

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF
INFORMATION ASSOCIATED WITH
THREE ACCOUNTS STORED AT
PREMISES CONTROLLED BY GOOGLE,
INC. FOR INVESTIGATION OF
VIOLATION OF 18 U.S.C. § 1344

Misc. Action No. 18-sc-322 (BAH)

Chief Judge Beryl A. Howell

FILED UNDER SEAL

MEMORANDUM OPINION

Pending before the Court is the government’s *Ex Parte, In Camera* Application Seeking Authorization to Review Certain Attorney-Client and Spousal Communications between and among Robin Rosenzweig, Rosenzweig’s husband Elliott Broidy, Nickie Lum Davis, Prakazrel (“Pras”) Michel, Low Taek Jho (“Jho Low”), [REDACTED], and their agents (“Gov’t Mot.”), ECF No. 7. The communications were obtained by the government, pursuant to a February 8, 2018, search warrant, issued under 18 U.S.C. §§ 2703(a), 2703(b)(1)(A), and 2703(c)(1)(A), requiring Google, Inc., and eNom, Inc., to disclose to the government and authorizing the government to review the contents of email accounts associated with Nickie Lum Davis, Joel Rousseau, and Pras Michel, *see* Affidavit Supp. App. Search Warrant of Senior Special Agent Harry A. Lidsky, United States Department of Justice (“DOJ”), Office of the Inspector General (“OIG”) (“Lidsky Aff.”) ¶ 1, ECF No. 1-1, and from the voluntary production to the Federal Bureau of Investigation (“FBI”), by Broidy and Rosenzweig’s attorney in a separate matter, of forty-one emails from Broidy’s and Rosenzweig’s personal and business email accounts, *see* Gov’t Mot. at 23–29.

In the course of reviewing records returned by the February 8, 2018, search warrant, the government’s filter team identified “several retainer agreements involving Robin Rosenzweig,

Esq.,” and “[o]ut of an abundance of caution, the investigative team has neither accessed any communications involving Rosenzweig nor confronted Rosenzweig, Broidy, or Lum Davis.” Gov’t Mot. at 4. Attorneys from the filter team now seek an order authorizing the investigative team to access communications involving Rosenzweig and the alleged illegal schemes, “confront Rosenzweig, her purported clients, and her spouse, Broidy, with the facts recited herein, and take any other investigative steps needed to complete its investigation.” *Id.* at 4–5.

In support of this motion, the government argues that “no legitimate attorney-client relationship existed” between Rosenzweig and her purported clients and that, “[i]n the alternative,” “the crime-fraud exception applies to any past and future communications made in furtherance of the crimes and schemes” described below. *Id.* at 18. In addition, the government contends that Broidy and Rosenzweig waived any claim to attorney-client privilege or spousal privilege by voluntarily disclosing certain documents to the FBI in connection with an unrelated matter. *Id.* at 23–29. 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 and, with respect to the communications voluntarily provided to the FBI, that Broidy and Rosenzweig waived the protections of the attorney-client and spousal privileges.

I. BACKGROUND

The government’s motion paints a detailed picture of several schemes to influence the United States government on behalf of foreign interests. At the center of these schemes are Elliott Broidy, the former finance chairman of the Republican National Committee, and Robin Rosenzweig, his wife and the principal at Colfax Law Office. The relevant details are presented below.

A. Efforts to Benefit Malaysian National Low Taek Jho

1. Legal Arrangement between Jho Low and Colfax Law Office

Jho Low is a Malaysian national, who is allegedly involved in the money laundering of billions of U.S. dollars from 1Malaysia Development Berhad (“1MDB”), a “strategic investment and development company wholly-owned by the government of Malaysia.” Gov’t Mot., Ex. 20, *United States v. Certain Rights To & Interests In the Viceroy Hotel Group*, No. 17-cv-4438 (C.D. Cal. filed June 15, 2017), Complaint for Forfeiture *In Rem* (“Forfeiture Compl.”) ¶ 6; *see also* Lidsky Aff. ¶ 13. Jho Low and other individuals are currently subject to civil forfeiture and criminal proceedings in the United States. *See generally* Forfeiture Compl.; Lidsky Aff. ¶ 14. In late 2016, Low’s brother, [REDACTED], asked his acquaintance, Pras Michel, a businessman in the entertainment industry, to assist Jho Low in finding legal representation to help with those civil and criminal proceedings in the United States. Gov’t Mot., Ex. 6, Memorandum of Investigation, Proffer of Prakazrel “Pras” Michel (“Michel MOI”) at 2. Michel offered to look for firms on Jho Low’s behalf. *Id.*; Gov’t Mot., Ex. 10, FBI 302 Report, dated Jan. 17, 2018 (“Michel FBI Report”) at 6; Gov’t Mot., Ex. 8, Memorandum of Investigation, Proffer of George Higginbotham (“Higginbotham MOI”) at 2.

Michel then spoke with his acquaintance, Nickie Lum Davis, an individual with “connections to Republicans or the Republican Party,” Higginbotham MOI at 3, about Jho Low’s case without mentioning Jho Low’s name. Michel FBI Report at 6. Lum Davis told Michel about the Colfax Law Office, which she described as “a reputable law firm that employed great attorneys who dealt with large cases at DOJ.” Michel MOI at 2. Lum Davis knew the owners of Colfax Law Office, Elliott Broidy and his wife Robin Rosenzweig. *Id.* Michel relayed this information to [REDACTED], who indicated that Jho Low was “interested.” *Id.* Michel then flew to China in February or March 2017 to meet with Jho Low, at which meeting Jho Low told Michel, “I

need someone who can talk to the DOJ to get this thing dismissed or move it along.” Michel FBI Report at 6; *see also* Michel MOI at 3. Michel allegedly “explained that Broidy has a law firm and that his wife is an attorney, and that Broidy is a chairman in the Republican National Committee.” Michel FBI Report at 6. Lum Davis subsequently facilitated an in-person meeting between Michel and Broidy in Los Angeles, at which meeting Michel “mentioned Low’s name to Lum and Broidy for the first time and explained that he had some legal issues about money related to the 1MDB scandal.” Michel MOI at 2; *see also* Michel FBI Report at 7. Broidy represented that he would “consult on the matter and his wife would act as an attorney.” Michel FBI Report at 7. Broidy is not a lawyer and is not a partner at Colfax Law Office. *See* Gov’t Mot., Ex. 33, Memorandum of Investigation, Analysis of Responsive Files from Subpoenaed Records - Colfax (“Colfax MOI”) at 1; Gov’t Mot., Ex. 7, Memorandum of Investigation, Anicorn Payment Summary - Broidy’s (“Anicorn MOI”) at 1; Michel MOI at 3.

