IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD

RANDY MICHAEL BRODNIK, D.O.,

Plaintiff,

v. Civil Action No. 1:11-0178

ROBERT LANHAM, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the court are the parties' cross motions for summary judgment as to Count I of plaintiff's Second Amended Complaint. (ECF Nos. 101 and 105). For the reasons discussed below, defendant's motion (ECF No. 105)[1] is **GRANTED** and plaintiff's motion (ECF No. 101) is **DENIED**.[2]

I. Background

According to the Second Amended Complaint, at the time of the events giving rise to the instant Complaint, defendant Robert Lanham was employed as a special agent with the Internal Revenue Service. Complaint ¶¶ 8 and 10. As a result of a six-year investigation of plaintiff Randy Michael Brodnik, D.O.

[1] Plaintiff argues that defendant's motion should be denied because it was not timely filed. Given the confusion surrounding the deadline, the court finds that good cause exists for filing the motion out of time.

[2] Plaintiff actually filed a Motion For Court to Make Finding As to Whether or Not Defendant Deborah Beck is a State Actor for Purposes of Bivens Liability which the court has construed as a motion for partial summary judgment in plaintiff's favor.

("Brodnik") for income tax evasion, Lanham recommended that Brodnik be prosecuted. See id. at ¶ 10. On March 18, 2009, a federal grand jury returned a seven-count indictment against Brodnik charging him with conspiracy and six counts of income tax evasion. See id. at ¶ 11. On June 2, 2010, the grand jury returned a seven-count second superseding indictment charging Brodnik with one count of conspiracy, five counts of income tax evasion, and one count of corruptly endeavoring to impede and obstruct the due administration of the Internal Revenue laws. See id. at ¶ 13. After a three-week jury trial, Brodnik was acquitted of all charges. See id. at ¶¶ 14, 20.

Brodnik alleges that one of the government's witnesses, defendant Deborah Beck, testified at Brodnik's trial that she illegally accessed Brodnik's electronic mail and provided it to defendant Lanham. See id. at 17-18. Count I of the Complaint is brought pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and alleges the violation of Brodnik's constitutional rights.

Lanham filed a motion to dismiss the Bivens claim which the court denied insofar as it alleged a violation of Brodnik's Fourth Amendment rights regarding his email.[3] In his complaint, Brodnik alleged as follows:

[3] Lanham's motion to dismiss the Bivens claim was granted in all other respects. See ECF No. 83.

17. Defendant Beck testified that she illegally accessed plaintiff Brodnik's electronic email.

18. Defendant Beck testified that she produced print outs of messages she obtained when she illegally accessed plaintiff Brodnik's electronic mail to defendant Lanham.

19. Defendants Lanham and Beck conversed frequently via electronic mail and other means. Some of defendants' conversations included defendant Beck's compensation if plaintiff Brodnik was convicted.

32. Defendant Lanham participated in defendant Beck's actions by using the illegally accessed electronic mail in the prosecution of plaintiff Brodnik in violation of the Fourth and Fourteenth Amendments.

35. Furthermore, defendant Lanham also discussed possible compensation for defendant Beck if plaintiff was convicted, thus encouraging defendant Beck to gain information in any manner possible in violation of the Fourteenth Amendment.

36. By encouraging defendant Beck to illegally search and seize plaintiff's electronic mail, and then subsequently using the fruit of that illegal search and seizure, plaintiff's Fourth Amendment rights were violated.

Second Amended Complaint ¶¶ 17-19, 32, and 35-36. Taking plaintiff's allegations as true and drawing all reasonable inferences in plaintiff's favor, the court found that a fair reading of plaintiff's complaint is that Beck's acquisition of Brodnik's emails was done at the behest and with the encouragement of defendant Lanham, thereby transforming her action into government action. Specifically, the court stated:

> According to the complaint, in seizing the emails, Beck was encouraged to do so by Lanham and, therefore, could be considered an agent of

