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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH J. GIRAUDO, RAYMOND A. GRINSELL, KEVIN B. CULLINANE, JAMES F. APPENRODT, and ABRAHAM S. FARAG,

Defendants.

CASE NO. CR 14-00534 CRB

DEFENDANTS' NOTICE OF MOTION AND MOTION TO SUPPRESS EVIDENCE; MEMORANDUM OF POINTS AND AUTHORITIES

The Honorable Charles R. Breyer
Courtroom 6, 17th Floor
Date: January 21, 2016
Time: 10:00 am

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on January 21, 2016 at 10:00 am, and in future hearings at dates to be determined, in the courtroom of the Honorable Charles R. Breyer, Defendants JOSEPH J. GIRAUDO, RAYMOND A. GRINSELL, KEVIN B. CULLINANE, JAMES F. APPENRODT, and ABRAHAM S. FARAG will move the Court for an order suppressing evidence obtained from unlawful searches undertaken by agents from the Federal Bureau of Investigation between approximately December 2009 and September 2010, as well as all evidence derived from those unlawful searches.

This motion is based on the Fourth Amendment to the Constitution of the United States; Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.*; all relevant case law and statutory authority; the following memorandum of points and authorities; the attached Declaration of Ashley M. Bauer; any reply memorandum; supporting evidence; and any evidence taken and oral argument made at the motion hearing.

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I. SUMMARY OF ARGUMENT

In *Katz v. United States*, 389 U.S. 347, 351-52 (1967), the seminal case on modern Fourth Amendment interpretation, the Supreme Court affirmed the right of individuals to be free from warrantless government eavesdropping in places accessible to the public. Speaking in a public place does *not* mean that the individual has no reasonable expectation of privacy. *Id.* (public telephone booth); *Wesley v. WISN Division-Hearst Corp.*, 806 F. Supp. 812, 814 (E.D. Wis. 1992) ("[W]e do not have to assume that as soon as we leave our homes we enter an Orwellian world of ubiquitous hidden microphones."). A private communication in a public place qualifies as a protected "oral communication" under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* ("Title III"), and therefore may not be intercepted without judicial authorization.

Nevertheless, in this case, FBI agents planted electronic recording devices outside the 401 Marshall Street entrance to the San Mateo County courthouse—where judges, lawyers, and other citizens regularly engage in confidential and sometimes privileged communications—for the purpose of capturing private conversations that the Government hoped would prove the existence of a conspiracy. It is extremely unlikely that the Government could have obtained Title III authorization to do this, but the Government did not seek authorization—except from itself. Notwithstanding the fact that electronic eavesdropping would capture private, protected communications, the Government set up an unauthorized electronic dragnet outside the courthouse, and on at least 31 occasions between December 22, 2009 and September 15, 2010, captured over 200 hours of conversations.[1] Declaration of Ashley M. Bauer in Support of Defendants' Notice of Motion and Motion to Suppress Evidence; Memorandum of Points and Authorities ("Bauer Decl."), Ex. D (Sept. 17 Disclosure); Bauer Decl., ¶ 8. Those unlawfully

[1] While this motion discusses only the non-consensual recordings that were disclosed by the Government to date, it seeks to suppress all evidence related to any illegally seized recordings that the Government made during the course of this investigation. The Government has identified some such recordings, but has declined to identify or produce others; thus, the full scope of these recordings is not presently known.

recorded conversations are inadmissible under the Fourth Amendment and Title III, as is all evidence derived therefrom.

The Government has claimed in its initial statements to the Court that it had the right to plant stationary listening devices "aimed at the public space in front of the courthouse where the public auctions took place." Dkt. 49 at 3. But *Katz* and numerous subsequent cases reject any such omnibus justification for electronic eavesdropping. Even in a public place, if the government uses an electronic device to capture private communications, courts find Fourth Amendment and Title III violations. *See United States v. Mankani*, 738 F.2d 538, 543 (2d Cir. 1984); *People v. Lesslie*, 939 P.2d 443, 448 (Colo. App. 1996) (agents may not, without a warrant, use listening devices to capture conversations that they could not have heard were they actually present). Here, the Government targeted conversations that an informant and an undercover agent with full access to the public place were apparently unable to overhear. The evidence will show that Defendants often took affirmative steps to create a zone of privacy for their communications, such as moving away from others, standing close together, covering their mouths, and speaking in low volumes. *See Dorris v. Absher*, 179 F.3d 420, 425 (6th Cir. 1999) (employees who took steps to ensure their conversations remained private had a reasonable expectation of privacy). Society recognizes that judges, lawyers, and other citizens frequently have private and privileged conversations near the courthouse, and it is reasonable to expect that such conversations will not be subject to interception. *See Kee v. City of Rowlett*, 247 F.3d 206, 215 n.18 (5th Cir. 2001).