Around the same time, Michel reached out to another acquaintance, George Higginbotham, who had in the past “performed some ‘episodic’ legal work for Michel,” to ask Higginbotham about Broidy and the Colfax Law Office. Higginbotham MOI at 1–2. At the time, Higginbotham was a congressional liaison for oversight matters at the DOJ Office of Justice Programs. *Id.* at 1. Michel allegedly told Higginbotham that “the change in administration meant that there would be changes in prosecutors, and [Broidy] could not do anything until there were new appointments in place.” Gov’t Mot., Ex. 9, FBI 302 Report, dated Jan. 19, 2018 (“Higginbotham FBI Report”) at 4. Broidy had told Michel that “someone was going to be appointed in Los Angeles who would be friendlier to dismissing the charges” against Jho Low. *Id.* Higginbotham agreed to assist Michel in facilitating Low’s relationship with

Colfax Law Office and to advise on a retainer agreement between Colfax and Jho Low, among other various legal work for Michel. *See* Higginbotham MOI at 2–3.

On March 12, 2017, Rosenzweig—the owner of Colfax Law Office—sent Lum Davis a Retainer and Fee Agreement between the firm and Jho Low. Under this agreement, an executed copy of which is not included in the proffered exhibits, the firm agreed to provide Jho Low with “all legal services reasonably required to represent” Jho Low in connection with forfeiture proceedings filed in the Central District of California and “[a]ll other Forfeiture *In Rem* actions filed by the United States of America . . . which apply to” Jho Low, in exchange for a nonrefundable \$8 million retainer fee and a \$50 million to \$75 million success fee. Gov’t Mot., Ex. 13, Email from Rosenzweig to Lum Davis, Mar. 12, 2017, Attach. 1, Retainer and Fee Agreement (“Jho Low/Colfax Agreement”) at 1–3, 6. Rosenzweig also sent Lum Davis a Consulting Services Agreement between Colfax Law Office and Lum Davis, indicating that “Colfax has been engaged to render litigation services to [] Jho Low” and that Lum Davis would “render Consulting Services to Colfax with regard to the Matter” described in the Jho Low/Colfax Agreement—that is, assistance with the forfeiture proceedings. Gov’t Mot., Ex. 13, Email from Rosenzweig to Lum Davis, Mar. 12, 2017, Attach. 2, Consulting Services Agreement (“Lum Davis/Colfax Agreement”) at 1. This agreement indicated that “[a]ll work product produced by [Lum Davis] for Colfax shall be Attorney-Client Privileged and owned by Colfax,” *id.*, and also awarded to Lum Davis 25 percent of the fees paid to Colfax under the Jho Low/Colfax Agreement, *id.* at 1–2.

The Jho Low/Colfax Agreement made its way to Michel, who also provided Higginbotham with a copy of the proposed Agreement. *See* Higginbotham MOI at 2; Higginbotham MOI, Attach. 1, Retainer and Fee Agreement (“Jho Low/Colfax Agreement”) at

1. Michel instructed Higginbotham to change the Agreement to list Anicorn LLC, a company established by Michel, rather than Jho Low, and to “leave Low’s name off of the retainer agreement.” Higginbotham MOI at 2–3. Michel and Higginbotham agreed to use the code name “Wu” in reference to Low. *Id.* at 3. Higginbotham then provided Michel with a consulting agreement between Anicorn and “Client,” stating that Client would assist in the resolution of the same civil forfeiture matters listed in the Jho Low/Colfax Agreement and providing 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. Higginbotham MOI, Attach. 2, Retainer and Fee Agreement (“Anicorn/Client Agreement”) at 1–2. According to Higginbotham, Michel told him that “while Broidy was still confident of success, movement on Jho Low’s case was delayed pending transition appointments, such as the United States Attorney in California.”

Higginbotham MOI at 3. Michel also informed Higginbotham that “Broidy would not lift a finger until he had received his \$8 million per the agreement.” *Id.* In May 2017, Michel, Lum Davis, and Broidy traveled together to Thailand to meet with Jho Low, at which meeting Jho Low talked about his legal team. Michel MOI at 4.

The government has not found executed versions of these proposed agreements between Colfax and Jho Low or Colfax and Lum Davis. Gov’t Mot. at 8. Nevertheless, between May 2017 and August 2017, bank accounts associated with Michel’s company, Anicorn, “received four wire transfers totaling approximately \$21.4 million from a bank account held in Hong Kong . . . in the name of Lucky Mark (HK) Trading Limited (‘Lucky Mark’),” Lidsky Aff. ¶ 12, an entity with apparent ties to Jho Low, *id.* ¶¶ 12, 21–22. “Within a day of each wire transfer from Lucky Mark, Anicorn transferred a portion of the funds” to Colfax Law Office. *Id.* ¶ 12; *see also* Anicorn MOI at 1. Colfax Law Office appears to have received between \$8 million and \$9

million from Anicorn during this three-month period, which funds “are believed to have been paid by Jho Taek Low under the auspices of legal work.” Colfax MOI at 1; *see also* Anicorn MOI at 1. Similarly, during this time period, Anicorn (Michel’s company) and Colfax Law Office both made payments to Lum Davis, totaling approximately \$9.2 million. Gov’t Mot., Ex. 12, Memorandum of Investigation, Subpoena Record Analysis - CHR Group LLC Account Activity (“CHR Group MOI”) at 1. According to Michel, he paid these sums to Lum Davis because she had “made the introduction” to Broidy and because she “knew that Michel was getting lots of money.” Michel FBI Report at 7.

