MS. HOGAN: Not for Kenneth Buck.

8 THE COURT: All right. First of all, we'll
9 take the issue of proceeding through the use of
10 pseudonyms.

11 I should state, by the way, that obviously
12 this could be done with a written order and that is a
13 common way to address this. My feeling just was -- and
14 I appreciate all counsel and parties being back here --
15 my feeling was that this is a matter of some interest
16 in the community. That's obviously been demonstrated
17 by news stories, by the number of people in the
18 courtroom observing, so forth. It seems to me in an
19 case like that, it's just appropriate for the judge to
20 be in the community, sit on the bench, make a ruling,
21 be available to answer questions from counsel,
22 whatever, and not just mail in an order. And so I did
23 want to do it in this fashion.

24 Regarding the motion to proceed through the
25 use of pseudonyms, the Court finds that the following

1 has been established. First of all, obviously the bias
2 in the law is in favor of not doing this, that
3 individuals would be identified. The presumption is
4 that all proceedings including the names of
5 participants would be public knowledge. Rule 10
6 obviously makes that clear, as does case law.

7 In this case, the Court notes several
8 things. First of all, the plaintiffs involved were not
9 present when the warrant was executed, other than as to
10 some facts that are pretty much agreed to. The
11 existence of files, the content of the files. They are
12 not really fact witnesses. So the Court finds that
13 that is not -- that that is the case. They, the
14 issues, in the Court's view are pretty well set out in
15 the Heitler case which has been cited by both counsel.

16 The Court does find that there has been
17 established a reasonable risk of fear -- or a
18 reasonable fear of the risk of retaliation and adverse
19 consequences in the community by the individuals who
20 are plaintiffs and who want to proceed with pseudonyms.

21 The Court bases this on, very simply, the
22 issues raised in the case. It's a high profile case.
23 It involves matters that involve a lot of passion and
24 argument, and great concern on both sides of the
25 debate. That debate has been as reflected in letters

1 to the editor and newspaper reports, e-filings -- or I
2 think there was an exhibit with some e-mails quoted, et
3 cetera. Clearly there are strong feelings here. And
4 they slop over into the area where some folks are
5 perhaps intemperate, and that's probably the case on
6 both sides.

7 Be that as it may, it is legitimate for
8 those individuals to believe they might be subject to
9 harassment or retaliation or some sort of mistreatment
10 in the community if their names are revealed and if
11 they are identified as being aligned with advocating a
12 position or with a cause or a side that, for a lot of
13 people, carries some proprium with it.

14 The Court is not persuaded there is a
15 reasonable -- that the motion should be granted because
16 of some fear of criminal prosecution, or some fear of
17 immigration consequences. Absent some evidence to the
18 contrary, I'm going to believe and base the ruling on
19 -- the order on the belief that everybody here would
20 act professionally if there is criminal prosecution or
21 other legal consequence, that would come appropriately,
22 not in violation of any order for any improper reason.

23 So I don't think that's a concern, but I do
24 think there has been established a concern of -- a
25 legitimate concern of harassment in the community. I'm

1 talking things now of employment consequences, children
2 being -- having adverse consequences at school, people
3 in the community, et cetera. I think that has been
4 established, and that is a fair legitimate concern.

5 This is not just a matter of being annoyed,
6 I mean, this -- slightly bothered. This is clearly
7 something where emotions run as high as, for example,
8 in the Mississippi case involving Bible reading in the
9 school, where plaintiffs want to proceed through
10 pseudonyms.

11 The Court also notes that the defendants
12 here, they're named as individuals but they're sued in
13 their official capacity. It is really agency action
14 and state -- or the policy of the agency, of the
15 official action of the agencies that are at issue here.

16 There is not prejudice to the defendants if
17 plaintiffs are allowed to proceed through the use of a
18 pseudonym. The Court finds that if there should be
19 such prejudice -- and honestly I haven't been able to
20 identify any, but if there would be some that could be
21 addressed through a protective order, through
22 particular discovery rules or regulations in this case
23 and is not so significant it would affect the outcome
24 of the Court's ruling on this order.