The Government must obtain a Title III order prior to conducting the type of electronic eavesdropping that occurred here. But the Government did not seek Title III authorization, nor did it conduct this surveillance campaign as Title III would have required. On numerous occasions the FBI agents did not even document what was happening at the courthouse while the recording devices were active, thereby hindering subsequent appropriate judicial review. *See* Bauer Decl., Ex. S (NDRE-FBI-FISUR-000068); Bauer Decl., Ex. T (NDRE-FBI-FISUR-000071). With these papers and through the upcoming evidentiary hearings, Defendants will establish a reasonable expectation of privacy. The Government will then have to explain why

there has not been a Fourth Amendment or Title III violation requiring suppression of the recordings and all evidence derived therefrom. *See Kyllo v. United States*, 533 U.S. 27, 33 (2001).

II. STATEMENT OF FACTS

In 2009, the Government began investigating allegations of bid-rigging and fraud at public real estate foreclosure auctions in San Mateo County. Bauer Decl., Ex. E (Wynar Decl.), ¶ 2. Between September 2009 and December 2009, FBI agents interviewed cooperators, reviewed documentary evidence, conducted surveillance at the San Mateo County courthouse (the site of some auctions), and obtained recordings of alleged illicit agreements using an informant and an undercover agent. *Id.* In December 2009, despite apparent success with these traditional investigative techniques, FBI agents planted eavesdropping devices around the vicinity of the 401 Marshall Street entrance to the San Mateo County courthouse for the purpose of secretly recording private conversations. *Id.* ¶¶ 2-3. Agents planted these eavesdropping devices in at least three covert locations: a metal sprinkler box attached to a wall near the courthouse entrance, a large planter box to the right of the courthouse entrance, and vehicles parked on the street in front of the courthouse entrance—all areas where citizens reasonably could be expected to engage in confidential communications (and lawyers and clients reasonably could be expected to have privileged conversations). Bauer Decl., Ex. B (Sept. 3 Letter from D. Ward); *see also* Bauer Decl., Ex. C (diagram).[2]

Agents activated the listening devices on at least 31 occasions between December 22, 2009 and September 15, 2010. Bauer Decl., Ex. D. Generally, the recording devices were activated more than an hour before the auctions began, and they would run for a period of time after the auctions had concluded. Bauer Decl., ¶ 9. Some of the devices intercepted every communication that occurred in their vicinity over a period of more than five hours. *Id.* For example, the Government recorded individuals having private conversations on their cellphones in an area away from the auctions. Bauer Decl., Ex. F (1D045.002.avi). In one instance, the

[2] The listening devices in the sprinkler box and the planter box captured audio, while the devices in the vehicles captured both audio and video. Bauer Decl., Ex. E, ¶¶ 4-6.

Government was able to capture an alleged co-conspirator talking on his cell phone with the other party to the call partially audible through the cellphone's receiver. Bauer Decl., Ex. G (1D564.001_part1.wav). And the Government repeatedly hid an eavesdropping device immediately adjacent to the spot where one of the bidders usually set up a chair from which he conducted business and communicated with his joint venture partners. Bauer Decl., Exs. H-M (surveillance photograph and video stills). These recordings captured far more than just the bids and public pronouncements that were made during the auctions. *See* Bauer Decl., Exs. O & P (1D098.002_part2.wav & 1D098.002_part3.wav).

All of this occurred without any judicial authorization or oversight. The agents did not obtain a warrant or a Title III order; the only "authorization" came from the DOJ itself, namely the FBI and DOJ attorneys. Bauer Decl., Ex. A (July 2 Email from D. Ward); Bauer Decl., Ex. E, ¶ 3. There was no minimization as contemplated by Title III. *See* 18 U.S.C. § 2518(5). Given that some of the listening devices were turned on and continuously recording conversations for more than five hours, Bauer Decl., ¶ 9, the Government apparently decided that it could record all conversations that occurred near the courthouse without any concern that it would capture communications protected by the Fourth Amendment and Title III.

