UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENAS 2022-051890739, 2022-051990785, 2022-052390855	Grand Jury Action No. 22-gj-38 (BAH) Chief Judge Beryl A. Howell **UNDER SEAL**

MEMORANDUM OPINION

For over two years, a grand jury has investigated whether Barry Bennett, the founder and principal of political consulting firm Avenue Strategies LLC ("Avenue"), and Douglas Watts violated the Foreign Agents Registration Act ("FARA"), 22 U.S.C. § 612, after they failed to register and disclose that [redacted], a purported humanitarian organization that Bennett created and of which Watts was president, was actually paid for and established to support the political goals of Avenue's client, the [redacted] *See generally* Mem. Op. ("October 26, 2021 Decision"), *In re Grand Jury Subpoena 2020-070764729,* Case No. 21-gj-23, ECF No. 14.[1] In the investigation's latest turn, the government has [redacted]. The "critical question [that] remains" before the grand jury is whether the [redacted] attorneys were witting or unwitting co-conspirators in what the government describes as an unlawful scheme to violate FARA. Gov't's Mot. to Compel the Production of Documents to the Grand Jury ("Gov't's Mot.") at 3, ECF No. 1.

[1] The investigation began sometime before the grand jury issued a subpoena for Avenue's records on [redacted]—meaning that this investigation has now stretched more than six times longer than the time [redacted] was operational (October 2017 – January 2018).

To this end, the government served subpoenas on [redacted] in [redacted] 2022, which [redacted], then representing all respondents, contested. *See* Gov't's Mot., Ex. 1, [redacted] Subpoena ([redacted], 2022), ECF No. 1-1; Gov't's Mot., Ex. 2, [redacted] Subpoena ([redacted] 2022), ECF No. 1-2; Gov't's Mot., Ex. 3, [redacted] Subpoena ([redacted] 2022), ECF No. 1-3; Gov't's Mot. at 1. The government now moves to compel production of [redacted] records withheld by [redacted], asserting that the crime-fraud exception cuts through the respondents' asserted shields of attorney-client privilege and work-product protection. [redacted] claims that former client Avenue's attorney-client privilege protects all but one record, which it contends is instead protected by the firm's *own* attorney-client privilege.

As detailed in this Court's earlier decision related to this investigation, *see* October 26, 2021 Decision, Avenue's claim to attorney-client privilege is vitiated by the crime-fraud exception, leaving no question as to [redacted] obligation to produce those [redacted] documents. As to the email over which [redacted] claims its *own* attorney-client privilege, identified as the first email in the chain contained in Document No. [redacted] on [redacted] privilege log, this email is protected as opinion work product and intertwined fact work product. Accordingly, the government's motion to compel production of records to the grand jury in **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

Set out below is the factual background of the investigation of Avenue and [redacted] with many relevant facts derived from the government's motion to compel filed on July 7, 2021 in an earlier stage of the grand jury investigation, *see* Gov't's Mot. to Compel ("Gov't's Mot. to Compel Avenue"), Case No. 21-gj-23, ECF No. 1, followed by a summary of the relevant procedural history of the overall investigation and the instant motion.

A. Factual Background

1. Avenue's Work on Behalf of [redacted]

Avenue began to work on behalf of [redacted] on July 17, 2017, shortly after [redacted]. *See* Gov't's Mot. to Compel Avenue, Ex. 2, Consulting Agreement between Avenue and the [redacted] at 19, ECF No. 1-1. In exchange for, among other activities, [redacted] *id.* at 24, Avenue was to be paid $150,000 per month by [redacted]. *See id.* at 20.

In accordance with FARA, which requires agents of foreign governments and entities who engage in political activities to disclose publicly their foreign influence, [redacted] attorneys filed registration documents that disclosed the contract to the Department of Justice one week later. *See* Gov't's Mot. to Compel Avenue at 7. According to an Avenue privilege log, Avenue representatives communicated with [redacted] about the FARA filing during this time period. *See id.*, Ex. 3, Avenue Privilege Log at 28–29, 31, ECF No. 1-1.

