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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

IN RE: SEARCH OF HARMONY	)	Case No. CV 06-07663 DDP (JCx)
GOLD, USA, INC., 7655 Sunset	)	
Boulevard, Los Angeles,	)	
California, and the premises	)	
located at 2265 Canyonback	)	
Road, Los Angeles,	)	<b>ORDER DENYING MOTION TO ENFORCE</b>
California,	)	<b>COURT ORDER</b>
	)	
Plaintiff,	)	
	)	
v.		[Dkt. 37]
,		
Defendants.		

Presently before the court is a motion by Frank Agrama and Harmony Gold USA, Inc. to enforce an order entered by this Court on January 26, 2007 ("the 2007 Order"). Having considered the submissions of the parties and heard oral argument, the court denies the motion and adopts the following Order.

**I. Background**

A. The 2006 search

The facts of this matter are not in dispute. In late 2006, Italian prosecutor Fabio De Pasquale sought, pursuant to a Treaty on Mutual Legal Assistance in Criminal Matters ("MLAT") between

1 Italy and the United States, U.S. government assistance with an  
2 Italian investigation of Movant Frank Agrama. In compliance with  
3 the MLAT and De Pasquale's request, the FBI sought and obtained  
4 search warrants for Agrama's home and his business, Movant Harmony  
5 Gold USA, Inc.

6 FBI agents executed the search warrants on November 15, 2006.  
7 De Pasquale and two of his assistants were present during the  
8 searches. The FBI ultimately seized approximately 100 boxes of  
9 documents, among other items.

10 Soon after, Movants filed a Motion for Return of Unlawfully  
11 Seized Property (Dkt. 1) in this Court. Movants asserted, among  
12 other things, that the affidavits underlying the search warrants  
13 were defective, that government agents failed to follow search  
14 protocols set forth in the warrants, and that approximately half of  
15 the documents seized were privileged materials relating to an  
16 upcoming trial in Italy.

17 The government initially opposed the motion for return of  
18 property, relying in part upon a declaration from De Pasquale.  
19 (Dkt. 18.) Later, however, the government filed a "Notice  
20 Regarding [] Response to Motion for Return of Property" ("the  
21 government's Notice"). (Dkt. 24.) In that notice, the government  
22 acknowledged that agents failed to follow certain search protocols.  
23 Agents failed, for example, to sequester privileged materials and  
24 allowed De Pasquale and his team to review privileged materials.  
25 The government also withdrew De Pasquale's declaration and  
26 represented that the government "no longer relie[d] upon the  
27 assertions therein to support its Response" to Movants' motion for  
28 return of property. (Dkt. 24 at 2.) Soon after, the government

1 withdrew its opposition to the motion. (Dkt. 25.) The  
2 government's withdrawal stated that the government "agrees that the  
3 warrants should be withdrawn, and agrees to return all materials .  
4 . . . forthwith. No materials seized . . . , or copies thereof, will  
5 be transmitted to Italy." (Dkt. 25 at 2:22-26.)

6 This Court subsequently entered an order granting Movants'  
7 motion for return of property, the 2007 Order.<sup>1</sup> (Dkt. 20.) That  
8 order, summarizing the procedural history of the matter, stated  
9 that the government's Notice "brought to the Court's attention  
10 that, among other things, the government would no longer rely upon  
11 the assertions of Fabio De Pasquale." (Dkt. 20 at 2:9-11.) The  
12 court ordered the search warrants withdrawn and ordered the  
13 government (1) to return all property seized to Movants, without  
14 retaining any copies, and (2) "not to transmit to Italy or  
15 otherwise provide to Fabio De Pasquale or his prosecution team, or  
16 to any third party, any item of property seized . . . or any copy  
17 of same." (Id. at 3:10-18.)

18 B. The instant motion

19 Now, approximately twelve years later, Movants ask that this  
20 Court enforce the 2007 Order. Movants do not contend that the  
21 government failed to return all of the property seized during the  
22 November 2006 search, nor do they contend that the government  
23 transmitted any seized item or information to Italy or to any  
24 member of De Pasquale's team. Rather, this motion appears to arise

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26 <sup>1</sup> The 2007 Order took the form of Movants' Proposed Order  
27 granting their motion for return of property, which Movants lodged  
28 in connection with that motion. The form of the order was  
therefore known to the government at the time it withdrew its  
opposition to the motion and to the relief requested therein.

