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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

NO. CR. S-10-061 LKK

Plaintiff,

v.

O R D E R

FREDERICK SCOTT SALYER,

Defendant.

In 2007 and 2008 the government sought, and this court granted, authority to wiretap two phones used by Randall Rahal in connection with its criminal investigation of Rahal, defendant Frederick Scott Salyer and others. Defendant Salyer seeks to suppress the fruits of these wiretaps.¹ He asserts that the

¹ Salyer is an "aggrieved person" with standing to seek the suppression of captured conversations to which he was a party, even though the wiretaps were placed on the phones of Randal Rahal in New Jersey, and not on Salyer's phones or premises. See 18 U.S.C. § 2518(10)(a) (any "aggrieved person" may move "to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom"); Alderman v. U.S., 394 U.S. 165, 176 & n.9 (1969) (a person is "aggrieved" with regard

1 wiretaps were not necessary, and that the affidavits submitted in
2 support of the wiretaps contained falsehoods and omissions.

3 The court finds that the affidavits submitted in support of
4 the wiretap applications adequately explained the necessity for the
5 wiretaps, and that the omissions and any arguably false statements
6 in the affidavits were not material. Accordingly, and for the
7 reasons set forth below, the motion will be denied.

8 **I. THE GOVERNMENT SEEKS WIRETAP AUTHORITY**

9 On June 4, 2007, the government sought the first wiretap of
10 two phones used by Randall Rahal. Artley Aff. (Dkt. No. 166-1)
11 (June 4, 2007) (the first affidavit). The government sought a 30-
12 day extension on July 5, 2007 (Dkt. No. 168-3) (the second
13 affidavit). It sought a second wiretap on February 21, 2008 (Dkt.
14 No. 165-10) (the third affidavit), and an extension of that one on
15 March 25, 2008 (Dkt. No. 164-5) (the fourth affidavit).

16 Although Rahal was asserted to be the owner of Intramark in
17 New Jersey, the government also asserted through these affidavits,
18 that Rahal "works on behalf of, and may be part owner of, SK Foods"
19 (166-1 ¶ 6).² It further asserted that: (i) Rahal "and others at
20 SK Foods" were bribing the purchasing managers at various companies
21 to buy from SK Foods rather than from the competition (166-1 ¶ 6);

22 _____
23 to "unlawfully overheard conversations of a petitioner himself or
24 conversations occurring on his premises"); Government Opposition
25 at 16 (Dkt. No. 193 at 21) ("The government concedes that the
26 defendant has standing to suppress any oral or wire communication
to which he was a party.")

² Generally, this order cites only the first affidavit where
the referenced material occurs.

1 (ii) Rahal "and others at SK Foods" were engaged in price fixing
2 with two competitors of SK Foods (166-1 ¶ 7; 164-5 ¶ 7); and that
3 (iii) Rahal "and some of the other individuals at SK Foods" were
4 selling adulterated food to its customers (166-1 ¶ 7).

5 Eight of the original targets, including Rahal, eventually
6 pled guilty after the last of the wiretaps was completed, with five
7 of the targets signing cooperation agreements with the government.
8 Rahal was the first of the targets to sign a cooperation agreement,
9 eight (8) months after the last wiretap authorization had expired.

10 Five (5) targets entered guilty pleas and agreed to cooperate:
11 (i) Randall Rahal (Intramark);³ (ii) Jennifer Lou Dahlman (SK
12 Foods);⁴ Alan Scott Huey (SK Foods);⁵ (iii) Jeffrey Sherman Beasley
13 (SK Foods);⁶ and (iv) James Richard Wahl, Jr. (Frito Lay).⁷ Three

14 (3) targets pled guilty without cooperation agreements:
15 (v) RobertC. Turner, Jr. (B&G Foods);⁸ (vi) Robert Watson (Kraft

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19 ³ U.S. v. Rahal, 2:08-Cr-566-LKK (Dkt. No. 7) (December 16, 2008).

20 ⁴ U.S. v. Dahlman, 2:09-Cr-62-LKK (Dkt. No. 7) (February 18, 2009).

21
22 ⁵ U.S. v. Huey, 2:09-Cr-468-LKK (Dkt. No. 3) (November 4, 2009).

23 ⁶ U.S. v. Beasley, 2:09-Cr-351-LKK (Dkt. No. 5) (August 25, 2009).

24
25 ⁷ U.S. v. Wahl, 2:09-Cr-40-LKK (Dkt. No. 3) (January 27, 2009).

26 ⁸ U.S. v. Turner, 2:09-Cr-145-LKK (Dkt. No. 9) (May 5, 2009).

1 Foods);⁹ and (vii) Michael Chavez (Safeway).¹⁰

2 The purpose of the wiretap request was said to be to gather
3 all pertinent information about the alleged bribes, price-fixing
4 and the sale of adulterated food products (166-1 ¶¶ 21; 165-10 ¶
5 24).¹¹ Specifically, the government wanted to corroborate
6 information about the targets engaging in the various alleged
7 activities, identify others at SK Foods and elsewhere who were
8 involved in the activity or had knowledge, identify other phones
9 used in criminal activity, identify the methods for covering up the
10 criminal activity, discover what happened to the proceeds of the
11 bribes and find new members of the conspiracy (165-10 ¶ 24).

12 In explaining the need for the wiretaps, the government set
13 forth the traditional investigative methods it had already
14 employed, and the reasons it asserted those means were insufficient

15 _____
16 ⁹ U.S. v. Watson, 2:09-Cr-35-LKK (Dkt. No. 7) (January 27,
2009).

17 ¹⁰ U.S. v. Chavez, 2:10-Cr-2-LKK (Dkt. No. 7) (January 20,
18 2010). Defendant mentions Steven James King, who also pled guilty.
19 U.S. v. King, 2:10-Cr-59-LKK (Dkt. No. 3) (February 18, 2010).
However, King was never identified in the affidavits as a target.