The same day that Avenue filed its FARA registration with DOJ, Bennett began pitching a [redacted] government official on the creation of an "organization . . . to bring attention to the humanitarian and health crisis occurring as a result of the [redacted] blockade in [redacted]," calling it "[redacted]." *Id.*, Ex. 4, Bennett Email to [redacted] Government Official (July 24, 2017) at 39, ECF No. 1-1. The organization would use "social media and digital advertising" to "seek 100,000 Americans to sign a petition asking the President and Congress to insist [redacted] stop their campaign and end the suffering" in [redacted]. *Id.* This new project would require a budget of

$350,000, Bennett told the [redacted] government official; in exchange, Bennett would "manage the entire project quietly." *Id.*, Ex. 5, Bennett Email to [redacted] Government Official (July 25, 2017) at 44, ECF No. 1-1.

2. The September 2017 Launch of [redacted]

In early September 2017, two events [redacted] attorneys occurred in unison: (1) [redacted] amended its contract with Avenue to pay the firm an additional $350,000 per month, and (2) Bennett's pitch, [redacted], became a reality. On September 5, 2017, an addendum to the July 17, 2017 contract between Avenue and [redacted] was executed to increase the monthly fee that [redacted] was required to pay Avenue from $150,000 to $500,000, *id.*, Ex. 13, Addendum (Sept. 5, 2017) at 73, ECF No. 1-1, reflecting the $350,000 per month that Bennett had indicated to a [redacted] official would be necessary to finance [redacted] activities, see *id.*, Ex. 5. [redacted] *Id.* at 3. [redacted] amended Avenue's FARA filing on September 18, 2017 to account for the increased payments, disclosing to the Justice Department that the new funds were for "strategic public relations consulting" and "promoting the image of the State of [redacted]" Gov't's Mot., Ex. 11, Email from [redacted] (Sept. 18, 2017) at 8, ECF No. 1-11.

At the same time that Avenue amended its contract with [redacted]. *See* Gov't's Mot. at 7. [redacted] was registered in Delaware as a limited liability company on September 6, 2017, one day after the

Avenue contract with [redacted] was dramatically expanded. Gov't's Mot., Ex. 13, LLC Documentation at 2, ECF No. 1-13. Avenue wired the new corporation its first infusion of funds in the amount of $100,000, on September 15, 2017. *See* Gov't's Mot. to Compel Avenue, Ex. 29B, Transfers from Avenue to [redacted] at 144, ECF No. 1-1. [redacted] amended FARA filing on behalf of Avenue, however, failed to mention the creation or funding of [redacted].

[redacted]

Gov't's Mot., Ex. 6, [redacted] at 4, ECF No. 1-6. [redacted]

Id. [redacted]

[redacted] work from September 2017 through January 2018, when it ceased operations, Gov't's Mot. to Compel Avenue at 19, expanded far beyond activities that would have fit within the humanitarian exemption to FARA's reporting requirements. *See* October 26, 2021 Decision at 21–22 (holding Avenue's earlier arguments that [redacted] activities fell within the exemption to be "without merit"). [redacted] sought to sour American public opinion of [redacted] by raising awareness of [redacted] role in the humanitarian crisis in [redacted]. In furtherance of this objective, [redacted] specifically

sought to generate public support to "cause [redacted] *see* Gov't's Mot. to Compel Avenue, Ex. 19, Case Study at 107, ECF No. 1-1, and to focus both public support and former President Donald Trump's attention on "end[ing] the blockade" of [redacted] organized by [redacted], *see id.*, Ex. 23, Washington Examiner Op-Ed by [redacted] at 121–22, ECF No. 1-1; *id.*, Ex. 24, Letter from [redacted] to Former President Donald Trump (Dec. 8, 2017) at 125, ECF No. 1-1. These activities are unmoored from any purpose of raising "funds and contributions . . . to be used only for medical aid and assistance, or for food and clothing to relieve human suffering." FARA, 22 U.S.C. § 613(d)(3).

