UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. AMIT DAGAR and ATUL BHIWAPURKAR, Defendants.	Case No. 23 Cr 319 (ALC)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUPPRESSION OF EVIDENCE AND FOR A *FRANKS* HEARING

BACHNER & ASSOCIATES, P.C.
Michael F. Bachner
111 Broadway, Suite 701
(212) 344-7778 (Telephone)
(212) 344-7774 (Facsimile)
mb@bhlawfirm.com

Attorneys for Defendant Atul Bhiwapurkar

CLARK SMITH VILLAZOR LLP
Patrick J. Smith
Sean McMahon
250 West 55th Street, 30th Floor
New York, New York 10019
(212) 582-4400 (Telephone)
(212) 377-0868 (Facsimile)
patrick.smith@csvllp.com
sean.mcmahon@csvllp.com

Attorneys for Defendant Amit Dagar

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

I. Dagar's Background and Employment at Pfizer 2

II. The Search Warrants 2

III. The Search and Seizure Warrant Applications Are Misleading 3

IV. The Search and Seizure Warrant Applications Fail to Allege Cellphone Use in Furtherance of the Alleged Insider Trading Scheme 8

V. The Other Affidavits Rely on the Same Misstatements and Unsupported Inferences 10

VI. The FBI's Interview of Oberoi Further Undermines the Affidavits 10

VII. Other Experienced Pharmaceutical Programmers Say a "Lot of Work" Does Not Necessarily Mean a Positive Result 11

ARGUMENT 12

I. The Court Should Suppress Evidence from the Dagar and Bhiwapurkar Cellphones Because There Was No Showing of Probable Cause That They Were Used in Furtherance of the Specified Federal Offenses 13

A. Legal Standard 13

B. The Affidavits Provide No Showing of Probable Cause that the Dagar or Bhiwapurkar Cellphones Were Used in Furtherance of the Specified Federal Offenses 14

II. The False Statements in the Warrant Applications Require Suppression 16

A. Legal Standard 16

B. The Affidavits Contain Misstatements and Omissions Made Intentionally or with Reckless Disregard for the Truth 17

C. The Misstatements and Omissions in the Affidavits Were Material to the Finding of Probable Cause 19

D. The Remaining Allegations in the Affidavits Are Insufficient to Establish Probable Cause 21

CONCLUSION 21

TABLE OF AUTHORITIES

PAGE(S)

<u>Cases</u>

Franks v. Delaware,
438 U.S. 154 (1978) 13, 17, 21

Illinois v. Gates,
462 U.S. 213 (1983) 13, 16

Johnson v. United States,
333 U.S. 10 (1948) 16

Riley v. California,
573 U.S. 373 (2014) 16

Rivera v. United States,
728 F. Supp. 250 (S.D.N.Y.1990) 18

Rivera v. United States,
928 F.2d 592 (2d Cir. 1991) 17, 18

S.E.C. v. One or More Unknown Traders in Sec. of Onyx Pharms., Inc.,
296 F.R.D. 241 (S.D.N.Y. 2013) 20

Terry v. Ohio,
392 U.S. 1 (1968) 13

United States v. Awadallah,
349 F.3d 42 (2d Cir. 2003) 19

United States v. Cioffi,
668 F. Supp. 2d 385 (E.D.N.Y. 2009) 13

United States v. Galpin,
720 F.3d 436 (2d Cir. 2013) 14

United States v. Halsey,
257 F. Supp. 1002 (S.D.N.Y. 1966) 17

United States v. Lauria,
70 F.4th 106 (2d Cir. 2023) 13, 14, 15

United States v. Purcell,
967 F.3d 159 (2d Cir. 2020) 13, 14

United States v. Rutherford,
71 F. Supp. 3d 386 (S.D.N.Y. 2014) 17

United States v. Sandalo,
70 F.4th 77 (2d Cir. 2023) 19, 20

United States v. Ulbricht,
858 F.3d 71 (2d Cir. 2017) 14

United States v. Weigand,
482 F. Supp. 3d 224 (S.D.N.Y. 2020) 13

Statutes

15 U.S.C. § 78j(b) 9

15 U.S.C. § 78ff 9

18 U.S.C. § 371 9

18 U.S.C. § 1343 9

18 U.S.C. § 1348 9

18 U.S.C. § 1349 9

Regulations

17 C.F.R. § 240.10b-5 9

Defendants Amit Dagar and Atul Bhiwapurkar, by and through counsel, submit this memorandum of law in support of their motion for suppression of evidence and for a *Franks* hearing (the "Motion").