The government’s proffered exhibits also reveal that the parties contemplated these legal and consulting relationships at least in part to be able to invoke the attorney-client privilege. On May 22, 2017, Rosenzweig emailed Lum Davis, copying Broidy, explaining that “[m]ost important for me right now is AN agreement with Colfax and Pras re: J LOW. Pras needs to hire me as his consultant on legal matters in connection with J LOW. Then I also need an [sic] Agreement between Colfax and you. I cannot operate without these.” Gov’t Mot., Ex. 14, Email from Rosenzweig to Lum Davis, May 22, 2017 (“Rosenzweig May 22, 2017 Email”) at 1. Lum Davis responded the same day and told Rosenzweig, copying Broidy, that “we should all sit down and figure out how to best structure the agreements and structure the relationship so everyone feels comfortable and protected.” Gov’t Mot., Ex. 15, Email from Lum Davis to Rosenzweig, May 22, 2017 (“Lum Davis May 22, 2017 Email”) at 1. Lum Davis also asked Rosenzweig to send “a legal representation letter to officialize that Colfax is my atty and thus our correspondence is privileged [sic].” *Id.*

In addition, Broidy, who is not an attorney, repeatedly stressed to Lum Davis and Rosenzweig that these agreements were needed. On May 18, 2017, Rosenzweig informed Lum

Davis, copying Broidy, that she had “discuss[ed] these contracts with Elliott [Broidy] and he agrees now that they are needed.” Gov’t Ex. 16, Email from Rosenzweig to Lum Davis, May 18, 2017 (“Rosenzweig May 18, 2017 Email”) at 1. Notably, the government points out that “Broidy is no stranger to the practice of using attorneys and agreements to conceal improper payments.” Gov’t Mot. at 9. In December 2009, Broidy pleaded guilty to corruption charges after “enter[ing] into a sham consulting agreement with a family member of a senior [New York state] official. Broidy paid more than \$380,000 to the consultant over a period of more than two years.” Gov’t Mot., Ex. 17, New York State Attorney General’s Office, Press Release, *Cuomo Announces Guilty Plea by Founder of Private Equity Firm in Continuing Investigation of Pay-to-Play Kickback Scheme at State Pension Fund*, dated Dec. 3, 2009 (“Broidy Article”) at 2.

Despite these agreements, Rosenzweig—the only lawyer involved so far—never entered an appearance on behalf of Jho Low in court. Rather, her only involvement appears to have been drafting these agreements. Gov’t Mot. at 9–10. Indeed, according to Michel, “Colfax and Broidy have not really done anything to help with the Malaysian legal matter.” Michel FBI Report at 5.

2. Lobbying Activity on Jho Low’s Behalf

Through a search warrant, the government obtained several documents and images from Lum Davis’s Google account illustrating the various efforts taken on Jho Low’s behalf by Rosenzweig, Broidy, Lum Davis, Michel, and Higginbotham, often after discussions or collaboration with each other. *See, e.g.*, Gov’t Mot., Ex. 27, Email from Rosenzweig to Lum Davis, Apr. 30, 2017 at 1 (Rosenzweig emailing Lum Davis, copying Broidy, regarding “JLOW Strategy Doc” to inform her that “[w]e couldn’t read the strategy document that you faxed last night”). For example, one screenshot created on or before June 29, 2017, captures the following text message from an undisclosed sender:

Call me urgent.

1. The DOJ filed asset forfeiture actions against 3 additional assets last Friday via California Courts. Assets are in London. They are clearly not stopping and we need it shut down asap.
2. I am still waiting on the document which was given to Nickie on Minister meetings and persons originally scheduled in USA. Please load ASAP.

Gov't Mot., Ex. 19, Screenshot ("Ex. 19 Screenshot") at 1. Indeed, on June 15, 2017, the government filed a new forfeiture complaint against Jho Low in the Central District of California. *See generally* Forfeiture Compl.

Another screenshot showed a message from "Robin & Elliott Broidy" to Lum Davis stating the following:

Spoke with MG Ricky Waddell, Deputy National Security Advisor. Meeting for PM of Malaysia, Najib Razak with POTUS is being set for month end July or early August. Working to get precise date. This information will be received soon and we will make sure contact is made through proper channels asap. When I get to D.C. tomorrow, I will work to receive precise date. Please feel comfortable that the meeting with POTUS will take place.

Gov't Mot., Ex. 21, Screenshot ("Ex. 21 Screenshot") at 1. The application used to send and receive this message indicates that this message was set to "[d]estruct[] in 12 hours." *Id.* The government noted that, "because there is a possibility—however remote—that this message was authored by Rosenzweig, it has been withheld from the investigative team pending this Court's ruling on the instant motion." Gov't Mot. at 11.

A third screenshot, also found on Lum Davis's Google account from "Robin & Elliott Broidy" and also set to "[d]estruct[] in 12 hours," stated that "I just spoke to Reince re M. Says he is getting it done. I told him is absolutely critical I get it today. Said he would do his best."

Gov't Mot., Ex. 22, Screenshot ("Ex. 22 Screenshot") at 1. Reince Priebus was the President's Chief of Staff from January 2017 until July 2017, after serving as Chairman of the Republican

National Committee. Gov't Mot. at 11. Still other screenshots from Lum Davis's Google account describe Broidy's background and his apparent ability to influence higher-ups in the U.S. government. For example, one image shows a printed document resting against a green folder. This document does not describe Broidy by name but includes descriptors that match Broidy's role throughout 2016 and 2017: "Single largest fundraiser for Trump - raised the most money of any other person"; "Finance Vice Chair of the Trump Victory Campaign and was Vice Chairman of the Presidential Inaugural committee"; "advising Trump transition with respect to nominees for key cabinet and deputy secretaries, undersecretaries and other appointments." Gov't Mot., Ex. 23, Screenshot ("Qualifications Screenshot") at 1.

Notably, the document in this screenshot also states that the individual described had a "[g]reat relationship with the White House counsel—and we believe solution will be a collaboration between Dept of Justice and Atty General Sessions, US atty in LA, and the White House counsel," and that "[h]e has long standing relationship with the incoming US attorney for the central district of CA (which is handling the case now)." *Id.* The document indicates that the parties were "[l]ooking at 4 months probably to get this settled" and to "stop seizure of assets here in the US and turn case over to the other country," and concludes by noting that "when you talk about Jared and/or Steve Bannon—you have to understand that those folks with official government capacity cannot move without scrutiny and will be uninterested or unwilling to assist. Example of General Flynn and also even Jared Kushner and the Chinese company looking to buy his family's building in NYC." *Id.* Another screenshot in the same file depicts a document, typed in the same font as the first document and also resting against a green folder, describing Broidy's biography with his name displayed at the top of the document. *Id.* at 2.