20 ¹¹ In addition, the third affidavit asserted that SK Foods was
21 engaged in a "bill and hold" fraud against its customers and its
22 creditors, in which customers paid extra to have SK Foods set their
23 product aside until they were ready to receive delivery, and SK
24 Foods used the set-aside product as assets in getting credit
25 (165-10 ¶ 9). But in fact, the affidavit asserts, SK Foods was not
26 holding the product aside (164-10 ¶ 9). Instead, Salyer and his
confederates are asserted to have raided other customers' orders
to get enough product to ship to the "bill and hold" customers
(164-5 ¶ 9). However, there is no reference to the "bill and hold"
fraud in the "goals of the investigation" section, or in the
"necessity" section, nor is any connection with Rahal's phone
alleged. Accordingly, those allegations will not be considered in
reviewing the propriety of the wiretaps.

1 to meet its investigative goals. The affidavits also explained why
2 the government had not used other traditional investigative
3 methods.

4 **II. STANDARD FOR SUPPRESSING WIRETAP EVIDENCE**

5 The federal wiretap statute provides:

6 Whenever any wire or oral communication has been intercepted,
7 no part of the contents of such communication and no evidence
8 derived therefrom may be received in evidence in any trial
9 ... if the disclosure of that information would be in
10 violation of this chapter.

11 18 U.S.C. § 2515; U.S. v. Donovan, 429 U.S. 413, 432 (1977). The
12 statute further provides for the suppression of wiretap evidence
13 if "the communication was unlawfully intercepted." 18 U.S.C.
14 § 2518(10)(a)(i); Donovan, 429 U.S. at 432. A communication was
15 "unlawfully intercepted" if it was obtained in violation of
16 Section 2518:

17 The words "unlawfully intercepted" ... require suppression
18 where there is failure to satisfy any of those statutory
19 requirements that directly and substantially implement the
20 congressional intention to limit the use of intercept
21 procedures to those situations clearly calling for the
22 employment of this extraordinary investigative device.

23 U.S. v. Giordano, 416 U.S. 505, 527-28 (1974).

24 Defendant asserts that the wiretaps were obtained in violation
25 of 18 U.S.C. § 2518(1)(c), which requires that the application for
26 wiretap contain "a full and complete statement as to whether or not

1 other investigative procedures have been tried and failed or why
2 they reasonably appear to be unlikely to succeed if tried or to be
3 too dangerous." This provision, together with 18 U.S.C. §
4 2518(3)(c),¹² constitutes the "necessity" requirement, which must
5 be satisfied in order for the government to overcome "the statutory
6 presumption against granting a wiretap application." U.S. v.
7 Ippolito, 774 F.2d 1482, 1485-86 (9th Cir. 1985); United States v.
8 Gonzalez, Inc., 412 F.3d 1102, 1112 (9th Cir.2005) ("To obtain a
9 wiretap, the government must overcome the statutory presumption
10 against this intrusive investigative method by proving
11 necessity").¹³

12 Pursuant to the necessity requirement, the government must
13 show that "the normal investigative techniques employing a normal
14 amount of resources have failed to make the case" against the
15 targets "within a reasonable period of time." U.S. v. Spagnuolo,
16 549 F.2d 705, 709 (9th Cir. 1977). Complete failure of those other
17 techniques is not required; rather they "need only to have reached
18 a stage where further use cannot reasonably be required."
19 Spagnuolo, 549 F.2d at 710 n.1.¹⁴ Nevertheless, the government
20 cannot "ignore avenues of investigation that appear both fruitful

21
22 ¹² After reviewing the affidavit the court may issue the
23 wiretap order ex parte if it determines that "... normal
24 investigative procedures have been tried and have failed or
25 reasonably appear to be unlikely to succeed if tried" 18
26 U.S.C. § 2518(3)(c).

¹³ As amended, 437 F.3d 854 (2006).

¹⁴ Citing U.S. v. Sandoval, 550 F.2d 427 (9th Cir. 1976),
cert. denied, 434 U.S. 879 (1977).

1 and cost-effective," lest it be able "to secure a wiretap in every
2 case, even where a normal strategy would be likely to achieve the
3 same result without resort to the serious intrusion that a wiretap
4 necessarily entails." Ippolito, 774 F.2d at 1486.

5 The government's showing of "necessity" is not defeated
6 because it has already gathered "some evidence" against the
7 targets. U.S. v. Decoud, 456 F.3d 996, 1007 (9th Cir. 2006), cert.
8 denied, 551 U.S. 1116 (2007). Rather, necessity may persist where
9 the government still needs "to 'develop an effective case'" against
10 the targets of the investigation, that is, "'evidence of guilt
11 beyond a reasonable doubt.'" Decoud, 456 F.3d at 1007.¹⁵
12 Defendant correctly points out that boilerplate allegations in the
13 affidavit will not suffice, citing U.S. v. Kerrigan, 514 F.2d 35,
14 38 (9th Cir.) (per curiam) (denying motion to suppress wiretap
15 evidence, even though the supporting affidavit was "marginal"),
16 cert. denied 423 U.S. 924 (1975).

17 Overall, the court applies a "'common sense approach'" in
18 which it applies "a standard of reasonableness to evaluate the
19 government's good faith effort to use alternative investigative
20 means or its failure to do so" U.S. v. Blackmon, 273 F.3d
21 1204, 1207 (9th Cir. 2001).

22 **III. ARGUMENTS**

23 Because defendant argues that the government failed to make
24 the requisite showing of "necessity," the court focuses its

25 ¹⁵ Quoting U.S. v. Brone, 792 F.2d 1504, 1506 (9th Cir. 2002),
26 and U.S. v. McGuire, 307 F.3d 1192, 1198-99 (9th Cir. 2002).

1 attention on those portions of the affidavits supporting the
2 wiretap applications. Defendant does not challenge the showing of
3 "probable cause" except as part of his defunct "fruit of the
4 poisonous tree" argument.¹⁶ Because defendant asserts that the
5 necessity showing was tainted by lies and material omissions, the
6 court takes that up in Part B.