PRELIMINARY STATEMENT

The government obtained several search warrants in this case on the basis of false and misleading statements. Specifically, the warrants were based on affidavits that falsely claimed Dagar learned that the actual results of Pfizer's Paxlovid drug trial were positive and that Dagar and Bhiwapurkar then traded on that information. In the absence of evidence showing that Dagar, who was on the "blinded" side of the Paxlovid trial, learned of the outcome of the study, the supporting affidavits fall back on unreasonable and unjustified inferences to salvage a showing of probable cause. The choice to draw an unsupported and uninvestigated inference was a knowing one, and that makes the false assertions about Dagar's knowledge intentional. At a minimum, the sworn statements about Dagar's knowledge were made with reckless disregard for the truth. The affidavits also omit important facts that would have put the inferences into context and thus have permitted the Magistrate Judge to make an independent judgment about the validity of the core claim that knowledge can be inferred from the words in several electronic communications. Once the false claims and conclusory inferences are removed from the supporting affidavits, and the omissions are properly considered, the affidavits fail to support a showing of probable cause. The Court should order suppression of the evidence seized pursuant to the warrants, or, alternatively, order a hearing under *Franks v. Delaware* to assess the misstatements and omissions and suppress the evidence obtained in reliance upon them.

The several warrants ordering search and seizure of cellphones belonging to the Defendants are also defective because they fail to allege that the phones were actually used in furtherance of the alleged insider trading scheme under investigation. Generalized allegations about historical use of phones and observations about the type of information people keep on their phones in the modern technology-driven world do not constitute probable cause that a particular phone was used in furtherance of a particular offense.

STATEMENT OF FACTS

On June 29, 2023, Defendants Dagar and Bhiwapurkar were arrested after a federal grand jury returned a six-count indictment against them (the "Indictment"). The Indictment alleges that the Defendants "participated in an insider trading scheme to reap illicit profits from options trading based on material non-public information ("MNPI") about the results of clinical trials of Paxlovid, a drug treatment for COVID-19." (Indictment ¶ 1.) The six counts in the Indictment consist of one count of conspiracy to commit securities fraud and five counts of securities fraud.

I. Dagar's Background and Employment at Pfizer

Dagar is 44 years old and lives in New Jersey with his wife and young daughter. He is a lawful permanent resident of the United States, while his wife and daughter are American citizens. Pfizer, Inc. ("Pfizer") is a multinational pharmaceutical and biotechnology company. Dagar began working with Pfizer through a vendor in 2006 and became directly employed by Pfizer as a senior statistical programming lead in 2018. The Indictment alleges that his primary responsibilities included "assist[ing] in data analysis for certain clinical drug trials." (*Id.* ¶ 7.) One of the trials Dagar worked on was for Paxlovid, a medicine designed to treat COVID-19 infection. (*Id.*) Dagar was on the "blinded" side of the trial (*id.* ¶ 8), meaning he was not told which patient received the actual drug versus the placebo.

II. The Search Warrants

On December 28, 2022, the government applied for and obtained a warrant for cellphone location and pen register information for several cellphones (the "Cellphone Location Warrant"), including Dagar's cellphone (the "Dagar Cellphone") and Bhiwapurkar's cellphone (the "Bhiwapurkar Cellphone"). In support of this application, the government submitted the affidavit of Nicholas Anderson, a Special Agent with the FBI (the "Cellphone Location Affidavit"). *See* September 28, 2023 Declaration of Patrick J. Smith, Ex. A.[1] On January 13, 2023, the government applied for and obtained a search and seizure warrant to search Dagar's person and residence (the "Dagar Search and Seizure Warrant"), supported by an affidavit from Agent Anderson (the "Dagar Search and Seizure Affidavit"). *See* Ex. B. On January 17, 2023, the government applied for and obtained a search and seizure warrant to search Bhiwapurkar's person and residence (the "Bhiwapurkar Search and Seizure Warrant"), supported by an affidavit from Agent Anderson (the "Bhiwapurkar Search and Seizure Affidavit "). *See* Ex. C. On February 6, 2023, the government applied for a warrant for electronic communications stored on Dagar's cellphone and submitted a supporting affidavit from Agent Anderson. On February 10, 2023, the government filed a "corrected" application for and obtained a warrant for electronic communications stored on the Dagar Cellphone and the Bhiwapurkar Cellphone (the "ESI Warrant" and, together with the Cellphone Location Warrant, the Dagar Search and Seizure Warrant, and the Bhiwapurkar Search and Seizure Warrant, the "Warrants") and submitted a "corrected" supporting affidavit from Agent Anderson (the "ESI Affidavit" and, together with the Cellphone Location Affidavit, the Dagar Search and Seizure Affidavit, and the Bhiwapurkar Search and Seizure Affidavit, the "Affidavits"). *See* Ex. D.

