No. _____

In The
Supreme Court of the United States

JOSEPH W. NAGLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER NAGLE, AS PRESIDENT, CEO AND CONTROLLING SHAREHOLDER OF A CLOSELY HELD FAMILY BUSINESS, HAD STANDING FOR FOURTH AMENDMENT PURPOSES, TO CHALLENGE THE SEARCH AND SEIZURE OF BUSINESS RECORDS STORED ON COMPUTERS AND A COMPUTER SERVER HIS CLOSELY HELD COMPANY OWNED, WHEN THE OBJECT OF THE SEARCH WAS THE CRIMINAL PROSECUTION OF NAGLE, PERSONALLY, AND NOT HIS CORPORATION.

LIST OF PARTIES

Joseph W. Nagle, Petitioner

Ernest G. Fink, Co-appellant below, not a party to this petition.

United States of America, Respondent

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Joseph W. Nagle, respectfully prays that a writ of certiorari issue to review the judgment and published opinion of the United States Court of Appeals for the Third Circuit, entered in *United States v. Joseph W. Nagle*, 803 F.3d 167 (3d Cir. 2015).

OPINION BELOW

A true and correct copy of the reported decision of the Third Circuit is included in the Appendix, *infra*.

JURISDICTION

This Petition seeks review of the judgment entered by the United States Court of Appeals for the Third Circuit. The jurisdiction of this Court to review the judgment of the United States Court of Appeals is invoked under Title 28, United States Code § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On November 19, 2009, Nagle was charged in a 32-count indictment alleging conspiracy to commit mail and wire fraud, substantive counts of mail and wire fraud, conspiracy to commit money laundering and substantive counts of money laundering, for his role in an alleged conspiracy to violate disadvantaged business enterprise ("DBE") regulations as they related to highway construction contracts issued by the Pennsylvania Department of Transportation and the Southeastern Pennsylvania Transportation Authority. Nagle's company, Schuylkill Products, Inc. ("SPI"), of which he became its president after the death of his father, manufactured large pre-stressed concrete bridge beams used in the construction of highway overpasses. The company had been established in 1950 by Nagle's grandfather and was the primary manufacturer of such highway beams in Pennsylvania. The indictment alleged that Nagle's deceased father and other officers of the company, prior to Nagle's involvement in the company, had developed a system to use a legitimate DBE named Marikina Construction Corporation ("Marikina") in an illegitimate way: according to the indictment, contracts were obtained in the name of the DBE,

Marikina, but it had no commercially useful function in the construction process other than to serve as a pass-through of the state contract obligations and payments. The Government alleged that this violated federal DBE regulations. The indictment alleged that after Nagle became president of the company on his father's death, he learned of the fraudulent nature of SPI's relationship with the DBE, Marikina, and assisted in the fraud thereafter. The Government did not question the value or quality of the work produced by SPI, the gravamen of the Government's fraud allegation was that DBE regulations, as understood by the Government, were not followed.

Nagle filed a pre-trial motion to suppress electronic evidence which was seized pursuant to a search warrant. The motion challenged the seizure of numerous company computers and the company's central computer server. After an extensive evidentiary hearing, the District Court denied the motion solely on the basis of Nagle's supposed lack of standing as the controlling shareholder and day to day chief operating officer of this family held business.

Nagle proceeded to trial, was convicted and sentenced. Nagle appealed to the Third Circuit Court of Appeals. The Third Circuit denied Nagle relief, agreeing with the District Court that Nagle lacked standing to challenge the search.[1] Nagle sought permission

[1] The Third Circuit accepted Nagle's sentencing argument that the District Court had misapplied the sentencing guidelines

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from this Court to extend the time for filing his petition for certiorari. Justice Alito granted Nagle's motion and extended the time for filing this petition to January 28, 2016.

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For almost sixty years, the Nagle family owned and operated SPI, a company that manufactured pre-stressed concrete beams which were used as, among other things, bridge beams on highway construction projects. In the 1980s, the Nagle family formed CDS Engineers, Inc. ("CDS") to operate as an engineering and erection subsidiary of SPI.

After the unexpected death of Gordon Nagle in 2004, Joseph W. Nagle, Gordon's son, became the President, Chief Executive Officer, and majority shareholder of SPI and CDS. Ernest G. Fink, Jr. ("Fink"), the brother-in-law of Gordon Nagle, became the Vice-President, Chief Operating Officer, Chairman of the Board of Directors, and remaining shareholder of SPI and CDS.

Based on allegations of wrongdoing from a former CDS employee, the United States Attorney's Office for

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in determining loss amount and remanded the case to the District Court for resentencing. The District Court on remand reimposed the same sentence it had imposed before. That sentencing error is back before the Third Circuit and is not part of this petition.

the Middle District of Pennsylvania, the Federal Bureau of Investigation ("FBI"), the United States Department of Transportation, Office of Inspector General, the U.S. Department of Labor Office of Inspector General, and the Internal Revenue Service began an investigation into whether CDS, SPI, and Marikina engaged in a DBE fraud scheme.

THE SEARCH WARRANT

On October 9, 2007, the FBI sought and obtained from United States Magistrate Judge J. Andrew Smyser search warrants for SPI and CDS, located at 121 and 125 River Street, Cressona, Pennsylvania. The FBI executed the warrants on October 10, 2007. The warrants for SPI and CDS authorized the seizure of SPI's and CDS's business records. Pursuant to the warrants, the government seized over 100 boxes of documents and numerous other objects and records. As part of this seizure, the government made mirror images of SPI's server and several computer hard drives from SPI and CDS. The electronic data seized amounted to roughly two thousand gigabytes.

THE SUPPRESSION MOTION

Nagle and co-defendant Fink filed a joint motion to suppress and a supporting brief. The district court set the matter for an evidentiary hearing. The Government objected at the commencement of

the hearing that Nagle and Fink lacked standing to challenge the search warrants. The court allowed the hearing to proceed and took testimony on the substantive claims as well as standing.

FBI Agent Thomas Marakovits testified that he prepared the affidavits for the search warrant. In doing so he knew that SPI and CDS were closely held family businesses run by Nagle and Fink. Agent Marakovits described the office space. The SPI office was called the "White House," and was located at 121 River Street, Cressona, Pennsylvania. It was a converted two story residence with attic which had been subdivided into offices and office cubicles. Nagle had a private office with a door to it on the second floor of the White House and Fink had a private office on the first floor of the White House.

Agent Marakovits at first estimated that 20-25 people – Nagle, Fink and various others, including secretaries and receptionists – worked in the White House, but then acknowledged that in fact when he executed the search warrant none of the employees were present and then conceded that it may have only been a dozen to fifteen people who would have worked in the White House.

The White House was not open to the public, it was not a retail business.

The CDS building was located at 125 River Street next door to the White House. It too was a converted residence. When Agent Marakovits executed the

search warrant no employees were present, but he estimated that there might have been six to ten employees in the CDS building. The CDS building also was not open to the public and was not a retail business. However, all told, Agent Marakovits estimated that there were a total of about 75 employees working at SPI and CDS that day.

The entire property on which the buildings were situated was estimated by Agent Marakovits to be about a quarter of a mile long and an eighth of a mile wide. Agent Marakovits acknowledged that SPI is a sub-chapter S corporation owned by a small number of individuals all with operating ties to the company.

FBI digital forensic examiner Donald Justin Price testified that no computers were found in Nagle's office, one was found in Fink's office. The computers which were seized or imaged by the FBI were found in the two main administrative offices, that is, the White House and the CDS building, but there were also some computers found in the transportation building and one in the human resources office in the production building. The transportation building was estimated to be 200-300 yards from the administrative buildings and the human resources office was in the production building, which was another 200 yards from the transportation building.

Nagle testified at the suppression hearing that SPI was founded by his grandfather in 1950, and the grandfather ran the company until he died in 1980. At that point Nagle's father and his uncle, Fink, took

over ownership of the company and they jointly ran it until Nagle's father died in January 2004. Nagle's father's ownership was transferred to Nagle in late 2004.

Nagle testified that CDS was started by his father in 1985 and after his death was absorbed into SPI as a wholly-owned subsidiary. At the time of the execution of the search warrants, October 2007, the owners of SPI and CDS were Nagle and Fink. Nagle owned a 50.1 percent interest in the companies and Fink owned a 49.9 percent interest. There were no other owners of SPI and CDS. At the time of the search Nagle was not only the controlling shareholder of SPI and CDS but was also the President and Chief Executive Officer. Fink was the Chairman and Chief Operating Officer.

At the time of the search, SPI and CDS employed many family members, for example, Nagle's mother and Fink's wife were employees. Additionally, Fink's brother and son and a couple of nieces were employees. Dennis Campbell's wife was an employee. There were many long-term employees, one had started with the company when Nagle's grandfather founded it, many had worked 30 or 40 years and probably half of the work force had been there over 20 years. In sum, this was a close knit small business continuously owned and managed by the Nagle family for over 50 years.

Indeed, the SPI administrative office was a home that had been built by Nagle's great-grandfather, and

which Nagle's grandfather, the founder of the company, had lived in until sometime in the mid 1970s; later Nagle lived in it as a child, then Fink and his wife and family lived in it until the mid 1980s, at which time it was converted into the administrative offices for SPI. It was only about 2,500 to 3,000 square feet in size, including a converted attic. Nagle's own office used to be his grandfather's bedroom. The attic offices had been where Nagle and his sisters had had their bedrooms as children. The office conference room had been the dining room and the kitchen was where the accountants worked.

When you first walked in the SPI building the first thing you saw was Nagle's mother's desk, which served as a reception. But one would not simply walk in, because the offices were not open to the public, only invited guests or employees could enter and the buildings were locked during non-business hours. Nagle used his office every day. Nagle kept personal and business records in his office. Nagle worked from a laptop computer which he took home with him each night, but when in the office it was connected to the office computer network and access to that network was restricted by a username and password. His uncle, Fink's, office was downstairs below his. Like Nagle's it was a private office with a door. Nagle would, during the regular course of business, go about the entire building.

Likewise, Nagle testified that the offices of CDS, which were next door to SPI on the property, was a converted residence, a two-story home, about 2,000

square feet, with six to eight offices. It had been Dennis Campbell's home. The building itself was owned by Fink, but leased to CDS, and like the SPI building it was not open to the public, but only to invited guests and was kept locked after business hours.

SPI and CDS had one common computer network. It was a private network and encrypted. Employees had usernames and passwords to access the network. The computer network stored business records which Nagle considered confidential and proprietary, and to maintain its privacy, it was secured in various technical ways. Nagle estimated that three-quarters of his work day was spent on the company computer network. But Nagle also used the computer for personal matters. Nagle used the computer network for his laptop computer, and his personal as well as business computer files were on the network. His only email address was the company email address and he used it for both personal and business matters and all of his email records were on the computer network. Nagle never authorized anyone to access his files and email other than the company IT administrator to deal with computer problems. When his computer was on his desk it was set to go to screensaver and require a password within a couple of minutes, to maintain its security and security of access to the computer network.

Nagle was not an absentee owner but came to work every day and would work a 40-hour week plus or minus. He essentially ran the company. Nagle was

responsible for the engineering side and some sales (he was an engineer by education and training with a degree in engineering), and his uncle Fink was in charge of finance and production. Indirectly Nagle supervised all of the employees of the company. Neither Nagle nor Fink had secretaries, they did their own correspondence, appointments and the like.

The District Court denied the motion to suppress solely on the basis that she found Nagle and Fink lacked standing to challenge the search of their own small business. Nagle perfected a timely appeal to the Third Circuit Court of Appeals.

PANEL OPINION

Following oral argument, the Third Circuit issued a published opinion which affirmed the denial of the motion to suppress solely on lack of standing grounds:

> No one disputes that SPI and CDS, as corporate entities, could challenge the search of their respective offices, whether through a motion to suppress – had they been charged with a crime – or through a *Bivens* action. Nagle argues that because he is the majority owner of the small, family-operated corporations, he should have the same ability to challenge the searches that the corporations do. In other words, Nagle says, because the Government physically intruded on the corporations' property and otherwise invaded

their legitimate expectations of privacy, and because he is the majority owner of the corporations, the Government physically intruded on his property and otherwise invaded his legitimate expectation of privacy. In support of that argument, Nagle cites a line from *New York v. Burger*: "An owner or operator of a business ... has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable." 482 U.S. 691, 699, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987).