7 **A. Necessity.**

8 **1. Defendant's Argument: The government already had**
9 **enough evidence.**

10 Defendant argues that the government already had so much
11 evidence, gathered from informant Manuel's seizures and recordings,
12 and prior wiretaps, that further wiretaps were not necessary.
13 Indeed, defendant essentially portrays the informant - an SK Foods
14 employee - as all-powerful, able to gather instantly any piece of
15 evidence regarding any target the government wanted, from anywhere.
16 In fact, the Artley affidavit fully and adequately explains why the
17 government sought wiretap evidence beyond that which it had already
18 gathered from the informant and elsewhere.

19 Specifically, the goals of the investigation were not simply
20 to gather evidence against defendant, SK Foods and SK Foods
21

22
23 ¹⁶ Defendant's "fruit of the poisonous tree" argument, based
24 upon his assertion that the wiretaps are the fruit of the allegedly
25 illegal searches by the government's informant, is precluded by his
26 lack of standing to challenge those searches. See U.S. v. Reyes-Bosque, 596 F.3d 1017, 1031 (9th Cir.), cert. denied, 562 U.S. _____, 131 S. Ct. 249 (2010) ("Ramirez-Esqueda does not have standing to challenge this search, and therefore cannot make the 'fruit of the poisonous tree' argument").

1 employees.¹⁷ Rather, the investigation was looking for, among
2 other things: other purchasing agents, not associated with SK
3 Foods, who had received bribes from Rahal, and details about those
4 bribes, including what was purchased with them; other purchasing
5 agents, not associated with SK Foods, whom Rahal planned to bribe
6 or whom he had attempted to bribe; and other phone numbers used by
7 Rahal and those of his criminal associates, not necessarily
8 associated with SK Foods, whom he had spoken with (Dkt. No. 166-1
9 at ¶ 21).¹⁸

10 Defendant does not assert that the government had this
11 information, either through Manuel's seizures or recordings or
12 otherwise. Nor does defendant explain how the government could
13 have obtained such information through its informant, or through
14 means other than the requested wiretaps.

15 **2. Defendant's argument: The targets pled guilty**
16 **without much reliance on the wiretaps.**

17 Defendant argues that when the targets finally pled guilty,
18 most of the evidence used was gathered before the third affidavit

19 ¹⁷ Defendant's arguments would make more sense if the
20 investigation had been all about him and SK Foods and no one else.
21 But the indictment, the affidavits and the subsequent guilty pleas
22 by those not employed by SK Foods, disclose that the investigation
reached beyond defendant and his company.

23 ¹⁸ At oral argument, defendant asserted that the informant,
Manuel, held "the keys to the kingdom." The government answered
24 that it was Rahal who held the "keys to the kingdom," that is, to
the broader investigation into the activities of the purchasing
agents and other companies the government was investigating.
25 Rahal, not Manuel, was the broker who dealt the most with the non-
SK Foods purchasing agents, and allegedly paid the bribes to them,
26 according to the government.

1 was filed. Therefore, he argues, the government could have gotten
2 the targets to plead without the wiretap sought by that affidavit.

3 Defendant is arguing, unpersuasively, with the benefit of
4 hindsight. "Necessity exists if probable cause is established in
5 the affidavit according to the principles discussed above. It must
6 be shown to exist at the time application for the warrant is made,
7 and it is entirely irrelevant that hindsight shows the purposes of
8 the wiretap were not achieved." U.S. v. Martinez, 588 F.2d 1227,
9 1232 (9th Cir. 1978).

10 In any event, the court disagrees with defendant's hindsight
11 characterization of the usefulness of the wiretaps in obtaining
12 guilty pleas. In fact, "wiretapped calls [between Rahal and
13 Beasley] were played for Beasley at the 7/13/09 interview," and
14 Beasley then pled guilty, with a cooperation agreement, a month
15 later. See Golub Decl. Exh. B (Dkt. No. 394-2). A "[r]ecorded
16 call between Rahal and Huey was played during [Huey's] 9/2/09
17 interview," and Huey then pled guilty, with a cooperation
18 agreement, two months later. Id. A "[r]ecorded call between Rahal
19 and Salyer ... appears to have been played for Rahal during the
20 10/29/08 interview," and Rahal then pled guilty, with a cooperation
21 agreement, a month and half later. Id. Also, a wiretap was played
22 for Wahl after he pled guilty and agreed to cooperate. Id. The
23 fact that other defendants did not have wiretaps played before they
24 pled guilty - three of them with no cooperation agreements - does
25 not undermine the utility of the wiretaps.

26 In addition, the affidavits state that the government sought

1 the wiretaps to find other co-conspirators - those who might emerge
2 with the dawn of the new buying season around the time of the third
3 affidavit - not just the ones the government already had in its
4 sights.

5 **3. Defendant's Argument: The government failed to use**
6 **traditional investigative tools.**

7 Defendant argues that "Agent Artley could have, but failed to
8 take advantage of traditional investigative tools like search
9 warrants and subpoenas before seeking the first wiretap and
10 extension" (Dkt. No. 393 at 35).¹⁹ But Agent Artley's exhaustive
11 affidavits establish that he did take advantage of traditional
12 investigative tools: use of information supplied by a private
13 investigative firm; research on public databases; use of a
14 confidential informant - Manuel - including documents and recorded
15 conversations he provided; a search warrant (for the informant's
16 residence); analyses of bank, credit card and tax return records;
17 pen registers; discussions with FDA officials; analysis of
18 telephone subscriber records; surveillance; witness interviews; and

19
20 ¹⁹ Earlier, defendant's language implied that the government
21 did not bother to use any traditional investigative techniques,
22 "including physical surveillance, trash runs, interviews of
23 subjects/persons, undercover agents/informants, grand jury
24 subpoenas[,] search warrants, and telephone toll records/pen
25 registers," claiming that Agent Artley asserted that they "would
26 not avail him." Motion To Suppress at 25 (Dkt. No. 156 at 31)
(emphasis in text). In fact, Agent Artley's affidavits assert that
he used all of those traditional methods, other than grand jury
subpoenas, but that they were not sufficient (although he did not
use search warrants after the investigation into the informant was
completed, and he conducted witness interviews only of persons
other than SK Foods employees).

1 trash runs.