> the government. The viability of Brodnik's Bivens claim hinges on whether Beck was acting as an agent of the government when she seized plaintiff's emails. If she was, the Fourth Amendment is implicated. If she was not, there is no Fourth Amendment violation and plaintiff's Bivens claim is subject to dismissal.
>
> For this reason, the court deems it necessary to allow limited discovery on this issue so that the court can determine whether to allow plaintiff's Bivens claim to proceed. See Crawford-El v. Britton, 523 U.S. 574, 600 (1998) ("[T]he judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible."). Where, as here, a court finds that a "plaintiff has made sufficiently specific factual allegations" and "taking plaintiff's allegations as true, plaintiff has stated a violation of clearly established law[,] . . . "[a]llowing limited discovery enables the Court to resolve the issue of qualified immunity in the manner envisioned by Crawford-El."). Delph v. Trent, 86 F. Supp.2d 572, 577 (E.D. Va. 2000).

ECF No. 83.

The parties engaged in limited discovery on the email issue and the instant motions followed.

II. Analysis

With respect to plaintiff's claims regarding Lanham's methods in obtaining his emails, Lanham argues that his actions are entitled to qualified immunity. The defense of qualified immunity shields a government official from liability for civil monetary damages if the officer's conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known. Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994); Smook v. Hall, 460 F.3d 768, 777 (6th Cir. 2006). The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In Saucier v. Katz, 533 U.S. 194, 195 (2002), the Supreme Court mandated a two-step sequence for resolving the qualified immunity claims of government officials.

> First, a court must decide whether the facts that a plaintiff has alleged (see Fed. Rules Civ. Proc. 12(b)(6), (c)) or shown (see Rules 50, 56) make out a violation of a constitutional right. 533 U.S., at 201, 121 S. Ct. 2151. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. Ibid. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right.

Pearson v. Callahan, 129 S. Ct. 808, 815-16 (2009). The Court has held that courts may exercise discretion in deciding which of the two Saucier prongs "should be addressed first in light of the circumstances in the particular case at hand." See id. at 818. "[T]he rigid Saucier procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no outcome on the case. There are cases in which it is plain that a constitutional

right is not clearly established but far from obvious whether in fact there is such a right." Id.

Under the first prong, a court must determine whether the facts as alleged, taken in the light most favorable to plaintiff, demonstrate the violation of a constitutional right. Saucier, 533 U.S. at 201 ("Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [state actor's] conduct violated a constitutional right?"). If the allegations do not give rise to a constitutional violation, no further inquiry is necessary. Id.

A right is clearly established when it has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state in which the action arose. Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999). The relevant, dispositive inquiry is whether it would be clear to a reasonable person that the conduct was unlawful in the situation he confronted. Saucier v. Katz, 533 U.S. 194, 195 (2002). "Clearly established" does not mean that "the very action in question has previously been held unlawful," but requires the unlawfulness of the conduct to be apparent "in light of preexisting law." Wilson v. Layne, 526 U.S. 603, 615 (1999).

> The responsibility imposed on public officials to comply with constitutional requirements is commensurate with the legal knowledge of an objectively reasonable official in similar

> circumstances at the time of the challenged conduct. It is not measured by the collective hindsight of skilled lawyers and learned judges. . . . "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." Maciarello v. Sumner, 973 F.2d 295, 295 (4th Cir. 1992), cert. denied, 506 U.S. 1080 (1993).

Jackson v. Long, 102 F.3d 722, 730-31 (4th Cir. 1996); see also Williams v. Hansen, 326 F.3d 569, 578-79 (4th Cir. 2003) (holding that for purposes of qualified immunity, executive actors are not required to predict how the courts will resolve legal issues). "In determining whether the specific right allegedly violated was `clearly established,' the proper focus is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged.'" Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994)(quoting Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992)).

