

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN THE MATTER OF THE SEARCH OF
INFORMATION ASSOCIATED WITH
[REDACTED] AND
[REDACTED] WHICH ARE
STORED AT PREMISES CONTROLLED BY
GOOGLE

Misc. Action No. 17-mj-619 (BAH)
Chief Judge Beryl A. Howell

ORDER

On November 9, 2017, a sealed Memorandum Opinion (“2017 Memorandum Opinion”) was filed in the instant sealed matter resolving the government’s motion to review certain communications. Almost nineteen months later, on May 20, 2019, after consultation with the government, the 2017 Memorandum Opinion was partially unsealed, with a redacted version released to the public, after certain information became publicly available following the entry of a guilty plea and the filing of a civil forfeiture complaint involving individuals named in the 2017 Memorandum Opinion. In its Order directing that the 2017 Memorandum Opinion be partially unsealed, the Court also directed the government to report when any further public disclosure obviated the need for continued sealing and would thereby permit the 2017 Memorandum Opinion to be further unsealed in whole or in part.

The government filed a responsive status report on November 25, 2020, indicating that two additional defendants have entered publicly available guilty pleas. The 2017 Memorandum Opinion may therefore be further unsealed as to portions identifying those defendants. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) (“Our case law, moreover, reflects the common-sense proposition that secrecy is no longer ‘necessary’ when the contents of grand jury matters have become public.”).

Accordingly, upon consideration of the Government's Status Report Regarding Further Unsealing, ECF No. 16, it is hereby

ORDERED that this Order, along with the Redacted Memorandum Opinion attached to this Order that is a redacted version of the 2017 Memorandum Opinion, ECF No. 10, be unsealed and posted on the Court's website; and it is further

ORDERED that the government shall file, by the earlier of November 25, 2021 or when any public disclosure obviates the need for further sealing, a status report advising the Court whether the 2017 Memorandum Opinion, ECF No. 10, may be further unsealed and proposing any redactions to be made prior to any unsealing.

SO ORDERED.

Date: November 25, 2020



A handwritten signature in cursive script that reads "Beryl A. Howell".

BERYL A. HOWELL
Chief Judge

ATTACHMENT A

UNITED STATES DISTRICT COURT
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Chief Judge Beryl A. Howell

FILED UNDER SEAL

MEMORANDUM OPINION

Pending before the Court is the government's *Ex Parte, In Camera* Motion Seeking Authorization to Review Past and Future Communications between George Higginbotham, Esq., and [REDACTED] and His Agents ("Gov't Mot."), ECF No. 8. The communications at issue arose from the execution of a search warrant, issued under 18 U.S.C. §§ 2703(a), 2703(b)(1)(A) and 2703(c)(1)(A), requiring Google to disclose and authorizing the government to review the contents of Higginbotham's and [REDACTED]'s personal e-mail accounts.

[REDACTED]
[REDACTED]
[REDACTED]. The application for the warrant expressly noted that "the government will undertake a taint review as part of the content review process," given that the warrant authorized "the search of an attorney's email account." [REDACTED]
[REDACTED].

Based on Higginbotham's representation that he may be viewed by [REDACTED] as [REDACTED]'s attorney, the Department of Justice ("DOJ") set up a "filter team" to review communications to ensure that documents covered by the attorney-client privilege were not turned over to the

investigative team. Attorneys on the filter team allege that Higginbotham does not have an attorney-client relationship with [REDACTED] and that the subject communications are therefore not protected by the attorney-client privilege. Gov't Mot. at 1. Alternatively, the government alleges that the crime-fraud exception to the attorney-client privilege applies to the subject communications. *Id.* at 2. Based on an *ex parte*, *in camera* review of the government's motion and the attached exhibits, the Court finds that the government has made a *prima facie* showing that the crime-fraud exception to the attorney-client privilege applies.

I. BACKGROUND

A. Higginbotham's Relationship with [REDACTED]

The relationship between Higginbotham and [REDACTED] is not entirely clear. Higginbotham is a licensed attorney currently employed by the DOJ and assigned to the Office of Legislative Affairs as an Attorney Adviser. Gov't Mot., Ex. 13, E-Mail from Higginbotham to [REDACTED] on April 28, 2017 ("April 28 E-Mail"); Gov't Mot., Ex. 14, George Higginbotham LinkedIn Profile ("LinkedIn Profile"). Earlier in his career, Higginbotham worked in the music industry and became acquainted with [REDACTED], [REDACTED] Gov't Mot., Ex. 3, [REDACTED] [REDACTED]).