2 Defendant challenges the government's assertion that the
3 surveillance was not effective, asserting that the affidavits
4 characterize the surveillance results "in conclusory fashion" (Dkt.
5 No. 156 at 25). There is nothing "conclusory" about the
6 government's affidavits regarding surveillance. The affidavits
7 disclose when Rahal was put under surveillance, where, who was
8 present, what was the reason Rahal was there and how long the
9 surveillance lasted.²⁰ They further disclose that the surveillance
10 was insufficient because of the agent's inability "to overhear
11 conversations which took place in crowded public places." Although
12 the last assertion by Artley is the repetitive type that defendant
13 objects to in this case, it is entirely reasonable to repeat an
14 explanation that continues to be true despite the surveillance
15 efforts. This is, after all, not a drug conspiracy, where the
16 government could swoop in once the agents saw people meeting and
17 packages changing hands. In this case Rahal and the others under
18 surveillance would be expected to attend conferences together and

19
20 ²⁰ The four affidavits Agent Artley filed in support of the
21 wiretaps disclose several specific surveillance attempts on Randall
22 Rahal, but assert that they were unsuccessful in meeting the goals
23 of the investigation. See First Affidavit ¶ 102 (month-long
24 surveillance in January 2007 at Sacramento Convention Center) and
25 ¶ 103 (surveillance at Sheraton Hotel and restaurants in
26 Sacramento); Second Affidavit ¶ 99 (Monterey, CA area surveillance,
including SK Foods corporate offices); Third Affidavit ¶ 100
(January 17, 2008 surveillance in Monterey, CA area); Fourth
Affidavit ¶ 51 (week-long surveillance in February 2008 in San
Diego, CA area at a conference). Defendant has pointed to no case
in this Circuit that has identified this level of surveillance
activity as insufficient.

1 to talk with each other - entirely lawful conduct. Accordingly,
2 the surveillance apparently failed each time and in exactly the
3 same way. This is sufficient to establish that surveillance had
4 been tried and failed.

5 Defendant's argument that Artley should have used grand jury
6 subpoenas, even more search warrants,²¹ and interviews of SK Foods
7 employees, is without merit. Agent Artley adequately explained why
8 use of these techniques would not likely have been productive.²²

9 At the time the wiretaps were authorized, the court already knew
10 that these other investigative techniques could have been used
11 prior to the wiretaps, but it was convinced by the affidavits that
12 those techniques would not have been sufficient. Defendant simply
13 disagrees, without presenting any new facts to show that the court
14 was not fully informed.

15 Rather, defendant cites the success of the post-wiretap search
16 warrants as evidence that the government should have gotten them
17 before the wiretaps (Dkt. 393 at 29-31). This argument could
18 prevail only if defendant made a showing that the documents
19 retrieved pursuant to the search warrants would have obviated the
20 need for the wiretaps, had the search warrants been executed first.

21
22 ²¹ The federal investigators did use search warrants in its
investigation into the informant, Manuel. Dkt. No. 166-1 at ¶ 39.

23 ²² Indeed, this court is aware of no Ninth Circuit authority
24 that has denied a wiretap application for lack of grand jury
25 subpoenas, search warrants or certain witness interviews, in the
26 face of as thorough an investigation as is described in the Artley
affidavits. It simply is not necessary to employ every single
conceivable investigative technique, no matter how unlikely to
succeed, before seeking a wiretap.

1 Defendant has not done so. Defendant does set forth the breadth
2 of the search warrant applications. However, he fails to make any
3 showing that documents, computers, or other things retrieved from
4 the premises of SK Foods would have obtained the evidence the
5 government needed against Rahal in his dealings with co-
6 conspirators not associated with SK Foods. Nor is there any
7 showing of how those documents would identify new bribe recipients
8 Rahal may have identified in phone conversations. In fact, the
9 wiretaps were directed primarily at Rahal and those actual or
10 potential co-conspirators he spoke with over the phone, some of
11 whom were not associated with SK Foods. The search warrants, on
12 the other hand, were directed primarily at Rahal, SK Foods and SK
13 Foods personnel (although of course they could also produce
14 evidence of co-conspirators whose names happened to turn up in
15 those documents).

16 Even excluding the government's less persuasive, add-on
17 reason -- that it did not seek search warrants because it did not
18 know where to find the documents -- the reasons presented to the
19 issuing judge appear to be sound: subpoenas would produce more
20 Fifth Amendment invocations than evidence; interviews of SK Foods
21 employees would just alert the company that it was time to destroy
22 documents; search warrants are most effective when the (secret)
23 investigation is nearly over; and these methods would not produce
24 adequate evidence of the targets' state of mind.

25 ////

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1 **4. Defendant's Argument: The Wiretap Is a Fishing**
2 **Expedition.**

3 Defendant argues that the February 21, 2008 application for
4 a wiretap was just a "fishing expedition." He argues that there
5 was a "striking" lack of specificity, that the affidavit failed to
6 state what information is sought. And, he argues, the affidavit
7 failed to disclose a lack of evidence despite years of
8 investigation, including 60 days of wiretaps six months before.

9 I cannot agree. The government was clear about what it was
10 seeking - corroboration of information obtained by the informant
11 that Rahal was making incriminating statements over the phone, and
12 additional co-conspirators emerging with the start of the new
13 buying season. The informant was able to record conversations that
14 he initiated, but it appears that he was unable to record the
15 conversations when Rahal called the informant. The government
16 could not reasonably have based its case on the informant's
17 testimony about what Rahal had admitted, given the informant's
18 sordid history. It seems reasonable that the government wanted to
19 be able to present Rahals' admissions from his own mouth, rather
20 than as testimony from a seriously tainted informer.

21 Defendant says that the government "has dozens of consensual
22 recordings by mole Anthony Manuel, and had hundreds of telephone
23 calls intercepted from the wiretaps approved in the summer of
24 2007." Defendant's Suppl. Brief at 7 (Dkt. No. 393 at 11). That
25 may be, but it does not undermine the government's need to
26 intercept more of Rahal's conversations, especially in light of the

1 new buying season, with the possibility of new conspirators coming
2 to light.