Plaintiff's Bivens claim is that defendants Lanham and Beck violated his Fourth Amendment right to be protected from unreasonable searches and seizures by "illegally" accessing his email. The Fourth Amendment guarantees that, "The right of the people to be secure in their persons, houses, paper, 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." U.S. Const. amend. IV; Minnesota v. Carter, 525 U.S. 83, 88

(1998). To establish a violation of his rights under the Fourth Amendment, Simons must first prove that he had a legitimate expectation of privacy in the place searched or the item seized. See Rakas v. Illinois, 439 U.S. 128, 143 (1978); United States v. Rusher, 966 F.2d 868, 873-74 (4th Cir. 1992).

In order to prove a legitimate expectation of privacy, Brodnik must show that his subjective expectation of privacy is one that society is prepared to accept as objectively reasonable. See California v. Greenwood, 486 U.S. 35, 39 (1988). A government action constitutes a "search" only if it infringes on an expectation of privacy that society considers reasonable. United States v. Jacobsen, 466 U.S. 109, 113 (1984). "Thus, the government must obtain a warrant before inspecting places where the public traditionally expects privacy, like the inside of a home or the contents of a letter." In re § 2703(d) Order, 787 F. Supp.2d 430, 439 (E.D. Va. 2011)); see also United States v. Karo, 468 U.S. 705, 714 (1984) (warrant required to use electronic location-monitoring device in a private home); Kyllo v. United States, 533 U.S. 27, 34 (2001) (warrant required to use publically unavailable, sense-enhancing technology to gather information about the interior of a home); Jacobsen, 466 U.S. at 114 (warrant required to inspect the contents of sealed letters and packages); United States v. Warshak, 631 F.3d 266, 287–89

(6th Cir. 2010) (extending Fourth Amendment protection to the contents of email communications).

The court has already held that Brodnik had a legitimate expectation in the privacy of his emails. Furthermore, it was clearly established that as of the time Lanham began his investigation, on or about 2002 or later, that he needed a warrant to obtain Brodnik's emails. As the court previously found, the viability of Brodnik's Bivens claim turns on whether Beck was a state actor when she accessed Brodnik's emails. The court finds she was not.

Lanham testified that the first time he met Beck was on March 20, 2002. Deposition of Robert Lanham, February 2, 2017, at 116 (ECF No. 103-1) (hereinafter "Lanham Depo. at ___").[4] Beck testified that she had accessed Brodnik's email on two occasions after her employment ended -- once in Lanham's presence and on an earlier occasion outside his presence. Deposition of Deborah Beck, February 2, 2017, at 6-7, 11 (ECF No. 103-2) (hereinafter "Beck Depo. at ___"). The evidence is undisputed that Lanham did not know Beck had accessed Brodnik's email until he asked her where she had gotten a certain document (the will) and Beck told him. Lanham testified repeatedly and unequivocally

[4] Brodnik has objected to defendant's filing of the deposition transcripts in their entirety. However, more often than not, the court directs the parties to file the full deposition transcripts and would have done so in this case.

that he did not tell Beck to access Brodnik's email nor did he encourage her to do so. Lanham further testified that when he found out that she had accessed Brodnik's email, he told Beck not to do it again. Specifically, he testifed:

Q: Did you ever access Brodnik's e-mail account without his retort?

A: Absolutely not.

Q: Did you ever tell Deborah Beck that she should access Doctor Brodnik's e-mail account?

A: That she should or shouldn't?

Q That she should.

A: No.

Q: Okay. In fact, you directed her not to access Brodnik's e-mail account.

A: Yes.

Q: And you did that at your first meeting on March 20, 2002, correct?

A: Yes.

Q: And then you followed up and again admonished her not to access his e-mail account in June of 2002, correct?

A: I did.

Q: Are you aware whether or not Ms. Beck – when you met with her in March of 2002, were you aware at that moment, during that meeting, whether or not Ms. Beck had in fact accessed Doctor

A: No.

Q: Okay. Was that a general statement you would make to a witness?

A: Any time that I had a witness who had access to records in an office or something like that, if they no longer worked there, if there was some indication that maybe they were gonna try to get something and it was not legal, I would advise them, and that's what I did with her about the e-mail when I realized what she had done.

Q: And when did you realize what she had done?

A: After she had logged in, pulled up the document we were looking at and I asked her, you know, "What is this? Where did it come from?"