Higginbotham admitted during an interview with the FBI on July 26, 2017, that, while working for DOJ, he offered consulting services to [REDACTED] as a "side-job." *Id.* at 2.

According to Higginbotham, in early 2017, [REDACTED] asked Higginbotham to recommend a politically connected attorney to help represent someone whose property had been seized by the U.S. government. Gov't Mot., Ex. 12, [REDACTED] [REDACTED]. Higginbotham later learned that this individual

was Low Tack Jho ("Jho Low"), a Malaysian national [REDACTED]
[REDACTED]; Gov't Mot., Ex. 2, Verified Complaint for Forfeiture
In Rem, United States v. Certain Rights to & Interests in the Viceroy Hotel Grp., No. 17-4438
(C.D. Cal. filed June 15, 2017) ("Forfeiture Compl.") ¶¶ 16–15. Low is allegedly involved in the
embezzlement and subsequent money laundering of billions of U.S. dollars from 1Malaysia
Development Berhad ("1MDB"), a strategic investment and development firm that is wholly
owned by the Malaysian government through the Malaysian Ministry of Finance. Forfeiture
Compl. ¶ 19; Gov't Mot., Ex. 15, Order Granting Request for Stay, *United States v. "The Wolf of
Wall Street" Motion Picture, etc. (and related cases)*, No. 16-05363 (C.D. Cal. Sept. 13, 2017)
("Stay Order").¹

Higginbotham told OIG and FBI special agents that in response to [REDACTED]'s request, he
first identified [REDACTED]'s law firm, but [REDACTED] rejected this suggestion, telling
Higginbotham that Jho Low had already paid [REDACTED]'s firm \$8 million with no results.
[REDACTED]. Higginbotham then recommended Elliot Broidy, who
is an attorney and also the [REDACTED]
[REDACTED]; Gov't Mot., Ex. 4, [REDACTED]
[REDACTED]. Broidy is married to attorney [REDACTED]
[REDACTED]. [REDACTED] is registered
to [REDACTED] at the [REDACTED] where [REDACTED] and Broidy live. [REDACTED];
Gov't Mot., Ex. 8, [REDACTED]
[REDACTED].

¹ The government is investigating allegations that Jho Low and [REDACTED]
[REDACTED], with the assistance of others, "criminally misappropriated public funds from 1MDB and
laundered the proceeds of that criminal activity through accounts, real estate property, luxury goods, and other assets
in the United States and elsewhere." Gov't Mot. at 10–11.

Also in early 2017, Higginbotham recommended that [REDACTED] consult with wealth manager [REDACTED]. Gov't Mot., Ex. 5, E-Mail from Higginbotham to [REDACTED] on January 13, 2017 ("January 13 E-Mail"). [REDACTED] is the [REDACTED], a New York-based accounting firm that specializes in "providing tax and financial services to high-income and high net worth clients." Gov't Mot. at 5. In an e-mail to [REDACTED], Higginbotham identified [REDACTED] as a "long time friend and client" with a "delicate situation where he needs someone with [REDACTED]'s] skills and expereince [sic] to determine if certain financial matters were handled appropriately." January 13 E-Mail. In March 20, 2017, [REDACTED] registered two corporations in Delaware on [REDACTED]'s behalf: Anicorn LLC and Artemus LLC. Gov't Mot., Ex. 6, [REDACTED]; Gov't Mot., Ex. 7, [REDACTED]. [REDACTED] is listed as the manager of both Anicorn's and Artemus's bank accounts at City National Bank ("CNB"), a U.S. financial institution. [REDACTED].

On April 10, 2017, soon after Anicorn and Artemus were incorporated, Higginbotham sent an e-mail asking [REDACTED] to review an attached file, labeled "[REDACTED] Agreement 1.0," and to discuss it with him that evening. Gov't Mot., Ex. 19, E-Mail and Attachment from Higginbotham to [REDACTED], April 10, 2017 ("Anicorn [REDACTED] Agreement") at 1. This attachment appears to be a draft consulting agreement between Anicorn and [REDACTED], the firm owned by [REDACTED]. Higginbotham recommended to [REDACTED]. The agreement provided that Anicorn would pay [REDACTED] an \$8 million retainer fee, followed by \$50 million to \$75 million in "success fees" upon successful resolution of "a series of matters (the 'Asset Resolution')" including (1) "United States of America v. 'The Wolf of Wall Street' Motion

Picture, including any rights to profits, royalties and distribution proceeds owed to Red Granite Pictures, Inc. or its affiliates and/or assigns, Case No. CV 16-16-5362” filed in the Central District of California on July 20, 2016, and (2) “All other Forfeiture *In Rem* actions filed by the United States of America that are referred to in the Compliant filed in the case described in Item 1 above which apply to Client or any corporation in which Client has or is alleged to have an interest.” *Id.* at 2–3, 11. Exhibit A to the agreement was a draft agreement between [REDACTED] and Jho Low under which [REDACTED] would provide “all legal services reasonably required to represent [Jho Low] in connection with” the same two matters. *Id.* at 6, 11.