25 So there's essentially no risk or very

1 minimal and controllable risk of unfairness to the
2 defendants. There is, we're dealing with a suit
3 essentially against government action, not against a
4 private individual. There is a legitimate concern
5 regarding adverse consequences in the community.

6 The bottom line is the Court finds that the
7 -- this motion should be granted. So the plaintiffs
8 can't -- may proceed in this litigation through the use
9 of pseudonyms as they have up to this point.

10 The next order, or the next motion that I
11 want to take up, is the motion for the preliminary
12 injunction and/or also for the return of property. I
13 want to make certain findings of facts and conclusions
14 of law that go to this issue. The order will be
15 entered. At the conclusion of that, I will ask one
16 side to prepare a written order that will be E-filed
17 and will become the order in this case. Obviously, the
18 Court has reviewed this primarily and I think the
19 parties have tried it primarily as -- or at least the
20 plaintiffs have -- as a request for a preliminary
21 injunction. In the Court's view, Rathke versus
22 McFarland and related cases set out the factors to be
23 looked at by the Court.

24 First of all, the facts that are established
25 by the evidence, these are largely agreed to. There

1 haven't been a lot of really contested or disputed
2 facts, but I think some factual framework is necessary
3 for the order. And the Court finds the following is
4 established, either by agreement or from the evidence.
5 And that is that there was the seizure of the various
6 tax records and other things at the office of the
7 plaintiff, Amalia's Tax Service. This took place on
8 October 17th of last year. As to why this happened,
9 first of all, this was pursuant to a search warrant
10 that was issued by a judicial officer on affidavit. As
11 to why it happened, the facts are set out very well and
12 in detail in Judge Hartmann's order in the People
13 versus Gutierrez case. And also are set out with
14 sufficient adequacies in the affidavit which has been
15 received as an exhibit.

16 Just to briefly reiterate, Servando Trejo
17 was being investigated for possible crimes including
18 criminal impersonation and related crimes. It came to
19 the attention -- the attention of the investigators
20 that he had -- he had his taxes done at plaintiff's tax
21 service. Evidence was produced through Mr. Trejo that
22 not only he, but others who used that service, had
23 filed taxes using ITIN and possibly using Social
24 Security numbers that did not belong to Mr. Trejo, or
25 in the case of the others, did not belong to these

1 others. It was believed then by the officers seeking
2 the warrant that there was evidence to be found there
3 of identity theft, criminal impersonation and related
4 crimes.

5 So the search warrant was sought. The
6 affidavit was executed in front of the judicial
7 officer. The warrant was issued. The seizure took
8 place. There was a return. That is also an exhibit
9 reflecting what was seized. To summarize, there were
10 many, many boxes of materials, papers, et cetera,
11 files, approximately 5,000 tax files. There also were
12 computers, computer records, CDs, related electronics.
13 Much of this pertaining to the tax records of the
14 clients and customers of Ms. Cerrillo. But other
15 materials pertaining to her business operation and
16 pertaining to her as an individual, family records,
17 personal bank records, et cetera, et cetera. The
18 warrant sought specifically tax records for '06 -- or
19 authorized the seizure, would be more precise language,
20 of tax returns for '06 and '07, where the ITIN did not
21 match the W-2 or related employment information.

22 It also sought related computer materials
23 and equipment, so essentially all of these items as
24 reflected in the exhibits, the return, et cetera, were
25 seized. They were physically removed from the

1 premises. They were viewed. A significant portion of
2 -- the majority of these items were returned on October
3 23d, uncopied. The balance was returned but was
4 copied.

5 The ratio of uncopied material in terms of
6 files, to copied was about 3700 to 1300. So again,
7 some was reviewed, found not to come within the warrant
8 at all, returned; others, items were reviewed, copied
9 and then the originals returned.