Lanham Depo. at 118-19.

Upon repeated questioning, Lanham continued to maintain that Beck accessed Brodnik's email without his knowledge or assent.

A: [T]here was a time when Ms. Beck showed me – and I don't remember which meeting it was –

Q: All right. Showed you what?

A: – a will – or maybe it was two wills. It was a document that Anthony Kritt had prepared. And I noticed that the document was prepared after [Beck] had left the employ of Doctor Brodnik and it – you know, it struck me.

And I said, "How did you get this?" And I can't recall – I can't recall if it was that first meeting or the second meeting.

Q: Okay. Do you remember anything else?

A: She went to her computer and did something, which I now know she was

logging into, apparently, Doctor Brodnik's email account.

Q: You say you now know. You knew at the time of the trial, the criminal trial, didn't you?

A: Yes.

Q: You were asked about that.

A: I did not know when she did this what she was doing. I asked her where the document came from, and she went to her computer.

I did not know what she was doing. I didn't know if it was a file on her computer. I did not know until I asked her, "What is this? Where did this come from?"

Q: And this is at one of the meetings that you had with her. And what do you remember, if anything, she said?

A: Like I said, she went to the computer, she pulled up this document, and I asked her something like, "What is this? Where did it come from?" And she said it was Doctor Brodnik's e-mail account.

Q: All right. And that was either the March 2002 or the June 2002 – or I think you may have said July 2002 meeting with Ms. Beck. Right?

A: Yeah. I'm not sure when the two meetings took place. I'm pretty sure the first one was in March.

Q: All right. And so do you remember anything else?

A: The thing about the – her getting into the e-mail was probably in the first meeting.

* * *

Q: Have we covered it?

A: Everything I remember about?

Q: Your meeting with Ms. Beck. If you want to say on both occasions or one occasion or differentiate between the two, that's fine.

A: . . . I'm not sure but I believe that she gave me records at that meeting, but I can't specifically identify what they were. I just – it was either that meeting or the second meeting, she gave me like a – like a shopping bag of records.

I advised her after she accessed the e-mail account and told me that's what it was that she could not do that anymore, not to do it anymore.

Lanham Depo. at 23-25.

Lanham's testimony did not waver on this point: Lanham maintained that he told Beck not to access Brodnik's email.

Q: All right. Do you recall when you first determined that Ms. Beck had accessed Doctor Brodnik's e-mail if you told her not to do it anymore?

A: I absolutely did.

Q: Why?

A: Because of everything you just said. I am not allowed to access someone's e-mail account without their permission unless I have some authority to do it. And I did not have any authority to do so.

Q: Yeah, we just have to put this on the record. We're both on the same page here. But I wanted to make certain, you know, you understood that. So there isn't any question about that. If Doctor – if the government wanted to access Doctor Brodnik's e-mail, it would have had to

have gone before a judge or used some judicial method - warrant or Grand Jury subpoena - to attempt to get that information. Right?

A: Yes.

Q: Okay. And you believe that Ms. Beck, through Doctor Brodnik's e-mail, acquired information about Doctor Brodnik's will?

A: I think that's what it was.

Lanham Depo. at 34-35.

Lanham's testimony is internally consistent on this issue and there was no ambiguity. Once he found out that Beck had accessed Brodnik's email, he told her not to do it again.

Q: All right. Her accessing Doctor Brodnik's e-mail account was a big no-no, wasn't it?

A: For me, yes.

Q: Yes. And so it was of such a significant issue, why didn't you make note of it in your handwritten notes?

A: Because that is one of the few things that I remember to this day about that meeting.

* * *

Q: I see on the Deposition Exhibit 3, you say to her not to log on to Brodnik's e-mail account and view his mail anymore, right?

A: Yes.

Lanham Depo. at 62-63.

Q: And you – Ms. Beck is telling you about changes to Doctor Brodnik's will, correct?

A: Yes.

Q: And then there's also a reference where it says, "Beck obtained this information from Brodnik's e-mail." Right?

A: Yes.