On April 28, 2017, Higginbotham again e-mailed [REDACTED], stating “Per your request,” this time attaching a file labeled “Anicorn-WuTang 03.docx.” Gov’t Mot., Ex. 20, E-Mail from Higginbotham to [REDACTED], April 28, 2017 (“Anicorn/Client Agreement”) at 1. The attachment appears to be a draft agreement between Anicorn and a party identified as “Client” contemplating that the services provided by Anicorn to “Client” were the same services listed in the draft agreement between Jho Low and [REDACTED] concerning the civil forfeiture issue. *Id.* at 2. The agreement provided for a \$25 million retainer fee and a \$300 million “success fee” that “Client” would pay to Anicorn regardless of the outcome of the services rendered. *Id.* at 3. The agreement also included wire transfer instructions, including Anicorn’s bank account and routing numbers. *Id.* Three minutes after sending that e-mail to [REDACTED], Higginbotham sent another e-mail to [REDACTED] attaching a photograph of his DOJ business card. April 28 E-Mail.

On May 1, 2017, Higginbotham sent [REDACTED] an invoice from Anicorn to “Principal” for \$3 million, which included the same wire transfer instructions provided in the draft agreement. Gov’t Mot., Ex. 21, E-Mail from Higginbotham to [REDACTED], May 1, 2017 (“May 1 E-Mail”). On May 3, [REDACTED], Broidy, and a third individual, Nickie Lum, traveled to Bangkok, Thailand, to

meet with Jho Low. Gov't Mot., Ex. 22, [REDACTED]
[REDACTED].

B. Higginbotham Comes under Investigation, Leading to a Search Warrant

On July 15, 2017, DOJ's Office of International Affairs ("OIA") received two phone calls from counterparts at the Embassy of the People's Republic of China to the United States in Washington, D.C. [REDACTED]. The Chinese officials asked about Higginbotham's position at DOJ and about an upcoming meeting between Higginbotham and the Chinese Ambassador to the United States; upon learning his position, the Chinese officials were surprised that Higginbotham would be meeting with the Ambassador. [REDACTED]. The OIA employees responded that they were unaware of Higginbotham's position or of his meeting with the Ambassador, but they confirmed Higginbotham's employment with DOJ. [REDACTED].

On July 16, 2017, Higginbotham met with the Chinese Ambassador. [REDACTED]. Four days later, Higginbotham spoke with an OIG special agent about his contacts at the Chinese Embassy, explaining that the meeting was arranged by [REDACTED] for the purpose of delivering a message to the Ambassador on [REDACTED]'s behalf regarding "a particular matter relating to the foreign policy of the United States and China." [REDACTED]. Higginbotham said that he attended the meeting with the Ambassador in his capacity as a consultant for [REDACTED] and not in his official capacity as a DOJ attorney. [REDACTED].

On July 26, 2017, Higginbotham reiterated this same information when he voluntarily spoke to FBI special agents. [REDACTED]. With his consent, the agents searched Higginbotham's work e-mail and personal cell phone. [REDACTED]. Higginbotham's cell phone contained a photograph of the second page of a contract stating that a company called "Anicorn"—one of the companies set up by [REDACTED] on behalf of [REDACTED]—would be paid for "work done and/or

efforts taken” to persuade the DOJ, FBI, and “any other relevant US Government agencies . . . to drop all civil and/or criminal cases and/or cease investigations and/or removal of any INTERPOL Red Notice . . . by 31 September 2017 . . . against” four specified foreign individuals and their families, one of whom was Jho Low. *Id.* ¶ 13; Gov’t Mot., Ex. 27, Photograph of Page 2 of a Contract (“Contract Screenshot”). The contract also stated that the “Client” would pay Anicorn a retainer of €19 million, followed by a “success fee” of €280 million when the matter was completed. Contract Screenshot; [REDACTED] y by the FBI revealed that at least two of the individuals mentioned in the contract are the subjects of an ongoing federal money-laundering investigation. [REDACTED]. The cell phone also contained a photograph taken on May 8, 2017, of a computer screen showing a wire transfer from a bank in Hong Kong to a bank in Los Angeles. [REDACTED]. The wire transfer was dated May 8, 2017, the day before the due date of the retainer payment specified in the contract. [REDACTED] Law enforcement corroborated that this transaction and other high-value transactions occurred between the two listed accounts. *Id.* In Higginbotham’s interviews with agents on July 20 and July 26, he never mentioned Anicorn or the contract found on his cell phone. When asked about his consulting work for [REDACTED], Higginbotham denied any involvement with the Chinese. [REDACTED]. [REDACTED].