III. The Search and Seizure Warrant Applications Are Misleading

In the section entitled "Probable Cause Regarding the Commission of the Specified Federal Offenses," the Dagar Search and Seizure Affidavit states that "[t]he United States is

[1] Exhibits to the September 28, 2023 Declaration of Patrick J. Smith are hereinafter cited as "Ex. __."

investigating the Subjects" – defined to include the Defendants – "and others for suspected securities fraud and wire fraud offenses relating to insider trading in the stock of Pfizer, Inc." (Dagar Search and Seizure Affidavit ¶ 5.) The Bhiwapurkar Search and Seizure Affidavit contains an identical statement. (*See* Bhiwapurkar Search and Seizure Affidavit ¶ 5.) According to both Search and Seizure Affidavits, "certain suspicious trading occurred in advance of an announcement by Pfizer regarding positive study results from a study of the drug Paxlovid." (Search and Seizure Affidavits ¶ 5.)[2] The Search and Seizure Affidavits contain a series of suggestive assertions that are designed to raise the suspicion of the reader, but lack conclusive force. For example, the affidavits assert that "[t]he suspicious trading was engaged in by Amit Dagar, an employee of Pfizer who *appears* to have had *some* access to information about the Paxlovid trials." (*Id.* (emphasis added).) The affidavits further allege that Dagar "*may* have provided material non-public information" to "co-conspirators known and unknown." (*Id.* (emphasis added).) According to the affidavits, "Dagar was formally on the 'blinded' side of the drug trial, but nevertheless *appears* to have learned the results, or *part* of the results, of the relevant study." (*Id.* ¶ 7(a) (emphasis added).)

The Search and Seizure Affidavits assert that, "in late October and early November 2021, drug trial database tables were released and made accessible to members of the unblinded study team and certain other Pfizer employees." (*Id.*) The affidavits do not allege that the database tables were made accessible to Dagar. According to the affidavits, "[t]he results disclosed in these tables" – which Dagar is not alleged to have seen – "were extraordinarily positive; Paxlovid was found to reduce the risk of hospitalization or death by 89% compared to placebo in

[2] Because the Dagar Search and Seizure Affidavit and Bhiwapurkar Search and Seizure Affidavit contain identical allegations using the same paragraph numbering, they are referred to and cited collectively in this brief as the "Search and Seizure Affidavits."

non-hospitalized high-risk adults with COVID-19." (*Id.*) There is no allegation that anybody told Dagar the actual results, or that they were "extraordinarily positive." The affidavits do not explain or provide any background as to what constitutes an "extraordinarily positive" result.

Next, the Search and Seizure Affidavits assert that "Kawleen Singh Oberoi, who is the manager or supervisor of Amit Dagar," received an email at approximately 5:54 a.m. on November 4, 2021. According to the affidavit, the email stated: "Dear Kawleen: Good morning! Since you are unblinded to the results, I'm reaching out to let you know we met last night with the EBRC and the decision is to file the NDA as soon as possible. Please do whatever you can today to start this process including the TLFs for secondary analysis. The press release will be out tomorrow morning." (*Id.* ¶ 7(b).) Agent Anderson stated his belief in each affidavit that "'NDA' refers to a New Drug Application, which is the vehicle through which drug sponsors formally propose that the FDA approve a new pharmaceutical for sale and marketing." (*Id.*) "Accordingly," Agent Anderson wrote in each affidavit, "I believe that in this message, Oberoi was being informed that the positive results of the Paxlovid trial would be announced the following morning, on November 5, 2021, and that he was further being asked to begin work on the work to 'file the NDA as soon as possible.'" (*Id.*) Dagar is not alleged to have ever seen this email.

Oberoi allegedly wrote back, "Great news! I have been the blinded member of the team, but let me reach out to [another Pfizer employee] for guidance with next steps and we will expedite the work on our end." (*Id.* ¶ 7(c).) The Search and Seizure Affidavits state that "I also believe that the statement 'Great news!' indicates that Oberoi understood the results of the trial were positive and significant for Pfizer." (*Id.*) Again, Dagar is not alleged to have seen this email.

Without any allegation that Dagar saw the foregoing emails, the Search and Seizure Affidavits then state that, on November 4, 2021, Oberoi and Dagar "exchanged electronic communications," which "included the following messages:"

Oberoi: we got the outcome

Oberoi: lag gayee hamari

Dagar: oh really

Oberoi: lot of work lined up

Dagar: yeah . screwed

Oberoi: have to find the details

Dagar: officially kal pata chalega ?

Oberoi: press release tomorrow

Oberoi: we may know today

Dagar: ok

Oberoi: since people will ask for un-blinded results

Dagar: yeah

Dagar: kind of exciting

(*Id.* ¶ 7(d).)

With respect to Oberoi's statement "lag gayee hamari," Agent Anderson asserted in the Search and Seizure Affidavits that, "[b]ased on my consultation with a linguist fluent in Hindi, I have learned that, in Hindi, this statement translates to, in sum and substance, 'we are screwed.'" (*Id.* ¶ 7 n.3.) And with respect to Dagar's question "officially kal pata chalega?", Agent Anderson asserted in both affidavits that, "[b]ased on my consultation with a linguist fluent in

Hindi, I have learned that, in Hindi, this statement translates to, in sum and substance, 'officially, will find out tomorrow?'" (*Id.* ¶ 7 n.4.)

These are the only facts alleged in the Search and Seizure Affidavits regarding information Dagar obtained about the study, or communications he had with others regarding the study. Yet they form the entire basis of the affidavits' claim that Dagar learned "the results, or part of the results" of the study.