3 **B. Alleged Falsehoods and Omissions.**

4 The crux of defendant's argument is that Agent Artley's
5 affidavits are undermined by falsehoods and omissions, and that a
6 Franks hearing²³ is necessary to determine their extent and impact.

7 **1. Defendant's Argument: The affidavits misrepresented**
8 **the effectiveness of the informant.**

9 Defendant asserts that Agent Artley's representations about
10 the effectiveness of the informant were "demonstrably false." The
11 court disagrees. In fact, defendant objects principally to
12 Artley's characterizations, not his simple up or down statements
13 of fact. For example, Agent Artley's affidavits state:

14 Although Witness # 1 [the informant, Manuel], is able to
15 provide significant amount of information regarding the
16 criminal activities of the targets, he does not have full
17 access to their face-to-face encounters or to the content of
18 their conversations over the phone.

19 Dkt. No. 166-1 ¶ 180. Defendant counters with different
20 characterizations, asserting that in fact, the informant had
21 "significant access to targets of the investigation," access to
22 "significant conversations," and the ability "to make recordings
23 at will" (Dkt. No. 441 at 6).

24 Defendant's blanket assertions about the informant's ability
25

26 ²³ Franks v. Delaware, 438 U.S. 154 (1978).

1 to make recordings, is belied by the affidavits. In explaining why
2 the informant was not sufficient to meet its investigative goals,
3 the affidavits identified several occasions in which the informant
4 spoke with Rahal by telephone but was not able to record the
5 conversation. See Dkt. No. 165-10 ¶¶ 36 (not able to record
6 January 10, 2008 call initiated by Rahal), 41 (not able to record
7 January 24, 2008 call initiated by Rahal), and 43 (not able to
8 record February 1, 2008 call apparently initiated by Rahal). See
9 also Dkt. No. 165-10 ¶ 39 (target Beasley tells informant about a
10 telephone conversation with Rahal to which the informant was not
11 a party).²⁴

12 Moreover, defendant's counter-characterizations, even accepted
13 as accurate, do not show that Artley's affidavits were false. To
14 the contrary, Artley's assertions are characterizations of the
15 informant's limitations, made in the context of the entire
16 affidavit, were reasonable, for the most part. In that context,
17 it can be seen that the affidavits disclose the information that
18 defendant says was withheld. Thus, the affidavits disclose that
19 the informant had access to Rahal and other Targets, that he
20 overheard conversations over the telephone, and that he made
21 recordings of targets. Artley's characterization of them however,
22 was that these leads were not sufficient, not they they were non-

23
24 ²⁴ It does appear, however, that Rahal could record phone
25 calls that he initiated, or some of them, as well as some face-to-
26 face meetings. See Dkt. No. 165-10 ¶¶ 38 (recorded January 11,
2008 call initiated by informant), and 40 (recorded January 24,
2008 face-to-face meeting).

1 existent. Artley's characterizations of the informant's ability
2 to "learn things," to overhear conversations, to record
3 conversations, and to meet face-to-face are similarly not put into
4 question by defendant.

5 Two of those characterizations, however, are worth discussing
6 separately. The government's affidavits assert that the
7 informant's assistance was limited by the scope of his employment
8 at SK Foods. Defendant asserted at oral argument, and the
9 government has never disputed, that in fact the informant rose to
10 the highest levels in the SK Foods executive suite, a fact that was
11 not disclosed in the affidavits. Thus, to the extent the
12 informant's assistance was limited, it was not likely limited by
13 his circumscribed job duties. Even if this was arguably a
14 falsehood (or an omission in that the change in his position at the
15 company was not disclosed), it is not material in the context of
16 the wiretap application. The affidavits fully explain that the
17 informant's assistance was limited for other reasons, including the
18 important fact that he did not have full access to non-SK Foods
19 targets. The material fact is that the informant's assistance was
20 limited, and the reasons for the limitation are set forth in the
21 affidavit. The government's use of the informant's "limited job
22 duties" as a repeated reason for the limitation is unfortunate, but
23 not material in this case.²⁵

24
25 ²⁵ The government's constant repetition - through all the
26 affidavits - of the informant's "limited" job duties, while
omitting any hint about the ever-increasing role the informant
apparently played in the company, does not represent affidavit

1 Second, the government asserted that it needed the wiretaps
2 because it did not know where every document was kept, information
3 it would need to obtain a search warrant.²⁶ That justification
4 does appear to be rather weak, since the informant, with his ever-
5 increasing job duties, could presumably have told them where the
6 documents were kept.²⁷ Omitting this assertion from the
7 affidavits, however, there remain very good reasons for authorizing
8 the wiretaps.²⁸

9
10 drafting at its best, however. In response to the court's query
11 about this repetition at oral argument, the government asserted
12 that its description of the informant's job duties was like
13 repeating that a sprinter was still not running fast "enough,"
14 despite the fact that his speed was increasing all the time. In
15 fact, the court believes that it is more properly analogized to a
16 repeated description of the sprinter as running just as slowly as
17 ever, despite his (undisclosed) ever-increasing speed. The court
18 entirely rejects, however, defendant's blanket attack on other
19 assertions repeated throughout the affidavits, and which defendant
20 describes as "forbidden boiler plate." These affidavits are not
21 presented as works of literature, and there is no reason for the
22 government to find different ways of stating facts that have not
23 changed over time.

24
25 ²⁶ Defendant also argues that the government already had the
26 evidence it needed that Rahal had paid bribes. In support, it
27 appears to argue a non-sequitur, saying that there was a piece of
28 evidence - a brokerage commission paid to Intramark - from which
29 a jury could infer that Rahal received a bribe. But the government
30 says it was looking for information that Rahal paid bribes to the
31 targets, not that he received one. (Although the government was
32 also looking for evidence that he received bribes from SK Foods.)

33
34 ²⁷ Also, the government presumably would search every place at
35 SK Foods for documents, not just places disclosed by the wiretaps.
36 The government does not assert that there were secret document
37 hiding places that were known only to the informant.