But that expectation of privacy "is different from, and indeed less than, a similar expectation in an individual's home." Id. at 700. Although the Supreme Court has not clarified precisely how much "less" of an expectation of privacy a business owner has in commercial premises, we see a consensus among the Courts of Appeals that a corporate shareholder has a legitimate expectation of privacy in corporate property only if the shareholder demonstrates a personal expectation of privacy in the areas searched independent of his status as a shareholder....

These decisions all support a common proposition: a shareholder may not challenge a search of corporate property merely because he is a shareholder, but he may challenge the search if he "show[ed] some personal connection to the places searched and the materials seized," *SDI Future Health*, 568 F.3d at 698 [*United States v. SDI Future Health, Inc.*, 568 F.3d 684 (9th Cir. 2009)], and protected

those places or materials from outside intrusion.

Even the cases in which a shareholder was permitted to challenge the search of corporate offices fall within this paradigm. In *United States v. Gonzalez, Inc*., the shareholders of a corporation wished to challenge recordings from a wiretap placed in their corporation's office. 412 F.3d 1102, 1116 (9th Cir. 2005). The Ninth Circuit observed that "owners of the premises where an illegal wiretap occurs have standing." Id. Because the shareholders owned the office themselves directly – and not indirectly through the corporation – the court found that they had the reasonable expectation of privacy necessary to challenge the wiretaps. Id. at 1116-17. The shareholders in *Gonzalez* showed a personal connection to the place searched in that they were the actual, direct owners of the property, and they showed effort to keep the conversations there private. Thus, *Gonzalez* falls within the larger circuit consensus....

We find this line of authority persuasive and adopt it. To show he can challenge the search of SPI's and CDS's offices and the seizure of the employees' computers and network server as a shareholder and executive, Nagle must show a personal connection to the place searched or to the item seized and that he attempted to keep the place and item private. Nagle has failed to meet this standard....

> The server is, however, slightly more complicated. The server was not seized from his office. Therefore, Nagle must show a personal connection to the electronic files located on the server and that he kept them private in order to demonstrate a reasonable expectation of privacy. Nagle failed to show that he ever accessed other employees' files and emails on the server and, therefore, failed to establish a personal connection to their files. Although Nagle certainly had a personal connection to his own files and emails located on the server, he failed to show what efforts he made to keep his materials private from others. Although the server was password protected and only five individuals, including Nagle, had access to every drive on the server, Nagle did not establish where his files and emails were located on the server and how many people had access to those drives. Thus, Nagle did not meet his burden of proof to demonstrate a subjective expectation of privacy in his files and emails on the server.
>
> For these reasons, we conclude that Nagle failed to establish that he had a reasonable expectation of privacy in the places searched and items seized or that the Government intruded onto his property.

United States v. Nagle, 803 F.3d 167, 175-179 (3d Cir. 2015).

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

WHETHER NAGLE, AS PRESIDENT, CEO AND CONTROLLING SHAREHOLDER OF A CLOSELY HELD FAMILY BUSINESS, HAD STANDING FOR FOURTH AMENDMENT PURPOSES, TO CHALLENGE THE SEARCH AND SEIZURE OF BUSINESS RECORDS STORED ON COMPUTERS AND A COMPUTER SERVER HIS CLOSELY HELD COMPANY OWNED, WHEN THE OBJECT OF THE SEARCH WAS THE CRIMINAL PROSECUTION OF NAGLE, PERSONALLY, AND NOT HIS CORPORATION.

This is an important Fourth Amendment case – a family owned business of over fifty years was bankrupted and its owners convicted and imprisoned based on evidence that was illegally seized, but the owner of the company, Joseph W. Nagle, was not allowed to challenge the seizure because the District Court and Third Circuit Court of Appeals held that only the corporation, not Mr. Nagle, had standing to challenge the search. The Third Circuit expressly held that Nagle's *corporation* had standing, but not Mr. Nagle – because he chose to do business in corporate form.

According to the Third Circuit, Mr. Nagle had to demonstrate a personal privacy interest in specific computer files on his company's computer server and employees' computers, to have standing to challenge

their seizure – the fact that he owned the closely-held company and therefore that he owned the computer server and computers and thus was aggrieved as the owner of the property in their seizure and search was held to be of no Fourth Amendment significance.

Although this Court has not had occasion to expressly address Fourth Amendment standing for corporate owners of closely held businesses, the Third Circuit's holding is flatly inconsistent with the language and logic of decades of this Court's Fourth Amendment jurisprudence and inconsistent with the evolving trend of this Court's Constitutional jurisprudence as to both the Fourth and First Amendments, and yet it appears to follow the settled rule to the contrary across every circuit which has considered the matter. In announcing its holding, the Third Circuit stated that it was joining the consensus of the Second, Fifth, Sixth and Ninth Circuits – it could have added the Seventh and Tenth Circuits, which appear to agree.

Therefore this petition does not present a conflict in the Circuits, but rather, presents this Court with a wall of authority contrary to what Nagle understands this Court has made clear.

The importance of this petition and the issue presented is that unless this Court grants review, small business owners and closely held business owners across the country will continue to be subject

to violations of their Fourth Amendment rights and continue to be prosecuted by over zealous prosecutors with no recourse to the Courts to address their grievances.

There are two separate and distinct bases which establish standing for Fourth Amendment purposes: one is based on property rights, the other based on more nebulous privacy rights. Nagle argues that Fourth Amendment challenges are sustainable solely on the basis of property rights, without the defendant having to show an invasion of his privacy beyond that inherent in property ownership. This understanding of Fourth Amendment standing has been all but lost in the lower appellate court cases deciding standing for small business owners. The cases uniformly require the business owner to establish personalized, privacy interests in the property seized or searched to challenge the action under the Fourth Amendment.

Indeed, in Nagle's case the Third Circuit has turned standing on its head, and automatically disqualified Mr. Nagle from having standing which the Court conceded his closely held corporation had, insisting that Mr. Nagle, unlike his company, had to show a personalized privacy interest in the files on his server before granting him standing under the Fourth Amendment. Because Mr. Nagle chose to hold title to his computer server in corporate form instead of holding title to the server in his own name as a sole proprietor, he lost his Constitutional Fourth Amendment rights.

As counsel argued at oral argument on behalf of Mr. Nagle, corporations are people. This is the teaching, for example, most recently in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). There is nothing disqualifying in Constitutional terms in holding title to property in corporate form. If there were, then virtually every businessman and businesswoman in America has been disenfranchised. This cannot be and yet, it is the rule of law according to the unbroken wall of Circuit authority Mr. Nagle unsuccessfully challenged below.

While "[e]xpectations of privacy protected by the Fourth Amendment ... need not be based on a common-law interest in real or personal property ... by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment." *Rakas v. Illinois*, 439 U.S. 128, 140, 143 n. 12, 99 S.Ct. 421 (1978). Therefore, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude." Id.; see also *United States v. Acosta*, 965 F.2d 1248, 1256-1257 (3d Cir. 1992) ("Recent cases ... reflect the Supreme Court's continued consideration of property interests in determining Fourth Amendment privacy interests.").

The owner of a small business has the same expectation of privacy in his business premises as a homeowner in his home. Nagle, as the controlling

owner with a 50.1% ownership share in this family run business, had standing to challenge the search of the business and its computers. The Fourth Amendment protects the right of a corporate owner to challenge the search of corporate property and it certainly protects the right of a small business owner of a family founded business that he works at every working day to challenge the search of such a small, closely held, family business when the purpose of the search was to obtain evidence to use to criminally prosecute him as the owner for his operation of his business.

Is commercial property ever subject to a lesser standard of protection under the Fourth Amendment? The only lesser standard permitted under the Fourth Amendment for the search of commercial property is when the search is an administrative search of a closely regulated business for records or matters relating to the regulatory framework under which the search is conducted. That was not what this search was about, and neither the Government nor Courts below sought to rely upon that authority for this search.

The Government led the lower court into reversible error by arguing that Nagle, as the majority shareholder and president of this closely held corporation, had to establish standing based on circumstances necessary to establish a privacy interest peculiar to the workplace which he owned and controlled, as if he were a mere employee of his own business. Nagle, as the controlling shareholder owner

and president of the company, which owned the commercial premises which were searched, had standing by virtue of his *ownership* of the company, and it was error to use the mode of analysis dictated by the cases which have examined the rights of employees to challenge governmental searches of their workplaces.

Nagle does not argue that a small business owner has "automatic standing." Nagle never asserted a claim of automatic standing. Nagle does argue that his property interest, as the controlling owner in a family run closely held corporation, and the way the property and in particular the places and things searched and seized were secured from public and even governmental intrusion, is sufficient to establish Fourth Amendment standing to challenge the governmental search in this case.

In *New York v. Burger*, 482 U.S. 691, 699-700 (1987), this Court held:

> The Court long has recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes. *See v. City of Seattle*, 387 U.S. 541, 543, 546, 87 S.Ct. 1737, 1739, 1741, 18 L.Ed.2d 943 (1967). An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable, see *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring).

In *Rakas*, this Court stated: "[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [his] right to exclude." *Rakas v. Illinois*, 439 U.S. 128, 143 n. 12 (1978). *Rakas* supports Nagle's position:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, *Commentaries*, Book 2, ch. 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. These ideas were rejected both in *Jones*, *supra*, and *Katz*, *supra*. But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment. . . . On the other hand, even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.

> See *Katz*, *supra*, 389 U.S., at 351, 88 S.Ct., at 511; *Lewis v. United States*, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312 (1966); *United States v. Lee*, 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202 (1927); *Hester v. United States*, 265 U.S. 57, 58-59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924).

Rakas v. Illinois, 439 U.S. 128, 143 (1978).

In other words, one does not have to have a property interest to have a reasonable expectation of privacy, but the reverse is virtually always true (not automatic, but generally so) that a property interest does establish a reasonable expectation of privacy.

The "on the other hand" limitation in *Rakas*, that a property interest does not guarantee standing, was supported by citing four specific examples: *Katz*, *Lewis*, *Lee*, and *Hester*. These four cases have to be examined to understand the limitation the Court had in mind. When the four cases are read it becomes apparent that the Court's limitation on property rights establishing a reasonable expectation of privacy, are themselves very limited. For example, in *Katz* the Court stated:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis v. United States*, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312; *United States v. Lee*, 274 U.S. 559, 563, 47 S.Ct. 746, 748, 71 L.Ed. 1202. But what he seeks to preserve

> as private, even in an area accessible to the public, may be constitutionally protected.

Goods on display to the public in a place of business open to the public do not have constitutional protection, but things kept private from the public even in a business open to the public, do have constitutional protection. Nagle's computer server was not open to the public; that it had to be open to a certain extent to employees of the business for the purpose of operating the business does not mean the contents of the server then lost constitutional protection, certainly not under this language from *Katz*.[2]

Lewis involved an undercover agent invited into a home to do a drug deal. The Court explained:

> A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant. Of course, this does not mean that,

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[2] That Nagle allowed his employees access to corporate records no more undermines his reasonable expectation of privacy in such records than it would for a husband to allow his wife access to their bedroom in the marital home – it is in the very nature of the thing and indeed the very nature of the marital home as in the nature of the confidentiality of business records. See, e.g. the statutes and rules prohibiting trading on confidential business information under Title 15, United States Code, § 78 and Title 17, Code of Federal Regulations, §§ 2401.10b-5 and 2401.10b5-2. Corporate information widely shared within a corporation and its lawyers and accountants, nevertheless is the basis for criminal prosecution if disclosed by a corporate insider for compensation.

> whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials.

Thus, property can lose its constitutional protection when the public or agent is invited in to view the very thing that is the subject of the search. That was not the case with Nagle's business. The Government was not invited in to examine the server Nagle used to run his business.

Lee was a Coast Guard search of a private vessel outside the 12-mile United States territorial limit. The fact that a private vessel was searched, that is, the property interest in the vessel, was irrelevant, because the Court held that the Coast Guard simply has the right to search vessels outside the 12-mile territorial limit: "Officers of the Coast Guard are authorized, by virtue of Revised Statutes, s 3072 (Comp. St. s 5775), to seize on the high seas beyond the 12-mile limit an American vessel." *Lee* at 562.