Other information found on Higginbotham’s cell phone verified that the recipient of the wire transfer in the photograph on his cell phone was Anicorn’s bank account at City National Bank. [REDACTED]. On May 10, 2017, \$20,000 was wired from Anicorn’s account to an account belonging to Higginbotham. [REDACTED]. On May 18, 2017, [REDACTED] withdrew \$33,000 in cash from the Anicorn account. [REDACTED]. Five weeks later, on June 26, 2017, Higginbotham used his

personal cell phone to send a text message to [REDACTED] stating, "Check your email – sent you wiring instructions." [REDACTED].

Based on this information, a search warrant was issued on August 21, 2017, for information associated with [REDACTED]'s and Higginbotham's personal Google Mail accounts. In reviewing the documents returned as a result of the search warrant, the government acknowledged that Higginbotham had often represented that he was [REDACTED]'s lawyer and set up a "filter team" to ensure that "potentially privileged communications" that "do not pertain to the alleged crimes or scheme discussed" in the warrant would be "withheld from the investigative team." Gov't Mot. at 1 n.1. The government now seeks an order authorizing the investigative team to "access the subject communications, confront Higginbotham and others with the facts recited herein, and take any other investigative steps needed to complete its investigation." *Id.* at 2.

C. Funds Traceable to Jho Low Enter the U.S. Banking System

As noted, Jho Low's alleged embezzlement and money laundering from 1MDB are currently under criminal investigation and are the subject of civil forfeiture proceedings. Due to those proceedings and to Jho Low's status as a "politically exposed person," U.S. financial institutions are reluctant to engage in business with Jho Low or any companies or individuals acting on his behalf.² The government has now identified a new scheme in which Jho Low has allegedly relied on [REDACTED], Higginbotham, and others "to conceal the source and purpose of his transfers to CNB, thereby escaping the heightened scrutiny that banks must employ for

² See Gov't Mot. at 9; Gov't Mot., Ex. 16, E-Mail from [REDACTED] to [REDACTED], *et al.*, Feb. 11, 2015 ("[REDACTED] E-Mail") (providing news stories about Jho Low and 1MDB to [REDACTED]); Gov't Mot., Ex. 17, E-Mail from [REDACTED] to [REDACTED], Mar. 27, 2015 ("[REDACTED] E-Mail").

politically exposed persons like Jho Low,” in order to place up to \$300 million of funds traceable to Jho Low in the U.S. banking system. *Id.* at 10.

According to the draft agreement between Anicorn and [REDACTED] that Higginbotham sent to [REDACTED] on April 10, Anicorn was to pay [REDACTED] an \$8 million retainer fee, followed by \$50 million to \$75 million in “success fees” upon successful resolution of “a series of matters (the ‘Asset Resolution’)” outlined in an attachment to the contract. Anicorn/ [REDACTED] Agreement at 1–2. Between May 8, 2017, and August 9, 2017, Anicorn’s CNB bank account received approximately \$21.4 million via four wire transfers from Lucky Mark (HK) Trading Limited (“Lucky Mark”), an entity with apparent ties to Jho Low. [REDACTED]; Gov’t Mot., Ex. 18, [REDACTED] [REDACTED]. On either the same day as or the next day after each of those transfers, Anicorn wired funds to [REDACTED]. Specifically, on May 8, Anicorn received \$2.9 million from Lucky Mark and transferred \$1 million to [REDACTED]. On May 17, Anicorn received \$3 million from Lucky Mark and transferred \$3 million to [REDACTED]. On May 25, Anicorn received \$2.7 million from Lucky Mark and, the next day, transferred \$2 million to [REDACTED]. On August 9, Anicorn received \$12.8 million from Lucky Mark and transferred \$3 million to [REDACTED]. [REDACTED]. The first three wire transfers from Anicorn to [REDACTED] total approximately \$8 million, consistent with the retainer fee provided for in the agreement between Anicorn and [REDACTED]. *See* Anicorn/ [REDACTED] Agreement at 2. On August 24, Artemus’s CNB bank account received approximately \$10 million through an international wire transfer. [REDACTED]. During a September 11, 2017, interview with the FBI, Higginbotham confirmed to officers that the funds transferred into Anicorn’s account were

from Jho Low and that he expected more funds from Jho Low to arrive in the future.