10 The right that is involved is guaranteed by
11 the Fourth Amendment of the U.S. Constitution by
12 Article II Section 7 of the Colorado Constitution. All
13 individuals are to be free from unreasonable searches
14 and seizure. Obviously the issue presented here is,
15 was this an unreasonable search and seizure. Clearly
16 -- well, maybe it isn't 100 percent clear, but the
17 Court finds there was a search, there was a seizure.
18 The question is, is this reasonable.

19 The Court finds that there is a privacy
20 right that attaches to the various tax documents and
21 materials that are at issue here. I think that is
22 clear beyond any quarrel, and the Court finds it's very
23 clear.

24 These items are not privileged. They may
25 be, under certain circumstances, obtained for criminal

1 or other prosecutions. But they are accompanied by a
2 reasonable expectation of privacy. They are
3 confidential. They are -- generally people believe and
4 expect they will be held confidential. That is true
5 when they're in someone's own home; that is true when
6 they're at a preparer's office; that is true when
7 they're in the custody of the IRS. And section 6103,
8 6713 reflect this. Losavio versus Robb, Stone versus
9 State Farm, related Colorado cases that have been cited
10 by both sides, C.R.S. 39-21-113, all of this is clear
11 that there is an expectation of privacy here.

12 The information in the tax files of these
13 clients and customers included obviously tax records,
14 but also identification, things pertaining to
15 dissolution of marriage, medical records, other things
16 that we find on tax returns such as charitable
17 activities, et cetera, work activities, things related
18 to children or other dependents, immigration materials.
19 All of these things are essentially private and
20 confidential in the expectation of most people.

21 Additionally, as I said, there was -- what
22 was seized included personal information of Ms.
23 Cerrillo through the computer records, her own bank
24 records, her own personal business records, et cetera.

25 Also the Court finds, and both sides can

1 concede, and this is reflected in the affidavit for the
2 warrant, it is clear, Ms. Cerrillo is not suspected of
3 a crime. She was not the object of the investigation.
4 Rather one or more, some unknown number of her
5 customers, clients who were believed to be committing
6 identity theft or criminal impersonation or other
7 criminal acts, were the target of the warrant. She was
8 not.

9 This, in the Court's view, is an extremely
10 important fact and really is the focus of the
11 discussion in terms of the Fourth Amendment, and
12 whether this action was reasonable or not. The fact
13 that she was not herself the target removes this case
14 from the holding of many other cases where professional
15 offices that have been a target have been involved with
16 the search warrants and privacy issues such as a
17 lawyer's office or an accountant, or things of that
18 sort.

19 In those examples, typically the lawyer was
20 the person suspected or the accountant or whatever.
21 And that goes to issues of specificity, where the items
22 might be found, how specific the warrant is, et cetera.
23 It's a different kettle of fish where Ms. Cerrillo was
24 the target and they were looking for evidence of a
25 crime by her and they were specific as to what type of

1 crime, what type of evidence. It's not critical where
2 exactly that's specified. Is it in a red folder, a
3 blue folder, is it in a bank record, is it in
4 electronic form, is it in a checkbook, as long as there
5 is otherwise specificity. But here, the people that
6 were the targets of this and that were suspected of
7 criminal conduct were not Ms. Cerrillo, but her
8 customers, thousands of individuals.

9 So, again, we'll talk more about that in a
10 minute, but the Court finds that to be the case, finds
11 that that is both factually so, but also as a matter of
12 law that removes this case from the Roccaforte and the
13 analysis used in those cases. And finally as a factual
14 matter, the issue of the removal, return.

15 The Court finds, and I would characterize
16 this as a mixed finding of fact and law, but the Court
17 finds that that is a search. That is not some
18 preliminary or precursor activity or anything other
19 than a search. There could have been a search on the
20 premises. They could have removed the items as they
21 did and reviewed them elsewhere. Presumably they could
22 have looked at them in the yard or the driveway, but
23 regardless, it is a search. They were -- all the
24 materials were reviewed. They were evaluated, albeit
25 in some instances briefly, and they were searched.