III. DISCUSSION

The Government's unauthorized use of recording devices to capture private conversations at the San Mateo County courthouse violated Defendants' Fourth Amendment rights to be secure against unreasonable searches and seizures. *See* U.S. Const. amend. IV. Further, this electronic eavesdropping operation violated Title III, which prohibits the interception of oral communications without judicial authorization. Defendants expect that the factual record that will be developed at the evidentiary hearings will support suppression, and therefore respectfully move the Court to suppress all non-consensual recordings made during the course of the Government's investigation and all evidence derived therefrom. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963); 18 U.S.C. § 2515 (Title III's exclusionary rule).

Defendants will meet their burden to show that their conversations as a whole were protected under the Fourth Amendment and Title III. *See* Parts B, C, and D, below as well as

evidence to be offered at the hearings; *see also United States v. Ziegler*, 474 F.3d 1184, 1189 (9th Cir. 2007). Defendants will also establish that the Government completely evaded the procedural and substantive requirements of Title III. *See* Part E, below. Under the circumstances, it is hard to imagine how, consistent with the policies underlying Title III, the Government could salvage any part of this unlawful surveillance campaign. The Government conducted this electronic surveillance nearly six years ago, without consistently or thoroughly documenting what was happening at the courthouse while the recording devices were active, and amassed over 200 hours of recordings. Bauer Decl., Exs. S & T; Bauer Decl., ¶ 8. That is a large quantity of unlawfully obtained evidence, and it must have tainted other evidence the Government intends to rely on. If the Government now wants to claim that particular recordings lacked a subjective and objectively reasonable expectation of privacy, it must do so with a degree of specificity that will allow the Defendants to meaningfully respond.

A. General Principles

"To invoke the protections of the Fourth Amendment, a person must show he had a 'legitimate expectation of privacy.'" *United States v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000). An expectation of privacy is "legitimate" if the person had a subjective expectation that his communications would be private, and that expectation is one that society is prepared to recognize as reasonable. *Id.*; *Kyllo*, 533 U.S. at 33.

The potential for electronic eavesdropping to invade privacy interests is clear. "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41, 63 (1967); *see also Katz*, 389 U.S. at 351. Indeed, it was in response to *Berger* and *Katz* that Congress enacted Title III as a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard v. United States*, 408 U.S. 41, 46 (1972). Title III prohibits the unauthorized recording of oral communications, and imposes criminal penalties for intentional violations of the statute. 18 U.S.C. § 2511; *United States v. Jones*, 542 F.2d 661, 668 (6th Cir. 1976) ("[T]he purpose of [Title III] was to establish an across-the-board prohibition on all unauthorized electronic surveillance[.]"). Title III also comes with its own exclusionary rule, which provides that when the government intercepts a communication

other than as Title III expressly authorizes, "no . . . such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . of the United States." 18 U.S.C. § 2515. "Any aggrieved person" may move to suppress a communication intercepted as a result of a Title III violation. *Id.* § 2518(10)(a).

Under Title III, a protected "oral communication" is "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation[.]" 18 U.S.C. § 2510(2). Congress intended the definition of "oral communication" to parallel the reasonable expectation of privacy test used in the Fourth Amendment context. *United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir. 1978); *see also Kee*, 247 F.3d at 211 n.8. Thus, the Fourth Amendment and Title III analyses are similar.

B. Courts Have Long Recognized Reasonable Expectations of Privacy in Locations Accessible to the Public

Katz affirms the right of individuals to be free from warrantless government eavesdropping in places accessible to the public. The government captured Katz's end of a telephone conversation by placing an electronic recording device on the outside of the public telephone booth from which Katz placed a call. *Katz*, 389 U.S. at 348. The Court held that the government's use of the device constituted a search: "[W]hat [a person] seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." *Id.* at 351 (emphasis added). By occupying the booth and shutting the door behind him, Katz was "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* at 352.