Q: And then you say, "I reminded Beck she was not supposed to be looking at his e-mail anymore." Right?

A: Yes.

Lanham Depo. at 84.

Furthermore, Lanham's testimony was also clear that he had no reason to believe that Beck accessed Brodnik's email after he told her not to do so.

Q: Did you receive any indication in writing after June of 2012 that Ms. Beck was accessing Doctor Brodnik's e-mails again?

A: I didn't receive it in writing, and I didn't receive anything from anyone indicating that she was doing that.

Lanham Depo. at 88-89.

Q: And there's no way really to know if after – except for looking at the documents and trying to make that educated guess, after June of 2002, any of the other things she sent you came from the e-mails. There's no way to determine that, right?

A: If I had suspected that that had happened, just like I did with the wills - which were of no use - I would have instructed her and told her, "We told you not to do that any more," and I would have went to the AUSA and said, "Look, we've got a problem here."

Q: Did you do that?

A: No, because it never happened.

Q: You don’t know that she didn’t access it again.

A: Okay, you asked me did I go to the AUSA and say that she had accessed his e-mail.

Q: Yes.

A: And I said it never happened, I never did that because I am unaware of her accessing his e-mail account after that one time.

Lanham Depo. at 94-95.

Q: And how do you know that she had accessed the e-mail account by looking at Deposition Exhibit 3?

A: Because that’s where I wrote in there that I’d served her with a subpoena and I told her not to take any documents out of the office, and I explained to her it would cause problems, and I told her not to access the e-mail account anymore.

Q: And do you know how it was that you determined that she had logged into Brodnik’s e-mail account?

A: I asked her.

Q: Okay.

A: Otherwise I wouldn’t have known.

Q: Okay. Did she show you any e-mails at that time? At this March 20th, two thousand interview.

A: I don’t think she did, because she – I asked her about the document and she brought the document up, and once she brought the document up and I asked where it came from, then everything else was off limits. We couldn’t go any father.

Told her to log out of it and not to do it anymore.

Lanham Depo. at 122-23.

> Q: Okay. Are you aware of whether Ms. Beck accessed Brodnik's e-mail account more than once?
>
> A: No. The one time that, you know, I cautioned her not to do it anymore was the only time that – well, it was the last time. I think she had done it before, but I didn't know anything about any of it until the time she did it in my presence.
>
> Q: Okay. And in fact, you told her not to do that.
>
> A: Yes. At that point, when I became aware of it.

Lanham Depo. at 126-27.

Beck testified in a similar vein – that Lanham never told her to access Brodnik's email and that, when he found out she had, he admonished her not to do so again.

> Q: Tell me how many times you – after your employment ended with Doctor Brodnik or Bluefield Women's Center how many times you accessed his e-mail account.
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> A: Actually, it may have been two. I was thinking one. But the reason I say two is because the only reason I accessed it was to see if I still had access before Mr. Lanham came with the subpoena.

Beck Depo. at 6-7.

> Q: Okay. When you accessed Doctor Brodnik's e-mail, whichever time it was –
>
> A: Uh-huh.
>
> Q: – you say, Mr. Lanham was there, right?

A: The one time. The first time that I did it was – I was just trying to see if this was information – as a perfectionist, I'm not gonna give you bad information –

Q: My question was: Mr. Lanham was there?

A: The second time.

Q: The second time Mr. Lanham was there.

A: Yeah, because I handed it to him.

Q: Right.

A: I said, "I can't believe he's using my password."

Q: Right. And then what did Mr. Lanham say?

A: He told me not to do it anymore, and he asked me, had I done it previously, and I said, "Yes, when I checked to see if this worked yesterday" – I think it was like yesterday.

* * *

Q: And he was standing there while you were accessing it.

A: Yes, but I didn't tell him what I was doing. But I did go and key it in.

Beck Depo. at 32-34.

Upon repeated questioning, Beck's testimony likewise remained consistent on this issue:

Q: And before you testified that you accessed the e-mail account –

A: Uh-huh.