1 The issues to be addressed regarding the
2 preliminary injunction are, again, set out in Rathke
3 versus McFarland. All counsel know what they are. I'm
4 not going to go through those cases again. We'll just
5 take these one by one.

6 Regarding the possibility or the probability
7 of immediate irreparable injury, the Court finds this
8 has been established. Clearly, there is a privacy
9 right. There is an ongoing violation, in the Court's
10 view of that, right through the execution of this
11 search.

12 The information, at least the part that has
13 been copied, is still in the possession of the
14 defendants. There was evidence of disclosures such as
15 to employers, et cetera. There is a continued risk of
16 this problem continuing to haunt the plaintiffs, and
17 the Court finds that the irreparable injury factor has
18 been established.

19 As far as the reasonable possibility of success
20 on the merits, of all these factors, I would
21 characterize this as the critical factor. If this does
22 not exist, the others don't really matter, but the
23 Court finds that it does exist, there is a reasonable
24 probability of success on the part of the plaintiffs on
25 the merits of their claim for injunctive and

1 declaratory relief.

2 The search, the Court finds, was
3 unreasonably overbroad as to the 5,000 files. The
4 warrant itself was overbroad to the extent it dealt
5 with computer and related records. The Court finds, as
6 I've said, that the seizure, removal, review, return
7 process was a search, essentially to review
8 confidential records to see if they're covered. So you
9 may do a search, it is in fact a search, it's not
10 something preliminary to a search, it's the search.
11 And so essentially everything here was searched, far
12 beyond what was established, either authorized by the
13 warrant or for which there might have been probable
14 cause in the affidavit.

15 The Court finds that the warrant lacked
16 particularity as to what was to be seized; that it
17 failed to identify or establish probable cause for a
18 specific criminal act. It was in fact a barebones
19 general search. It was an exploratory search that was
20 authorized by this warrant, and it was improper.

21 The Court finds that at best, what happened
22 here was the affidavit established probable cause to
23 believe that somewhere in Ms. Cerrillo's records, in
24 the records of some customer, or customers -- we don't
25 know who and we don't know how many -- there would be

1 evidence of some crime by someone. There was not
2 probable cause as to a specific individual, as to
3 specific files, as to a specific crime and, again, this
4 gets back to the fact that Ms. Cerrillo was not the
5 target. These other individuals were. As to them, and
6 as to invading their rights of privacy and to be secure
7 under the amendment from an unreasonable search and
8 seizure, probable cause had to be established, not just
9 generally that something had happened and there would
10 be some evidence of it here, but probable cause to --
11 as to an individual that his or her rights could
12 legally and properly be invaded because of the evidence
13 going to establish probable cause that that person or
14 that person's records would substantiate the claim and
15 would be in violation of the law.

16 I want to refer specifically to the
17 supplemental brief of defendants, page 3, page 11,
18 where they talk about specificity. I think the fact
19 that Ms. Cerrillo was not a target, these other people
20 were, really rebuts that argument, and that's the key
21 issue that the Court has had to deal with.

22 This is a case where everybody has seemed to
23 want to come up with analogies and examples from
24 apartment houses to dormitories in college to all sorts
25 of things and some have been reasonable and some have

1 been a stretch in the Court's view.

2 I have my own analogy, and I'm only going to
3 offer one, but it illustrates the reasoning that is
4 behind the Court's finding here. And this would be an
5 analogy having to do with my doctor and my doctor's
6 office and my medical records. I don't know why I came
7 up with this, it could have been anything, but maybe at
8 the time I was visiting my doctor, at the time we had
9 this hearing. But in any event, in my example, I have
10 a physician and he has my medical records. They are
11 confidential, not privileged, but generally expected to
12 be confidential and private.