[REDACTED].

As a U.S. financial institution, CNB is obligated to comply with the Bank Secrecy Act, 31 U.S.C. §§ 5311 *et seq.*, and other anti-money-laundering regulations. Part of CNB's obligations under federal law and regulations includes reporting on suspicious transactions. *See* 31 C.F.R. § 1020.320(a). On July 21, 2017, CNB requested information from [REDACTED] about Anicorn, Artemus, and Lucky Mark and several recent large transactions. Gov't Mot., Ex. 24, E-Mail from [REDACTED] to Higginbotham, July 21, 2017 ("CNB Inquiry") at 2. Specifically, CNB wanted to know the primary business activities of Anicorn, Artemus, and Lucky Mark and wanted more information about a transfer of nearly \$9 million from Lucky Mark to the two companies. *Id.* CNB also asked about two cash withdrawals totaling \$33,000 made on May 9, 2017. [REDACTED] forwarded the request to Higginbotham, asking him to call to discuss after he had reviewed the request. *Id.* at 1. On August 1, [REDACTED] responded to CNB that Anicorn "undertakes International consulting projects" and was assisting Lucky Mark with "trademark infringement issues" arising from software it had developed that had resulted in a civil lawsuit in the U.S. Gov't Mot., Ex. 25, E-Mail from [REDACTED] to Higginbotham, August 3, 2017 ("[REDACTED] Reply") at 2 (forwarding the reply to CDB on to Higginbotham). [REDACTED] also explained that once Anicorn received funds from Lucky Mark, it made payments to a law firm in the U.S. for assistance in the forfeiture case. *Id.*

On September 19, 2017, CNB requested additional documents and information related to Anicorn's and Artemus's business transactions. Gov't Mot., Ex. 26, Letter from Higginbotham to CNB, September 27, 2017 ("Higginbotham Reply") at 1. This time, Higginbotham responded directly to this request in a three-page letter on formal letterhead from "Higginbotham Law,

P.C.” *Id.* Higginbotham stated that he “represent[s] [REDACTED] who owns both of these entities” and explained that Lucky Mark had retained Anicorn to identify counsel and other professionals to resolve “a highly complex civil litigation matter.” *Id.* at 1–2. Higginbotham also confirmed that the source of the funds was Lucky Mark, provided a Certificate of Incorporation showing that Lucky Mark (HK) Trading Limited was incorporated in Hong Kong in July 2016, and claimed that “Lucky Mark is a souvenirs, gifts and novelty manufacturer and exporter.” *Id.* at 2–4.³ He also provided an executed agreement between Artemus and Lucky Mark for “Strategic Communications and Crisis Management” as support for the nearly \$10 million that Lucky Mark transferred to Artemus on August 24, 2017. *Id.* at 18–29. Neither [REDACTED] nor Higginbotham mentioned the civil forfeiture proceedings described in the agreements between Anicorn and [REDACTED] or the services that were identified in the photographed contract retrieved from Higginbotham’s cell phone.

Finally, in addition to Higginbotham’s involvement in explaining the transfer of funds from Lucky Mark to Anicorn, on September 14, 2017, he scanned a document using a DOJ scanner that appears to be a loan agreement between Lucky Mark and Anicorn reflecting that Lucky Mark would lend €25 million to Anicorn. Gov’t Mot. at 20; Gov’t Mot., Ex. 28,

[REDACTED]
[REDACTED]. This loan agreement was personally signed by Higginbotham on Anicorn’s behalf and was countersigned on Lucky Mark’s behalf by an individual whom OIG alleges “might be a cousin of Low’s” and who has “possibly signed as an agent for Low in the

³ Government investigators have identified an entity named “Lucky Mark International (HK) Limited” that is actually in the souvenir-manufacturing industry—but this entity was formed in 2014, not in 2016, like Lucky Mark (HK) Trading Limited. Gov’t Mot. at 19. In the past, Jho Low has allegedly created “shell entities using similar or slightly modified names of established companies as a strategy to confound banks and financial regulators.” *Id.*; Forfeiture Compl. ¶ 231.

past.” *Id.* at 2. On September 20, 2017, Anicorn’s CNB account received a wire transfer from Lucky Mark in the amount of \$29.9 million, or the equivalent of €25 million. [REDACTED]

[REDACTED]. The government alleges that this agreement “was likely executed in early September 2017, when [REDACTED] and Higginbotham traveled to Hong Kong” and met with Jho Low.