Attorneys [redacted] appear to have been somewhat aware that [redacted] Gov't's Mot., Ex. 20, Email from [redacted] to Watts (Oct. 16, 2017), ECF No. 1-20, [redacted] *See id.*, Ex. 26, Email from Watts to [redacted] (Oct. 20, 2017) at 2–10, ECF No. 1-26. Further, both [redacted]

[redacted] *Id.*, Ex. 21, Email from Watts to [redacted] (Oct. 25, 2017) at 1–3, ECF No. 1-21.

3. [redacted] ***Misrepresentations After Launch of Yemen Crisis Watch***

[redacted] drafted two regulatory filings on behalf of Avenue and [redacted] that the government alleges included [redacted] statements: (1) [redacted] and (2) Avenue's 2018 supplemental FARA statement. *See* Gov't's Mot. at 8–10, 11–16.

[redacted] Indeed, Avenue was the sole funder of [redacted], to the tune of $773,000 between September 2017 to January 2018, which the government alleges reflects pass-through payments from the fees that [redacted] paid Avenue. *See* October 26, 2021 Decision at 10.

As to the second filing, in February and March 2018, [redacted] prepared Avenue's semi-annual mandatory FARA filing, which materially omitted any reference to [redacted]. In the course of preparing this filing, [redacted]

[redacted]

ECF No. 1-25. The government contends that [redacted] Avenue's FARA filing was submitted with multiple falsehoods and omissions, including: (1) characterizing a $250,000 payment from [redacted] to Avenue as supporting "the relief of humanitarian suffering in [redacted]" rather than as a pass-through payment for the expenses incurred by [redacted] in producing the [redacted] television program, (2) omitting mention of any [redacted] activities, and (3) omitting mention of the $773,000 in payments it made to [redacted] "in connection with activity on behalf of" [redacted]. *See* Gov't's Mot. at 12–16.

B. Procedural Background

1. Government's First Motion to Compel

The grand jury's investigation into Avenue and [redacted] first surfaced before this Court in July 2021, when the government sought to compel Avenue to produce [redacted] documents involving communications with [redacted], which Avenue had withheld on the basis of attorney-client privilege, *see* Gov't's Mot. to Compel Avenue at 24, which motion to compel became ripe on October 1, 2021, in accordance with the briefing schedule agreed to and later extended, with the Court's permission, by the parties. The October 26, 2021 Decision granted the government's motion, holding that Avenue's attorney-client privilege claim was vitiated by the crime-fraud exception as to (1) Avenue's communications with [redacted] attorneys from August

30, 2017 to March 12, 2018, and (2) all communications with any attorney related to [redacted]. On the basis of the evidence submitted in the government's motion to compel, the Court found that the government had established a prima facie case that "[Avenue] engaged in the communications at issue with [redacted] attorneys 'to further a crime, fraud, or other fundamental misconduct,'" by engaging in a scheme to "create[] and direct[] [redacted] to advance [redacted] interests in the United States, while concealing disclosure of [redacted] and its activities in [Avenue]'s 2017 and 2018 FARA filings prepared and filed in consultation with [redacted] attorneys." October 26, 2021 Decision at 18–19 (quoting *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982)).

Avenue delayed its production of those [redacted] documents, instead moving for the documents' production to be stayed until the Court could approve the staffing and protocol of the government filter team that would review each document to exclude any privileged materials falling outside of the Court's Order. *See* Avenue's Mot. for Clarification or in the Alternative to Compel or for a Stay at 4, Case No. 21-gj-23, ECF No. 15. Avenue also argued that the Court should review all [redacted] documents *in camera*. This motion was denied upon determination that the filter team would follow standard procedures and *in camera* review was unnecessary, and Avenue was ordered to produce the documents by November 18, 2021. *See* generally Mem. and Order, Case No. 21-gj-23, ECF No. 23. Avenue's subsequent appeal to the D.C. Circuit was similarly unsuccessful. *See In re Sealed Case*, Case No. 21-3080 (D.C. Cir. Jan. 7, 2022) (per curiam).