Still another screenshot recovered from Lum Davis's Google account is a Word document titled "Talking Points - 3 Priorities: Isolate N Korea, Counter terrorism, and Trade." Gov't Mot., Ex. 24, Screenshot ("Talking Points Screenshot") at 1. The document appears to contain talking points regarding relations between Malaysia and the United States, including, as "Priority 1," that "Malaysia fully stands behind the US to do all that it can to isolate N Korea" and that "Malaysia is very interested in forming a personal and diplomatic relationship to the Trump administration." *Id.* In addition, the document includes talking points on counterterrorism, noting that "Malaysia is working with a US company headed by RNC co finance chair Elliott Broidy to be able to improve and monitor open source intelligence in order to combat terrorism," *id.* at 2, and trade, noting that Malaysia "would like to work with Secretary Wilbur Ross and other private business individuals like Elliott Broidy to increase the trade and business between the 2 countries," *id.* Of particular relevance to the pending motion, a final section of the document on the "[r]elationship between the US and Malaysia" notes that "[t]he US Justice Department's current investigation into 1MDB hinders this close relationship and is perplexing to Malaysia in a number of ways." *Id.* at 3. Specifically, the document notes:

- a. The investigation into the 1MDB is an *internal issue* and is being handled by Malaysia and any relevant parties i.e [sic] Saudi Arabia or Abu Dhabi.
- b. There should be no involvement by the US courts or Justice Department as no harm has been done to any American.
- c. Our own Justice Department and Attorney General have looked into the matter and found no proof of any wrongdoing.
- d. The US action under former Attorney Loretta Lynch and the Obama administration causes unnecessary tension between our 2 countries that have a history of friendship and cooperation and may cause a negative reaction amongst the Malaysian people, who following our administrations [sic] lead, have been very supportive and have great affection for the US.
- e. I will send our Attorney General to Washington DC prior to my meetings with President Trump in September and would like him to meet directly with Attorney General Jeff Sessions to begin to resolve this issue with 1MDB that lingers from the previous Obama administration.

Id. (emphasis in original). As the government's exhibits show, Broidy had been trying to facilitate a meeting with the President to discuss issues relevant to Malaysia. *See, e.g.*, Ex. 21 Screenshot at 1; Ex. 22 Screenshot at 1.

In addition, in a screenshot of a message sent by Lum Davis to an unidentified recipient, set to "[d]estruct[] in 6 days," Lum Davis explained to the recipient that "E wanted me to tell him that don't expect anything today as admin is under fire and really preoccupied. We are close to new FBI director nominee and the us attorney appointments are still on track. E is going in to sit w big dude on this trip. He told them he's not leaving D.C. till the m date is solidified." Gov't Mot., Ex. 25, Screenshot ("Ex. 25 Screenshot") at 1. The government contends that, "[r]ead in conjunction with other communications identified by the filter team, it appears that part of Broidy's activities on behalf of his foreign clients included efforts to influence the appointment of individuals to key positions in the Department [of Justice]'s leadership." Gov't Mot. at 13. Indeed, according to a log of WhatsApp messages exchanged between Broidy and Richard W. Gates, III, a former deputy campaign manager for President Donald J. Trump, who has since pleaded guilty to unrelated charges, Broidy and Gates appeared to discuss efforts to appoint Nathan J. Hochman as U.S. Attorney for the Central District of California. *See* Gov't Mot., Ex. 18, Log of WhatsApp Messages ("Gates WhatsApp Messages") at 1–3; *see also* Gov't Mot., Ex. 26, Email from Lum Davis to Broidy, Mar. 11, 2017 at 1 (Broidy forwarding Lum Davis a news article about Attorney General Jeff Sessions asking "remaining 46 US attorneys to resign" and asking her to "Share with our friend," which Lum Davis tells Broidy she "did [] yesterday").

The government's exhibits do more than explain the lobbying efforts undertaken on Jho Low's behalf, however. The record also reflects a chain of financial transactions linking Jho

Low to political contributions made within the United States. During the time Rosenzweig, Broidy, Lum Davis, Michel, and Higginbotham appear to have been working on behalf of Jho Low, a Malaysian national, Colfax Law Office was receiving money from entities connected to Jho Low [REDACTED]

[REDACTED]. As discussed above, between May and August 2017, bank accounts associated with Michel’s company, Anicorn, received wire transfers totaling approximately \$21.4 million from Lucky Mark, a Jho Low–related entity. *See* Lidsky Aff. ¶¶ 12, 21–22. Within a day of those transfers from Lucky Mark, Anicorn would transfer funds to Colfax Law Office. *Id.* ¶ 12; Anicorn MOI at 1. An FBI analysis of subpoenaed bank records from Colfax Law Office indicates that between May 2, 2017, and August 9, 2017, Colfax “received approximately \$11,500,000 in deposits via wire transfers and a cashier check deposit,” approximately \$8 million of which appear to have come from Anicorn and, by extension, from Jho Low. *See* Anicorn MOI at 1; Colfax MOI at 1. Throughout this time period, the received funds were routinely transferred from Colfax’s account to Broidy’s personal account, Broidy’s business account, and Rosenzweig’s personal account, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Efforts to Deport Chinese Dissident Guo Wengui

The government has also provided in its materials exhibits referring to an alleged “effort[] to deport a Chinese dissident, Guo Wengui (a.k.a. Miles Kwok), from the United States to China.” Gov’t Mot. at 5 n.3. Although the government does not rely on this scheme in its argument that the crime-fraud exception applies to the communications at issue, the facts relating to Wengui nevertheless present an alarming attempt to influence U.S. policy with respect to a

single individual, on behalf of Jho Low and, possibly, the Chinese government. Higginbotham informed the FBI that, during a trip to Macau in September 2017, “he, Low, Michel, and Joel Rousseau discussed transferring funds to the U.S. for two purposes,” one of which included the settlement of Jho Low’s legal troubles as discussed above. Gov’t Mot., Ex. 2, Memorandum of Investigation, Interview of George Higginbotham (“Higginbotham Interview MOI”) at 4. The second purpose was to “influence U.S. policy related to Guo Wengui” and to assist Low’s “petition[] to have Guo returned to China.” *Id.* Higginbotham recalled “that he, Michel, and Low discussed that they needed to get funds into the U.S. and understood they would need to be able to explain to the banks what the source of the funds was and the reason for the transfers.” *Id.* Higginbotham understood that the source of these funds “was likely the Chinese government,” and he believed that “Low [wa]s under pressure from the Chinese government to get Guo extradited back to China.” *Id.*

Eventually, in October 2017, some \$41 million was transferred from Red Rock IX, a company owned by Low, into an escrow account held by Higginbotham. *Id.* at 5–6. Higginbotham told the FBI that he “understood that the funds being transferred by Low were potentially to be paid to Eric Trump, Steve Wynn [a casino and resort owner], and Elliott Broidy, whom he referred to as the ‘influencers’” advocating for Wengui’s deportation. *Id.* at 4. According to the government, “[o]pen source reporting further confirms that Steve Wynn has taken steps to lobby President [REDACTED] to deport Wengui on behalf of the Chinese government.” Gov’t Mot. at 5 n.3; *see also* Gov’t Mot., Ex. 5, Wall Street Journal, China’s Pursuit of Fugitive Businessman Guo Wengui Kicks Off Manhattan Capers Worthy of Spy Thriller (“Wengui Article”) at 1. The government has only “partially corroborated Higginbotham’s allegations,” Gov’t Mot. at 5 n.3, but the facts presented reveal a troubling

series of communications, meetings, and payoffs to deport a Chinese national at the behest of foreign nationals and foreign principals in exchange for substantial sums of money.