38
39 ²⁸ The law in this Circuit is that even if a falsehood or
40 material omission does find its way into a wiretap affidavit, that
41 fact alone is not enough to deny the wiretap or suppress the
42 evidence thus gathered. Rather, the falsehood or omission must be
43 material to the decision to authorize. Assuming this assertion was

1 **2. Defendant's Argument: The Artley Affidavit**
2 **suppressed evidence of the informant's credibility.**

3 Defendant asserts that the first affidavit depends upon the
4 credibility of the government's informant, Manuel, and that the
5 affidavit "suppressed evidence which demonstrated Manuel's lack of
6 credibility." Defendant's Memorandum in Support of Motion To
7 Suppress Fruits of Illegal Wiretaps at 39 (Dkt. No. 156 at 45).
8 In fact, as defendant acknowledges, the Artley Affidavit does
9 disclose the informant's sordid history and the problems with his
10 credibility.

11 The affidavit discloses that the informant engaged in a scheme
12 to defraud his former employer of \$1 million or more; that he faced
13 charges including mail and wire fraud and money laundering in
14 connection with that scheme; that the scheme lasted eight years;
15 that he set up fictitious (front) companies to receive the illegal
16 proceeds of the scheme; that he created fraudulent documentation;
17 that he engaged in self-dealing at his employer's expense; that he
18 engaged in a kick-back scheme; that if he did not cooperate with
19 the government in this case, he faced years in prison for the
20 scheme; and that he continued to take salary and bonuses from SK
21 Foods while informing on the company to the government. The
22 affidavit also discloses that the informant has prior arrests for

23 _____
24 false, it was not material. The court recognizes the theoretical
25 danger that this rule could encourage the insertion of falsehoods
26 anyway so long as there are sufficient true facts included. Given
the law of this Circuit, however, the court has no choice but to
trust that this will not happen.

1 battery and "corporal injury to spouse." In case the court did not
2 get the point, the affidavit spelled out the credibility problem
3 thus: (i) the informant continues "to cooperate with the government
4 in return for consideration on criminal charges to be filed against
5 him;" and (ii) the informant "stands to benefit from a prolonged
6 investigation in which we utilize his information and services
7 because, in addition to being at liberty, he will continue to earn
8 money (including increased bonuses for longer retention periods)
9 while employed at SK Foods."

10 The only "omitted" information, according to the defendant,
11 is that the informant "was taking proprietary and internal SK Foods
12 information and documents and giving them to Artley." Id. at 20
13 & 40 (Dkt. No. 156 at 26 & 46). But this accusation does not
14 comport with the facts then before me, the issuing judge. In fact,
15 the first affidavit discloses that the informant provided the FBI
16 agent, Artley, with company e-mails, "internal SK Foods inventory
17 documents," and a tomato paste label that he retrieved after it had
18 been "taken off of a bin at an SK Foods shipping location." First
19 Artley Affidavit (Dkt. No. 166-1) (June 4, 2007) ¶¶ 90 & 92. The
20 second affidavit discloses that the informant provided the FBI
21 agent with an "internal phone list." Second Artley Affidavit (Dkt.
22 No. 168-3) (July 5, 2007) ¶¶ 32, 53, 60, 63, 92 and 95. The third
23 affidavit also discloses that the informant provided the FBI agent

24 ////

25 ////

26 ////

1 with an "internal phone list"²⁹ and an "organizational chart."
2 Third Artley Affidavit (Dkt. No. 165-10) (February 21, 2008) ¶¶ 51,
3 54, 56, 63, 67, 69 and 72.³⁰

4 Thus, of the "documents, emails, labels, internal reports, and
5 food samples" that the informant was "tasked" with retrieving on
6 behalf of the FBI (see Dkt. 156 at 10), Artley's affidavits clearly
7 disclose all except the food samples.³¹ Defendant does not explain
8 why this omission is material, and the court does not find it to
9 be so.

10 It is true that the affidavits do not state that the retrieved
11 materials were "stolen" by the informant, thus purportedly
12 undermining the informant's credibility even further. But the
13 government is not required to adopt the defendant's litigation
14 position - that documents taken by an SK Foods employee in
15 connection with a government investigation into SK Foods and
16 others, are "stolen" documents. The government is entitled simply
17 to advise the court that the employee took the documents and turned
18

19 ²⁹ The affidavits do not disclose whether there is one
20 internal phone list, or more than one. The point however, is that
21 the disclosure of the internal list or lists is repeated throughout
22 the affidavits and is not hidden from the court or concealed.

23 ³⁰ The fourth affidavit does not appear to contain any
24 additional disclosures of documents taken by the informant and
25 provided to the FBI agent.

26 ³¹ The fact that the government did not provide the issuing
judge with an item and page count of the documents and materials
provided by the informant is not a material omission. The
government's description of things the informant did take does not
represent a statement that he took only those things and nothing
else.

1 them over to the government. It did so.³²

2 In short, the affidavits repeatedly disclosed the informant's
3 fraudulent conduct against his former employer, his kick-back and
4 money-laundering schemes, his arrests for assaulting his spouse,
5 and the rest of his sordid past. The credibility of such a person
6 simply is not further undermined by the fact that he took documents
7 from his employer as part of his cooperation with the government's
8 investigation.

9 **3. Defendant's Argument: The affidavits misrepresented**
10 **the informant's access to conversations with the**
11 **targets.**³³

12 Defendant argues that the informant "had significant access
13 to the target subjects who were ultimately prosecuted," Def.
14 Suppl. Brief at 9-10 (Dkt. No. 393 at 13-14), contrary to the
15 affidavit's statement that he "does not have full access to their
16 face-to-face encounters or to the content of their conversations
17 over the phone" (Dkt. No. 165-10 ¶ 113).

18 ³² In any event, the defendant's argument - including his
19 claim that the informant took documents he did not have access to
20 in the normal course of his duties - is in essence a re-play of its
21 argument that the evidence was taken by Manuel pursuant to illegal
22 warrantless searches, and should therefore be suppressed. The
23 court has already rejected that argument on standing grounds.

24 ³³ Defendant also says that agent Artley lied when he said the
25 informant was "not a party to significant conversations." Def.
26 Suppl. Brief at 13 (Dkt. No. 393 at 17). But this misreads
Artley's statement. The statement only says that there were
significant conversations to which the informant was not a party.
It does not indicate that the informant was a party to no
significant conversations. This is clear from the rest of the
affidavit, which details several significant conversations that
Rahal was a party to.