Following *Katz*, the courts have repeatedly held that one may have a reasonable expectation of privacy in communications undertaken in a public place. *See, e.g., United States v. Taketa*, 923 F.2d 665, 673 (9th Cir. 1991) ("Privacy does not require solitude."); *United States v. Lyons*, 706 F.2d 321, 326 (D.C. Cir. 1983) ("[B]y exposing oneself to public view, for instance, one does not relinquish one's right not to be overheard."); *United States v. Jackson*, 588 F.2d 1046, 1052 (5th Cir. 1979) ("No matter where an individual is, whether in his home, a

motel room, or a public park, he is entitled to a 'reasonable' expectation of privacy."); *Fazaga v. FBI*, 885 F. Supp. 2d 978, 985 (C.D. Cal. 2012) ("[E]ven open areas may be private places so long as they are not so open to [others] or the public that no expectation of privacy is reasonable.") (citations and internal quotation marks omitted).[3]

Whether an individual has a reasonable expectation of privacy in oral communications is a highly fact-specific inquiry. *United States v. Smith*, 978 F.2d 171, 180 (5th Cir. 1992); *United States v. Williams*, 15 F. Supp. 3d 821, 828 (N.D. Ill. 2014). Courts generally look to the following factors, *inter alia*: "(1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for technological enhancements to hear the communications; and (6) the place or location of the oral communication as it relates to the subjective expectations of the individuals who are communicating." *Kee*, 247 F.3d at 213-15 & nn. 12-17 (finding that plaintiffs failed to provide sufficient facts to defeat a motion for summary judgment on § 1983 claim, and collecting cases); *see also Stinebaugh v. County of Walla Walla*, No. CV-07-5019, 2008 WL 4809886, at *8-9 (E.D. Wash. Oct. 31, 2008) (applying the factors set forth in *Kee* and denying summary judgment for defendants on plaintiffs' § 1983 claim based on recording of activities in an employee break room).

Applying these factors, courts have consistently found that warrantless electronic surveillance of public oral communications violates the Fourth Amendment and Title III. The Sixth Circuit held that four employees of a rabies control center, which consisted of one large room, had a reasonable expectation of privacy in conversations about their boss because they spoke only when no one else was present and stopped speaking whenever a car pulled into the driveway or the telephone was being used. *Dorris*, 179 F.3d at 425. The Ninth Circuit held that a police officer had a reasonable expectation of privacy in statements made in his office, even

[3] State court decisions are to the same effect. *See, e.g.*, *Brandin v. State*, 669 So. 2d 280, 281 (Fla. Dist. Ct. App. 1996) ("We cannot agree with the state's assertion that conversations occurring in public areas can *never* be made with an expectation of privacy. Common experience teaches that the opposite may often be true."); *Lesslie*, 939 P.2d at 448.

though his office doors were open and a records clerk sat fifteen feet away. *McIntyre*, 582 F.2d at 1224; *see also Opal v. Cencom E 911*, No. 93 C 20124, 1994 WL 559040, at *4 (N.D. Ill. Oct. 5, 1994) (finding that plaintiffs plausibly alleged a reasonable expectation of privacy in a 911 dispatch room because plaintiffs suspended conversation when speaking on the phone or using the radio and when anyone walked into the room, and the supervisor told plaintiffs they could speak privately). The Northern District of Illinois held that two arrestees had a reasonable expectation of privacy in their conversation in the back of a police squadrol because they spoke quietly and ceased talking when the squadrol doors were open or when an officer was present, and the prisoner compartment was separate from the front cab and had no visible recording devices. *Williams*, 15 F. Supp. 3d at 827-29.

At a minimum, these cases establish that the Government could not presume that, just because the San Mateo County foreclosure auctions were held outside in a public space, it could disregard the Fourth Amendment and Title III and "authorize" *itself* to indiscriminately eavesdrop on private communications.

C. The Government Targeted Private Communications that Defendants Reasonably Expected to Keep Private

Before commencing electronic eavesdropping, the Government witnessed private communications that it thought might evidence a conspiracy. The Government admits that FBI agents planted electronic listening devices at the entrance to the San Mateo County courthouse "*in locations that were chosen* after [FBI] agents had developed evidence that bidders at the auctions *were reaching collusive bid-rigging agreements at those locations*, during and around the time of, the foreclosure auctions." Dkt. 49 at 3 (emphasis added). The Government was targeting communications that consensual recordings (with an informant) could not capture, and which apparently an undercover agent—who, of course, had full access to this public space—could not hear.