D. Broidy and ██████████'s Voluntary Disclosure of Communications to the FBI

Separately from this investigation, on March 26, 2018, Broidy Capital Management LLC, Broidy, and ██████████ retained counsel and filed a complaint in the Central District of California against the State of Qatar, Stonington Strategies LLC, Nicolas D. Muzin, and Does 1–10, alleging that these defendants “hacked into the email accounts and computer servers” associated with ██████████, “stole private emails and documents from them, and broadly disseminated the stolen emails and documents to domestic and foreign media.” Gov’t Mot., Ex. 35, *Broidy Capital Mgmt. LLC v. State of Qatar*, No. 18-cv-2421, Complaint (“Broidy Compl.”) ¶ 2. In an amended complaint filed on May 24, 2018, Rosenzweig is no longer listed as a plaintiff and is instead described in the complaint as “legal counsel to Plaintiffs.” Gov’t Mot., Ex. 36, *Broidy Capital Mgmt. LLC v. State of Qatar*, No. 18-cv-2421, First Amended Complaint (“Broidy FAC”) ¶ 97.

On March 27, 2018, the couple’s lawyer, ██████████ of the law firm ██████████ ██████████, spoke to the FBI to report the alleged hacking. *See* Gov’t Mot., Ex. 40, ██████████ ██████████; Gov’t Mot., Ex. 41, Email from ██████████ to ██████████, Mar. 30, 2018 at 1–3. Broidy, Rosenzweig, and their counsel later provided the FBI with information regarding a forensic analysis conducted by two cybersecurity firms during a conference call on April 2, 2018. Gov’t Mot., Ex. 42, ██████████ (“Conference Call FBI Report”) at 1. Then, on April 12, 2018, counsel for Broidy and Rosenzweig informed the FBI that he had uploaded, to a File Transfer Protocol website maintained by his law firm, “41 PDFs that were

provided to [the firm] by members of the media and which [the firm] understood to have been leaked by anonymous sources.” Gov’t Mot., Ex. 43, [REDACTED]. According to the FBI, the emails had been provided “without restrictions on their use” and “the FBI had made no representations or promises to [the attorney] or others, including Broidy, about how the emails would be used by the FBI.” Gov’t Mot., Ex. 44, [REDACTED].¹

The government explains that, “in an abundance of caution, the government’s filter team reviewed the materials that Broidy and Rosenzweig produced to the FBI before releasing any of them to the investigative team.” Gov’t Mot. at 17. Specifically, the filter team withheld 142 of the 1,393 pages across the 41 PDFs due to potentially privileged material. *Id.* The government grouped the withheld communications into three categories: “(1) e-mails in which Broidy or Rosenzweig and Broidy are communicating with attorneys (Exhibit 37); (2) e-mails in which Broidy and Rosenzweig are communicating only with one another (Exhibit 38); and (3) relevant e-mails among Broidy, Rosenzweig, and Nickie Lum Davis that are duplicative of those discovered through search and seizure warrants obtained in this matter (Exhibit 39).” *Id.*

II. LEGAL STANDARD

A. The Crime-Fraud Exception to Attorney-Client Privilege

“The attorney-client privilege ‘is the oldest of the privileges for confidential communications known to the common law,’” *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)), and applies to

¹ On or about May 30, 2018, the law firm representing Broidy and Rosenzweig learned that the cybersecurity firms employed by Broidy had [REDACTED].” Gov’t Mot., Ex. 45, [REDACTED]. The attorney represented to the FBI that [REDACTED]. *Id.*

“a 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); *see also In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (“[T]he privilege applies only if the person to whom the communication was made is ‘a member of the bar of a court’ who ‘in connection with th[e] communication is acting as a lawyer’ and the communication was made ‘for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.’” (quoting *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984))).

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 internal 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.” *Id.* (citing *In re Sealed Case*, 676 F.2d at 815). “The determination that a prima facie showing has been made lies within the sound discretion of the district court,” *id.*, 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 quotation marks omitted).

B. Waiver of Attorney-Client Privilege

Even if the attorney-client privilege initially attaches to a communication, the client may waive the privilege by disclosing the communication to a third party. *See In re Sealed Case*, 877 F.2d 976, 979 (D.C. Cir. 1989) (recognizing the difference between “waiver of an existing

privilege and absence of an intent to maintain confidentiality in the first place”). The D.C. Circuit “adheres to a strict rule on waiver of privileges,” requiring a privilege holder to “zealously protect the privileged materials” and “tak[e] all reasonable steps to prevent their disclosure.” *SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997) (citing *In re Sealed Case*, 877 F.2d at 980). “Any voluntary disclosure by the holder of such a privilege is inconsistent with the confidential relationship,” *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (quoting *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)), and as such, “will waive the privilege,” *In re Sealed Case*, 877 F.2d at 980. A client waives the privilege by either “releasing documents” or “disclos[ing] the substance of privileged documents” to “an investigative body.” *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989); see also *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1370 (D.C. Cir. 1984) (concluding that a client waives the privilege entirely as to all “material that has been disclosed to [a] federal agency”); *Permian*, 665 F.2d at 1219 (concluding that a client “destroy[s] the confidential status of . . . attorney-client communications by permitting their disclosure to the SEC staff”).

Waiver of the attorney-client privilege “extends to all other communications relating to the same subject matter.” *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994) (quoting *In re Sealed Case*, 877 F.2d at 981); see also *Williams & Connolly v. SEC*, 662 F.3d 1240, 1244 (D.C. Cir. 2011) (“[I]f a party voluntarily discloses part of an attorney-client conversation, the party may have waived confidentiality—and thus the attorney client privilege—for the rest of that conversation *and* for any conversations related to the same subject matter.” (emphasis in original)); *In re Sealed Case*, 877 F.2d at 980–81 (“[W]aiver of the privilege in an attorney-client communication extends ‘to all other communications relating to the same subject matter.’” (quoting *In re Sealed Case*, 676 F.2d at 809)).