13 Assume that some other individual has a drug
14 problem and as a part of that drug problem, possesses,
15 uses and deals with controlled substances and he visits
16 my doctor. He makes that fact known to my doctor. It
17 is reflected in the records of this individual, and
18 furthermore, there are others like him and he knows
19 that and my doctor knows that, and all of this is
20 established in some discussion or interrogation with
21 law enforcement. We know at that point that my
22 doctor's records would reflect some evidence of drug
23 misconduct by some people. Would a search warrant be
24 properly issued to review every single record,
25 including mine, to see if there is evidence of my or

1 other people's violation of the drug laws? I think the
2 answer is no, there's no probable cause as to me.
3 There's no probable cause as to the next person.

4 What if the search warrant issued and only
5 addressed the medical records of those who did have a
6 drug problem and the officer executing the warrant
7 reviewed all the records to ascertain which fell within
8 that category, which did not, looked at my records and
9 see whether there's a reference to a drug problem in my
10 medical records? The answer again is no. That is a
11 search in the Court's view.

12 And I think what is on point is the case of
13 Doe versus Broadrick involving the methadone clinic. I
14 think that is more or less what happened here. That is
15 not a proper search.

16 So the Court finds for all those --
17 consistent with the constitution, the Court finds for
18 all those reasons that there is a reasonable
19 probability of success on the merits.

20 There is, in the Court's view, no adequate
21 remedy at law. Rule 41, first of all, is equitable.
22 Secondly, suppression is not an issue for individuals
23 who don't face criminal prosecution. It might be for
24 those who do, but many, or most of those people don't.

25 But what they seek is return of these items,

1 not suppression of evidence. Damages certainly are not
2 adequate. Rule 41 doesn't address the situation where
3 private information is copied and retained, possessed
4 and known by people who shouldn't possess and know it.

5 There may be future violations, absent an
6 order. So, again, there's no adequate remedy at law.
7 In terms of balancing the equities, there is little
8 public gain through this search. Arguably there is no
9 gain through information or evidence obtained through a
10 violation of the constitution, but overlooking that
11 issue, even so, there is little of public benefit
12 compared to the private harm to Ms. Cerrillo, to her
13 business, to her clients, to her clients' privacy in
14 terms of fear, in terms of invasion of confidential
15 private material.

16 Preserving the status quo. Obviously, the
17 status quo prior to the arising of this controversy was
18 that these materials were private and were not held by
19 the defendants.

20 And finally, the issues of public policy,
21 where much evidence was presented. The Court finds
22 that this factor favors plaintiffs as well.
23 Specifically that the IRS and federal government's tax
24 policy of allowing the ITIN to be used, or requiring
25 that it be used in some circumstances, requiring all

1 people with income to file returns regardless of other
2 status. That is a public policy and a significant
3 public policy, as is the protection of legitimate
4 privacy rights. And beyond the IRS issue, the overall
5 issue of the confidentiality of tax records, and things
6 in the possession of tax preparers.

7 The public policy issues here, in the
8 Court's view, strongly favor the plaintiffs and not the
9 defendants.

10 Now, there's been a lot of briefing, a lot
11 of argument, a lot of evidence. We could go on at
12 great length, but I think essentially, I have covered
13 the things that I think are important to be covered.
14 So I'm not going to go back and address every single
15 point, every argument, et cetera, beyond what I've said
16 already.

17 The Court finds that the preliminary
18 injunction should be granted. The plaintiffs have met
19 their burden of proof as to that issue for the reasons
20 stated, so it is granted, specifically prohibiting
21 further searches consistent with this Court's ruling on
22 this issue, prohibiting further disclosures of
23 materials obtained through the search on the 17th of
24 October. The Court further, in this preliminary
25 injunction, will direct that any information,

1 documents, materials, et cetera, remaining in the
2 possession of defendants, whether original -- and
3 actually I believe there would be no original ones --
4 but also copies -- and I do know there may be copied
5 materials -- that that would be destroyed or returned
6 to plaintiffs, one or the other, within seven days of
7 today's date.