Based on this information, the Search and Seizure Affidavits then make a series of unsupported inferences designed to show that Dagar somehow knew the results of the trial were "positive and significant for Pfizer." (*Id.* ¶ 7(d).) According to Agent Anderson, "[b]ased on my participation in this investigation, I *believe* that in the above exchange, including based on the translations provided by a Hindi linguist, Oberoi is stating to Dagar, in sum and substance, that the outcome of the trial was positive and that they are 'screwed' because the positive results mean they will have a 'lot of work' to do." (*Id.* ¶ 7(d) (emphasis added).) The affidavits do not explain why having a "lot of work" necessarily means that the results were positive. There is no recitation of any investigative step, including, for example, interviews of knowledgeable professionals at Pfizer or elsewhere in the industry, that might support an inference that a "lot of work" necessarily follows only from a positive result. As discussed below, it does not.

The Search and Seizure Affidavits provide no basis to infer that Dagar would have more work due to a positive result than due to a negative or indeterminate result. On top of this unsubstantiated belief, Agent Anderson – who does not profess to have any experience or specialized knowledge with respect to the duties of statistical analysts on drug trials – adds in both affidavits that "I *believe* that Dagar's question about whether they will 'officially' find out the following day indicates that Dagar understands the news and is asking when it will be publicly released." (*Id.* (emphasis added).) This is yet another baseless, unsupported logical leap. Worse, Agent Anderson ignores Oberoi's next statement: "we may know today" – the plain upshot of which is that ***we do not know now***. (*Id.*) Finally, Agent Anderson states in the affidavits that "I also *believe* that Dagar's comment that it was 'kind of exciting' indicates his understanding that the results were positive and significant for Pfizer." (*Id.* (emphasis added).) This conclusory allegation does not explain how Dagar's view that it was "kind of exciting" that months of tireless work were reaching their conclusion means that he knew whether the results were positive, how positive they were, or how they were significant for Pfizer.

There is no basis from this exchange to infer that Dagar knew the actual results. Nor was there any basis to lard on the additional speculative conclusion that Dagar knew the results were "significant." Agent Anderson's interpretation is pure guesswork.

IV. The Search and Seizure Warrant Applications Fail to Allege Cellphone Use in Furtherance of the Alleged Insider Trading Scheme

After describing the foregoing communications, the Search and Seizure Affidavits state that, "[f]ollowing this exchange, approximately between 1:21 and 1:22 p.m., and still on November 4, Dagar purchased three sets of short-dated, out of the money call options." (*Id.* ¶ 7(e).) "Dagar spent approximately $8,380 on the positions," the affidavits assert, which "gave Dagar the right to purchase 66,500 shares of Pfizer stock." (*Id.*) Then, the affidavits allege that, "[a]pproximately two hours after Dagar placed his trade, at approximately 3:24 p.m., Bhiwapurkar—who, as described below, appears to be a close friend or associate of Dagar—placed an order for 200 call option contracts for Pfizer shares." (*Id.* ¶ 7(f).) The affidavits go on to state that Bhiwapurkar placed calls to a third individual, Gursimran Bedi, who then purchased his own options for Pfizer shares. (*Id.* ¶ 7(f)-(g).)

Critically, however, the Search and Seizure Affidavits fail to allege any facts demonstrating that Dagar's cellphone was used in furtherance of any unlawful activity (defined in the warrant as "Specified Federal Offenses"). The Specified Federal Offenses are: "violations of Title 18, United States Code, Sections 371 (conspiracy to commit securities fraud), 1349 (conspiracy to commit wire fraud and securities fraud), 1343 (wire fraud), 1348 (securities fraud); and Title 15, United States Code, Sections 78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5 (securities fraud)." (*Id.* ¶ 3.)

The Search and Seizure Affidavits do not allege that Dagar used his cellphone to contact Bhiwapurkar, or even that the two communicated in any way on November 4, 2021. Instead, the affidavits describe a pattern of prior communications among Dagar, Bhiwapurkar, and Bedi without alleging that Dagar ever used his cellphone to communicate what he allegedly learned about the Paxlovid study results to anyone. (*See* Dagar Search and Seizure Affidavit ¶ 11; Bhiwapurkar Search and Seizure Affidavit ¶ 12 ("[W]ith respect to contacts between Dagar and Bhiwapurkar, there are approximately more than 650 telephone calls and approximately more than 10 texts between them from in or about January 2018 through August 2022.")) The affidavits add statements regarding generalized knowledge about societal use of cell phones, which provide no evidence at all regarding Dagar's use of his cellphone on November 4, 2021. There is no basis for a probable cause finding that Dagar's cellphone was used in furtherance of the alleged insider trading scheme.

There is similarly no basis for a probable cause finding that Bhiwapurkar's cellphone was used in connection with the alleged insider trading scheme. While the Bhiwapurkar Search and Seizure Affidavit does allege that Bhiwapurkar contacted Bedi on November 4, 2021, in the absence of any indication that Dagar communicated with Bhiwapurkar, any allegation that the

Bhiwapurkar Cellphone was used in furtherance of the alleged insider trading scheme is speculative.