What the Government plainly understood, and what Defendants reasonably believed, was that Defendants' conversations were private. From Defendants' perspective, the conversations were private because of the highly competitive nature of the San Mateo auctions and the fact that

pairs or small groups of bidders (including but not limited to Defendants) often bid *together* against others in legitimate joint venture arrangements. Bauer Decl., Ex. Q (NDRE-FBI-I-000101).[4] To avoid inadvertent information-sharing and "piggybacking"—when someone at the auction would bid on a property simply because one of the more experienced bidders did so—Defendants privately discussed how and when to bid. *See* Bauer Decl., Ex. R (NDRE-FBI-I-000221). The Government claims that sometimes these communications were actually collusive, and the private subject matter was about payoffs and suppressing competition. That is what the Government says it targeted with electronic eavesdropping. But either way the conversations were *private*—and meant to be kept private. After watching this process over and over for an untold number of hours, the Government surely understood that the conversations it was capturing were meant to be private.

Courts frequently look to the nature of the conduct or communication in evaluating a person's subjective expectation of privacy. *See, e.g.*, *Dorris*, 179 F.3d at 425 ("[T]he frank nature of the employees' conversations makes it obvious that they had a subjective expectation of privacy. After all, no reasonable employee would harshly criticize the boss if the employee thought the boss was listening."). Courts also recognize that one may have a subjective expectation of privacy because of the supposed unlawful nature of the activity. *Nerber*, 222 F.3d at 603 (holding that defendants had a subjective expectation of privacy in a motel room because they "ingested cocaine and brandished weapons in a way they clearly would not have done had they thought outsiders might see them"). Here, whether or not the targeted communications prove conspiracy, they were secretive. Thus the Government had no right to presume that it could electronically eavesdrop on those communications.

The recordings themselves and the FBI 302 reports generated by the agents evidence that Defendants often huddled together or spoke to one another in low volumes so that other auction attendees would not hear them. *See, e.g.*, Bauer Decl., Ex. N (NDRE-FBI-FISUR-000056). While the recording devices were active, FBI agents observed Defendants and alleged co-

[4] The Government does not deny there was legitimate joint bidding. Bauer Decl., ¶ 22.

conspirators holding private conversations away from others who might overhear. *Id.* at 57 (describing Defendant Kevin Cullinane and an alleged co-conspirator having "separated themselves from the auction crowd" to have a "brief discussion" and then "return[ing] to the crowd"). Agents also observed alleged co-conspirator Dan Rosenbledt speaking into Defendant Cullinane's ear. *Id.* On one occasion, the Government intercepted a conversation between Rosenbledt and Cullinane which details matters that were obviously expressed with the expectation that they would remain private—such as criticisms of business partners, opinions on attorneys with whom the speakers had had interactions during the course of business, whether a particular business partner should be allowed to continue with the group, and issues related to funding certain purchases. Bauer Decl., Exs. O & P. While Rosenbledt and Cullinane were engaged in this conversation, a man approached and requested directions to traffic court. *Id.* After providing directions, both Rosenbledt and Cullinane resumed their discussion in a lower volume, while the man's footsteps can be heard retreating from them. *Id.* Despite the obviously private nature of this conversation, the Government continued to record it for more than thirty-five minutes. *Id.*[5]

It bears repeating that this particular public place was immediately outside a courthouse. Defendants' expectation that discreet conversations outside a courthouse would remain private is surely one that society is prepared to recognize as reasonable. Private affairs are routinely discussed as citizens, their lawyers, and even judges walk to and from court, and lawyers often take clients aside outside the courthouse for privileged conversations. "Common experience" and "everyday expectations" teach that individuals frequently have private conversations near the courthouse despite the public's access to this location, and expect that such conversations are not subject to the type of dragnet electronic eavesdropping that took place in this case. *See Brandin*, 669 So. 2d at 281; *Williams*, 15 F. Supp. 3d at 828; *see also Rakas v. Illinois*, 439 U.S.

[5] Defendants expect that cross-examination of the agents who installed and activated the recording devices will reveal significant additional evidence that Defendants intended to keep their conversations private. But even the limited information available from the recordings themselves and the agents' selective descriptions of the auction scenes (which are available for only some of the recordings) helps demonstrate that Defendants had a reasonable expectation of privacy.