8 The intent of this order is that at the end
9 of seven days there is nothing in whatever form or
10 nature derived from this search that remains in the
11 possession of defendants.

12 The Court also directs that the materials in
13 the possession of the clerk pursuant to the interim
14 order may be returned to the plaintiffs. Plaintiffs'
15 counsel should communicate with the clerk -- the
16 District Court Clerk, and arrange the details of that,
17 but these materials may be returned.

18 The interim order that was entered, to the
19 extent it's consistent with this ruling, it's continued
20 in effect.

21 What I don't think is properly done, is I
22 don't think this Court can prohibit any grand jury
23 activity and certainly it appeared that the interim
24 order very broadly prohibited grand jury activity that
25 might relate to the materials that have been seized. I

1 think that the more appropriate and legally correct
2 order is that the grand jury may proceed as it deems
3 appropriate and any indictments handed up may be
4 addressed obviously through due process of law;
5 however, information, materials, et cetera, gleaned
6 through this search may not be used or presented to the
7 grand jury.

8 The same is the case with the arrest
9 warrants. If an arrest warrant now exists, it may be
10 executed, and the individuals involved obviously retain
11 their rights under the law and that issue may be
12 pursued as appropriate through the courts, but no
13 warrant may be sought from this point, using
14 information derived from this search.

15 Related to this, tangentially at least,
16 would be that defendants should file their answer
17 within 20 days. Discovery can commence immediately.
18 The Court sees no reason why that should not happen if
19 indeed it has not happened, but it certainly is
20 authorized to commence.

21 Then the final issue would be the question
22 of certification of the class under Rule 23,
23 specifically 23(b)(2). This issue has given me a lot
24 of difficulty because I have a concern and a problem
25 that really I don't believe has been briefed or argued

1 by either side. And it is this: First of all, the
2 Court finds that the criteria of 23(a) have been
3 established here. Clearly it's impractical to join
4 5,000 people, there's commonalty, there's typicality,
5 there is certainly adequacy of representation. The
6 23(b)(2) criterion I think also exists. The possible
7 exception would be Ms. Cerrillo. But the way the class
8 is worded, the class is her customers, not Ms. Cerrillo
9 herself. And the defendants have acted in a uniform
10 fashion towards all those individuals, in the Court's
11 view, in conducting a search. I understand some may
12 have been prosecuted, some have not. Some had this
13 ITIN mismatch, some did not. But in every instance
14 there was a search the Court finds.

15 What gives me a problem with this is that
16 unlike many cases where a class certification is
17 sought, there already is a representative of this class
18 here and this person is a plaintiff and this is Ms.
19 Cerrillo. Ms. Cerrillo brought this action for herself
20 because of her own documentation that was taken and her
21 own business that was searched, and she certainly had
22 standing to assert her own rights, but she also brought
23 this action as a fiduciary addressing the rights of all
24 of her customers.

25 The issue she raised was the seizure and was

1 it proper or not, of the tax files of all of her
2 customers. The class proposed is her customers who
3 have tax files that are involved in this. She has a
4 fiduciary duty to her clients. She was the custodian
5 of these records and she brought this action.

6 If she prevails in this action, the rights
7 of each and every one of her clients, certainly as to
8 privacy, et cetera, would be vindicated. If she did
9 not prevail, there would be no reason to think that
10 someone else representing this class would prevail if
11 they had brought the action instead of her. She
12 stands, in a way, in the shoes of all these people,
13 representing all of them, because she was the custodian
14 of the records.

15 For that reason, the Court is having great
16 difficulty perceiving the reason for class
17 certification. Why that would need to happen doesn't
18 seem obvious when the custodian of all of these records
19 is a named plaintiff, participating in this litigation.