2. Government's Instant Motion to Compel

In May and June 2022, in furtherance of the government's investigation of [redacted] involvement in Avenue's scheme, the government served subpoenas on [redacted].

The subpoenas sought: (1) communications between the respondents and Bennett, Watts, and Avenue employees related to [redacted]; (2) communications between [redacted] Avenue or its agents, and Watts related to [redacted] and Avenue's work on behalf of [redacted] between August 30, 2017 and March 12, 2018; and (3) time and expense reports related to [redacted] work for Avenue, [redacted] Bennett, or Watts. *See* [redacted] Subpoena ([redacted] 2022); [redacted] Subpoena ([redacted] 2022); [redacted] Subpoena ([redacted] 2022).

Three months after receiving the subpoenas, [redacted] had failed to produce any documents, or even a privilege log, in response to the subpoena. Gov't's Mot. at 1. Within days after the government filed, on August 29, 2022, the instant motion to compel production, however, [redacted] produced, on September 1, 2022, [redacted] documents responsive to the [redacted] 2022 [redacted] Subpoena, including documents "associated with legal work or legal advice to [redacted] for which former client [redacted] waived attorney-client privilege; duplicates of documents already produced by Avenue pursuant to the Court's earlier Order; and other non-privileged responsive documents. [redacted]s Opp'n to Gov't's Mot. to Compel ("[redacted] Opp'n") at 1 n.1, 2–3, Case No. 22-gj-38, ECF No. 13. [redacted] also produced a privilege log, listing [redacted] responsive documents that it withheld. Of those documents, it claims "[redacted] own attorney-client privilege" as to a portion of one, and Avenue's attorney-client privilege as to the remaining 136. *Id.* at 3.

II. APPLICABLE LEGAL PRINCIPLES

"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)). As the Supreme Court explained, "[b]y assuring confidentiality, the privilege encourages clients to

make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation," and "[t]his, in turn, serves 'broader public interests in the observance of law and administration of justice.'" *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108 (2009) (quoting *Upjohn Co.,* 449 U.S. at 389). Thus, the privilege covers only a 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) (Kavanaugh, J.); *see also In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) ("[Attorney-client] privilege applies only if the person to whom the communication was made is 'a member of a 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.'" (citing *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984))).

The work-product doctrine protects a different category of materials: only "documents and tangible things that are prepared in anticipation of litigation" by an attorney or an attorney's agent. *United States v. Deloitte LLP*, 610 F.3d 129, 135 (D.C. Cir. 2010) (quoting FED. R. CIV. P. 26(b)(3)(A)). These materials include the attorney's "interviews, statements, memoranda, correspondence, briefs, mental impressions," and "personal beliefs." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). The doctrine emerged as a common law privilege in the civil litigation context, *see Hickman*, 329 U.S. 495, and has been extended to apply to criminal matters, *see Nobles*, 422 U.S. at 236–38, with codification in both the federal civil and criminal procedural rules, see FED. R. CIV. P. 26(b)(3) and FED. R. CRIM. P.

16(b)(2). Courts consider work-product challenges to grand jury subpoenas, "even though neither FED. R. CIV. P. 26(b)(3) nor FED. R. CRIM. P. 16(b)(2) strictly applies in that context." *In re Grand Jury Subpoenas*, 318 F.3d 379, 384 (2d Cir. 2003).

The core of the work-product doctrine is opinion work product, which "reveals 'the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation,'" in contrast with fact work product, which does not. *F.T.C. v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 151 (D.C. Cir. 2015) (quoting FED. R. CIV. P. 26(b)(3)(B)). Opinion work product is "virtually undiscoverable," *Dir., Off. Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997), requiring an "extraordinary showing of necessity" to merit disclosure, *Boehringer*, 778 F.3d at 153. In the context of fact work product, on the other hand, the doctrine "merely shifts the standard presumption in favor of discovery and requires the party seeking discovery to show 'adequate reasons' why the work product should be subject to discovery," *Id.* (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)).