Finally, *Hester* was an abandonment case; when revenue officers observed moonshiners with jugs of whiskey and gave the alarm, the moonshiners dropped their jugs and ran; the jugs were admissible as abandoned property:

> [The revenue officers] concealed themselves from fifty to one hundred yards away and saw Hester come out and hand Henderson a quart bottle. An alarm was given. Hester went to a car standing near, took a gallon jug from it and he and Henderson ran. One of

> the officers pursued, and fired a pistol. Hester dropped his jug, which broke but kept about a quart of its contents. Henderson threw away his bottle also. The jug and bottle both contained what the officers, being experts, recognized as moonshine whisky, that is, whisky illicitly distilled; said to be easily recognizable. The other officer entered the house, but being told there was no whisky there left it, but found outside a jar that had been thrown out and broken and that also contained whisky. While the officers were there other cars stopped at the house but were spoken to by Hester's father and drove off. The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle – and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned.

The four cited cases are the limits set by this Court on standing based on property interests. Plainly none apply to Nagle's case, instead Nagle falls squarely under the holding of *Rakas* by which the owner of property derives his reasonable expectation

of privacy from that fact – his ownership of the property – and from, as here, his efforts to reasonably limit public access or government access to the places and things searched and seized.

The statement in *New York v. Burger* that an expectation of privacy in commercial premises "is different from, and indeed less than, a similar expectation in an individual's home," is ripped out of context by the Court of Appeals in denying Nagle standing. The context is the holding in *Burger* that industries which are heavily regulated are subject to administrative searches to secure compliance with the regulatory scheme. It is not a general proposition applicable to business premises, in particular not to the property of a small business owner whose industry is not subject to heavy regulation and the search of which had nothing to do with regulatory compliance, but which was a strictly criminal search for evidence of a crime committed by the business owner for the purpose of indicting that business owner for the operation of his business, not for the purpose of indicting the corporation.

The Third Circuit panel cited six other Circuit Court decisions from outside the Third Circuit to support its argument that the owner of commercial premises does not have standing to challenge the search of his premises: *United States v. SDI Future Health, Inc*., 568 F.3d 684, 696 (9th Cir. 2009) ("SDI"); *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1116 (9th Cir. 2005); *Henzel v. United States*, 296 F.2d 650 (5th Cir. 1961); *United States v. Mohney*, 949 F.2d

1397, 1403-1404 (6th Cir. 1991); *Lagow v. United States*, 159 F.2d 245 (2d Cir. 1946); and *Williams v. Kunze*, 806 F.2d 594, 597 (5th Cir. 1986).

SDI was wrongly decided. The starting premise of the court in *SDI* was to analyze the standing rights of the *owners* of the company searched as if they were *employees* of the company searched. The right of *employees* to challenge searches of work areas is limited and turns on the specifics of the work space. This analysis has no place in the determination of the right of the *owner* of the business to challenge a search of the business.

The other Ninth Circuit case, *Gonzalez*, appears to support Nagle's position, and suggests a limited intra-circuit conflict. *Gonzalez* held:

> The Supreme Court has held that owners of the premises where an illegal wiretap occurs have standing to challenge the interception, even if the owners did not participate in the intercepted conversations. *Alderman*, 394 U.S. at 175-76, 89 S.Ct. 961; see also *King*, 478 F.2d at 506 ("[A] defendant may move to suppress the fruits of a wire-tap only if his privacy was actually invaded; that is, if he was a participant in an intercepted conversation, or if such conversation occurred on his premises.") (emphasis added). Although the government concedes that the Gonzalezes owned the Blake Avenue property, it suggests that *Alderman* and *King* are distinguishable because the premises at issue in those cases were residential, not commercial properties,

and because it is well-established that an individual's expectation of privacy is lower in a commercial property. See, e.g., *New York v. Burger*, 482 U.S. 691, 700, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987). At least in the instant case, we do not find this to be a distinction that makes a difference.

In determining whether the Gonzalezes had a reasonable expectation of privacy over the intercepted calls, it is important to assess the nature of the location where these conversations were seized. See *O'Connor* [*v. Ortega*], 480 U.S. [709] at 715, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) ("[T]he reasonableness of an expectation of privacy ... is understood to differ according to context...."). The Blake Avenue office was a small, family-run business housing only 25 employees at its peak. In such an office, individuals who own and manage the business operation have a reasonable expectation of privacy over the on-site business conversations between their agents. In reaching this result, we do not rule out the possibility that the hands-off executives of a major corporate conglomerate might lack standing to challenge all intercepted conversations at a commercial property that they owned, but rarely visited. Instead, we simply hold that because the Gonzalezes were corporate officers and directors who not only had ownership of the Blake Avenue office but also exercised full access to the building as well as managerial control over its day-to-day operations, they had a

> reasonable expectation of privacy over calls made on the premises.

United States v. Gonzalez, Inc., 412 F.3d 1102, 1116-1117 (9th Cir. 2005).

Thus, the Ninth Circuit has two conflicting opinions, as it were, *SDI* and *Gonzalez*.[3] In *Gonzalez* the Ninth Circuit found standing for a small business owner to challenge the search of his business premises, whereas *SDI* analyzed the standing rights of the owner of the company as if he were an employee of the company. But what we call the "employee mode of analysis" is exactly what the lower courts relied upon in denying Nagle standing.

What of the remaining cases relied upon by the lower Court? First is *United States v. Mohney*, 949 F.2d 1397, 1403-1404 (6th Cir. 1991). Until Nagle, *Mohney* had not been cited by the Third Circuit in the 25 years since it was first published, and had only been cited by one other Court of Appeals anywhere.[4]

> When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege of the corporation under the Fourth Amendment;

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[3] Therefore if conflict within the circuits is required to grant certiorari, *Gonzalez* arguably presents that conflict.

[4] See *United States v. Anderson*, 154 F.3d 1225 (10th Cir. 1998) (finding standing for an employee of ADT who entered the building during a holiday weekend and used a vacant office to receive and view a package of child pornography).

> documents which he could have protected from seizure, if they had been his own, may be used against him, no matter how they were obtained from the corporation. Its wrongs are not his wrongs; its immunity is not his immunity.

United States v. Mohney, 949 F.2d 1397, 1403-1404 (6th Cir. 1991).

This is automatic standing turned upside down:[5] that is, *Mohney* holds that an individual automatically loses the right to challenge a seizure of corporate records because he has chosen to do business in the form of a corporation. There is no support for this holding in any Supreme Court precedent and its reasoning is of the sort that has long been rejected; it simply has no foundation in the Fourth Amendment or in any modern understanding of reasonable expectation of privacy.

The language in *Alderman*[6] that "[w]e adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be *vicariously* asserted" has been misinterpreted in its application in Nagle's case to read it to mean that Nagle

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[5] We say "upside down" because it is taking a legal interest (corporate ownership) and having that legal interest determine the outcome of the standing issue.

[6] *Alderman v. United States*, 394 U.S. 165, 174 (1969) (emphasis supplied), citing *Simmons v. United States*, 390 U.S. 377 (1968).

cannot "vicariously" assert the rights of the corporation he owned. This is not the vicarious assertion of rights that *Simmons*, *Alderman* and other such cases intended. Vicarious assertion of rights in *Simmons* and *Alderman* refers to one *person* asserting the rights of *another person*, because, indeed, Fourth Amendment rights are personal rights. Nagle may choose to hold title to his property in corporate form, but his rights over the corporation and property owned in corporate title, remain his *personal* rights, not vicarious rights of others.

Lagow, *Henzel* and *Kunze* follow the *Mohney* pattern. These cases are simply wrong. An owner of a business does not automatically lose his Fourth Amendment right to protection against unreasonable governmental search and seizure merely by virtue of his having chosen to engage in business in corporate form. By choosing to hold title to his business in corporate form he does not become an employee for Fourth Amendment standing analysis and does not have to establish, as an employee would, a particularized and personal privacy interest on a document by document and computer file by computer file basis.

In any event, the fact based examination of the nexus of Nagle to the places and things searched and seized serves only to support his claim of a reasonable expectation of privacy, certainly well more than is required under *Rakas* and if nothing more, if this Court does not grant plenary review of this question, we would respectfully request the Court grant certiorari and vacate the decision below and summarily

remand for reconsideration in light of the cases cited in support by Nagle herein.

The distinction between owners and employees seems to have been overlooked and yet as we have seen from a careful reading of *Rakas* and *Alderman* and *New York v. Burger*, ownership is critical in the analysis.

In denying relief, the district court concluded:

> [Defendant's] ownership of the companies whose records were seized is *irrelevant*.

And the Third Circuit then held that:

> No one disputes that SPI and CDS [the two companies Nagle owned and controlled], *as corporate entities*, could challenge the search ...

Nagle slip opinion, at p. 13 (emphasis supplied).

The Court of Appeals was letting the form by which Nagle held title to the searched property determine his Fourth Amendment rights – and deprive him of his rights – rather than looking to the Fourth Amendment to determine whether the Government had engaged in an unreasonable search and seizure. The Court's ultimate conclusion is ironically expressly bottomed on a perverse form of property rights analysis, one turned upside down. The district judge concluded that Nagle had not shown that he, Nagle, owned the computer server in his own name, but instead the corporation owned the server, therefore, according to the court, Nagle has not shown a Fourth

Amendment violation. This is using the legal fiction that Nagle did business as a closely held corporation and owned the property being searched in the name of such corporation to determine whether Nagle had a reasonable expectation of privacy. The Government and lower court's analysis of the problem has been cut adrift from the Fourth Amendment itself. Nothing in the text or history of the Fourth Amendment supports this approach.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The server and computers searched in Nagle's case were *his* "papers, and effects" and under the clear and unambiguous language of the Fourth Amendment he had a right to be free from an unreasonable search and seizure of his papers and effects. That Nagle held legal title to the server by virtue of a corporate form is irrelevant to Fourth Amendment analysis and the lower court is mistakenly allowing the form of legal title to control the disposition of Nagle's Fourth Amendment claim.

Justice Scalia in his special concurrence to *Minnesota v. Carter* had this to say:

Of course this is not to say that the Fourth Amendment protects only the Lord of the Manor who holds his estate in fee simple. People call a house "their" home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free – so long as they actually live there....

The dissent believes that "[o]ur obligation to produce coherent results" requires that we ignore this clear text and 4-century-old tradition, and apply instead the notoriously unhelpful test adopted in a "benchmar[k]" decision that is 31 years old. Post, at 483, citing *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In my view, the only thing the past three decades have established about the *Katz* test (which has come to mean the test enunciated by Justice Harlan's separate concurrence in *Katz*, see *id*., at 360, 88 S.Ct. 507) is that, unsurprisingly, those "actual (subjective) expectation[s] of privacy" "that society is prepared to recognize as 'reasonable,'" id., at 361, 88 S.Ct. 507, bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable. When that self-indulgent test is employed (as the dissent would employ it here) to determine whether a "search or seizure" within the meaning of the Constitution has occurred (as opposed to whether that "search or seizure" is an "unreasonable" one), it has no plausible foundation in the text of the Fourth Amendment. That provision did not guarantee some generalized "right of privacy" and leave it to this Court to

> determine which particular manifestations of the value of privacy "society is prepared to recognize as 'reasonable.'" *Ibid*. Rather, it enumerated ("persons, houses, papers, and effects") the objects of privacy protection to which the Constitution would extend, leaving further expansion to the good judgment, not of this Court, but of the people through their representatives in the legislature.

Minnesota v. Carter, 525 U.S. 83, 96-98 (1998).

In other words, that Nagle owned the server through a corporation does not determine his Fourth Amendment claim, rather the other way around, that Nagle *owned* the server, that it was *his* server, determines his Fourth Amendment claim.

Justice Scalia was writing a special concurrence in *Minnesota v. Carter*, but he wrote for the majority in *United States v. Jones*, 132 S.Ct. 945 (2012), where he makes clear that Nagle's view of his property right based claim is correct:

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted. *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765) ... In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis:

> "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." *Entick*, *supra*, at 817.

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to "the right of the people to be secure against unreasonable searches and seizures"; the phrase "in their persons, houses, papers, and effects" would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. *Kyllo v. United States*, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L.Rev. 801, 816 (2004).... Our later cases, of course, have deviated from that exclusively property-based approach. In *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), we said that "the Fourth Amendment protects people, not places," and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan's concurrence in that case, which said that a violation

occurs when government officers violate a person's "reasonable expectation of privacy," id., at 360, 88 S.Ct. 507. See, e.g. *Bond v. United States*, 529 U.S. 334, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000); *California v. Ciraolo*, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986); *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)....

Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, *supra*, at 34, 121 S.Ct. 2038. As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. *Katz* did not repudiate that understanding "[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home...." [*Alderman v. United States*, 394 U.S. 165, 176, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).], at 180, 89 S.Ct. 961....

Katz, the Court explained [in *Soldal v. Cook County*, 506 U.S. 56 (1992)], established that "property rights are not the sole measure of Fourth Amendment violations," but did not "snuf[f] out the previously recognized protection for property." 506 U.S., at 64, 113 S.Ct.

> 538.... We have embodied that preservation of past rights in our very definition of "reasonable expectation of privacy" which we have said to be an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998) (internal quotation marks omitted). *Katz* did not narrow the Fourth Amendment's scope.

United States v. Jones, 132 S.Ct. 945, 949-951 (2012).

This Court has clearly taught that the owner of commercial premises enjoys the same Fourth Amendment protection of his business as does the businessman in his home, the only exception to this is regulatory searches of closely regulated industries:

> In *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; *Amos v. United States*, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654; and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, this Court refused to uphold otherwise unreasonable criminal investigative searches merely because commercial rather than residential premises were the object of the police intrusions. Likewise, we see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises.

> As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant.

See v. City of Seattle, 387 U.S. 541, 543, 87 S.Ct. 1737, 1739 (1967).

Nagle enjoyed standing to contest the search warrants and admission of the evidence taken thereunder and the lower court reversibly erred in denying his motion to suppress based on lack of standing alone, without addressing his substantive Constitutional claims.

CONCLUSION

WHEREFORE, the Petitioner, JOSEPH W. NAGLE, respectfully requests this Honorable Court grant this petition for certiorari to determine this important question of Fourth Amendment standing.

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 14-3184 and 14-3422

UNITED STATES OF AMERICA

v.

JOSEPH W. NAGLE,
Appellant, No. 14-3184

ERNEST G. FINK,
Appellant, No. 14-3422

On Appeal from United States District Court
for the Middle District of Pennsylvania
(M.D. Pa. No. 1-09-cr-00384-001)
(M.D. Pa. No. 1-09-cr-00384-002)
District Judge: Honorable Sylvia H. Rambo

Argued April 27, 2015
Before: FISHER, HARDIMAN,
and ROTH, *Circuit Judges.*

(Filed: September 30, 2015)

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OPINION OF THE COURT

FISHER, *Circuit Judge.*

Joseph Nagle and Ernest Fink were co-owners and executives of concrete manufacturing and construction businesses. The businesses entered into a relationship with a company owned by a person of

Filipino descent. His company would bid for subcontracts on Pennsylvania transportation projects as a disadvantaged business enterprise. If his company won the bid for the subcontract, Nagle and Fink's businesses would perform all of the work.

Fink pled guilty to one count of conspiracy to defraud the United States. Nagle proceeded to trial, where a jury found him guilty of a myriad of charges relating to the scheme. Both defendants filed timely appeals. Nagle challenges the District Court's order denying his motion to suppress electronic evidence discovered during searches of the businesses' offices. Both defendants challenge the amount of loss the District Court found they were responsible for in calculating the appropriate Sentencing Guidelines range. We will affirm Nagle's conviction, vacate Nagle's and Fink's sentences, and remand for resentencing.

I.

A.

The United States Department of Transportation provides funds to state transportation agencies to finance transportation projects. These funds often go towards highway construction, provided through the Federal Highway Administration ("FHWA"), or towards mass transit systems, provided through the Federal Transit Administration ("FTA"). In Pennsylvania, the FHWA provides funds to the Pennsylvania Department of Transportation ("PennDOT"), and the

FTA provides funds to the Southeastern Pennsylvania Transportation Authority ("SEPTA").

Federal regulations require states that receive federal transportation funds to set annual goals for participation in transportation construction projects by disadvantaged business enterprises ("DBEs"). 49 C.F.R. § 26.21. A DBE is a for-profit small business that is at least 51% owned by an individual or individuals who are both socially and economically disadvantaged and whose management and daily operations are controlled by one or more of the disadvantaged individuals who own it. *Id.* § 26.5. A state agency will announce a DBE-participation goal when soliciting bids for a contract, and bids for the contract must show how the contractor will meet the goal. If the prime contractor is not a DBE, this is usually demonstrated by showing that certain subcontractors that will work on a contract are DBEs. States themselves certify businesses as DBEs. *Id.* § 26.81. A business must be certified as a DBE before it or a prime contractor can rely on its DBE status in bidding for a contract. *Id.* § 26.81(c).

Most importantly here, in order to count towards a contract's DBE participation, a DBE must "perform[ ] a commercially useful function on [the] contract." *Id.* § 26.55(c). Therefore, a certified DBE whose "role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation" cannot be counted towards DBE participation. *Id. §* 26.55(c)(2).

B.

In the 1950's Joseph Nagle's grandfather established Schuylkill Products Inc. ("SPI"), a Pennsylvania-incorporated S-corporation, in Cressona, Pennsylvania. SPI manufactured concrete beams that are used in highway construction projects. In the 1980's, the Nagle family also established CDS Engineers, Inc. ("CDS"), to operate as a construction company for the concrete beams SPI manufactured. By 2004, CDS was a wholly-owned subsidiary of SPI. Neither SPI nor CDS qualified as or was certified as a DBE in any state.

In 1993, SPI was owned by two people: Nagle's father, Gordon, who owned 50.1% of SPI, and Fink, Nagle's uncle by marriage, who owned 49.9%. Gordon Nagle was the President and Chief Executive Officer of SPI, while Fink served as Vice-President and General Manager of SPI. That year, SPI entered into an arrangement with a company called Marikina Engineers and Construction Corp. ("Marikina"). Marikina was a Connecticut corporation owned and managed by Romeo P. Cruz, an American citizen of Filipino descent. Because Cruz was of Filipino descent, Marikina qualified as a DBE for FHWA and FTA projects. Marikina was certified as a DBE in Connecticut and Pennsylvania, among other states.

SPI and Marikina agreed that Marikina would bid to serve as a subcontractor for PennDOT and SEPTA contracts that had DBE participation requirements. If Marikina was selected for the subcontracts,

SPI and CDS would perform all of the work on those contracts. SPI and CDS would pay Marikina a fixed fee for its participation but otherwise keep the profits from the scheme.

In practice, SPI identified subcontracts that SPI and CDS could fulfill, prepared the bid paperwork, and submitted the information to prime contractors in Marikina's name. SPI used stationery and email addresses bearing Marikina's name to create this correspondence. It also used Marikina's log-in information to access PennDOT's electronic contract management system. CDS employees who performed construction work on site used vehicles with magnetic placards of Marikina's logo covering SPI's and CDS's logos. SPI and CDS employees used Marikina business cards and separate cell phones to disguise whom they worked for. They also used a stamp of Cruz's signature to endorse checks from the prime contractors for deposit into SPI's bank accounts. Although Marikina's payroll account paid CDS's employees, CDS reimbursed Marikina for the labor costs.

In 2004, Gordon Nagle passed away. Joseph Nagle inherited his father's 50.1% stake in SPI and assumed the titles of President and Chief Executive Officer. At that time, Fink became the Chief Operating Officer and Chairman of the Board. SPI's relationship with Marikina lasted until March 2008. Between 1993 and March 2008, Marikina was awarded contracts under the PennDOT DBE program worth over $119 million and contracts under the SEPTA DBE program worth over $16 million. Between 2004 and

March 2008, Marikina was awarded contracts under the DBE programs worth nearly $54 million.

C.

SPI's and CDS's offices were all located in the same compound in Cressona. None of the offices was open to the public. SPI's administrative office was a converted, two-story white house. The house was subdivided into offices and cubicles. Between twelve and fifteen people worked in the building, as well as Nagle and Fink. CDS's administrative office was also a converted house, owned by Fink and leased to CDS. The compound contained a transportation building, a production building, and various parking lots. In total, SPI and CDS employed around 140 individuals who worked in the compound.

SPI and CDS purchased a computer for nearly every employee who required one. They also created a shared network over a server. The twenty-five employees who had access to the network needed a user identification and password to access it. The network itself was compartmentalized into drives. Only five people, including Nagle and Fink, had access to all of the drives on the network. Emails sent from or received by SPI or CDS accounts were stored on the network as well. Nagle received a company computer, which he took home every night and used for business and personal purposes. He never used any other employee's computer.

In October 2007, the Federal Bureau of Investigation ("FBI") executed two search warrants at SPI's and CDS's offices. The warrants authorized agents to seize "business records of [Marikina] and all predecessors and affiliated operating entities, [SPI,] and CDS . . . including any and all" financial documents; contracts and invoices; payroll documents and personnel files; email and correspondence; phone records and calendars; and "[c]omputers and computer equipment." Nagle Supp. App. at 5, 65. During their search of SPI's and CDS's offices pursuant to the warrants, agents found eleven computers and the shared network server. The agents imaged the computers on site. Nagle had brought his computer home with him before the search, so it was not seized and imaged.

D.

In November 2009, a federal grand jury in the Middle District of Pennsylvania returned an indictment against Nagle and Fink. The indictment charged them with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371; eleven counts of wire fraud, in violation of 18 U.S.C. § 1343; six counts of mail fraud, in violation of 18 U.S.C. § 1341; one count of conspiracy to engage in unlawful monetary transactions, in violation of 18 U.S.C. § 1956(h); and eleven counts of engaging in unlawful monetary transactions, in violation of 18 U.S.C. § 1957. Cruz, the owner of Marikina; Dennis Campbell, an SPI executive; and Timothy Hubler, a CDS executive, were indicted separately, pled guilty

to the charges, and agreed to cooperate against Nagle and Fink.

Nagle and Fink jointly moved to suppress the electronic evidence that the FBI agents had imaged from SPI's and CDS's computers and network server during the October 2007 search. They argued (1) that the warrants were unconstitutional general warrants, (2) that the warrants were unconstitutionally overbroad, and (3) that the agents had executed the warrant in an unreasonable manner. The United States opposed the motion, contesting each of the arguments and also suggesting that Nagle and Fink lacked the requisite privacy interest to challenge the searches. The District Court held a hearing and took evidence. Two FBI agents and an FBI employee testified about the preparation and execution of the warrants as well as the FBI's review and analysis of the imaged data. Nagle and Fink testified about the history and structure of SPI and CDS, the two companies' computers and network use, and their own use of the companies' computer infrastructure.

After the hearing, Fink pled guilty to one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. Nagle, however, continued his challenge to the search. In September 2010, the District Court denied Nagle's suppression motion. The District Court concluded that Nagle failed to show he had a personal expectation of privacy in the electronic information that the agents had imaged from SPI's and CDS's computers and network server. The District Court reasoned that Nagle never used the other

employees' computers and that "[w]hile [Nagle] may have had the expectation that, as President and CEO of SPI and CDS, the contents of the companies' server would remain private, he had this expectation in his official capacity as an executive and officer of these corporations as opposed to himself as an individual." Nagle App. at 21-22. Therefore, the District Court held that "Defendant has not demonstrated that any of *his* Fourth Amendment rights were violated, and thus his ownership of the companies whose records were seized is irrelevant." Nagle App. at 23-24.

On April 5, 2012, after a trial, a jury found Nagle guilty on all of the charges presented in the indictment except for four of the wire fraud charges.

E.

Before deciding Nagle's motion to suppress, the District Court began the process of sentencing Cruz, Campbell, and Hubler. As part of that process, the District Court issued an opinion on the amount of loss they were responsible for, under U.S.S.G. § 2B1.1, in order to calculate the appropriate Guidelines range. *See United States v. Campbell*, No. 08-cr-7, 2010 WL 2650541 (M.D. Pa July 1, 2010) [hereinafter "the *Campbell* loss opinion"]. The District Court concluded that Application Note 3(F)(ii) to § 2B1.1 was the appropriate legal standard to calculate the amount of loss; that under Note 3(F)(ii) the amount of loss was the face value of the contracts Marikina received; and that the defendants were not entitled to a credit

against the loss for the work performed because they had not refunded the contract price to allow a legitimate DBE to perform the work. *Id.* at *3-6.