Gov’t Mot. at 20; [REDACTED]; Gov’t Mot., Ex. 29, [REDACTED]

[REDACTED]

The government avers that “[t]he true purpose of the funds that were wire transferred to Anicorn and Artemus and the means by which [REDACTED], Higginbotham, and Broidy would advance Jho Low’s interests in the United States are not entirely known and remain a pressing focus of the investigation.” Gov’t Mot. at 21.

D. Funds Traceable to Jho Low Are [REDACTED]

The government alleges that the bank transfers between Lucky Mark, Anicorn, Artemus, and [REDACTED] were part of a scheme not only to defraud a U.S. financial institution [REDACTED]

[REDACTED]. As discussed, Anicorn made four wire transfers to [REDACTED] totaling approximately \$9 million. [REDACTED]. Three of the transfers add up to \$8 million, which corresponds to the retainer fee contemplated in the draft agreement between Anicorn and [REDACTED] that Higginbotham sent to [REDACTED] on April 10. *Id.*; Anicorn [REDACTED] Agreement at 2. [REDACTED]

[REDACTED]. All told, [REDACTED] received approximately \$11.5 million from foreign sources between May 2, 2017 and August 9, 2017. [REDACTED]; Gov’t Mot. at 22. By contrast, in the nine-month period

leading up to May 2017, [REDACTED] had received less than \$180,000 in other deposits and the company's month-end balance during this period never exceeded \$12,000. Gov't Mot. at 22;

[REDACTED]

Each time a foreign wire transfer was made to the [REDACTED] account, Broidy [REDACTED]

[REDACTED] and [REDACTED]

[REDACTED] made several transfers to Broidy's personal and business accounts and to [REDACTED]'s personal account. [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

During a later interview with an OIG special agent, Higginbotham confirmed that part of the money paid to [REDACTED] was for "access to someone who can make [a settlement] happen" for Jho Low. [REDACTED]

* * *

Based on these communications, members of the government's filter team filed the instant motion seeking authorization for the investigative team to access the subject communications. Specifically, the government alleges that Higginbotham's relationship with [REDACTED] does not amount to an attorney-client relationship and that their communications are not protected by the attorney-client privilege. Alternatively, the government alleges that the crime-fraud exception to the attorney-client privilege applies to the subject communications.

II. LEGAL STANDARD

“The attorney-client privilege ‘is the oldest of the privileges for confidential communications known to the common law,’” aiming “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). The privilege applies to “confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client.” *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014).

There are, however, certain exceptions to the attorney-client privilege. As relevant to this case, the crime-fraud exception “comes into play when a privileged relationship is used to further a crime, fraud, or other fundamental misconduct.” *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982). When such conduct is at issue, the attorney-client privilege no longer applies. *See In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) (“Attorney-client communications are not privileged if they ‘are made in furtherance of a crime, fraud, or other misconduct.’”) (quoting *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)); *United States v. Ballard*, 779 F.2d 287, 292 (5th Cir. 1986) (“The privilege for communications between client and attorney ceases when the purpose of the privilege is abused, when the lawyer becomes either the accomplice or the unwitting tool in a continuing or planned wrongful act.”). Generally, the crime-fraud exception reaches communications or work product with a relationship to the crime or fraud. *In re Sealed Case*, 754 F.2d at 399. Two conditions must be met for the crime-fraud exception to apply: “First, the client must have made or received the otherwise privileged communication with the intent to further an unlawful or fraudulent act. Second, the client must have carried out the crime

or fraud.” *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997) (footnote and citations omitted). “The privilege is the client’s and it is the client’s fraudulent or criminal intent that matters.” *Id.*

As the party seeking to overcome attorney-client privilege, the government has the burden of establishing “a prima facie showing of a violation sufficiently serious to defeat the privilege.” *In re Sealed Case*, 754 F.2d at 399. To satisfy this burden, the government may offer “evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud.” *In re Grand Jury*, 475 F.3d at 1305 (internal quotations omitted). “The determination that a prima facie showing has been made lies within the sound discretion of the district court,” *In re Sealed Case*, 754 F.2d at 400, which must “independently explain what facts would support th[e] conclusion” that the crime-fraud exception applies. *Chevron Corp. v. Weinberg Grp.*, 682 F.3d 96, 97 (D.C. Cir. 2012). The D.C. Circuit has “approved the use of ‘*in camera, ex parte*’ proceedings to determine the propriety of a grand jury subpoena or the existence of a crime-fraud exception to the attorney-client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings.” *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1179 (D.C. Cir. 2006) (quoting *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998)). The Circuit nevertheless recognized that “*in camera, ex parte* submissions generally deprive one party to a proceeding of a full opportunity to be heard on an issue, and thus should only be used where a compelling interest exists.” *In re Sealed Case No. 98-3077*, 151 F.3d at 1075 (internal citation and quotations omitted).