20 The case law is clear that certifying
21 classes is in the discretion of the Court. I've made
22 the findings regarding the specific factors of 23(a),
23 and (b)(2), but beyond that, I think the major
24 impediment here to my being willing to certify the
25 class is I just view it as unnecessary, as long as Ms.

1 Cerrillo is a plaintiff, every customer has -- of hers
2 has a person advocating for their privacy interests.

3 That is, in essence, a class, and she is the
4 representative. I hope I've made that clear. I feel
5 like I'm sort of repeating myself, but that's the
6 concern. And so based on that, the motion for class
7 certificate is denied.

8 Now, I'm going to stop at this point and ask
9 counsel for the plaintiff -- to me, and I think to
10 everybody, the key issue here is the issue of the
11 preliminary injunction. As to that, I'm going to ask
12 plaintiffs' counsel to prepare the order to be
13 submitted.

14 And, again, I've tried to avoid going
15 through every single fact that has been argued, et
16 cetera. I don't know the findings are needed on
17 everything. Findings are needed where they are
18 sufficient, but -- so let me just ask if there's
19 anything that I've left out, anything that you think I
20 need to clarify, and I don't know who specifically is
21 going to do the order but whoever it is, let me know
22 and tell me if there's something I should go into more
23 fully.

24 MR. NEUREITER: Your Honor, if I can take a
25 minute to consult with my co-counsel.

1 THE COURT: That would be fine.

2 MR. NEUREITER: Your Honor, Reid Neureiter
3 on behalf of Ms. Cerrillo and the plaintiffs.

4 The one issue we did have a question about,
5 and it relates to the class certification which I
6 understand you denied. The reason why the motion for
7 class certification was brought was recognizing that
8 Ms. Cerrillo had a strong interest herself in
9 protecting her own privacy interests. There was some
10 concern that the defendants might raise the issue that
11 she didn't have the Fourth Amendment standing to assert
12 the privacy interest of the individuals.

13 And I guess the one issue of clarification
14 is, in your findings, relating to her fiduciary
15 obligation to her client. If you have found that she
16 has, and if you are finding explicitly she does in fact
17 have the standing to assert the privacy interest for
18 individuals, that's the one area that raises a little
19 concern for us on that question.

20 THE COURT: Well, I am so finding to this
21 extent. I don't know that I could properly find that
22 as a fiduciary she is obligated to bring this action.
23 In fact, she might be. I'm just not sure of that, but
24 she certainly has standing and has the right to bring
25 it, and it's a prudent responsible act for her to bring

1 it, if she believes, No. 1, these people are her
2 customers, and No. 2, this material, et cetera, is
3 confidential, as she clearly believes. So yes, she
4 does have that standing, and that's the very reason I'm
5 finding that it's kind of redundant or superfluous to
6 certify a class.

7 MR. NEUREITER: Thank you, Your Honor.

8 THE COURT: Was there anything else?

9 MR. NEUREITER: No, Your Honor. And in
10 terms of the order, with the preliminary order, we
11 didn't recite the facts. We stated for the reasons
12 stated on the record.

13 THE COURT: I think that's fine. You can
14 kill a lot of trees reciting all these things. It's on
15 the record. It's there for anybody to review,
16 appellate court, whoever. I think that's fine.

17 MR. NEUREITER: There was one issue that
18 caused some dispute with the defendants in the first
19 order, and that we used the word in the first order,
20 "the fruits," "fruits of the search" could not be used.
21 And I think in that context it was for investigation.
22 And here Your Honor has given a directive there should
23 not be -- any of the materials that were seized
24 shouldn't have been used in grand jury investigation or
25 warrants issued based on that. I assume that the

1 fruits and anything generated down the chain that
2 originally started with Ms. Cerrillo, that too is
3 covered by your order, that all the fruits of the
4 search should not be used in any further contact.

5 THE COURT: What I would want would be all
6 sides to -- if this should become an issue in some
7 case, say a criminal prosecution, I would want all
8 sides to have a chance to litigate that issue. I mean,
9 how attenuated is it when you say it's derived from?
10 Are there other issues like inevitable discovery and so
11 forth?