V. The Other Affidavits Rely on the Same Misstatements and Unsupported Inferences

The Cellphone Location Affidavit, submitted on December 28, 2022, contains the same misstatements and baseless inferences as in the Search and Seizure Affidavits. It does not contain any additional allegations about information Dagar knew or communications he had. The ESI Affidavit was submitted on February 10, 2023 as a "corrected" version of an affidavit filed four days earlier. It is derived from the earlier affidavits and the misstatements and unsupported inferences contained therein. It contains no additional allegations about information Dagar knew or communications Dagar had.

VI. The FBI's Interview of Oberoi Further Undermines the Affidavits

The government provided a *Brady* letter on September 11, 2023 (the "*Brady* Letter") that further undermined the unsupported inferences drawn in the Search and Seizure Affidavits. *See* Ex. E. According to the *Brady* Letter, FBI agents interviewed Oberoi on January 18, 2023 and he stated, "in substance and in relevant part," the following:

> OBEROI explained that through the interoffice messages between OBEROI and Dagar he was telling Dagar that there were going to be long work hours ahead because there was going to be an urgent need to prepare the datasets for the unblinded group. The "outcome" referenced in the messages referred to the recommendation of the DMC. OBEROI advised that an outcome would be *either positive or negative*. Through the messages it was discussed that they would officially know the outcome *the next day* because there was going to be a press release.

(*Brady* Letter at 4 (emphasis added).)

The *Brady* Letter indicates that, contrary to the Search and Seizure Affidavits' characterization of the electronic communications between Oberoi and Dagar, Oberoi himself did not view the communications as revealing anything about the results of the Paxlovid study.

For example, while "there was going to be an urgent need to prepare the datasets for the unblinded group," there is no indication that this meant the results were positive or negative. Oberoi even explicitly stated that the results could have been "either positive or negative." Far from supporting the allegations in the Search and Seizure Affidavits, this information undermines them, which is presumably why the government put it in the *Brady* Letter.

VII. Other Experienced Pharmaceutical Programmers Say a "Lot of Work" Does Not Necessarily Mean a Positive Result

Further illustrating that Agent Anderson's inferences about the positivity of the Paxlovid trial results were baseless, basic investigative work would have readily revealed that experienced statistical programmers in the pharmaceutical industry would not infer from the statement about a "lot of work" that the result of a trial was positive. Filed concurrently with this Motion is the affidavit of Rachit Desai ("Desai Aff."), who has been a statistical programmer in the pharmaceutical industry since 2005. (*See* Desai Aff. ¶¶ 2-3.) Desai is currently the Associate Director of Statistical Programming at The Janssen Pharmaceuticals Companies of Johnson & Johnson, a position that sits on the blinded side of drug trials. (*See id.* ¶ 7.)

Desai's experience means he is "familiar with the nature and intensity of the work flow that follows a press release announcing the results of a drug trial." (*Id.* ¶ 8.) Desai affirms that "[w]hen the result of a trial is positive, there is typically substantial work for statistical programmers to assist in." (*Id.* ¶ 9.) However, "there is also substantial work for statistical programmers in those cases where the result of the study is negative or indeterminate" because "statistical programmers are typically engaged in analysis to designed to understand the data from the trials yielding a negative or indeterminate results so that the business can exercise its judgment about next steps." (*Id.* ¶ 10.) Desai provides an example from his career when a study's "initial result was not positive, and management commissioned intensive work to dissect the results to determine whether there was any indication of positivity in the data" that lasted "for many months." (*Id.* ¶ 11.) In sum, Desai states that, "[i]n my experience, it simply does not follow from the fact that there will be lots of work in the period following the announcement of the results of a drug trial that the result of that trial was positive." (*Id.* ¶ 12.)

Also filed concurrently with this Motion is the affidavit of David Etris ("Etris Aff."), who has been a statistical programmer in the pharmaceutical industry since 1997. (*See* Etris Aff. ¶ 3.) Through his employment at various contractors, Etris worked on projects for Pfizer full-time between 2004 and his retirement in 2021. (*Id.* ¶ 4.) Etris has "substantial experience when it comes to the timing and volume of work flow following the announcement of the results of a drug trial." (*Id.* ¶ 5.) He states that, "[i]n my experience, there is substantial work following such announcements regardless of whether the outcome is positive or negative. In either case, my experience is that there are inevitably numerous follow-up requests for statistical analysis." (*Id.* ¶ 6.) If a result was negative, Etris affirms that "there would be follow-up work to assist in determining what might have gone wrong with the study and whether additional testing is advisable. Where a trial is a failure, my experience is that we would be quite busy to wrap things up quickly so as not to waste resources." (*Id.*) As such, based on his "position working on Pfizer projects," Etris "would not be able to tell whether the result of a trial was positive simply from being told that there would be a lot of work. There was always a lot of work." (Id. ¶ 7.) As Etris states, "[i]t is incorrect to assume that only a positive result can lead to a 'lot of work.'" (*Id.*)

ARGUMENT

Because the Search and Seizure Affidavits utterly fail to support a probable cause showing that the Dagar or Bhiwapurkar Cellphones were used in furtherance of the alleged insider trading activity, the evidence obtained from the cellphones, and the fruits of that search, must be suppressed.