After Fink pled guilty and before Nagle's trial, a Presentence Report ("PSR") was prepared for him. The PSR relied on the *Campbell* loss opinion to conclude that the loss Fink was responsible for was the face value of the PennDOT and SEPTA contracts Marikina received while he was an executive: $135.8 million. Under § 2B1.1(b), this amounted to a twenty-six-level increase in the Guidelines offense level. With other enhancements and adjustments, the PSR calculated Fink's total offense level to be thirty-five and assigned him a criminal history category of I. This corresponded to a Guidelines range of 168 to 210 months of incarceration, which was reduced to 60 months pursuant to 18 U.S.C. § 371. *See* U.S.S.G. § 5G1.1(a).

Fink objected to the loss calculation in the PSR on the basis that the proper loss amount was the pecuniary harm suffered by an actual DBE that did not receive the contracts – in other words, the profit an actual DBE would have received on the contracts. The District Court reserved ruling on the objection until after Nagle's trial.

After the jury's verdict, a PSR was prepared for Nagle as well. The PSR relied on the *Campbell* loss opinion to conclude that the loss Nagle was responsible for was the face value of the PennDOT and SEPTA contracts Marikina received while he was an

executive: $53.9 million. This amounted to a twenty-four-level increase in the Guidelines offense level. With other enhancements, the PSR calculated Nagle's total offense level to be forty and assigned him a criminal history category of I. This corresponded to a Guidelines range of 292 to 365 months of incarceration.

Nagle objected to the loss calculation in the PSR on the grounds that (1) there was no evidence another DBE was willing to perform the contracts, (2) PennDOT and SEPTA received what they paid for under the contracts, and (3) the largest conceivable actual loss was the value of the contracts less overhead and expenses.

In February 2014, the District Court held a joint hearing to address the issue of the amount of loss for both defendants. At the hearing, in addition to arguing that the proper loss amount was the face value of the Marikina contracts, the Government introduced evidence pertaining to the gross profits earned by SPI and CDS on the Marikina contracts during Fink's and Nagle's respective tenures as executives. Fink and Nagle both contested the profit amounts, which the Government asserted were several million dollars.

On May 7, 2014, the District Court held that Nagle was responsible for $53.9 million in losses and that no credit was permitted. On May 16, 2014, the District Court held that Fink was responsible for $135.8 million and that no credit was permitted.

The District Court then requested briefing on the appropriate amount of restitution. After briefing, the District Court rejected the Government's argument that the appropriate amount of restitution was the same as the amount of loss under the Guidelines. The District Court reasoned that SPI and CDS fully performed the contracts, so the Government received what it paid for. The District Court held that the Government was only entitled to the difference between the face value of the contracts and what it would have paid SPI and CDS knowing that they were not DBEs. However, because the Government failed to prove what this difference was, the District Court found that no restitution was appropriate.

The District Court sentenced Nagle first. He requested a ten-level downward departure in his offense level. Under the Guidelines, this corresponded to a loss amount of between $400,000 and $1 million. The District Court granted the departure and additionally lowered another enhancement by one level. With a final offense level of twenty-nine, the District Court calculated Nagle's Guidelines range to be 87 to 108 months of incarceration. The District Court sentenced him to 84 months of incarceration, one year of supervised release, a $25,000 fine, a $2,600 special assessment, and no restitution.

The District Court then sentenced Fink. The Government moved for Fink to receive a ten-level downward departure in his offense level. Under the Guidelines, this corresponded to a loss amount of between $1 million and $2.5 million. The District Court

granted the departure and lowered another enhancement by one level. With a final offense level of twenty-four, the District Court calculated Fink's Guidelines range to be 51 to 60 months of incarceration. The District Court sentenced him to 51 months of incarceration, one year of supervised release, a $25,000 fine, a $100 special assessment, and no restitution.

Nagle and Fink filed timely appeals.[1]

II.

We first consider Nagle's challenge to the District Court's order denying his motion to suppress the electronic evidence seized from SPI's and CDS's offices. The District Court denied the motion because it concluded that Nagle did not show that he had a reasonable expectation of privacy in the places searched or items seized. We exercise plenary review over the District Court's legal conclusions but review its factual findings for clear error. *United States v. Silveus*, 542 F.3d 993, 999 (3d Cir. 2008).

A defendant who seeks to suppress evidence allegedly seized or discovered in violation of the Fourth Amendment must first demonstrate that the Government physically occupied his property for the purpose of obtaining information or that he had "a

[1] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

legitimate expectation of privacy that has been invaded by government action." *Free Speech Coal., Inc. v. Att'y Gen.*, 677 F.3d 519, 543 (3d Cir. 2012) (internal quotation marks omitted); *cf. Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." (internal quotation marks omitted)). To have a legitimate expectation of privacy, the defendant must show "an actual or subjective expectation of privacy in the subject of the search or seizure" and show that "this expectation of privacy is objectively justifiable under the circumstances." *United States v. Donahue*, 764 F.3d 293, 298-99 (3d Cir. 2014) (internal quotation marks omitted). In other words, the expectation of privacy must be "one that society is prepared to recognize as reasonable." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (internal quotation marks omitted).[2]

No one disputes that SIDI and CDS, as corporate entities, could challenge the search of their respective offices, whether through a motion to suppress – had they been charged with a crime – or through a

[2] This initial showing – that the defendant's property or legitimate expectation of privacy has been invaded – has been frequently referred to as "Fourth Amendment standing," to differentiate it from jurisdictional, Article III standing. *See*, *e.g.*, *United States v. Kennedy*, 638 F.3d 159, 163 (3d Cir. 2011). However, "this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing." *Rakas*, 439 U.S. at 429.

Bivens[3] action. Nagle argues that because he is the majority owner of the small, family-operated corporations, he should have the same ability to challenge the searches that the corporations do. In other words, Nagle says, because the Government physically intruded on the corporations' property and otherwise invaded their legitimate expectations of privacy, and because he is the majority owner of the corporations, the Government physically intruded on *his* property and otherwise invaded *his* legitimate expectation of privacy. In support of that argument, Nagle cites a line from *New York v. Burger*: "An owner or operator of a business . . . has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable." 482 U.S. 691, 699 (1987).

But that expectation of privacy "is different from, and indeed less than, a similar expectation in an individual's home." *Id.* at 700. Although the Supreme Court has not clarified precisely how much "less" of an expectation of privacy a business owner has in commercial premises, we see a consensus among the Courts of Appeals that a corporate shareholder has a legitimate expectation of privacy in corporate property only if the shareholder demonstrates a personal expectation of privacy in the areas searched independent of his status as a shareholder.

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[3] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

In *United States v. SDI Future Health, Inc.*, the defendants were part-owners of an incorporated business and sought to challenge a warrant authorizing a search of the corporation's premises. 568 F.3d 684, 691, 694 (9th Cir. 2009). The Ninth Circuit rejected their argument that "mere ownership and management of" the corporation allowed them to challenge the search of the corporation's premises. *Id.* at 694. This was because "a reasonable expectation of privacy does not arise *ex officio*, but must be established with respect to the person in question." *Id.* at 696. However, the defendants could still show a legitimate expectation of privacy in the corporation's property if they "show[ed] some personal connection to the places searched and the materials seized" and "took precautions on [their] own behalf to secure the place searched or things seized from any interference without [their] authorization." *Id.* at 698. The court remanded the matter for further fact finding.

In *United States v. Mohney*, the defendant was the sole owner of an incorporated business and sought to challenge the search of the business's headquarters. 949 F.2d 1397, 1399, 1403 (6th Cir. 1991). The Sixth Circuit concluded that the defendant failed to show he had a reasonable expectation of privacy. *Id.* at 1404. The court concluded,

> Where the documents seized were normal corporate records not personally prepared by the defendant and not taken from his personal office, desk, or files, in a search that was not directed at him personally, the

> defendant cannot challenge a search as he would not have a reasonable expectation of privacy in such materials.

Id. at 1403.

Mohney, in turn, relied on a decision of the Second Circuit in *Lagow v. United States*, 159 F.2d 245 (2d Cir. 1946) (per curiam). Lagow was the "sole shareholder and officer of [his] corporation" and sought an order forbidding the use of evidence seized from the corporation in any future trial against him. *Id.* at 246. The court rejected his claim, reasoning that Lagow chose "to avail himself of the privilege of doing business as a corporation" and, therefore, "he may not vicariously take on the privilege of the corporation under the Fourth Amendment. . . . Its wrongs are not his wrongs; its immunity is not his immunity." *Id.*

Finally, in *Williams v. Kunze*, one of the plaintiffs was the sole shareholder and president of a corporation and brought a *Bivens* action against an IRS agent who searched the company's records pursuant to a warrant. 806 F.2d 594, 597 (5th Cir. 1986). The Fifth Circuit found that summary judgment was properly granted to the federal agent because the shareholder could not challenge the search of the business's premises. *Id.* at 599. "An individual's status as the sole shareholder of a corporation is not always sufficient to confer upon him standing[[4]] to assert the

[4] *See supra* note 2.

corporation's [F]ourth [A]mendment rights. Unless the shareholder . . . can demonstrate a legitimate and reasonable expectation of privacy in the records seized," he cannot challenge the search. *Id.* (citation omitted). The court concluded that the shareholder could not show such a legitimate expectation of privacy in records seized from the common file room. *Id.* at 599-600.

These decisions all support a common proposition: a shareholder may not challenge a search of corporate property merely because he is a shareholder, but he may challenge the search if he "show[ed] some personal connection to the places searched and the materials seized," *SDI Future Health*, 568 F.3d at 698, and protected those places or materials from outside intrusion.

Even the cases in which a shareholder was permitted to challenge the search of corporate offices fall within this paradigm. In *United States v. Gonzalez, Inc.*, the shareholders of a corporation wished to challenge recordings from a wiretap placed in their corporation's office. 412 F.3d 1102, 1116 (9th Cir. 2005). The Ninth Circuit observed that "owners of the premises where an illegal wiretap occurs have standing[5] to challenge the interception, even if the owners did not participate in the intercepted conversations." *Id.* Because the shareholders owned the office themselves directly – and not indirectly through the corporation

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[5] *See supra* note 2.

– the court found that they had the reasonable expectation of privacy necessary to challenge the wiretaps. *Id.* at 1116-17. The shareholders in *Gonzalez* showed a personal connection to the place searched in that they were the actual, direct owners of the property, and they showed effort to keep the conversations there private. Thus, *Gonzalez* falls within the larger circuit consensus.

So does *Henzel v. United States*, 296 F.2d 650 (5th Cir. 1961). The defendant in *Henzel* was also the sole shareholder and president of his business, and he sought to challenge evidence seized from the corporation. *Id.* at 650. The evidence seized was the corporation's business records, which were located in his office and most of which he personally created. *Id.* at 653. The Fifth Circuit concluded that he, therefore, "had an interest in the property seized and premises searched." *Id.* Again, Henzel showed a personal connection to the place searched – his office – and the items seized – records he personally created – and showed an effort to keep both private.

We find this line of authority persuasive and adopt it. To show he can challenge the search of SPI's and CDS's offices and the seizure of the employees' computers and network server as a shareholder and executive, Nagle must show a personal connection to the place searched or to the item seized and that he attempted to keep the place and item private. Nagle has failed to meet this standard.

The employees' computers that were seized and imaged were discovered in the employees' offices. Nagle did not show that he used these employees' offices, nor that he used their computers or accessed their files. Accordingly, he failed to show a personal connection to the computers or the place where they were discovered.

The server is, however, slightly more complicated. The server was not seized from his office. Therefore, Nagle must show a personal connection to the electronic files located on the server and that he kept them private in order to demonstrate a reasonable expectation of privacy. Nagle failed to show that he ever accessed other employees' files and emails on the server and, therefore, failed to establish a personal connection to their files. Although Nagle certainly had a personal connection to his own files and emails located on the server, he failed to show what efforts he made to keep *his* materials private from others. Although the server was password protected and only five individuals, including Nagle, had access to every drive on the server, Nagle did not establish where his files and emails were located on the server and how many people had access to those drives. Thus, Nagle did not meet his burden of proof to demonstrate a subjective expectation of privacy in his files and e-mails on the server.