C. Marital Communications Privilege

“The federal common law recognizes two types of marital privileges: the privilege against adverse spousal testimony and the confidential marital communications privilege.” *Lavin*, 111 F.3d at 925. Relevant in this case is the confidential marital communications privilege, which “protects from disclosure private communications between the spouses in the confidence of the marital relationship.” *Id.* (citing *Blau v. United States*, 340 U.S. 332, 333 (1951)). This privilege applies when four prerequisites are met: “(1) there must have been a communication; (2) there must have been a valid marriage at the time of the communication; (3) the communication must have been made in confidence; and (4) the privilege must not have been waived.” *Id.* (internal citations omitted). Regarding this last requirement, the D.C. Circuit has noted that “any disclosure by a holder of a privilege inconsistent with maintaining the confidential nature of marital communications waives the privilege.” *Id.* at 933 (citing *In re Sealed Case*, 676 F.2d at 818).

In addition, several appellate courts have applied the crime-fraud exception to the marital communications privilege, holding that “conversations between husband and wife about crimes in which they conspire or participate or, after the fact, participate in, are not privileged marital communications for the purpose of protection as confidential marital communications.” *United States v. Neal*, 743 F.2d 1441, 1447 (10th Cir. 1984); *see also United States v. Short*, 4 F.3d 475, 478 (7th Cir. 1993) (“[W]e do not value criminal collusion between spouses, so any confidential statements concerning a joint criminal enterprise are not protected by the privilege.”); *United States v. Marashi*, 913 F.2d 724, 731 (9th Cir. 1990) (“[T]he marital communications privilege does not apply to statements made in furtherance of joint criminal activity.”); *United States v. Parker*, 834 F.2d 408, 411 (4th Cir. 1987) (“[W]here marital communications have to do with the commission of a crime in which both spouses are participants, the conversation does not fall

within the marital privilege.” (internal quotation marks omitted)); *United States v. Estes*, 793 F.2d 465, 467–68 (2d Cir. 1986); *United States v. Ammar*, 714 F.2d 238, 258 (3d Cir. 1983) (“[C]ommunications between spouses pertaining to ongoing or future criminal activity, are not protected against disclosure by the privilege for confidential marital communications.”); *United States v. Entrekin*, 624 F.2d 597, 598 (5th Cir. 1980) (“[C]onversations between husband and wife about crimes in which they are jointly participating when the conversations occur are not marital communications for the purpose of the marital privilege, and thus do not fall within the privilege’s protection of confidential marital communications.” (internal quotation marks omitted)).

III. DISCUSSION

The documents to which the government seeks access can be grouped into two categories: documents obtained through a search warrant that pertain to the alleged criminal conspiracies, and documents obtained through Brody and Rosenzweig’s voluntary disclosure to the FBI. These two categories of documents are discussed in turn.

A. Documents Obtained through a Search Warrant

The government posits that Rosenzweig “entered into several sham attorney-client relationships to shield access to communications that she and her co-conspirators made in furtherance of alleged crimes and schemes,” Gov’t Mot. at 1, and that, accordingly, “no legitimate attorney-client relationship existed” and “no relevant past or future communications are protected by attorney-client privilege,” *id.* at 18. Even assuming, however, that Rosenzweig’s attorney-client relationships were legitimate such that her client communications

were entitled to protection by the attorney-client privilege, the crime-fraud exception is applicable in this case.²

The government alleges that the subject communications were in furtherance of a scheme to defraud the United States by interfering with lawful government functions and committing international money laundering on behalf of an undisclosed foreign principal in violation of 18 U.S.C. § 371, 18 U.S.C. § 1956, and the Foreign Agent Registration Act (“FARA”), 22 U.S.C. § 611 *et seq.* *Id.* at 20–23. Under 18 U.S.C. § 371, it is a crime 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. Such a conspiracy is established when the alleged conspirators “interfere with or obstruct one of the [United States’] lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest.” *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). The FARA, in turn, sets forth a regulatory scheme that requires “public disclosure by persons engaging in propaganda activities and other activities for or on behalf of foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities.” *Meese v. Keene*, 481 U.S. 465, 469

² The facts detailed above in Part I.A–D present ample reason to believe that Rosenzweig’s purported attorney-client relationships were, in fact, sham relationships set up to allow the participants to rely on the protections of the attorney-client privilege. Communications between Rosenzweig and Lum Davis indicate that Broidy and Rosenzweig thought that agreements reflecting a legal representation between Colfax Law Office and Michel “are needed,” Rosenzweig May 18, 2017 Email at 1, and that the firm “cannot operate without those,” Rosenzweig May 22, 2017 Email at 1, despite Michel’s later statement to the FBI that “Colfax and Broidy have not really done anything to help with the Malaysian legal matter,” Michel FBI Report at 5. In addition, Lum Davis appears to have been concerned about the availability of attorney-client privilege, writing to Broidy and Rosenzweig that “we should all sit down and figure out how to best structure the agreements and structure the relationship so everyone feels comfortable and protected,” Lum Davis May 22, 2017 Email at 1, and asking Rosenzweig to send “a legal representation letter to officialize that Colfax is my atty and thus our correspondence is privileged [sic],” *id.* Nevertheless, a determination that these relationships were sham relationships is not necessary in this case as the crime-fraud exception is applicable to the relevant communications.

(1987) (quoting *Viereck v. United States*, 318 U.S. 236, 244 (1943)). The FARA requires that “an agent must, within 10 days of commencing his or her activities, file a registration statement” with the DOJ including specific information about the activities. *United States v. McGoff*, 831 F.2d 1071, 1075 (D.C. Cir. 1987).³ Failure to comply with FARA registration requirements risks both civil and criminal penalties. See 22 U.S.C. § 618(a)(2). Finally, 18 U.S.C. § 1956 makes it unlawful for any individual to “transport[], transmit[], or transfer[], or attempt[] to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States,” “with the intent to promote the carrying on of specified unlawful activity.” 18 U.S.C. § 1956(a)(2).