1 Defendant implies, without expressly saying so, that the
2 government hid from the court the fact that the informant continued
3 to make recordings of the targets - including Rahal - and presented
4 them to agent Artley. See Def. Suppl. Brief at 9 & 9 nn.5 & 6.
5 Actually, the affidavit discloses this fact. It reveals that the
6 informant taped calls he made to Rahal, and that he taped face-to-
7 face meetings. However, it also discloses that there were phone
8 calls the informant had with Rahal that the informant could not
9 record, namely, those that the informant did not initiate.

10 Also, the affidavits do not hide the fact that the informant
11 had significant access to the targets and to the contents of the
12 phone conversations. What the affidavits do say is that the
13 informant did not have full access to all the face-to-face
14 conversations of the targets, namely, those conversations to which
15 he was not a party. The affidavits clear up any ambiguity by
16 making clear that among the conversations the informant does not
17 have access to are those between Rahal and Salyer, and Rahal and
18 Beasley, and to which the informant was not a party. See Dkt.
19 No. 165-10 ¶ 114. And of great significance, as discussed above,
20 it was the wiretapped conversations that Manuel was not a party to
21 - between Rahal and Salyer, between Rahal and Beasley, and between
22 Rahal and Huey - that were played to the targets and preceded the
23 guilty pleas of Rahal, Beasley and Huey.

24 But the affidavit does not deny that the informant was a party
25 to other conversations with these targets. Also, he had access to
26 the "contents" of phone conversations because people told him about

1 them, but he did not necessarily hear all of them directly. And
2 as noted above, he is a tainted witness in any event.

3 Finally, the argument focuses on the informant's contacts with
4 targets other than Rahal, which is beside the point. The point of
5 the wiretaps is to get Rahal's admissions on tape, and those of his
6 co-conspirators, not just to gather more information about the
7 other targets. Thus, defendant focuses on the affidavits' omission
8 of any reference to conversations and recorded phone calls the
9 informant had with targets Coe, Wahl and De Lira, Def. Suppl. Brief
10 at 9-10 (Dkt. No. 393 at 13-14), but they are beside the point
11 because they are not recorded conversations with Rahal. The
12 omission of these conversations from the affidavit is not material,
13 because they have nothing to do with the need for a wiretap of
14 Rahal's phones.

15 **4. Defendant's Argument: The affidavits misrepresented**
16 **the scope of the informant's job.**

17 Defendant argues, Def. Suppl. Brief at 10-13 (Dkt. No. 393 at
18 14-17), that Artley deceived the issuing judge by stating that
19 Manuel's assistance was "limited by the scope of his employment
20 with SK" (Dkt. No. 165-10). In fact, defendant argues, the
21 informant's job duties were so expansive that "they touched upon
22 nearly all key aspects of SK Foods' business." Def. Suppl. Brief
23 at 10 (Dkt. No. 393 at 14). The government does not really engage
24 this argument (other than to say the informant's ability to seize
25 documents was disclosed), arguing that "nevertheless," the
26 affidavit sought a wiretap of Rahal's phones.

1 It seems fair to say that, as discussed earlier, the "limited"
2 scope assertion was not agent Artley's finest hour, and that he
3 simply repeated a phrase from the earlier affidavits. But it does
4 not matter here. It is true that the alleged breadth of the
5 informant's job duties is relevant to his access to SK Foods
6 documents, samples and employees, as defendant argues. But, no
7 matter how broad the scope of the informant's job duties, nor how
8 many times he was promoted, there is no showing that those duties
9 gave the informant any greater access to Rahal's phone
10 conversations to which he was not a party, as those conversations
11 are not SK Foods documents to which the informant would have access
12 through his job duties. And, his job duties did not create in him
13 the ability to record phone calls coming in from Rahal (as opposed
14 to those the informant initiated). Defendant simply makes no
15 connection between the "limited" scope assertion and the need for
16 the wiretap of Rahal's phones.

17 In short, the defendant is correct to point out that the
18 affidavit "omitted" the alleged facts of the informant's promotion,
19 and his ever-increasing ability to access SK Foods documents,
20 samples and other materials. But the omission is not material, as
21 those duties have nothing to do with the government's need to
22 record Rahal's phone conversations.³⁴

23
24 ³⁴ There is a nearly limitless number of things agent Artley
25 could have, but did not, include in his affidavit. The issue is
26 whether the omissions were relevant to the request for a wiretap
of Rahal's phones. The omissions complained of by the defendant
were not. Thus, defendant's complaint that the affidavits did not
disclose specific e-mails, instant messages and reports, see Dkt.

1 **5. Defendant's argument: The affidavit omitted**
2 **reference to the government's access to an**
3 **undisclosed "informant" - Gregory Wuttke.**

4 Defendant asserts that the government had another informant
5 that it failed to disclose - Gregory Wuttke, an employee of Morning
6 Star. The government says that Wuttke was not an "informant" at
7 all - a person the government gets information from and whom it
8 provides a benefit to, such as consideration in prosecution or
9 sentencing.³⁵ Defendant does not respond to this assertion and
10 continues to call Wuttke an "informant."

11 Defendant's assertion is beside the point however, because
12 there is nothing to indicate that Wuttke could provide the
13 information the government needed about Rahal and Rahal's co-
14 conspirators. Defendant asserts that Wuttke had contact with
15 Watson, and even recorded a conversation with him (Dkt. No. 164,
16 Exh. A-20). But there is no showing that he had any access to
17 Rahal, whose phones the government wanted to tap, or to those Rahal
18 was bribing, much less that he could somehow tape all of Rahal's
19 phone conversations, including those to which he was not a party.

20 **6. Defendant's Argument: The affidavit misrepresented**
21 **the informant's ability to record conversations.**

22 Defendant argues that Artley lied when he said that the
23

24 No. 156 at 27-28 & 36-39 (listing pieces of evidence not disclosed
25 in the affidavits), is of no moment.

26 ³⁵ The government acknowledges that Wuttke was a Confidential
Witness for the government, but denies that he was an "informant."