III. DISCUSSION

[redacted] withheld a total of [redacted] responsive documents, asserting that [redacted] of them "implicate the attorney-client privilege held by Avenue," with the [redacted] implicating "[redacted] own attorney-client privilege." [redacted] Opp'n at 3. [redacted] reasons for withholding these two categories of documents are considered in turn.

A. Documents Implicating Avenue's Attorney-Client Privilege

[redacted] asserts that all but one of the withheld documents are protected by former client Avenue's attorney-client privilege. The law firm acknowledges this Court's prior order requiring Avenue to produce documents as to which the crime-fraud exception overcame its

attorney-client privilege, but asserts that the documents now withheld by [redacted] were not part of the tranche of documents withheld by Avenue in 2021 and subject to the Court's order. *See* [redacted] Opp'n at 4–5. Essentially, [redacted] asks this Court explicitly to extend its prior ruling vitiating the privilege to additional communications between [redacted] and Avenue, pointing to the similar Ohio and D.C. Rules of Professional Conduct 1.6(a), which prohibit lawyers from "reveal[ing] a confidence or secret of the lawyer's client" without the client's informed consent unless limited exceptions apply, including if disclosure is required by law or to comply with a court order. D.C. Rule Prof. Conduct 1.6(a), (e)(2)(A); [redacted] Opp'n at 3–4. Avenue has declined to waive any privilege claim or to consent to the disclosure of the documents withheld by [redacted]; as a result, [redacted] contends that, under the rules of professional responsibility by which it is bound, it cannot release these client documents without a specific court order. *See* [redacted] Opp'n at 4–5.[2]

The responsive documents in [redacted] possession over which Avenue alone claims the attorney-client privilege are subject to the ruling in the October 26, 2021 Decision. That Decision held that the government has made a prima facie showing that the crime-fraud exception vitiates Avenue's claim of attorney-client privilege "as to responsive communications with [redacted] attorneys from August 2017 to March 2018 and all communications related to

[2] The professional necessity [redacted] cites to seek a specific court order to disclose these [redacted] client documents to the government is highly doubtful, given that the disclosure would be in response to a government subpoena where the client's claim to attorney-client privilege has already been held vitiated by the crime-fraud exception in the October 26, 2021 Decision. *See In re Grand Jury*, 475 F.3d 1299, 1306 (D.C. Cir. 2007) (where the "crime-fraud exception would expose the controverted evidence even in light of the common law attorney-client privilege, it would be odd beyond contemplation that a D.C. local bar rule [D.C. Rule 1.6] could thwart the grand jury's access to the same evidence"); *In re Mot. to Compel Compliance with Subpoena Directed to Cooke Legal Group, PLLC*, 333 F.R.D. 291, 296 (D.D.C. 2019) (Bates, J.) (holding that Rule 1.6 did not bar the law firm from complying with a subpoena, "but instead specifically permits the firm to do so"); *Selevan v. U.S. Secs. and Exch. Comm'n*, 482 F. Supp. 3d 90, 95 (S.D.N.Y. 2020) (holding under the similar N.J. Rule of Professional Conduct 1.6, which permits disclosure of client information to "comply with other law," that "judicial and administrative subpoenas qualify as such 'other law' and thereby authorize attorneys to disclose confidential client information in such contexts").

[redacted] or its activities irresponsive of date." *See* Mem. and Order at 2, *In re Grand Jury Subpoena 2020-070764729*, Case No. 21-gj-23, ECF No. 23; *see also* October 26, 2021 Decision. The scope of the destroyed privilege is coterminous with the requests for documents in the government's three subpoenas to [redacted].

B. Document No. [redacted]

[redacted] makes a more vigorous claim over only one email in this tranche of withheld documents: an August 18, 2020 email from [redacted].[3] Its claims to the shields of attorney work-product doctrine and the attorney-client privilege are addressed in turn.