1 out of investigatory activity undertaken by the Internal Revenue  
2 Service.

3         Some years after the events of 2006 and 2007, Agrama and his  
4 family indicated to the IRS an interest in participating in the  
5 IRS' voluntary disclosure program for offshore accounts, and made  
6 certain representations to the IRS in connection with that program.  
7 The IRS initially accepted the proffered disclosures and allowed  
8 the Agramas to participate in the voluntary disclosure program, but  
9 later came to doubt the veracity of some of the Agramas'  
10 representations. In 2013, the IRS rescinded the Agramas'  
11 acceptance into the voluntary disclosure program and began an  
12 examination of several of the Agramas' tax returns.

13         In 2015, the IRS issued penalty notices to Movant Frank  
14 Agrama's daughter. (Declaration of Dennis L. Perez, ¶ 9.) An  
15 attorney representing the Agrama family contacted IRS agents to  
16 ascertain the basis for the notices, and was told "that the IRS had  
17 received information from a report written by Gabriela Chersicla."  
18 (Id. ¶ 11.) The parties do not dispute that Chersicla was one of  
19 the members of De Pasquale's prosecution team, and was present  
20 during the flawed 2006 search. The government acknowledges that  
21 the IRS has possession of a report written by Chersicla in 2013.  
22 (Declaration of James Pack ¶ 9.) It appears, however, that as  
23 early as 2012, the IRS obtained information suggesting that  
24 Agrama's representations with respect to the voluntary disclosure  
25 program were not accurate.<sup>2</sup> (Pack Decl., ¶ 19.)

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27         <sup>2</sup> The IRS appears to be aware of other information suggesting  
28 the same, some of it resulting from investigations and legal  
proceedings in Italy and Switzerland. (Pack Decl. ¶¶ 33-43). It  
(continued...)

1           Approximately four years after IRS agents informed the  
2 Agramas' attorney that the IRS had received information from  
3 Chersicla, Movants filed the instant motion. Movants contend that  
4 the government, through the IRS, has violated the 2007 Order, and  
5 ask that this Court forbid the IRS from relying, for any purpose,  
6 upon any information obtained by Chersicla by any means.

7 II. Discussion

8           Much of Movants' argument is premised on the contention that  
9 in 2007, the government represented, both to Movants and to the  
10 court, that "it would not rely upon the representations of De  
11 Pasquale and his team for any purpose." (Reply at 3:4-6.) Movants  
12 read that supposed representation to apply to any government  
13 activity, including by the IRS, for any purpose, for all time.  
14 Movant's interpretation, however, is not supported in the record.  
15 The government's Notice stated, "The government . . . has withdrawn  
16 the Declaration of Fabio DePasquale . . ., and therefore no longer  
17 relies upon the assertions therein to support its Response." (Dkt.  
18 20 at 2:24-27 (emphasis added).) Granted, this Court's order,  
19 recounting the procedural history of the matter, did state that the  
20 government's Notice "brought to the court's attention that . . .  
21 the government would no longer rely upon the assertions of Fabio De  
22 Pasquale." (Dkt. 20 at 2:9-11.) Read in context, however, that  
23 statement can hardly be read as a recitation of a government pledge  
24 never to consider any information obtained from De Pasquale or any

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27           <sup>2</sup>(...continued)  
28 is unclear, however whether any of that information was derived  
from Chersicla's report.

1 member of his team, however and whenever obtained, for any purpose,  
2 at any time in the future.