1 informant was limited in his ability to record conversations
2 without attracting attention because he was surrounded by others
3 in his office. Defendant's only support for this is that Manuel
4 did record many targets. But Artley does not assert that the
5 informant could not make any recordings, only that he was limited
6 in that ability. And the affidavit sets forth those circumstances,
7 most notably, those in which Rahal initiated the call.

8 Defendant further asserts that Artley neglected to disclose
9 that the informant "produced more than forty recordings of
10 conversations to Agent Artley prior to February 2008," and others
11 made even before the first wiretap. Def. Suppl. Brief at 15 (Dkt.
12 No. 393 at 19). This is not quite accurate. It is true that
13 Artley did not disclose the number of recordings the informant
14 made, but it does disclose that the informant made recordings with
15 Rahal before February 2008, and even before the first wiretap was
16 sought in June 2007, as well as after the first wiretap was
17 authorized. See Dkt. No. 166-1 ¶¶ 57 (first affidavit discloses
18 the informant's January 29, 2007 "recorded conversation" with Rahal
19 "at a food conference in Sacramento," which the informant recorded
20 "at the direction of the FBI," before the first wiretap was
21 sought), 58 (same; January 31, 2007 conversation); Dkt. No. 165-10
22 ¶ 45 (third affidavit discloses the informant's recording of Rahal
23 in person on February 4, 2008, after the first wiretap was
24 authorized).

25 ////

26 ////

1 **7. Defendant's Argument: The affidavits misrepresented**
2 **the informant's face time with Rahal.**

3 Defendant argues that Agent Artley lied because he said that
4 the informant "has little face-to-face time with Rahal and little
5 opportunity to get information out of him or to build rapport and
6 trust to do so." Def. Suppl. Brief at 15 (Dkt. No. 393 at 19).

7 In fact, the affidavit discloses that the informant had face-
8 to-face meetings with Rahal (at least one of which was recorded),
9 and numerous phone calls with Rahal, some of which were recorded.
10 However, the court could possibly get a false impression of the
11 informant's contacts with Rahal if it only read that one paragraph
12 (see Dkt. No. 165-10 ¶ 117). But the affidavit statements
13 preceding that paragraph make clear that the informant did have
14 face time with Rahal. In short, rather than being deceptive, this
15 paragraph appears to be a bit contradictory of the disclosures made
16 earlier in the affidavit showing that the informant did have face
17 time with Rahal.³⁶

18 Defendant also argues that Agent Artley lied because he states
19 that "Rahal does not even tell [the informant] when he is coming
20 to California." Def. Suppl. Brief at 15 (Dkt. No. 393 at 19).
21 There is nothing in defendant's papers to indicate that Artley's
22 statement is false. Defendant argues that the informant did have
23

24 ³⁶ Defendant also argues that Artley lied about the
25 informant's access to target Coe and others. Def. Suppl. Brief at
26 17-18 (Dkt. No. 393 at 21-22). But nothing in his argument
explains away the government's need for a wiretap on Rahal's
phones.

1 knowledge of Rahal's trips to California, but that does not dispute
2 the assertion that Rahal did not tell the informant when he was
3 traveling.

4 **8. Defendant's Argument: The affidavits misrepresented**
5 **the effectiveness of the government's surveillance.**

6 Defendant asserts that the government's surveillance
7 assertions are false, because the surveillance activity was not
8 "ineffectual" as claimed (Dkt. No. 156 at 25), and because the
9 "full scope of productive surveillance" was not disclosed (Dkt.
10 No. 156 at 49). But defendant makes no showing to support these
11 conclusory assertions. Defendant does not explain how the
12 surveillance was effective,³⁷ nor does he explain what was the
13 "full scope of productive surveillance" that was allegedly omitted
14 from the affidavits. In short, defendant makes no showing - other
15 than assertions in his brief - that would contradict the sworn
16 statements presented by Agent Artley in any way.

17 **8. Defendant's argument: The affidavits falsely**
18 **claimed the existence of "moldy" tomato paste.**

19 Defendant asserts that Artley lied when he asserted that there
20 was evidence that SK Foods was selling tomato paste that was
21 "moldy." But that is not an accurate representation of what is in
22 the affidavit. In fact, Artley states: "This re-labeled paste can
23

24 ³⁷ In any event, the defendant appears to be imposing the
25 wrong standard. The government need not show that the surveillance
26 was completely ineffective, only that it was insufficient to meet
the government's legitimate investigative goals, and to collect
evidence sufficient to prove guilt beyond a reasonable doubt.

1 be either moldy or not consistent with the customer's
2 specifications." Dkt. No. 165-10 ¶ 9 (emphasis added). The mold
3 report does show that two of the samples had mold, consistently
4 with Artley's statement, regardless of whether it met FDA mold
5 standards. In addition, it appears that two of the samples had an
6 overall score of "substandard," so there appears to be nothing
7 false about Artley's assertion that it was not "consistent with the
8 customer's specifications." Dkt. No. 165-9 at 4 & 5 ("Exh. A-29").
9 It simply is not a "lie" to say that it was "either moldy or not
10 consistent with the customer's specifications."

11 **IV. CONCLUSION**

12 Defendant has failed to show that the government was not
13 entitled to the wiretaps and extensions it sought.³⁸ Accordingly,
14 defendant's motion to suppress the wiretap evidence (Dkt. No. 154),
15 is **DENIED**.

16 IT IS SO ORDERED.

17 DATED: January 11, 2012.

18
19 
20 LAWRENCE K. KARLTON
21 SENIOR JUDGE
22 UNITED STATES DISTRICT COURT

23
24
25
26 ³⁸ The extent and impact of the alleged falsehoods and omissions in the government's affidavits may be determined from the face of the affidavits, as discussed above. As discussed above, most of the alleged falsehoods are not false, and the omissions are not material to the wiretap authorization decision. The arguably false inclusions in the affidavits - the scope of the informant's job duties, and the need to find out where SK Foods documents were located - were not material to the wiretap authorization decision. Accordingly, there is no basis for a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978).