For these reasons, we conclude that Nagle failed to establish that he had a reasonable expectation of privacy in the places searched and items seized or that the Government intruded onto *his* property. *See*

Free Speech Coal., 677 F.3d at 543. Therefore, the District Court properly denied the motion to suppress.

III.

A.

Both Nagle and Fink challenge the District Court's calculation of the amount of loss they were responsible for under the Sentencing Guidelines. The District Court found that, under U.S.S.G. § 2B1.1, they were responsible for the face value of the contracts Marikina received without any credit for work done on the contracts. We review a criminal sentence for procedural and then substantive reasonableness. *United States v. Tomko*, 562 F.3d 558, 567 (3d Cir. 2009) (en banc). Procedural reasonableness requires the District Court to calculate the correct advisory Guidelines sentencing range. *Id.* When the calculation of the correct Guidelines range turns on an interpretation of "what constitutes loss" under the Guidelines, we exercise plenary review. *United States v. Fumo*, 655 F.3d 288, 309 (3d Cir. 2011) (internal quotation marks omitted).

Section 2B1.1 of the Guidelines governs the calculation of the offense level for crimes involving, among other things, fraud and deceit. Subsection (a) provides the base offense level, which is either seven, if the offense has a maximum term of imprisonment of twenty years or more, or six. Subsection (b) provides an extensive list of adjustments for offense-specific

characteristics. The first of these adjustments – and the one relevant to this appeal – is the adjustment for the amount of loss. As the loss increases, the offense level increases: for example, if the loss is more than $70,000, the court adds eight to the offense level; if the loss is more than $100 million, the court adds twenty-six to the offense level.

The main text of the Guidelines does not define "loss." Instead, we turn to the application notes that accompany § 2B1.1. We "keep in mind that [G]uidelines commentary, interpreting or explaining the application of a guideline, is binding on us when we are applying that guideline because we are obligated to adhere to the Commission's definition." *United States v. Savani*, 733 F.3d 56, 62 (3d Cir. 2013) (citing *Stinson v. United States*, 508 U.S. 36, 43 (1993)).

Note 3(A) to § 2B1.1 states that "loss is the greater of actual loss or intended loss." 'Actual loss' means the reasonably foreseeable pecuniary harm that resulted from the offense"; intended loss "means the pecuniary harm that was intended to result from the offense." U.S.S.G. § 2B1.1 cmt. n.3(A)(i)-(ii). In addition to this general definition, Note 3(F) gives some "special rules [to] be used to assist in determining loss" "[n]otwithstanding subdivision (A)." *Id.* cmt. n.3(F). One of these "special rules" is for "a case involving government benefits (*e.g.*, grants, loans, entitlement program payments)." *Id.* cmt. n.3(F)(ii). In such a case,

> loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50.

Id.

Nagle and Fink insist that the amount of loss they are responsible for is not the face value of the contracts Marikina received; instead, they say that they are at least entitled to a credit for the services they performed on the contracts or that the loss is $0. They argue that the District Court should have used Note 3(A) to calculate the amount of loss instead of Note 3(F)(ii) because the DBE program is not a "government benefit" and that under Note 3(A) they should receive a credit for completing the subcontracts. In the alternative, they argue that they are nonetheless entitled to a credit under Note 3(F)(ii). We need not decide whether the DBE program is a "government benefit" and, therefore, whether Note 3(A) or Note 3(F)(ii) applies; we conclude that under either application note, the amount of loss Nagle and Fink are responsible for is the face value of the contracts Marikina received minus the fair market

value of the services they provided under the contracts.[6]

1.

Our case law makes clear that, in a normal fraud case, "where value passes in both directions [between defrauded and defrauder] . . . the victim's loss will normally be the difference between the value he or she gave up and the value he or she received." *United States v. Dickler*, 64 F.3d 818, 825 (3d Cir. 1995).[7] For example:

> We have repeatedly emphasized that the amount of loss in a fraud case, unlike that in a theft case, often depends on the actual value received by the defrauded victim. Thus, when a defendant obtains a secured loan by means of fraudulent representations, the amount of loss is the difference between what the victim paid and the value of the security, because only that amount was actually lost.

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[6] Nagle and Fink rely heavily on the District Court's restitution order to argue that the amount of loss is $0. The Government did not file a cross-appeal for the restitution order, so it is not properly before us to determine whether it is correct or not. The restitution order does not affect our analysis of how to calculate the amount of loss under the Guidelines.

[7] *Dickler* interpreted § 2F1.1 of the Guidelines, which at the time was a separate section concerning fraud and deceit. However, in 2001, § 2F1.1 was merged into § 2B1.1.

United States v. Nathan, 188 F.3d 190, 210 (3d Cir. 1999) (Becker, C.J.) (citation omitted). Relying on that logic, we concluded in *Nathan* that "[i]n a fraudulent procurement case" we calculate the amount of loss by "offset[ting] the contract price by the actual value of the components provided." *Id.* This loss calculation is similar to a classic method of remedying fraud: rescission of any agreements and restitution of the reasonable value of what the parties exchanged. *See Schwartz v. Rockey*, 932 A.2d 885, 889 (Pa 2007); *Boyle v. Odell*, 605 A.2d 1260, 1265 (Pa Super. Ct. 1992).

Applying this well-established principle here, the defrauded parties – the transportation agencies – gave up the price of the contracts and received the performance on those contracts. Therefore, we conclude that, if the standard definition of "loss" in Note 3(A) applies, the amount of loss Nagle and Fink are responsible for is the value of the contracts Marikina received less the value of performance on the contracts – the fair market value of the raw materials SPI provided and the labor CDS provided to transport and assemble those materials.

2.

We next turn to calculating the amount of loss assuming that the DBE program is a "government benefit" and, therefore, the special rule of Note 3(F)(ii) applies. Under Note 3(F)(ii), the "loss" is "not less than the value of the benefits obtained by unintended

recipients or diverted to unintended uses." U.S.S.G. § 2B1.1 cmt. n.3(F)(ii). An example of this rule follows: "if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, loss is $50." *Id.* The Government argues that the "benefits" are the face value of the contracts that Marikina improperly received. Nagle and Fink argue that the "benefits" are only the moneys that they "g[ot] and retain[ed] possession of," that is, the profit SPI and CDS earned on the contracts. Fink Reply Br. at 10 (internal quotation marks and emphasis omitted).

We find the Government's position persuasive, particularly in light of the goals of the DBE program. The DBE program cares about who performs the work. It assumes that performance of a contract allows a DBE to not only earn a profit on the deal but also to form connections with suppliers, labor, and others in the industry. The profit earned, therefore, is not the only benefit the DBE obtains when it receives the contract. Therefore, when SPI and CDS fraudulently received the transportation contracts, the DBE program assumed that all of the contract price was going towards benefiting a true DBE. Instead, the entire contract price was put towards a different use: profiting SPI and CDS and improving their business connections.

Nagle's and Fink's arguments to the contrary lose. They ask us to consider the definition of "benefit" under a different section of the Guidelines, § 2C1.1, governing offenses involving bribes in interpreting

the term "benefit" for Note 3(F)(ii). We disagree that the appropriate comparison for the term "government benefit" is the benefit that is offered as a bribe to an official. They also argue that the legislative history of § 2B1.1 shows that "benefit" means "net loss." *See* U.S.S.G. app. C, vol. II at 180-81 (2003). We find that the reference to "net loss" in this history refers to the example given at the end of the application note: the loss is the difference between the benefits they were intended to receive and the benefits they fraudulently received. *Cf. United States v. Tupone*, 442 F.3d 145, 153-54 (3d Cir. 2006). Here, as explained above, SPI and CDS were not intended to receive the subcontracts, so the loss is the difference between the intended benefits $0 – and the actual benefits received – the full contract price. Finally, they suggest that "benefit" only refers to the things got and retained and so means "profit." The DBE program allows true DBEs to form lasting relationships with suppliers, labor, and the broader industry; those relationships are things received and retained as a result of the program. Therefore, we agree with the Government that, if Note 3(F)(ii) applies, the benefits diverted from their intended use or obtained by unintended recipients is the entire value of the contracts Marikina received.

However, a different provision of the Guidelines requires a credit against the full face value of the contracts. Application Note 3(E)(i) to § 2B1.1 states that "the fair market value of the property returned and the services rendered, by the defendant or other

persons acting jointly with the defendant, to the victim before the offense was detected" shall be credited against the loss. *Id.* § 2B1.1 cmt. n.3(E)(i). Here, Note 3(E)(i) means that we must subtract the "fair market value" of the "services rendered" by SPI and CDS on the contracts before arriving at a final loss value.

The Government's argument that Nagle and Fink are not entitled to a credit under Note 3(E)(i) because as non-DBEs they did not "render any valuable services," Fink Gov't Br. at 35, is unpersuasive. Although the DBE program cares about who performs the work, it also requires that the work be completed. The transportation agencies required – and received – the construction of concrete materials. They did not receive the entire benefit of their bargain, in that their interest in having a DBE perform the work was not fulfilled, but they did receive the benefit of having the building materials provided and assembled.

The Government also argues that Note 3(E)(i) does not apply to the "special rule" of Note 3(F)(ii), but we disagree for two reasons. First, the special rules of Note 3(F) apply "[n]otwithstanding subdivision (A)." *Id.* § 2B1.1 cmt. n.3(F). Thus, Note 3(F) only supplants Note 3(A) when it applies; it does not supplant the other subsections of Note 3. Second, the drafters of Note 3 knew how to indicate that no credits would be permitted. Note 3(F)(v), which governs certain types of misrepresentation schemes, specifically states that "loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, *with no credit provided*

for the value of those items or services." *Id.* § 2B1.1 cmt. n.3(F)(v). Had the Sentencing Commission intended to preclude crediting services rendered against loss for Note 3(F)(ii), it would have used similar language as it used in Note 3(F)(v).[8]

The Government's primary argument is that other courts to have considered the issue of DBE fraud before us have not allowed a credit against the face value of the contracts received in calculating the loss. We do not find those cases persuasive on this point. First, two of the cases the Government relies on were decided using the previous Guidelines provision on fraud and deceit, § 2F1.1. *See United States v. Leahy*, 464 F.3d 773, 789-90 (7th Cir. 2006) (referring to § 2F1.1); *United States v. Bros. Constr. Co. of Ohio*, 219 F.3d 300, 317-18 (4th Cir. 2000) (same). This difference is important, because the old § 2F1.1 had an application note similar to current Note 3(F)(ii), which both courts relied on in reaching their holdings, but no application note similar to current Note 3(E)(i). *See* U.S.S.G. § 2F1.1 cmt. n.8(d) (2000). Therefore, neither the Fourth nor Seventh Circuits had occasion to consider whether Note 3(E)(i) required that the services rendered be credited against the loss. Second, although the Eleventh Circuit has also said that "the appropriate amount of loss . . . [is] the entire value of the . . . contracts that were diverted to

[8] At argument, the Government suggested we apply Note 3(F)(v) to calculate the loss on this appeal. We decline to address an argument raised for the first time at argument.

the unintended recipient" under § 2B1.1,[9] that court merely relied on *Leahy* and *Brothers Construction* and did not consider whether Note 3(E)(i) made a difference in the analysis. *United States v. Maxwell*, 579 F.3d 1282, 1305-07 (11th Cir. 2009). Accordingly, we see nothing in these cases that convinces us that Notes 3(E)(i) and (F)(ii) do not work together to allow a credit for the fair market value of the services rendered against the face value of the contracts.[10]

3.

We conclude that in a DBE fraud case, regardless of which application note is used, the District Court should calculate the amount of loss under § 2B1.1 by taking the face value of the contracts and subtracting the fair market value of the services rendered under those contracts. This includes, for example, the fair market value of the materials supplied, the fair

[9] The Government relies on similar language in our nonprecedential opinion in *United States v. Tulio*, 263 F. App'x 258, 263 (3d Cir. 2008). That case is, of course, not binding on this Court, *see* 3d Cir. I.O.P. 5.7, and in any event only dealt with the issue in a cursory manner.

[10] The Government's reliance on a worksheet from a Sentencing Commission training seminar is, therefore, misplaced. The worksheet relies on *Leahy* and *Tulio*, which we have rejected, and on our opinion in *Tupone*. We fail to see how *Tupone* supports the Government's position here. In *Tupone*, we concluded that the loss from a worker's compensation fraud was the difference between what the worker received and should have received. 442 F.3d at 15356. We did not address whether he was entitled to a credit for services rendered.

market cost of the labor necessary to assemble the materials, and the fair market value of transporting and storing the materials. If possible and when relevant, the District Court should keep in mind the goals of the DBE program that have been frustrated by the fraud.