128, 143 n.12 (1978) (looking to "understandings that are recognized and permitted by society"). The likelihood that privileged conversations will take place near the courthouse makes this expectation of privacy all the more reasonable. *See, e.g.*, *Gennusa v. Canova*, 748 F.3d 1103, 1110-13 (11th Cir. 2014) (recording of attorney-client communications in interview room of sheriff's office violated the Fourth Amendment); *United States v. Renzi*, 722 F. Supp. 2d 1100, 1118 (D. Ariz. 2010) (intentional interception of attorney-client communications violated the Fourth Amendment and Title III, and warranted suppression of all wiretap evidence). Indeed, as the Fifth Circuit recognized, it is eminently reasonable to expect that a "hushed conversation on the courthouse steps" will remain private. *Kee*, 247 F.3d at 215 n.18. What the Government did here is not unlawful only because it occurred outside a courthouse, but that fact makes it all the worse.

D. Fourth Amendment and Title III Violations Are Routinely Found When Electronic Devices Capture Communications a Bystander Could Not Hear

One of the most critical considerations in evaluating expectations of privacy in intercepted oral communications is whether the government captured by electronic device what it could not have heard were its agents actually present. "[T]he Fourth Amendment protects conversations that cannot be heard except by means of artificial enhancement." *Mankani*, 738 F.2d at 543; *see also* Wayne R. LaFave, Search & Seizure §2.2(f) (5th ed. 2012) ("[R]esort to [electronic] equipment to hear that which cannot be heard except by artificial means constitutes a search within the meaning of the Fourth Amendment."). Even in public places, individuals can guard against the risk of being overheard by others by taking precautions such as speaking quietly and moving away from others. *See Dorris*, 179 F.3d at 425. "But as soon as electronic surveillance comes into play, the risk [of being overheard] changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy." *Mankani*, 738 F.2d at 543 (citation omitted).

The policy underlying *Katz* and Title III is that hidden audio and video surveillance is extraordinarily invasive, *see Nerber*, 222 F.3d at 603, 605, and therefore, when it appears that the government has used electronic means to capture what a bystander could not hear, Fourth

Amendment and Title III violations should be found. *See United States v. Dempsey*, No. 89 CR 0666, 1990 WL 77978, at *4 (N.D. Ill. Mar. 13, 1990) ("[I]f the recording device used by the agent amplified the volume of sound such that some or all of the defendants' statements which it captured could not have been *audible* to the agent wearing the device, then unlawful 'enhancement,' violative of the fourth amendment and [Title III], has occurred."); *Lesslie*, 939 P.2d at 447-48 ("[C]landestine police surveillance by use of an electronic device is substantively different from simply overhearing a conversation without contrivance or augmentation of sound. . . . [A listening device] may not be used without a warrant when, as here, its value is in hearing what the observed party would not allow a visible observer to overhear."); *Federated Univ. Police Officers' Ass'n v. Regents of the Univ. of Cal.*, No. SACV 15-00137-JLS (RNBx), 2015 U.S. Dist. LEXIS 99147, at *5 (C.D. Cal. July 29, 2015) (finding that officers plausibly alleged a reasonable expectation of privacy in the offices, hallways, and bathrooms of the UC Irvine Police Department because their statements "could not have been heard by other individuals without the hidden recording devices").

Here, there is substantial evidence that agents employed electronic listening devices because they were otherwise unable to get close enough to Defendants to overhear these confidential, private conversations. *See* Bauer Decl., Ex. E, ¶¶ 2-3. If, as seems likely, the Government used electronic equipment to capture private conversations that bystanders would not have been able to overhear, that violates the Fourth Amendment and Title III. *See Mankani*, 738 F.2d at 543; *Lesslie*, 939 P.2d at 448; LaFave § 2.2(f).

E. The Government's Failure to Obtain a Title III Order in This Case Justifies an Exclusion Order

A core purpose of Title III is to ensure that interception of wire or oral communications "occurs only when there is a genuine need for it and only to the extent that it is needed." *Dalia v. United States*, 441 U.S. 238, 250 (1979). The Title III scheme thus includes various procedural and substantive restrictions, such as high-level Justice Department approval, 18 U.S.C. § 2516(1), and a written application to a judge for an order authorizing the interception that must include "a full and complete statement as to whether or not other investigative

procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous," *id.* §§ 2518(1)(c), 2518(3)(c). Title III reflects Congressional policy that electronic surveillance cannot be justified "in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974); *see also United States v. Kalustian*, 529 F.2d 585, 590 (9th Cir. 1975) (reversing denial of motion to suppress where Title III application failed to adequately show why traditional investigative techniques were not sufficient). And even when it is appropriate, electronic surveillance must be conducted pursuant to judicially approved procedures, including minimization efforts. 18 U.S.C. § 2518(5).