The government’s evidence paints a compelling picture of a scheme to defraud the government by “mount[ing] lobbying campaigns on behalf of foreign principals without registering under FARA” and by “conspir[ing] to transfer tens of millions of dollars into the U.S. banking system—from a place outside of the United States—to finance lobbying campaigns that should have been registered under FARA.” Gov’t Mot. at 21. Specifically, the evidence detailed above indicates that one purpose of the alleged scheme between Rosenzweig, Broidy, Lum Davis, Michel, and others was to work on behalf of Jho Low to find government officials who would be “friendl[y] to dismissing the charges” against Jho Low, Higginbotham FBI Report at 4, and to have the civil forfeiture actions against Jho Low “shut down asap.” Ex. 19 Screenshot at 1. Other documents reveal that Broidy was working on behalf of Jho Low to “stop seizure of

³ This information includes, *inter alia*, the “[r]egistrant’s name” and “principal business address”; the “[s]tatus of the registrant” including the individual’s “nationality”; “[a] comprehensive statement of the nature of registrant’s business,” including “the name and address of every foreign principal for whom the registrant is acting, assuming or purporting to act or has agreed to act”; “[c]opies of each written agreement and the terms and conditions of each oral agreement” between the registrant and any foreign principal; and “[t]he nature and amount of contributions, income, money, or thing of value, if any, that the registrant has received within the preceding sixty days from each such foreign principal.” 22 U.S.C. § 612(a)(1)–(5).

assets here in the US and turn case over to the other country,” that is, Malaysia. Qualifications Screenshot at 1. The repeated references to Broidy’s close connection to the administration and to possible nominees for U.S. Attorney in the Central District of California, where the civil forfeiture case against Jho Low was pending, further strengthen the conclusion that Broidy and others were working to influence the U.S. Government at the highest levels on behalf of an undisclosed foreign principal. *See, e.g., id.*; Ex. 21 Screenshot.

Throughout this process, neither Rosenzweig nor Broidy, nor any other individual associated in these schemes, filed FARA registration statements as required by law identifying their actions on behalf of Jho Low [REDACTED]. Nevertheless, Rosenzweig appears to have used her law office to draft retainer and consulting agreements that provided legal cover for these campaigns and used her law office as a conduit for bringing foreign money into the U.S. banking system for carrying out FARA violations. From May through August 2017, funds traceable to Jho Low and to [REDACTED] [REDACTED] made their way to the coffers of the Colfax Law Office. In that time period, Lucky Mark, a Malaysian company with ties to Jho Low, transferred approximately \$21.4 million to Anicorn, a company owned by Michel, which in turn transferred approximately \$9 million to Colfax Law Office. Lidsky Aff. ¶¶ 12, 21–22; Colfax MOI at 1–2.

[REDACTED] [REDACTED]. Shortly after these funds were received by Colfax Law Office, the firm would transfer the funds to Broidy’s personal account, Broidy’s business account, or Rosenzweig’s personal account, [REDACTED]

[REDACTED]. *Id.* at 1–3. [REDACTED]

[REDACTED]

[REDACTED]

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 22 of the U.S. Code. Accordingly, the government's investigative team is authorized to review any and all communications, past and future, made in furtherance of the crimes and schemes described herein and to interview known members of the conspiracies described herein, including Broidy, Rosenzweig, Lum Davis, Michel, and others known to be involved in the conspiracy.

B. Documents Voluntarily Produced to the FBI

The government also seeks authorization for the investigative team to review "certain attorney-client and spousal communications to which Robin Rosenzweig and her spouse, Elliott Broidy, waived privileges, and requests authorization to confront Rosenzweig and Broidy, separately, with the facts" of this investigation. Gov't Mot. at 1. Specifically, the government alleges that the couple waived both attorney-client privilege and the marital communications privilege when their attorney produced the couple's emails to the FBI for assistance in a separate matter. *See id.* at 23–24. The government is correct, and accordingly, the investigative team may review the materials that were voluntarily produced to the FBI.

As detailed above, Brody and Rosenzweig retained counsel in connection with a civil suit regarding the alleged hacking of their information systems. *See supra*, Part I.D. Brody and Rosenzweig's counsel in that matter provided the FBI with details about forensic work done on the couple's behalf and also produced to the FBI forty-one documents that had been allegedly stolen from Broidy's and Rosenzweig's accounts. *See* [REDACTED]. The government avers that "[t]he majority of the communications with attorneys that counsel to

Broidy and Rosenzweig provided to the FBI are between Broidy and an attorney concerning Broidy's business." Gov't Mot. at 25. Indeed, a review of these documents reveals that most are emails between Broidy and attorneys regarding matters not connected to this investigation. *See* Gov't Mot., Ex. 37, Emails Disclosed to FBI between Broidy and Lawyers ("Broidy Att'y Emails") at 1–8.

Despite the privileged nature of these attorney-client communications, these documents were voluntarily produced to the FBI, "without restrictions on their use," and "the FBI had made no representations or promises to [the attorney] or others, including Broidy, about how the emails would be used by the FBI." [REDACTED]. By making this voluntary disclosure to an investigative body, Broidy and Rosenzweig thus waived the protections of the attorney-client privilege for any privileged material produced to the FBI. *See In re Subpoenas Duces Tecum*, 738 F.2d at 1370 (concluding that a client waives the privilege entirely as to all "material that has been disclosed to [a] federal agency"); *Permian*, 665 F.2d at 1219 (concluding that a client "destroy[s] the confidential status of . . . attorney-client communications by permitting their disclosure to the SEC staff"); *White*, 887 F.2d at 271.⁴

The government also identified two copies of an email between Rosenzweig, Broidy, and a different attorney concerning Rosenzweig's agreement with Jho Low, bearing the subject line "Privileged and Confidential—Elliott Broidy." Gov't Mot. at 26; *see also* Broidy Att'y Emails at 9–10. "[I]n an abundance of caution," the government assumed that, in this email, "Rosenzweig and Broidy were jointly consulting an attorney regarding a matter of common

⁴ Merely seeking the FBI's assistance in responding to a cybersecurity threat does not, on its own, waive the protections of the attorney-client privilege. Rather, if the substance of privileged communications is properly guarded from disclosure, the privilege will remain intact. *See, e.g., White*, 887 F.2d at 271 ("[P]retrial disclosures have been found to waive the privilege only where a defendant disclosed the substance of privileged documents or permitted actual testimony by his attorney before an investigative body."). Here, however, the voluntary production of privileged documents to the FBI, an investigatory body, plainly disclosed the substance of such communications, thereby waiving the attorney-client privilege, at a minimum, as to those communications.

interest and, therefore, the fact that Rosenzweig copied Broidy on the e-mail to [the attorney] did not waive their attorney-client privilege, which they held jointly.” Gov’t Mot. at 26 (citing *In re Sealed Case*, 29 F.3d at 719 (“The common interest privilege protects communications between a lawyer and two or more clients regarding a matter of common interest.”)). When such a common interest exists, the consent of both clients is required to waive the joint attorney-client privilege. See, e.g., *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 363 (3d Cir. 2007) (“[W]aiving the joint-client privilege requires the consent of all joint clients.”). The government need not rest on this assumption, however, because Broidy and Rosenzweig’s voluntary disclosure of the communication at issue represented a waiver, by both clients, of the confidentiality of the email regarding their common interest. The voluntary disclosure of these communications to the FBI was “inconsistent with the confidential relationship,” *Permian*, 665 F.2d at 1219 (internal quotation marks omitted), and as such, operated to “waive the privilege,” *In re Sealed Case*, 877 F.2d at 980.