III. DISCUSSION

The government posits that no attorney-client relationship exists between Higginbotham and [REDACTED] that would trigger attorney-client privilege. Even assuming, however, that Higginbotham and [REDACTED] did have an attorney-client relationship such that their

communications were entitled to protection by the attorney-client privilege, the crime-fraud exception is applicable in this case.⁴

The government alleges that the subject communications were in furtherance of two schemes to violate federal law. Each is addressed in turn.

A. Scheme to Defraud a Financial Institution

The government first contends that the subject communications were in furtherance of a scheme to defraud a financial institution in violation of 18 U.S.C. § 1344. Section 1344 makes it unlawful for anyone to “knowingly execute[], or attempt[] to execute, a scheme or artifice . . . to defraud a financial institution.” 18 U.S.C. § 1344(1). To obtain a conviction for bank fraud under § 1344, the government must establish three elements: “(1) that the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution; (2) that the defendant did so with the intent to defraud; and (3) that the financial institution was insured by the FDIC.” *United States v. Everett*, 270 F.3d 986, 989 (6th Cir. 2001). “According to all circuits that have addressed the issue, subsection (1) of section 1344 does not require any

⁴ The government argues that no attorney-client relationship exists for several reasons, citing (1) “Higginbotham views [REDACTED] as his business partner,” (2) “there is no reasonable expectation of secrecy or confidentiality” due to the fact that Higginbotham is a DOJ employee, and (3) “[REDACTED] knew that the interests of Higginbotham’s employer were adverse to Jho Low’s.” Gov’t Mot. at 25–26. “Whether an attorney-client relationship existed is to be determined by the fact finder based on the circumstances of each case.” *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 45 (D.D.C. 2010) (citing *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982)). “In making this determination, courts consider factors such as whether the client perceived that an attorney-client relationship existed, whether the client sought professional advice or assistance from the attorney, whether the attorney took action on behalf of the client, and whether the attorney represented the client in proceedings or otherwise held [him]self out as the client’s attorney.” *Id.* In this case, these factors tend to indicate that Higginbotham and [REDACTED] had an attorney-client relationship. [REDACTED] sought advice and legal assistance from Higginbotham, including the drafting and editing of legal documents. April 28 E-Mail at 1; Anicorn/Client Agreement at 1; Anicorn/Client Agreement. Higginbotham repeatedly took actions on behalf of [REDACTED], including by providing information about Anicorn and Artemus to CNB and by personally signing a loan agreement on behalf of Anicorn. See generally Higginbotham Reply; [REDACTED]. Higginbotham also held himself out as [REDACTED]’s attorney, both in his interviews with government agents and in his communications with CNB. See [REDACTED]; Higginbotham Reply at 1 (“I represent Mr. [REDACTED].”). Moreover, [REDACTED] may not have known that Higginbotham was barred from engaging in outside consulting or legal work as a DOJ employee. Accordingly, sufficient indicia are present that [REDACTED] viewed Higginbotham as his attorney that the remainder of the analysis addresses the crime-fraud exception and its application to this case.

material misrepresentation.” *United States v. Sayan*, 968 F.2d 55, 62 n.7 (D.C. Cir. 1992) (emphasis added).

In addition, to comply with its obligations under the Bank Secrecy Act, CNB—a U.S. financial institution—is required to report any transaction that has “no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage.” 31 C.F.R. § 1020.320(a)(2)(iii). Failure to comply with these regulations triggers criminal and civil liability. *See* 31 U.S.C. §§ 5321–22.

The evidence provided by the government indicates that Higginbotham and [REDACTED] likely violated § 1344(1) in their communications to and behavior involving CNB by misrepresenting Lucky Mark, Anicorn, and Artemus’s business activities and the source of their funds. For starters, in Higginbotham’s response to CNB’s request for additional information regarding Anicorn and Artemus, he represented that “Lucky Mark is a souvenirs, gifts and novelty manufacturer and exporter.” Higginbotham Reply at 2–4. Just two months earlier, [REDACTED] told CNB that Lucky Mark developed software. [REDACTED]. In [REDACTED]’s response, he represented that the payments to Anicorn were for its assistance in a pending “trademark infringement” suit. *Id.* Neither he nor Higginbotham mentioned the civil forfeiture proceedings described in the actual agreements drafted by Higginbotham. They also did not mention the services mentioned in the photograph of a contract found on Higginbotham’s cell phone, which referenced efforts to “drop all civil and/or criminal cases” against Jho Low and other Malaysian nationals.