Further, since Dagar and Bhiwapurkar can show, on a preliminary basis, that the several Affidavits contained misstatements and omissions that were material to the finding of probable cause, the Court should order a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), to assess the misstatements and omissions. After removing the misstatements and considering the omissions, the statements remaining in the affidavits are insufficient to establish probable cause, and all evidence located pursuant to the affidavits should be suppressed.

I. The Court Should Suppress Evidence from the Dagar and Bhiwapurkar Cellphones Because There Was No Showing of Probable Cause That They Were Used in Furtherance of the Specified Federal Offenses

A. Legal Standard

"To be lawful under the Constitution, a search warrant must, *inter alia*, set forth evidence establishing probable cause to believe a crime has been committed and that evidence of that crime can be found in what is to be searched." *United States v. Weigand*, 482 F. Supp. 3d 224, 240 (S.D.N.Y. 2020). The probable cause standard "require[s] more than a 'hunch.'" *United States v. Lauria*, 70 F.4th 106, 128 (2d Cir. 2023) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983), and *Terry v. Ohio*, 392 U.S. 1, 22, 27 (1968)).

The Warrants Clause both "requires particularity and forbids overbreadth." *United States v. Cioffi*, 668 F. Supp. 2d 385, 390 (E.D.N.Y. 2009). "The manifest purpose of this particularity requirement was to prevent general searches." *United States v. Purcell*, 967 F.3d 159, 178 (2d Cir. 2020) (citation omitted). "To be sufficiently particular under the Fourth Amendment, a warrant must satisfy three requirements. First, 'a warrant must identify the specific offense for which the police have established probable cause.' Second, 'a warrant must describe the place to be searched.' Finally, the 'warrant must specify the items to be seized ***by their relation to***

designated crimes.'" *United States v. Ulbricht*, 858 F.3d 71, 99 (2d Cir. 2017) (emphases added) (quoting *United States v. Galpin*, 720 F.3d 436, 445-46 (2d Cir. 2013)). "A warrant is facially unconstitutional if it fails to comply with any of these requirements." *Purcell*, 967 F.3d at 178.

B. The Affidavits Provide No Showing of Probable Cause that the Dagar or Bhiwapurkar Cellphones Were Used in Furtherance of the Specified Federal Offenses

The Search and Seizure Affidavits fail the requirement that they specify the items to be seized by their relation to the designated crimes of wire fraud and securities fraud. The affidavits do not allege that Dagar used his cellphone in any way on November 4, 2021, the date of the alleged tip, much less that he used it to contact Bhiwapurkar or anyone else about the Paxlovid study. The affidavits, and the warrants they support, are thus "facially unconstitutional." *Purcell*, 967 F.3d at 178.

Instead of providing any support for its bald contention that the Dagar Cellphone and any other unspecified cellphones were "used as instrumentalities of and contain evidence of the commission of the Specified Federal Offenses" (Dagar Seach and Seizure Affidavit ¶ 12; Bhiwapurkar Seach and Seizure Affidavit ¶ 13), the Search and Seizure Affidavits fall back on generalized allegations that Dagar used his cellphone to communicate with Bhiwapurkar over several years. But "[t]he mere fact that persons know each other does not make it probable that they are criminal confederates." *Lauria*, 70 F.4th at 129.

In *Lauria*, the Second Circuit confronted affidavits that provided "only two 'facts' relating specifically to [the defendant] or to his [] cell phone" in support of warrants for the defendant's cellphone records: "(1) [the defendant] is Facebook 'friends' with [an alleged co-conspirator], and (2) [the defendant's] cell phone was in communication with [the alleged co-conspirator's] cell phone in February 2019 'shortly before' the [robbery at issue]." *Id.* The

Second Circuit held that "[t]hese facts are insufficient to demonstrate a 'reasonable probability' that the sought months of records for [the defendant's] cell phone would contain evidence pertaining to the [] [r]obberies." *Id.*

Here, when compared to allegations that a cellphone was used "shortly before" a specified crime, the Search and Seizure Affidavits rely on even more attenuated evidence of contacts between Dagar and Bhiwapurkar over several years, untethered to any allegation that the Dagar Cellphone was used on November 4, 2021 to contact anyone about the Paxlovid study in furtherance of the Specified Federal Offenses. Nor is it alleged that Bhiwapurkar used his cellphone to contact Dagar. That is insufficient to establish probable cause. Moreover, the information sought in *Lauria* consisted of cellphone location data, rather than the cellphone itself. *Id.* at 128. Dagar and Bhiwapurkar have even stronger Fourth Amendment interests in the contents of their cellphones than the *Lauria* defendant had in his cellphone location records, rendering the Search and Seizure Affidavits even more deficient than the affidavits found wanting in *Lauria*.