12 I don't know that I want to expand or vary
13 what I've said already. I want all the materials, and
14 I don't care what form they're in, I don't, you know,
15 that's not an issue, but I don't want to speculate what
16 else might exist because of the search. For example,
17 if there was a questioning of some individual and a
18 statement made, I'm not automatically ruling that that
19 is suppressed or has to be destroyed. I think that's
20 for another day if it does exist in another case and it
21 has to be litigated. I'll stick with what I said,
22 which is materials.

23 Let me ask the defendants the same question.
24 Questions? Issues left out? Things to be clarified?

25 MS. HOGAN: Yes, Your Honor, if I may. Lisa

1 Hogan appearing on behalf of Kenneth Buck, Weld County
2 District Attorney.

3 I have a couple of questions relating to
4 timing.

5 First of all, given the fact this is a
6 preliminary injunction, the fact that the Court is
7 ordering the return of everything as opposed to what
8 the interim ruling had been, it was simply out of my
9 client's hands and in the Court's hands. I guess the
10 preliminary nature of the injunction sort of causes me
11 concern, that if --

12 THE COURT: Okay. I certainly understand
13 the concern. I see where you're coming from. I'd be
14 very foolish if I didn't. But I think what should
15 happen here is this material should be returned or
16 destroyed, and so, I mean, there was an interim order
17 it was held by the clerk. We're past that stage and so
18 I'm not going to change the order.

19 MS. HOGAN: Could we get some clarification
20 on when the seven days begin to run? From today?

21 THE COURT: Unless you can give me a good
22 reason to change this, it would be from right now.

23 MS. HOGAN: Okay. From today.

24 THE COURT: I'm not trying to be
25 unreasonable. Obviously people leave the court all the

1 time and say, What's he saying? Of course he's
2 unreasonable. I'm not trying to arbitrarily pick a
3 number of days and cause somebody a problem. If ten
4 would be more appropriate for some mechanical reason I
5 haven't thought of, obviously tell me. But the point
6 is I want this done quickly.

7 MS. HOGAN: Okay. So we'll notify the Court
8 if there's going to be an issue.

9 THE COURT: I'm available on very short
10 notice if we need a telephone conference or whatever, I
11 can certainly do that.

12 MS. HOGAN: For the record, I would like to
13 move for a stay for the enforcement of the order for
14 appellate purposes.

15 THE COURT: Okay.

16 MS. HOGAN: And with regard to pending
17 criminal cases, Your Honor, is your order designed to
18 affect those as well where they're -- the cases are
19 already in process?

20 THE COURT: I don't think that's appropriate
21 for me to do that. Now, I assume there will be
22 litigation in those cases as to what may or may not be
23 used, et cetera, but, no, I'm not purporting to affect
24 the criminal processes of the whole judicial district
25 and what could be many, many cases.

1 MS. HOGAN: Okay.

2 THE COURT: The defendants' motion for stay
3 is denied.

4 And is there anything else from any counsel?

5 MS. HOGAN: Wait, wait, Your Honor. I
6 apologize. I'm sorry.

7 MR. BROUGHAM: I think for the record, I've
8 just conferred with my client in terms of the
9 compliance with your seven-day order. From the
10 sheriff's point of view, that's been complied with and
11 it should not be an issue.

12 THE COURT: Okay. Fine. I wasn't trying to
13 cut anybody off. Is there anything else? Other
14 matters we should take up? We'll be in recess.

15 (The court was in recess.)

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REPORTER'S TRANSCRIPT

The above and foregoing is a true and accurate transcription of my Stenographic notes taken in my capacity as Official Reporter, Weld County District Court on the date above set forth.

Dated at Greeley, Colorado, this 14th day of April, 2009.

Julie A. Rocha
Certified Shorthand Reporter
Registered Professional Reporter