Q: – this network account –

A: Uh-huh.

Q: – using your e-mail and your log-in and password –

A: Uh-huh.

Q: – because you had been served with a subpoena –

A: Yes.

Q: – and it was your understanding that some of the documents that were irrelevant were in this – on this network.

A: Could – you know, my understanding – my point was that this might be something that I had, this was information I had. And if it was something that was supposed to be in part of the subpoena, then that was the way I looked at it, you know.

Q: Okay.

A: So yeah.

Q: But Agent Lanham never told you to access –

A: No, no ma'am.

Q: – this network.

A: Actually, he said, "Have you done this before?" And I said, "No." And I had not, except for just that night before. And then he said, "Well, don't do it again."

Q: Okay.

A: And I think he told me then, you know, that – not to – he told me not to do it. He said, "Don't do this again." He said, "Don't ever get into this again." And I didn't.

Q: Okay. And you mentioned before, as you were testifying to Mr. Harris' questions,

that at some point in time, you were having a conversation – whether it was in the kitchen or at some point, somewhere in your house –

A: Uh-huh.

Q: – and then you walked over to the den and accessed –

A: Yes, yes.

Q: – your computer.

A: Yes.

Q: And you went into the network account.

A: Yes.

Q: How did Agent Lanham react when you told him that you had gone into this – into the network?

A: Well, he was visibly upset. I mean, he said – that's what he asked me, he said, "Have you done this before?" That was his first – and I said, "No." And that's when he said, "Well, don't do it again," you know. And so I didn't. Yeah.

Q: I mean, he made it clear to you not to do this again.

A: Yes, he made it very clear, yes, yes.

Beck Depo. at 57-59. In her deposition, Beck maintained that her decision to access the email was her belief, albeit mistaken, that it was covered by the subpoena.[5]

[5] In her response to plaintiff's interrogatories, Beck stated: "Deborah Beck acted at the direction of Robert Lanham who presented himself and his credentials to her. She believed that he had apparent authority to direct her to act both in interview and to access an email account which she established and had the

> Q: And – but it's your testimony here today that at no point in time did Agent Lanham ever tell you to access –
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> A: No.
>
> Q: – this e-mail.
>
> A: No, no, no, no, no. No, he didn't even know about it until, like I said, I think I went in there and was getting my stuff together and I said, "Oh, by the way," I think – I said, "Oh, by the way, there's an e-mail address," and I typed that in very quickly while I was talking.
>
> But he did – he told me, "Have you done this before? Don't do it again." And I didn't.

Beck Depo. at 64.

"We start with the presumption that conduct by private actors is not state action." Florer v. Congregation Pidyon Shevuyim, N.A., 639 F.3d 916, 922 (9th Cir. 2011). "[Plaintiff] bears the burden of establishing that Defendants were state actors." Id.; see also United States v. Aldridge, 642 F.3d 537, 541 (7th Cir. 2011) ("The defendant bears the burden of proving agency, based on all the circumstances."); United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003) ("The burden of proving that a private party acted as an agent or instrument of the government is on the defendant."); Mertens v. Shensky, No.

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password to access and which account she had used while within her employment with the plaintiff." (ECF No. 102-1). During her deposition, Beck explained that, in answering the interrogatory as she did, she thought that the search of the email was covered by the subpoena and not because Lanham had directed her to access the email. Beck Depo. at 62-65.

CV05-147-N-EJL, 2006 WL 173651, *3 (D. Idaho Jan. 23, 2006) ("The plaintiff bears the burden of showing that a private person is a state actor for the purposes of § 1983 [or Bivens]."). "Whether an agency relationship exists is a fact-intensive inquiry that is guided by common law agency principles." Ellyson, 326 F.3d at 527.