The Search and Seizure Affidavits fare no better with their generalized allegations of the use of cellphones in modern society. Agent Anderson states in the affidavits that, "based on my training and experience, devices such as smartphones like the Dagar [and Bhiwapurkar] Cellphone[s], which have been used to communicate with others who have engaged in activity giving rise to the Specified Federal Offenses often contain records of that activity . . . . For instance, call logs, voicemails, text messages, email correspondence, contact information, call notes, and certain documents are likely to contain evidence of communications with co-conspirators." (Dagar Search and Seizure Affidavit ¶ 14(b); Bhiwapurkar Search and Seizure Affidavit ¶ 15(b).) Imagine if, in a narcotics trafficking case, a DEA Agent alleged that automobiles are common modes of transportation and that drug dealers often use their cars to transport drugs and proceeds of drug transactions, and on that basis sought a warrant to search the alleged drug dealer's car. Absent an allegation that the car was used in furtherance of the narcotics offense under investigation, that application would be swiftly rejected.

The assertions in this case provide no basis to tie the Dagar Cellphone to the Specified Federal Offenses. As the Supreme Court has observed, "modern cell phones" are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014). The mere fact that they can be used by an individual does not provide probable cause that they were used in furtherance of any crimes. Because it provides no evidence at all that Dagar used his cellphone to communicate about the Paxlovid study with anyone on November 4, 2021, the Dagar Search and Seizure Affidavit does not demonstrate probable cause to seize and search the Dagar Cellphone. And because it does not contain any allegation that Bhiwapurkar used his cellphone to communicate with Dagar on November 4, 2021, the Bhiwapurkar Search and Seizure Affidavit suffers from the same defect.

II. The False Statements in the Warrant Applications Require Suppression

A. Legal Standard

"The essential protection of the warrant requirement of the Fourth Amendment . . . is in 'requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Gates*, 462 U.S. at 240 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)). "[S]ufficient factual information must be present in the warrant application for the magistrate to make an independent conclusion, therefore, a conclusory legal allegation is insufficient to establish the existence of probable cause sufficient to support the issuance of a search warrant." *United States v. Rutherford*, 71 F. Supp. 3d 386, 392 (S.D.N.Y. 2014).

"[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." *Franks*, 438 U.S. at 164-65 (quoting *United States v. Halsey*, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966)) (emphasis in original). "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks*, 438 U.S. at 155-56. "Intentional or reckless omissions of material information, like false statements, may serve as the basis for a *Franks* challenge." *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991) (citation omitted).

The Court should order a *Franks* hearing in this case because the Affidavits contain intentionally or recklessly false misstatements and omissions that were necessary to the initial finding of probable cause.

B. The Affidavits Contain Misstatements and Omissions Made Intentionally or with Reckless Disregard for the Truth

The Affidavits contain several intentionally or recklessly false and misleading statements and omissions. The Affidavits claim that Agent Anderson believes "Oberoi is stating to Dagar, in sum and substance, that the outcome of the trial was positive and that they are 'screwed' because the positive results mean they will have a 'lot of work.'" (Search and Seizure Affidavits ¶ 7(d); Cellphone Location Affidavit ¶ 10(b); ESI Affidavit ¶ 15(d).) In a transparent effort to persuade the Magistrate Judge that he had a basis to draw this inference from the message exchange, Agent Anderson claimed that "[b]ased upon my participation in the investigation," he is somehow in a position to state a belief about Dagar's state of mind. (*Id.*) But the Dagar Search and Seizure Affidavit, filed first, is devoid of any fact that would remotely suggest that the investigation to that point had yielded evidence that might assist in this project. Agent Anderson's assertion about the state of the investigation was misleading and designed to cover up the central flaw in the warrant application: there was no evidence that Dagar knew the actual result of the study, and all he knew was contained in the words exchanged with Oberoi.

The falsity of Agent Anderson's assertions is readily apparent. Oberoi, upon interview, plainly stated that the "outcome" referred to in the electronic communications "would be either positive or negative." (*Brady* Letter at 4.) Oberoi also said "that he did not tell anyone that there was a positive outcome of the Paxlovid clinical trial after receiving the email from Natarajan." (*Id.*) Further, experienced industry programmers like Desai and Etris confirm that there is no basis to infer a positive result from the fact that there will be a "lot of work" following the announcement of that result. Agent Anderson's statements "interpreting" the exchange lack any foundation. Indeed, it appears that Agent Anderson made his own interpretation without considering evidence to the contrary. These statements are false because there are no facts in the Dagar Search and Seizure Affidavit or the other Affidavits showing that Dagar actually knew the results were positive.