As for the source of the funds, Higginbotham made no mention of the loan agreement he executed on behalf of Anicorn, pursuant to which Lucky Mark agreed to loan nearly \$30 million to Anicorn. He also did not mention any connection with Jho Low, even though he later told

government investigators that the funds transferred into Anicorn's account came from Jho Low and that the funds were in connection with helping Jho Low's problems with DOJ "go away."

[REDACTED]

The evidence presented makes a strong case that Higginbotham, [REDACTED], Jho Low, and others acted with the intent of defrauding CNB, an FDIC-insured U.S. financial institution. The misrepresentations regarding Lucky Mark, Artemus and Anicorn's business activities likely interfered with CNB's obligation to report "suspicious activity" and, at a minimum, the misrepresentations were made with the intent of misleading and defrauding CNB. These misrepresentations make a *prima facie* showing of bank fraud carried out by Higginbotham, [REDACTED], and Jho Low. Accordingly, the crime-fraud exception applies to communications between Higginbotham and [REDACTED] related to this scheme.

B. Scheme [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In addition, 18 U.S.C. § 371 makes it unlawful for "two or more persons [to] conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." 18 U.S.C. § 371.

The evidence presented indicates that one purpose of the alleged scheme was to gain access to DOJ and other governmental officials to help make investigations into Jho Low and his

business dealings “go away.” [REDACTED]. The screenshot of a contract found on Higginbotham’s personal cell phone shows that Anicorn would be paid for “work done and/or efforts taken” to persuade DOJ, FBI, and “any other relevant US Government agencies . . . to drop all civil and/or criminal cases and/or cease investigations and/or removal of any INTERPOL Red Notice” against four individuals, including Jho Low. Contract Screenshot at 1: [REDACTED], [REDACTED], with Higginbotham’s assistance, facilitated this scheme by incorporating Anicorn and Artemus and by finding a politically connected law firm. Higginbotham’s communications with [REDACTED] directly furthered this effort by connecting Broidy to [REDACTED] and by drafting agreements to provide a facially legitimate explanation for the transfer of millions of dollars from Lucky Mark to Anicorn and Artemus, and then to [REDACTED].

Funds from Lucky Mark made their way to the coffers of [REDACTED] and, [REDACTED]. Each time Lucky Mark—an entity tied to Jho Low—transferred funds to Anicorn, a transfer of a similar size followed soon after to [REDACTED]. Those transfers were, in turn, followed by transfers by Broidy and [REDACTED] into their personal and business accounts, where the funds were commingled with preexisting funds. [REDACTED]

[REDACTED] Higginbotham confirmed that the funds transferred into Anicorn’s account came from Jho Low, [REDACTED], and that the funds were to be used for “lobbying” and for gaining “access

to someone” who could lead to a settlement of Jho Low’s problems with DOJ and other government entities, [REDACTED].

[REDACTED]
[REDACTED], they also likely violate 18 U.S.C. § 371 by giving rise to a conspiracy to defraud the United States. Here, Jho Low’s funds were likely introduced into the U.S. banking system to gain “access” to influential individuals within the government who could help Jho Low “drop all civil and/or criminal cases and/or cease investigations and/or removal of any INTERPOL Red Notice . . . against Mr. Low Taek Jho and related family.” Contract Screenshot at 1. [REDACTED]

[REDACTED] On the evidence presented here, the government has made “a *prima facie* showing of a violation sufficiently serious to defeat the privilege.” *In re Sealed Case*, 754 F.2d at 399.

IV. CONCLUSION

Through its *ex parte* production of evidence, the government has met its burden of making a *prima facie* showing that the crime-fraud exception applies based on possible violations of Title 18 and Title 52 of the U.S. Code. Accordingly, any communications, both past and future, between Higginbotham and [REDACTED], or between Higginbotham and [REDACTED]’s agents, relating to the alleged schemes and crimes described above are not covered by the attorney-client privilege. The investigative team may review any such communications and use them to confront the subjects of this investigation. To the extent that the filter team encounters any communications between Higginbotham and [REDACTED], or between Higginbotham and [REDACTED]’s agents, that appear to implicate legal advice or representation unrelated to the alleged schemes and crimes described above, they shall be withheld from the investigative team and

protected accordingly as required by law. An appropriate order accompanies this Memorandum Opinion.

Date: November 9, 2017



A handwritten signature in cursive script, reading "Beryl A. Howell".

BERYL A. HOWELL
United States District Judge