In this case, there is no Fourth Amendment violation because Beck, a private citizen, accessed Brodnik's email of her own volition. There is simply no evidence that Lanham encouraged Beck to do so or that he knew what she was doing until after the fact. The Fourth Amendment does not apply "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official." United States v. Jacobsen, 466 U.S. 109, 114 (1984) (quoting Walter v. United States, 447 U.S. 649, 662 (1980)). As our appeals court has explained:

> Of course, it is private individuals, not City officials, who have actually interfered with Presley's possessory interests here. Although private actions generally do not implicate the Fourth Amendment, when a private person acts as an agent of the Government or with the participation or knowledge of any governmental official, then the private person's acts are attributed to the government. The government need not compel nor even involve itself directly in the private person's actions.

Presley v. City of Charlottesville, 464 F.3d 480, 487 (4th Cir. 2006) (internal citations and quotations omitted).

The undisputed evidence is that Lanham did not acquiesce in Beck's search of Brodnik's email nor did he know about it prior to or as it was happening.[6] In fact, upon finding out about it, he told her not to do it again. Beck testified that she accessed Brodnik's email, not because Lanham told her to, but because (1) she thought it fell under the scope of the subpoena she received and (2) she was motivated by a desire to protect herself. "One highly pertinent consideration [to whether an

[6] Brodnik's attempt to cast Beck as a government agent after the search of Brodnik's email fails. The pertinent inquiry is whether the private actor was a government agent at the time of the search. Cf. United States v. Kinney, 953 F.2d 863, 865 (4th Cir. 1992) (rejecting notion "that even if the search was originally private in nature, the police, in their subsequent participation, exceeded the scope of the initial private search, thereby making their actions unlawful."). The emails between Beck and Lanham were all dated after the search of Brodnik's email occurred. See ECF Nos. 107-1, 107-2, and 107-3. Such evidence is insufficient to show that Lanham knew of and acquiesced in Beck's email search. See United States v. Jarrett, 338 F.3d 339, 346 (4th Cir. 2003) ("Although, as the Government conceded at oral argument, the [ ] email exchange probably does constitute the sort of active Government participation sufficient to create an agency relationship going forward (absent other countervailing facts), the district court erred in relying on this exchange to find that the Government knew of and acquiesced in the Jarrett search. This is so because Unknownuser's email exchange with Faulkner took place after Unknownuser had hacked into Jarrett's computer, after the fruits of Unknownuser's hacking had been made available to the FBI. . . . Thus, Faulkner's knowledge and acquiescence was entirely post-search. Such after-the-fact conduct cannot serve to transform the prior relationship between Unknownuser and the Government into an agency relationship with respect to the search of Jarrett's computer.") (emphasis in original).

agency relationship exists] is `whether the government knew of and acquiesced in the intrusive conduct and whether the private party's purpose for conducting the search was to assist law enforcement efforts or to further her own ends." United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003) (quoting United States v. Feffer, 831 F.2d 734, 739 (7th Cir. 1987)). Furthermore, "[p]re-search contact between a government official and a private citizen, whether or not intended by the official to prompt the citizen to render some type of assistance, does not, by itself, turn a private party into an agent of the government." Mutual Med. Plans, Inc. v. County of Peoria, 309 F. Supp. 2d 1067, 1076 (C.D. Ill. 2004).

"In order to run afoul of the Fourth Amendment, therefore, the Government must do more than passively accept or acquiesce in a private party's search efforts. Rather, there must be some degree of participation in the private search." United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003). As the court explained:

> Viewed in the aggregate, then, three major lessons emerge from the case law. First, courts should look to the facts and circumstances of each case in determining when a private search is in fact a Government search. Second, before a court will deem a private search a Government search, a defendant must demonstrate that the Government knew of and acquiesced in the private search and that the private individual intended to assist law enforcement authorities. Finally, simple acquiescence by the Government does not suffice to transform a private search into a Government

> search. Rather, there must be some evidence of Government participation in or affirmative encouragement of the private search before a court will hold it unconstitutional. Passive acceptance by the government is not enough.

Id. at 345-46. In this case, not only is there a lack of government participation or encouragement, there is also vehement government opposition to the search as evidenced by Lanham's directive to Beck not to access Brodnik's email in the future.