B.

The Government alternatively argues that the error in calculating the amount of loss for Nagle and Fink was harmless. In the Government's view, the ten-level departures that the District Court granted for both Nagle and Fink essentially assigned them the loss figures they now ask for. Therefore, because they were ultimately sentenced with a Guidelines range that corresponded to the loss figures they asked for, the Government says that the loss miscalculation had no effect on their sentences.

An erroneous Guidelines calculation is harmless such that we may not grant relief if it is "clear that the error did not affect the district court's selection of the sentence imposed." *United States v. Langford*, 516 F.3d 205, 215 (3d Cir. 2008). "Even when the sentence is below the Guidelines range, the record must be unambiguous that the miscalculation of the range had no effect." *Id.* at 217. Our review of the record indicates that the District Court's miscalculation of the loss amount likely affected the sentences Nagle and Fink received even with the ten-level departures. Of principal concern to us is that the District Court

referred to the size of the loss it incorrectly calculated in sentencing Fink as one of the reasons for the sentence he received. *See* Fink App. at 249. Because it is not clear that the incorrect loss calculations did not affect the sentences imposed, we cannot conclude that the incorrect loss calculations were harmless.

IV.

For these reasons, we affirm Nagle's judgment of conviction, vacate Nagle's and Fink's sentences, and remand for resentencing.

HARDIMAN, *Circuit Judge*, concurring in part and concurring in the judgment.

I join all but Section III-A-2 of the opinion of the Court, and I concur in the judgment in full. Because the loss amount calculation in a DBE fraud case of this kind is governed by Application Note 3(A) to § 2B1.1 of the Sentencing Guidelines, I would hold that the "government benefits" provision does not apply here.

In *United States v. Nathan*, we characterized as "fraudulent procurement" a contractor's false statements to the Government that it would comply with the Buy American Act by not using foreign components in performing the contracts at issue. 188 F.3d 190, 194, 210 (3d Cir. 1999); *see also United States v. Biberfeld*, 957 F.2d 98, 99 (3d Cir. 1992) (describing as

procurement fraud a contractor's concealment of the fact that his supplies originated in Pakistan). As in *Nathan*, the defendants here conspired to lie to the Government about their compliance with federal regulations in order to receive contracts that otherwise would have gone to others. This is classic procurement fraud.

The Sentencing Guidelines make clear that the loss calculation in a procurement fraud case is covered by the "general rule" of Application Note 3(A). A subdivision of that note, Note 3(A)(v)(II), specifically addresses how Note 3(A) is to be applied in procurement fraud cases. This suggests that Note 3(F)(ii), a "special rule" designed for cases involving the fraudulent receipt of public benefits like welfare payments, has no place in a procurement fraud case. I would therefore vacate and remand for the District Court to apply Note 3(A) in accordance with the guidance provided by the Court in Section III-A-1 of its opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**Criminal No. 1:09-CR-384-01**
v.	:	
JOSEPH W. NAGLE	:	**Judge Sylvia H. Rambo**

MEMORANDUM

(Filed Sep. 1, 2010)

Before the court is Defendant Joseph W. Nagle's motion to suppress all electronic evidence obtained from the computers and server seized from the premises of Schuylkill Products, Inc. ("SPI") and CDS Engineers, Inc. ("CDS") on October 10, 2007.[1] (Doc. 41.) Specifically, Defendant argues that the Government indiscriminately rummaged through more than a million computer files from the electronic evidence seized from SPI and CDS, that the warrants used to justify the seizure were unconstitutional general warrants, unconstitutionally over-broad, and were executed in an unreasonable manner.

The Government argues that Defendant does not have standing to challenge the search and seizure of

[1] This motion was originally filed on behalf of Defendant Joseph W. Nagle and codefendant Ernest G. Fink, Jr. However, on July 30, 2010, Fink entered into a plea agreement with the Government. On August 16, 2010, at his change of plea hearing, Fink withdrew his motion to suppress.

the electronic evidence because he cannot demonstrate that he had a reasonable expectation of privacy in the content of SPI's and CDS's computers, and as such he cannot show that his Fourth Amendment rights were violated by the Government's actions. The court held a hearing on June 24, 2010. Upon consideration of the evidence, the court agrees with the Government. Defendant has failed to demonstrate that he has a personal, reasonable expectation of privacy in the contents of SPI's and CDS's computer systems, and has failed to demonstrate that his Fourth Amendment rights were violated. Accordingly, Defendant's motion to suppress will be denied.

I. Background

Because the court determines that Defendant has not demonstrated that he had a reasonable expectation of privacy in the property searched and seized, the court need not delve too deeply into the facts underlying the methods employed by the Government to conduct its search of the electronic information seized. This is true because even if the Government's warrant were a general warrant or unconstitutionally over-broad, and even if the Government's search methods amounted to a general indiscriminate rummaging of electronic evidence, conclusions which this court does not reach, it is immaterial to the prosecution of Defendant because all of this would have been done at the expense of SPI's and CDS's Fourth Amendment rights as opposed to the Fourth Amendment rights of the Defendant. Accordingly, the court

provides the following information as background to provide context for its decision.

A. The Alleged Fraud

At some point in 2007, the Government began an investigation into whether SPI, CDS, Marikina Construction Corporation and Marikina Engineers and Construction Corporation (collectively "Marikina"), a small Connecticut-based certified disadvantaged business enterprise ("DBE"), were engaged in a DBE-fraud scheme. The alleged fraud spanned a period of fifteen years from 1993 through 2008. *See, e.g., United States v. Campbell,* 1:08-CR-07, slip op. at 3 (M.D. Pa. July 1, 2010). During this time, Marikina received 336 subcontracts worth approximately $119.4 million, making it PennDOT's largest recipient of DBE-designated funds. *Id.* These subcontracts were awarded to Marikina by general contractors to whom PennDOT had awarded the prime contract to perform federally funded highway work in Pennsylvania, and they generally called for Marikina to "furnish and install" bridge beams. *Id.* Most of the bridge beams were manufactured by SPI, but some required Marikina to install non-SPI products. *Id.*

Applicable federal regulations allowed general contractors to count the entire DBE contract amount, including the costs of supplies and materials obtained by the DBE, even if the suppliers of the materials were non-DBE entities, toward the general contractor's DBE goal. *See* 49 C.F.R. § 26.55(a)(1). Thus,

despite the fact that for any given contract the cost of materials may make up the majority of the contract amount, the entire contract amount could be credited towards the general contractor's DBE goal if the DBE performed a commercially useful function.

Here, the Government alleges that Marikina did not perform a commercially useful function in connection with any of the PennDOT DBE subcontracts, and in reality, the subcontracts were actually found, negotiated, coordinated, performed, managed, and supervised by SPI and CDS personnel. Furthermore, upon receiving payment from the general contractor, Marikina remitted all of the funds to SPI if an SPI beam was used. If a non-SPI beam was used, Marikina paid the third-party for the beam and then remitted the balance of the funds to SPI. SPI would then kickback a fixed amount to Marikina. Thus, with every contract which listed Marikina as the DBE, all of the work and all of the money (except some of the materials and the Marikina fixed fee) would go to SPI and/or CDS. This scheme resulted in money that the Government intended to go to legitimate DBEs performing commercially useful functions, instead being funneled through Marikina directly to non-DBEs.

B. The Structure of SPI and CDS/Layout of the Companies

SPI was started as a family owned company in 1950 by Defendant's grandfather who ran the business until his death in 1980. (Doc. 73, Suppression

Hr'g Tr. 153, June 24, 2010.) From 1980 through 2004, the company was run by Defendant's father and Ernest G. Fink ("Fink"), a co-defendant and uncle by marriage to Defendant. (*Id.*) Upon his father's death in 2004, Defendant assumed control of his father's ownership share. (*Id.*) At the time of the search in October 2007, Defendant owned 50.1 percent of SPI and Fink owned 49.9 percent. (*Id.*) CDS was started in 1985 by Defendant's father, and after his death was absorbed as a wholly-owned subsidiary of SPI. (*Id.*)

At the time the search warrant was executed, Defendant was the President and CEO of both companies, and Fink was the Chairman and Chief Operating Officer of both companies. (*Id.* at 154.) Both companies employed family and friends of the Nagle and Fink families. (*Id.*) All told, the company employed 150 people at the time of the search; however, only 12-15 people worked in the SPI corporate office and 6-8 people worked in the CDS office. (*Id.* at 156160; *see also,* Doc. 50-2, Exhibit A to Gov't Br. in Opp'n to Defs.' Motion to Suppress, Descriptive Mem., at 7 of 29.) Although he was the President and CEO, Defendant testified at the suppression hearing that he did not supervise any employees on a day-to-day basis. (Suppression Hr'g Tr. 173-74.)

The corporate offices of SPI and CDS are two separate converted residences with multiple floors that have office workers both in cubicles and offices on all levels. (*Id.* at 34.) The SPI office had more than fifteen rooms covering an area of 2500 to 3000 square

feet. Defendant's office was on the second floor; it had a door that could be locked, and was private from the remainder of the offices. (*Id.* at 156-57.) As a part of his job, Defendant used a laptop computer that was owned by SPI. (*Id.* at 158-59.) Defendant's laptop docked at a station on his desk and he connected each day to SPI's computer network. (*Id*.) In order to access his computer and the company's network, Defendant had to log in using a username and password. (*Id.* at 159.) CDS's offices were located in another converted residence that was slightly smaller than the SPI office space.

The companies shared one computer network. (*Id.* at 161.) The network was hosted by a server, and it was used to conduct all or most of the companies' business. The server housed, among other things, the companies' financial records, payroll records, pricing information, estimating standards, and technical data. (*Id.* at 162.) The server was partitioned into different drives, and certain users were restricted to certain areas on the server. (*Id.* at 162.) It is not clear from the record whether Defendant had access to the entire server, or only part of it; however, Defendant testified that the server required a password to access it and that the only person whom he was aware of who could access the server directly was the IT administrator. (*Id.* at 189.) He also testified that he was not aware of how the server worked, and that he did not have access to the server itself. (*Id.* at 181, 189.)

Each employee who had a computer also had a company e-mail address, which was used to conduct

company business. (*Id.* at 162-63.) In addition to using company e-mail for sending such things as financial records, scheduling information, product details, beam pricing and sales information, e-mail was also used for the company to seek and receive legal advice. (*Id.* at 163.)

At the suppression hearing, Defendant testified that he would spend approximately three-fourths of his day on his computer, which he used for both personal and business purposes. For instance, Defendant testified that he used the computer for communication with attorneys, banking, home refinancing, as well as communication with his wife and his friends. (*Id.* at 165.) At the time of the search, Defendant did not have another e-mail address and used his company e-mail for all of his personal e-mail. He also testified that he did not authorize anyone else to use his computer or his e-mail, and that the only other person at either of the companies who would have done so was the "IT administrator." (*Id.* at 165:21.) Defendant also testified that he never used anyone else's computer at either company. (*Id.* at 185.)

C. The Warrants

On October 9, 2007, FBI Special Agent Thomas Marakovits applied to Magistrate Judge J. Andrew Smyser for warrants to search the premises of SPI and CDS. The SPI warrant identified the premises to be searched as (a) SPI's corporate administrative

offices, located in a two-story building with a detached garage; (b) SPI's transportation office, located in a one-story building; (c) SPI's human resources and payroll office, located above the SPI manufacturing plant; and (d) certain vehicles parked at or adjacent to the SPI manufacturing plant. (*See* Doc. 422, SPI Warrant and Aff. of Probable Cause ("SPI Warrant").) The CDS warrant identified the premise to be searched as (a) the administrative offices of CDS, which include a detached garage, and (b) certain vehicles parked at or adjacent to the office. (*See* Doc. 42-3, CDS Warrant and Aff. of Probable Cause ("CDS Warrant").) Both warrants specifically authorized the seizure of the business records of Marikina, its predecessors and affiliated operating entities, SPI and CDS for the years 1999 through the date of the warrant. (*See* Attach. B to SPI Warrant and CDS Warrant.) The warrants listed fourteen categories of business records that could be seized, including "Computers and computer equipment." (*Id.*) After completing his review of the warrants, Magistrate Judge Smyser signed both of them.