"'[R]eckless disregard for the truth' means failure to heed or to pay attention to facts as [the affiant] knew them to be." *Rivera v. United States*, 728 F. Supp. 250, 258 (S.D.N.Y.1990), *aff'd in relevant part*, 928 F.2d 592 (2d Cir. 1991). Thus, "[i]f [the affiant] made statements which failed to take account of the facts as he knew them, or which he seriously doubted were true, that would show reckless disregard for the truth." *Id.* Here, Agent Anderson, knowing that the warrant application would be rejected if he did not draw an inference of Dagar's knowledge, ignored the communications between Oberoi and Dagar indicating that Dagar did *not* know what the results of the study were. Oberoi wrote that he would "have to find the details" – in other words, he did not know the details beyond the fact that "we got the outcome." And Dagar expressed a question as to when they would learn the results, with Oberoi responding that "we may know today" – in other words, they did not know the results at the time of this conversation. Ignoring these facts, Agent Anderson knowingly, or recklessly, chose to conclude that when Oberoi said they were "screwed" and in for "a lot of work" that Oberoi was telling Dagar that the result of the study was positive. (Search and Seizure Affidavits ¶ 7(d); Cellphone Location Affidavit ¶ 10(b); ESI Affidavit ¶ 15(d).) This conclusion is baseless and demonstrably false. This case is therefore distinguishable from *United States v. Sandalo*, 70 F.4th 77 (2d Cir. 2023), in which a divided panel of the Second Circuit upheld the denial of a *Franks* hearing. In *Sandalo*, unlike here, the defendant failed to make any showing that the alleged misstatements in the challenged affidavit were indeed false. *Id.* at 86-90. The affidavits of Desai and Etris, coupled with the Oberoi interview statement, are a sufficient showing of falsity for *Franks* purposes.

C. The Misstatements and Omissions in the Affidavits Were Material to the Finding of Probable Cause

Each Affidavit claims Dagar knew the Paxlovid study results were positive. As discussed above, however, these claims are based on false information.

In evaluating materiality, a court should determine whether "putting aside erroneous information . . . , there remains a residue of independent and lawful information sufficient to support probable cause." *United States v. Awadallah*, 349 F.3d 42, 65 (2d Cir. 2003). Here, once the erroneous statements are set aside, the Search and Seizure Affidavits relate the following:

- Dagar was on the blinded side of the Paxlovid study.
- Oberoi told Dagar the results were in, without relating whether they were positive or negative.
- Hours later, Dagar purchased options in Pfizer stock.
- Hours after that, Bhiwapurkar purchased options in Pfizer stock.

On these facts, there is no probable cause to believe Dagar possessed material non-public information about the results of the drug trial before trading in Pfizer securities, a required element of insider trading liability. *See S.E.C. v. One or More Unknown Traders in Sec. of Onyx Pharms., Inc.*, 296 F.R.D. 241, 249 (S.D.N.Y. 2013). Indeed, there is no indication Dagar did anything other than make a bet on Pfizer's stock without any indication of how that bet would turn out, or that Bhiwapurkar learned the results of the study in any way. That is insufficient to show probable cause. Again, this case stands in contrast to *Sandalo*, where the Second Circuit found that the challenged affidavit, even with the alleged misstatements removed, contained substantial allegations supporting a showing of probable cause. 70 F.4th at 90. For example, while the *Sandalo* defendant challenged the affidavit's contention that police officers "observed" the defendant making certain statements about selling narcotics out of his residence to a confidential informant during a controlled phone call, the Second Circuit noted that there was still probable cause based on the defendant's "prior conviction for similar conduct out of the same property," the evidence of past narcotics purchases involving the defendant, and the statements of the confidential informant, who was deemed reliable by the District Court. *Id.* at 87. The sort of corroborating information found in the *Sandalo* affidavit is simply not present here.

D. The Remaining Allegations in the Affidavits Are Insufficient to Establish Probable Cause

"In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Franks*, 438 U.S. at 156. As discussed above, once stripped of their misstatements, and bearing in mind their omissions, the Affidavits do not support a finding of probable cause. As such, *Franks* commands that the Warrants be voided and the evidence obtained pursuant to them be suppressed.

CONCLUSION

Dagar and Bhiwapurkar respectfully request that the Court grant the Motion, order a *Franks* hearing, and suppress the evidence obtained pursuant to the Warrants and the fruits thereof.

Dated: September 28, 2023

/s/ Michael F. Bachner
BACHNER & ASSOCIATES, P.C.
Michael F. Bachner
111 Broadway, Suite 701
(212) 344-7778 (Telephone)
(212) 344-7774 (Facsimile)
mb@bhlawfirm.com

Attorneys for Defendant Atul Bhiwapurkar

/ s/ Patrick J. Smith
CLARK SMITH VILLAZOR LLP
Patrick J. Smith
Sean McMahon
250 West 55th Street, 30th Floor
New York, New York 10019
(212) 582-4400 (Telephone)
(212) 377-0868 (Facsimile)
patrick.smith@csvllp.com
sean.mcmahon@csvllp.com

Attorneys for Defendant Amit Dagar