3 Movants also contend that the effect of the court's 2006 order  
4 "is to prohibit the Government from relying in any way on De  
5 Pasquale or the information seized during the unlawful raid."  
6 (Motion at 11:12-13.) As an initial matter, the court notes that  
7 that position is at odds with the relief Movants seek, which  
8 includes an order stating that "the IRS can no longer rely upon the  
9 assertions of Fabio De Pasquale, including, but not limited to, any  
10 information or documentation obtained or used by Fabie De Pasquale  
11 and his prosecution team, including Gabriela Chersicla, whether  
12 from the unlawful search and seizure that occurred in 2006 or  
13 otherwise." (Mot. at 20:10-14 (emphases added).) Furthermore, the  
14 2007 Order was not so broad as Movants suggest. The only  
15 government action required by the 2007 Order was the return of all  
16 seized property to Movants, without retention of any copies or  
17 transmittal to any third party. Movants acknowledge that the  
18 government complied with that mandate.<sup>3</sup>

19 In the alternative, Movants ask that this court "order the  
20 exclusion of the Chersicla Report . . . as a remedy for the  
21 violations of Mr. Agrama's constitutional rights in the 2006 search  
22 of his home . . . ." (Mot. at 15:19-21). Movants contend that the  
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24 <sup>3</sup> Movants made this acknowledgment at oral argument,  
25 notwithstanding their written contention that the government  
26 "violated the order by not only permitting Chersicla to rely on  
27 what she learned from the unlawfully obtained documents in foreign  
28 proceedings, but from relying on it itself for the purpose of a  
domestic tax examination." (Reply at 5:10-13.) It is unclear to  
the court how, even if the 2007 Order had required it, the  
government could possibly have prevented Chersicla from relying on  
any particular information in the course of a foreign proceeding.

1 2006 search violated Agrama's Fourth Amendment rights because the  
2 search warrants were defective and, in any event, were not adhered  
3 to. (Mot. at 15-16.) Movants also argue that the search violated  
4 Agrama's Fifth and Sixth Amendment rights because De Pasquale  
5 accessed privileged attorney work product and attorney-client  
6 communications. (Mot. at 18.)

7 The court declines to address these constitutional arguments.  
8 Although Movants ask that this Court exclude all Chersicla-derived  
9 information, it is not clear to the court what the information  
10 could be excluded from. Movants represent that they do not seek to  
11 restrain the government from assessing or collecting taxes. (Reply  
12 at 12:23-24.) Rather, Movants characterize their efforts as  
13 seeking to "limit the sources on which the IRS could rely in  
14 conducting its 'information gathering.'" (Id. at 13:8-9.) Movants  
15 do not cite, nor is the court aware of, any authority for the  
16 proposition that this Court has the power to dictate to a  
17 government agency what information it can or cannot consider in the  
18 course of an investigation. Although constitutional claims may  
19 become relevant in some other proceeding at some later time, they  
20 are not ripe at this stage. See G. M. Leasing Corp. v. United  
21 States, 429 U.S. 338, 359 (1977) ("The suppression issue . . .  
22 obviously is premature and may be considered if and when  
23 proceedings arise in which the Government seeks to use the  
24 documents or information obtained from them."); see also Mitchell  
25 v. Riddell, 402 F.2d 842, 846 (9th Cir. 1968) ("It appears  
26 undisputed in the record that no assessment for federal income  
27 taxes has ever been levied . . . . For such reason no 'actual  
28 controversy' exists under the record before us."); Swartz v. KPMG,

1 LLC, 401 F. Supp. 2d 1146, 1155 (W.D. Wash. 2004) (reversed in part  
2 on other grounds, Swartz v. KPMG LLP, 476 F.3d 756 (9th Cir. 2007))  
3 ("A declaratory judgment is "not ripe for adjudication if it rests  
4 upon contingent future events that may not occur as anticipated, or  
5 indeed may not occur at all. Any assessment of penalties against  
6 the plaintiff by the IRS remains a future event which may not occur  
7 as anticipated, if at all.") (internal citations and quotations  
8 omitted); Grier v. Hilton Worldwide Inc., No. CV-14-00189-PHX-DLR,  
9 2014 WL 11515700, at \*2 (D. Ariz. July 21, 2014); In re J.C. Watson  
10 Co., No. MS-5682, 2005 WL 1079362, at \*4 (D. Idaho May 5, 2005).

11 **III. Conclusion**

12 For the reasons stated above, Movants' Motion to Enforce Court  
13 Order is DENIED.

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17 IT IS SO ORDERED.

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20 Dated: August 25, 2020



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DEAN D. PREGERSON  
United States District Judge