Furthermore, to the extent that plaintiff makes much of the fact that Lanham kept the printout obtained from Beck's search of Brodnik's email, it does not alter the court's analysis. "[E]vidence secured by private searches, even if illegal, need not be excluded from a criminal trial." United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003); see also United States v. Wolfson, 160 F. App'x 95, 97-98 (2d Cir. 2005) ("[T]he subsequent seizure of the boxes was quite clearly carried out without the government's knowledge or encouragement, and hence, does not implicate the Fourth Amendment."); United States v. Kinney, 953 F.2d 863, 865 (4th Cir. 1992) ("The Fourth Amendment is directed exclusively at state action and evidence secured by private searches, even if illegal, need not be exluded from a criminal trial.").

Likewise, plaintiff's argument that Beck's possible status as a government informant is of no legal moment. It seems clear that Beck was a confidential informant for the government.

See Lanham Depo. at 102-03. Lanham conceded as much. See id. However, the allegations in the complaint – that Lanham financially incentivized Beck to access Brodnik's email – are not borne out by the record because there is no evidence that Beck was a paid government informant. See Lanham Depo. at 30-31, 102; Beck Depo. at 14-15. Furthermore, there is no hard and fast rule that the actions of a government informant, paid or otherwise, always rise to the level of government action. See Hiser v. City of Bowling Green, 42 F.3d 382, 383 (6th Cir. 1994) (acknowledging that the court has "refused to establish a per se rule that the activities of paid government informants must always be considered government action.") (internal quotation and citation omitted); Ghandi v. Police Dept. of City of Detroit, 823 F.2d 959, 963 (6th Cir. 1987) ("[W]e reject plaintiffs' invitation to establish a per se rule that the activities of paid government informants must always be considered government action."). In any event, informant or not, Lanham could not have been clearer that Beck was not to access Brodnik's email.

> Q: Okay. But I want to get back to something you said, which was, if she – if she was an informant, she would not have been permitted to access the e-mail. And –
>
> A: That is irrelevant.
>
> Q: It's not irrelevant. I can have her read it back, or we'll stand on what you said earlier.
>
> A: If I said that –

Q: All right.

A: – fine.

Q: All right.

A: But what I'm trying to tell you is: It doesn't matter if she's an informant, if she is the president of the United States, an attorney or whatever else. I would have instructed her "Do not access his e-mail."

Because I could not do that, and since she had talked to me, I knew that we would be right where we're at now with an attorney trying to say that she was my agent –

Q: Well –

A: – and she was not. And she did not act at my direction to access that e-mail.

* * *

A: We're speaking two different languages here. You're speaking what that says. She is termed a confidential informant to try to protect her identity. The word "informant" that you're hung up on is – it's a technical term for federal law enforcement and all law enforcement, is a person who has been taken in and is – records are kept, payments are made to them, etc., etc., etc.

Q: But –

A: That's what you're getting hung up on. And it doesn't matter – it doesn't matter what she was, as I've said. I would have told her, "Don't access the e-mail."

Lanham Depo. at 100-03.

As the Fourth Circuit has noted, there must be "clear indices of [Lanham's] encouragement, endorsement, and

participation . . . to implicate the Fourth Amendment." Presley v. City of Charlottesville, 464 F.3d 480, 488 (4th Cir. 2006). The uncontroverted evidence in this case is that Lanham neither encouraged, endorsed, or participated in Beck's search of Brodnik's email. For these reasons, Lanham's motion for summary judgment is granted.

III. Conclusion

For the reasons expressed above:

1) Plaintiff's Motion For Court to Make Finding As to Whether or Not Defendant Deborah Beck is a State Actor for Purposes of Bivens Liability (construed as a motion for partial summary judgment in plaintiff's favor) is **DENIED**;

2) Lanham's Motion for Summary Judgment as to Count I is **GRANTED**; and

3) Pursuant to concerns regarding HIPAA and confidential medical information, ECF Nos. 103-1 and 103-2 are to be filed under **SEAL**.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record.

IT IS SO ORDERED this 30th day of March, 2018.

ENTER:

David A. Faber
Senior United States District Judge