1. Attorney Work-Product Doctrine

As a threshold matter, unlike the attorney-client privilege, the work-product doctrine belongs to both the client and attorney, and [redacted] is entitled to independently claim the protection regardless of the status of its former client's claim. *See In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994). At the same time, [redacted] can only cloak its communications behind the work-product doctrine if the attorneys did "not knowingly participate in the client's crime or fraud." *In re Green Grand Jury Proc.*, 492 F.3d 976, 980 (8th Cir. 2007). *See also In re Grand*

[3] The solitary nature of this withheld email begs the question as to why [redacted] has uncovered no additional emails between [redacted]—or other internal communications within [redacted]—responsive to the government's subpoena over which the same privilege claim might be invoked. In an email with the government, [redacted] counsel previously indicated that "we at [redacted] began having conversations internally after [the firm learned of the grand jury investigation] . . . , leading to a separate privilege in some documents within the scope of this topic 1." Gov't's Reply, Ex. 1, Email from [redacted] to Justice Department Attorneys (June 10, 2022) at 3, ECF No. 14-1. Perhaps, all of those conversations were held orally. In any event, the privilege log does not list any of these internal communications besides the single email identified as disputed here.

Jury Subpoenas, 561 F.3d 408, 411 (5th Cir. 2009) ("The party intending crime or fraud cannot invoke the work product doctrine, but if the other party did not intend crime or fraud, that party can invoke it."); *In re Grand Jury Proceedings #5 Empaneled Jan. 28, 2004*, 401 F.3d 247, 252 (4th Cir. 2005) ("[W]hile the attorney-client privilege may be vitiated without showing that the attorney knew of the fraud or crime, those seeking to overcome the opinion work product privilege must make a prima facie showing that the attorney in question was aware of or a knowing participant in the criminal conduct." (citation omitted)). The government stresses that whether [redacted] were witting co-conspirators with Avenue and [redacted] is the "critical question remain[ing]," Gov't's Mot. at 3, but also argues that "[t]here is reason to believe" that [redacted] Gov't's Reply at 3–4. For its part, [redacted] Opp'n at 5.[4]

This Court would only find that [redacted] attorneys were [redacted] an entire law firm's loss of work-product protection by the conduct of one or two [redacted] is a step not to take lightly. At this stage of the government's investigation, the case for [redacted]

[4] Notably, [redacted] nearly fails to invoke the work-product protection. The firm merely name-checks the doctrine in its opposition, and fully abandons the argument in its supplemental memorandum defending its privilege claim over the email. *See* [redacted] Opp'n at 5–6; *see generally* [redacted] Filing Providing Further Information as to Privilege Assertion Regarding Document [redacted] for the Court's *In Camera, Ex Parte* Review ("[redacted] Suppl. Mem."), ECF No. 16.

[redacted] The government's own evidence shows the [redacted]. *See* Gov't's Mot., Ex. 25, Correspondence between [redacted] and Avenue Representatives at 4, ECF No. 1-25. [redacted] a sufficient prima facie showing for [redacted] to lose its claim to work-product protection has not been made.

[redacted] email clearly constitutes attorney work product, because the email was written "in anticipation of litigation," *Nobles*, 422 U.S. at 238 (quoting *Hickman*, 329 U.S. at 508). The email was written in the context of reviewing documents in connection with the Justice Department investigation. *See* [redacted] Opp'n at 5–6. *See, e.g., In re Sealed Case*, 146 F.3d 881, 886 (D.C. Cir. 1998) (noting that the work-product doctrine's policy goals are particularly well-served in the context of a lawyer's advice to a potential grand jury target).

Even though five of the six sentences in the email are fact work product and deserving of minimal protection, they are "so intertwined" with the single sentence of opinion work product that it is "impossible to segregate and disclose the purely factual part" without "disclos[ing] the mental impression of an attorney." *United States v. US Airways Grp., Inc.*, Case No. 13-cv-1236 (CKK), 2013 WL 12341600, at *4 (D.D.C. Oct. 10, 2013) (quoting *F.T.C. v. Boehringer Ingelheim Pharms., Inc.*, 286 F.R.D. 101, 108 (D.D.C. 2012), *aff'd in part, vacated in part*, *Boehringer*, 778 F.3d 142); *see also Boehringer*, 778 F.3d at 152 (noting that "where a document contains both opinion and fact work product, the court must examine whether the factual matter