Similarly, Broidy and Rosenzweig’s voluntary production of documents also waived any claim to spousal privilege in the produced documents. As the government notes, “Broidy and Rosenzweig also turned over several e-mail exchanges between the two of them.” Gov’t Mot. at 27; see also generally Gov’t Mot., Ex. 38, Emails Disclosed to FBI between Broidy and Rosenzweig (“Marital Commc’ns Emails”). These communications took place during a valid marriage and appear to have been made in confidence, and thus, in the absence of a waiver, the confidential marital communications privilege would shield these communications from disclosure. See *Lavin*, 111 F.3d at 925; *Blau*, 340 U.S. at 333. Here, however, Broidy and Rosenzweig’s voluntary disclosure of otherwise-protected documents served to waive the protections of the confidential marital communications privilege, because such disclosure was

“inconsistent with maintaining the confidential nature of marital communications.” *Lavin*, 111 F.3d at 933.⁵

In addition, even without a waiver of the privilege, some of the marital communications at issue would be subject to disclosure under the crime-fraud exception to the privilege. To the extent that the communications between Broidy and Rosenzweig involve “conversations . . . about crimes in which they conspire or participate or, after the fact, participate in,” such communications “are not privileged marital communications for the purpose of protection as confidential marital communications.” *Neal*, 743 F.2d at 1447. In one email, Broidy and Rosenzweig appear to discuss scheduling a meeting between the President of the United States and the Prime Minister of Malaysia, a meeting that was contemplated by the talking points recovered from Lum Davis’s Google account and that Broidy had been attempting to schedule to help with Jho Low’s case. *See Marital Commc’ns Emails at 1; Ex. 21 Screenshot at 1; Ex. 22 Screenshot at 1; Talking Points Screenshot at 3*. Accordingly, because “we do not value criminal collusion between spouses,” any such communications “concerning a joint criminal enterprise are not protected by the privilege” and may be reviewed by the investigative team. *Short*, 4 F.3d at 478.

Thus, by virtue of Broidy and Rosenzweig’s voluntary disclosure of forty-one documents to the FBI, any claims of attorney-client privilege or marital communications privilege in those documents has been waived. Moreover, that disclosure “waives the privilege, not only as to the specific communication disclosed but [also] as to all other communications relating to the same

⁵ The government also contends that “the context of many of the e-mails between Broidy and Rosenzweig suggest that they were not confidential” and were “intended to be shared with third parties by Broidy” or “to be included in public agendas and reports.” Gov’t Mot. at 27. While the government is correct that communications intended to be disclosed to third parties generally are not entitled to privilege protections, *see, e.g., In re Grand Jury Proceedings*, 727 F.2d 1352, 1355–56 (4th Cir. 1984), here the documents were also voluntarily disclosed to an investigative body, and therefore the Court need not assess whether Broidy and Rosenzweig “intended” to share the documents with third parties.

subject matter.” *In re Sealed Case*, 676 F.2d at 809; *see also Williams & Connolly*, 662 F.3d at 1244 (“[I]f a party voluntarily discloses part of an attorney-client conversation, the party may have waived confidentiality—and thus the attorney client privilege—for the rest of that conversation *and* for any conversations related to the same subject matter.” (emphasis in original)); *In re Sealed Case*, 877 F.2d at 980–81 (“[W]aiver of the privilege in an attorney-client communication extends to all other communications relating to the same subject matter.” (internal quotation marks omitted)); *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) (“[D]isclosure . . . effectively waives the privilege not only to the transmitted data but also as to the details underlying that information.” (internal quotation marks omitted)). The investigative team may therefore review the materials that have been produced to the FBI and may confront Brody and Rosenzweig about the emails and the subject matters contained therein.

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 22 of the U.S. Code. Accordingly, any communications, both past and future, between Rosenzweig, Brody, Lum Davis, Michel, and others relating to the alleged schemes and crimes described above are not covered by the attorney-client privilege. The investigative team may therefore review any such communications and use them to confront the subjects of this investigation. In addition, because Brody and Rosenzweig’s voluntary production of forty-one documents to the FBI served to waive the protections of both the attorney-client privilege and the marital communications privilege with respect to those documents, the investigative team may review those forty-one documents and use them to confront Brody and Rosenzweig. To the extent that the filter team encounters any

communications between Rosenzweig, Broidy, Lum Davis, Michel, and others 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: June 26, 2018



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

BERYL A. HOWELL
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF
INFORMATION ASSOCIATED WITH
THREE ACCOUNTS STORED AT
PREMISES CONTROLLED BY GOOGLE,
INC. FOR INVESTIGATION OF
VIOLATION OF 18 U.S.C. § 1344

Misc. Action No. 18-sc-322 (BAH)

Chief Judge Beryl A. Howell

FILED UNDER SEAL

ORDER

Upon consideration of the government's *Ex Parte, In Camera* Motion Seeking Authorization to Review Certain Attorney-Client and Spousal Communications, ECF No. 7, the memorandum and exhibits submitted in support, and the entire record herein, for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the government's motion is GRANTED; and it is further

ORDERED that the communications between and among ROBIN ROSENZWEIG, ELLIOTT BROIDY, NICKIE LUM DAVIS, PRAKAZREL MICHEL, LOW TAEK JHO, and [REDACTED], and/or their agents, both past and future, pertaining to the alleged schemes and crimes described in the government's motion are not protected by the attorney-client or other privilege and, therefore, may be reviewed by the investigative team and used to confront the subjects and targets of this investigation; and it is further

ORDERED that, because ROSENZWEIG and BROIDY waived privilege over the communications that they voluntarily provided to the Federal Bureau of Investigation, through counsel, on or about April 12, 2018, these communications may be reviewed by the investigative team and used to confront the subjects and targets of this investigation; and it is further

ORDERED that, to the extent the filter team encounters any communications between these individuals that appear to implicate legal advice or representation and do not relate to the alleged schemes and crimes described in the government's motion, those communications shall be withheld from the investigative team and protected accordingly, as required by law.

SO ORDERED.

Date: June 26, 2018



Beryl A. Howell

BERYL A. HOWELL
Chief Judge