D. Search of SPI and CDS

On October 10, 2007, Special Agent Marakovits led a team of agents in executing the SPI and CDS warrants. During the execution of the warrants, agents from the FBI's Computer Analysis and Response Team imaged eleven computers and one server onsite, and thereby obtained duplicate copies of each computer's data for later analysis. (Suppression Hr'g

Tr. 39-41.) Because the imaging of the information on the computers and the server was successful, the agents did not remove any computers or computer equipment from the premises of SPI and CDS, and did not review any data from the computers or the computer images at the search premises.

The images of the eleven computers and one server came from numerous locations at SPI and CDS, including employee offices. None of the imaged computers were located in Defendant's office, which did not contain a computer at the time of the search. (*Id.* at 190.)

II. Discussion

A. Legal Standard

Defendant seeks to suppress all of the electronic evidence seized from SPI's and CDS's computers and its server on the basis that this information was seized pursuant to a general warrant, and, if not a general warrant, then an overly broad warrant, as well as because of the procedures used by the Government to cull through the information once it was in their possession. However, "[t]o invoke the Fourth Amendment's exclusionary rule, [Defendant] must demonstrate that *his own* Fourth Amendment rights were violated by the challenged search or seizure." *United States v. Steam,* 597 F.3d 540, 551 (3d Cir. 2010) (quoting *Rakas v. Illinois,* 439 U.S. 128, 132-34 (1978)) (emphasis added). These rights are violated only if "the disputed search and seizure has infringed an

interest of the defendant which the Fourth Amendment was designed to protect." *Rakas,* 439 U.S. at 140. "Significantly, a defendant's Fourth Amendment rights are not violated by the introduction of evidence obtained in violation of a third party's rights." *Steam,* 597 F.3d at 551 (citing *Rakas,* 439 U.S. at 139).

The proponent of a motion to suppress "bears the burden of proving not only that the search . . . was illegal, but also that he had a legitimate expectation of privacy in [the place searched]." *Steam,* 597 F.3d at 551 (citing *Rawlings v. Kentucky,* 448 U.S. 98, 104 (1980)) (omissions and alterations in original). Thus, in the context of the Fourth Amendment's exclusionary rule, the question of whether a defendant has "standing" to assert a violation of the Fourth Amendment is simply "shorthand for the determination of whether a litigant's Fourth Amendment rights have been implicated," as opposed to another's Fourth Amendment rights. *United States v. Mosely,* 454 F.3d 249, 253 n. 5 (3d Cir. 2006). Evidence from an illegal search is suppressed "only [as to those] defendants who are able to satisfy *Rakas's* 'standing' prong." *Steam,* 597 F.3d at 554.

B. Standing

Here, the Government argues that Defendant has not demonstrated that any of his Fourth Amendment rights were implicated by the seizure and subsequent search of SPI's and CDS's computers or its server. The court agrees.

1. Computers

The evidence presented at the suppression hearing makes it clear that during its search of the SPI and CDS premises, the Government imaged computers belonging to SPI/CDS from multiple locations throughout the 28-acre campus. (*See* Suppression Hr'g Tr. 80, 183.) Specifically, the computers imaged were located in the private work space of employees other than Defendant, and Defendant testified that he never used any other employee's computer. (*Id.* at 183.) Certainly, Defendant's reasonable expectation of privacy cannot be said to include these areas. *See, e.g., United States v. Triumph Capital Group, Inc.,* 211 F.R.D. 31, 54 (D. Conn. 2002) (CEO of company lacked standing to challenge search of company laptop computer used exclusively by another employee). Moreover, Defendant testified that his laptop was not at the office on the day of the search and was not imaged. (Suppression Hr'g Tr. 190.) Finally, Defendant testified that the company did not monitor what its employees did on their computers, it did not have a computer use policy, and he was unaware of what was on any of these machines. (*Id.* at 183, 185.) These facts unequivocally demonstrate that Defendant knew nothing – except in the most general sense that the computers were used for work – about what was stored on the computers seized or how they were used; thus, he had no *personal* expectation of privacy in any of the information that was imaged by the Government. *See, e.g., Triumph Capital Group, Inc.,* 211 F.R.D. at 54 (CEO of company lacked standing to

challenge search of company laptop computer used exclusively by another employee).

2. Server

The same is true for the SPI and CDS server. The evidence at the suppression hearing demonstrated that the server stored various types of electronic files and could be accessed by all of the employees with accounts on the companies' joint computer system. (Suppression Hr'g Tr. 162, 195, 206.) The server was partitioned into different drives, at least one of which was a public drive that was available to anyone who had access to the server. (*Id.* at 181, 206.) The other drives could only be accessed by certain employees in the various departments within SPI and CDS; however, there was scant evidence about who had access to which drives. The only specific testimony was by Fink, who testified that five employees, including himself and Defendant, had access to all of the drives on the server. (*Id.* at 192.) However, Defendant himself testified that he did not know how the server worked or what was stored on it, except in the most general sense. (*Id.* at 181.) While Defendant also testified that the server was private, and that the companies took security measures to make sure that no one from the outside would have access, (*id.* at 187-88), there was no testimony that Defendant took steps to ensure that his information or user folder remained inaccessible to others.

There was testimony at the suppression hearing that Defendant had a separate "folder" located on the server that he accessed, which presumably contained e-mails and other information, but this information came from FBI Forensic Examiner D. Justin Price, not Defendant. (*See id.* at 85.) Defendant did not present this information and does not mention it in his brief, and it was not established that the folder was protected by a password or that it was restricted to use only by Defendant. (*See id.* at 89-91.) In fact, at the hearing, Defendant candidly admitted that he did not know how the server worked:

> Q: And on that network you mentioned that, I guess, there's one file that has your user file on there. Were you aware of that when you worked there?
>
> A: I don't know the nuts and bolts of exactly how the server worked.

(*Id.* at 181:6-10.)

Furthermore, while counsel for Defendant tried to elicit from the Government's witness whether or not Defendant's user folder was restricted, he was unsuccessful:

> Q: Were you able to determine, however, that [Defendant] had a section of the server that was designated for his information?
>
> A: That's correct, yes.

Q: And was that section on the server segregated from other users of the computer system?

A: I am not aware of that.

Q: Were you able – well, let me ask you this question. Generally, are you able to analyze the server to determine whether certain users have access to different portions of the server?

A: That's correct, yes.

Q: Did you attempt to do such an analysis on the Schuylkill/CDS server?

A: No, I did not.

Q: So you don't know one way or the other whether Mr. Nagle's section of the server was secured so that other people at CDS or Schuylkill Products would not have access to it?

A: I do not know that.

(*Id.* at 88:2-19; *see also id.* at 90:23-91:6.) Counsel did not follow up with his own witnesses to demonstrate that Defendant's user file was in fact restricted for his private use. Without this information, Defendant has not established a reasonable expectation of privacy in his user folder or the information that was stored on the server. At best, Defendant has demonstrated that there were steps that he *could* have taken to demonstrate an expectation of privacy in the content of the information stored in his user folder, but there was no

evidence presented that Defendant actually took the steps necessary to do this.

Defendant, as the proponent of a motion to suppress, bears the burden of proving not only that the search was illegal, but also that he had a legitimate expectation of privacy in the place searched. *United States v. Steam,* 597 F.3d 540, 551 (3d Cir. 2010). Taken as a whole, the evidence adduced at the hearing does not demonstrate that Defendant had a personal expectation of privacy in the contents of the server. The security measures taken by the companies to ensure the privacy of their business records are relevant only to the standing of the corporations themselves, not Defendant. *See United States v. SDI Futures Health, Inc.,* 568 F.3d 684, 698 (9th Cir. 2009) ("The security measures that [the corporation] took to ensure the privacy of its business records are relevant only to the standing of the corporation itself, not of its officers."). None of the evidence at the hearing established that Defendant had exclusive use of the contents of the server or that he had a *personal* expectation that its contents would remain private. While he may have had the expectation that, as President and CEO of SPI and CDS, the contents of the companies' server would remain private, he had this expectation in his official capacity as an executive and officer of these corporations as opposed to himself as an individual. *See id.* at 696 ("[A]n employee of a corporation, whether worker or manager, does not, simply by virtue of his status as such, acquire Fourth Amendment standing with respect to

company premises. . . . As always, a reasonable expectation of privacy does not arise *ex officio,* but must be established with respect to the person in question.").

3. Status as the Majority Shareholder of SPI and CDS

In his brief, Defendant asserts that his status as a majority co-owner of SPI and CDS gives him standing because both businesses were "family owned and operated." (*See* Doc. 76, Defs.' Supplemental Br. in Supp. of Mot. to Suppress at 23-25.) In support, Defendant references the Ninth Circuit's decision in *United States v. Gonzalez, Inc.,* 412 F.3d 1102, 1117 (9th Cir. 2005). A review of the facts of that case demonstrates how it is distinguishable from the facts of the present case.

In *Gonzalez,* the Ninth Circuit held that a father and son who owned "a small, family-run business housing only 25 employees at its peak" had standing to challenge a wiretap that had been installed at the business. *Id.* Among other things, the Ninth Circuit pointed out that the father and son had exercised managerial control over the day-to-day operations of the offices where the intercepted conversations occurred, and they also had exercised full access to the building. *Id.* at 1116-17. However, the ownership of SPI and CDS is dissimilar. First, CDS was a wholly owned subsidiary of SPI, and as of September 2008, SPI employed approximately 150 employees – or six times that of the business in *Gonzalez* – and operated

on a 28-acre site throughout multiple buildings. (Suppression Hr'g Tr. 167; Doc. 50-2, Exhibit A to Gov't Br. in Opp'n to Defs.' Motion to Suppress, Descriptive Mem., at 7 of 29.) Furthermore, SPI had a ten-person management team, and Defendant supervised all SPI employees only "in an indirect way." (Suppression Hr'g Tr. at 174.) Thus, the court finds that *Gonzalez* is distinguishable, and believes that the facts presented here are, as the Government points out, more analogous to those confronted by the Ninth Circuit in *SDI Future Health, supra*, a case decided after *Gonzalez*.

In *SDI Futures Health,* the owners were controlling shareholders of a business whose headquarters was approximately a fifty person office. 568 F.3d at 697. Like Defendant, the SDI Futures Health owners worked in the office and "set its general policy as officers," however, they did not "personally manage[ ] the operation of the office on a daily basis." *Id.* The Ninth Circuit distinguished its earlier decision in *Gonzalez,* and held that the owners of SDI Futures Health had to show "some personal connection to the places searched and the materials seized" to challenge the search of workplace areas outside of their personal offices. *Id.* at 698. The court believes that Defendant must show the same, and that he has failed to do so.

None of the evidence presented at the hearing demonstrates that Defendant had a personal expectation of privacy in the content of the seized electronic information. Defendant's computer was not seized or

imaged, and he failed to adduce sufficient evidence to allow the court to conclude that he had an expectation of privacy in the content of the electronic information stored on the server. As such, Defendant has not demonstrated that any of *his* Fourth Amendment rights were violated, and thus his ownership of the companies whose records were seized is irrelevant. *See Steam,* 597 F.3d at 551 ("[A] defendant's Fourth Amendment rights are not violated by the introduction of evidence obtained in violation of a third party's rights.")

IV. Conclusion

Because none of Defendant's Fourth Amendment rights were violated, there is no reason to reach a determination about the constitutionality of the Government's search methods. Doing so would be a futile waste of judicial resources. *See Steam,* 597 F.3d at 554 (finding that evidence from an illegal search is suppressed only against defendants who are able to satisfy *Rakas's* "standing" prong). Accordingly, the court will deny Defendant's motion to suppress electronic evidence. An appropriate order will follow.

s/Sylvia H. Rambo
United States District Judge

Dated: September 1, 2010.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**Criminal No. 1:09-CR-384-01**
v.	:	
JOSEPH W. NAGLE	:	**Judge Sylvia H. Rambo**

ORDER

(Filed Sep. 1, 2010)

In accordance with the accompanying memorandum of law, **IT IS HEREBY ORDERED THAT** Defendant's Motion to Suppress Electronic Evidence, (Doc. 41), is **DENIED**.

s/Sylvia H. Rambo
United States District Judge

Dated: September 1, 2010.