Here, there is every reason to believe that the Government could not have obtained Title III authorization to do what it did, in the manner that it did it. In the first place, the Government affirmatively contends that traditional investigative techniques *had exposed the alleged crime*. Its October 5 Status Report says:

> In 2009, FBI agents were assigned to an investigation into allegations of bid rigging and fraud at public real estate foreclosure auctions in the San Francisco Bay Area, including San Mateo County. Between September and December 2009, FBI agents interviewed multiple cooperators, reviewed documentary evidence, conducted surveillance of the San Mateo County auctions, and recorded multiple bid-rigging agreement payoffs at the San Mateo County auctions using a cooperator and an undercover FBI agent. In December 2009, FBI agents were granted authority [by the DOJ only] to place stationary audio and video recording devices in front of the San Mateo County Courthouse in order to capture conversations during and around the time of public foreclosure auctions. *** Stationary audio and video recording devices were placed in locations that were chosen after the agents had developed evidence that bidders at the auctions were reaching collusive bid-rigging agreements at those locations, during and around the time of, the foreclosure auctions.

Dkt. 49 at 3. Given that admission, it is not clear what the Government could have said to establish that "other investigative procedures have been tried and failed." 18 U.S.C. §§ 2518(1)(c), 2518(3)(c). The desire to obtain more evidence is not enough to justify electronic surveillance. *See Kalustian*, 529 F.2d at 589 (rejecting the argument that "all gambling

conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance").

The Government also appears to have disregarded altogether the Title III requirement that electronic surveillance be "conducted in such a way as to minimize the interception of communications" unrelated to the crime under investigation. 18 U.S.C. § 2518(5). To the contrary, the Government appears to have tried to capture nearly everything that happened at the courthouse on at least 31 occasions. It did not specify in advance the "identity of the person[s] . . . whose communications are to be intercepted," *id.* § 2518(4)(a), instead intercepting communications by everyone who was outside the courthouse, including passersby discussing ordinary matters. And of course the surveillance extended for far longer than the 30 days after which a Title III authorization would have to have been renewed. *Id*. § 2518(5).

The methodology and results of the Government's lengthy and invasive electronic surveillance campaign suggest that the Government chose not to seek judicial authorization precisely because it knew it could not satisfy the requirements of Title III. Faced with little chance of obtaining a Title III order, the Government simply chose to ignore the legal prerequisites to intercepting oral communications and to employ electronic listening devices without any oversight.

Defendants and the Court will learn more about the Government's investigative techniques and why Title III was bypassed at the evidentiary hearings. But it already appears, based on the discovery Defendants have received, that (1) the Government authorized itself to conduct this electronic eavesdropping operation under circumstances in which Title III authorization would have been denied; (2) the Government made no record of any efforts to avoid capturing privileged, confidential, or otherwise private communications; (3) the Government did not consistently or thoroughly document what was happening at the courthouse (now nearly six years ago) while the recording devices were active; and (4) the Government still thinks it can use at least some of the fruits of this illegal surveillance. Why would the Government ever bother with Title III if that argument works? Title III is meant to make the Government get judicial authorization *in the first instance*, and to conduct electronic surveillance

only *when deemed by the court to be necessary* and only *under approved procedures*.

In this case, where at the conclusion of the evidentiary hearings Defendants will have demonstrated a reasonable expectation of privacy in the intercepted communications as a whole, the Government's deliberate decision to eavesdrop without Title III authorization warrants the exclusion of the recordings themselves and all evidence derived therefrom. If there are any exceptions—and Defendants do not believe there can be under the law—it must be on a particularized showing by the Government that a specific conversation was conducted without any reasonable expectation of privacy.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their motion to suppress all non-consensual recordings that the Government made during the course of its investigation and all evidence derived therefrom.

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Respectfully submitted,

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CIVIL LOCAL RULE 5-1(i)(3)

Pursuant to Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from each of the other Signatories hereto.

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