may be disclosed without revealing the attorney's opinions"). This email contains [redacted] statement reflecting his brief "mental impressions," *Boehringer*, 778 F.3d at 151, as to his obligations vis-à-vis former client [redacted], *see* [redacted] *Ex Parte* Notice, Ex. A, Document No. 134 at 2, ECF No. 15-1. The other sentences, while only statements of fact, "expose[] the attorney's thought process[]," showing, "in deciding what to include and what to omit," the lawyer's focus in considering the basis for potential privilege claims. *Id.* at 151–52 (quoting *Dir., Off. Thrift Supervision*, 124 F.3d at 1308). As a result, the entirety of [redacted] message may be withheld from the government on the basis of work-product doctrine.

2. Attorney-Client Privilege

[redacted] contends that [redacted] email is protected by [redacted] own attorney-client privilege, on the basis of its "entitle[ment] to seek legal guidance and advice as to its own obligations in protecting client privileges and responding to government investigations." [redacted] Opp'n at 6. The government, for its part, contends that any attorney-client privilege claimed by [redacted] is vitiated by the crime-fraud exception. *See* Gov't's Reply at 3–4.

[redacted] claim of attorney-client privilege over this email fails at the privilege's threshold requirement. As a foundational principle, the attorney-client privilege only protects communications made within an attorney-client relationship—meaning, "the asserted holder of the privilege *is* or *sought to become* a client." *In re Sealed Case*, 737 F.2d at 98 (emphasis added) (quoting *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358–59 (D. Mass. 1950)). Courts have recognized that "a law firm, like other business or professional associations, [may] receive the benefit of the attorney client privilege when seeking legal advice from in house counsel." *In re Sunrise Secs. Litig.*, 130 F.R.D. 560, 595 (E.D. Pa. 1989); *see also* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4:5 (Dec. 2021) (citing

In re Sunrise Secs. Litig., 130 F.R.D. at 572); *In re Grand Jury Investigation*, Case No. 19-gj-15 (BAH), 2019 WL 2179116, *16 (D.D.C. March 4, 2019) (recognizing that a law firm's general counsel represented the law firm). Indeed, in [redacted] own email to the government regarding the instant subpoena, [redacted] counsel indicated that "we at [redacted] began having conversations internally after that, including with our General Counsel, leading to a separate privilege"—implying that the inclusion of the firm's General Counsel in firm communications gave rise to [redacted] own privilege claim. Gov't's Reply, Ex. 1, Email from [redacted] to Justice Department Attorneys (June 10, 2022) at 3, ECF No. 14-1.

[redacted] has made no effort to prove that [redacted] served as in-house counsel, either as General Counsel or in a designated role rendering him "effectively" the same, *see United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996). *See generally* [redacted] Opp'n; [redacted] Filing Providing Further Information as to Privilege Assertion Regarding Document [redacted] for the Court's *In Camera, Ex Parte* Review ("[redacted] Suppl. Mem."), ECF No. 16. Further, as the [redacted] attorneys most entangled with [redacted] and Avenue, [redacted] would be odd choices of counsel for [redacted] to choose for legal advice—not the least because of the potential conflicts of interests that might arise between the attorneys' personal interests in the investigation and [redacted] interests as an entity (which, relevantly, appears to have severed ties with [redacted]). [redacted] has failed to meet its burden to earn the protection of the attorney-client privilege over [redacted] email.

C. CONCLUSION

The government's Motion to Compel the Production of Documents to the Grand Jury is **GRANTED IN PART** and **DENIED IN PART.** [redacted] shall produce to the government the records responsive to the grand jury subpoenas that have been described in the Privilege Log as withheld on the grounds of Avenue's attorney-client privilege, with the exception of the e-mail

sent by [redacted] on Aug. 18, 2020 at 6:18 p.m. incorporated into Document No. [redacted]. The parties are directed, within 14 days of issuance of this decision, to confer and submit a joint report advising whether any portions of this Memorandum Opinion may be unsealed to the public in whole or in part and, if so, proposing any redactions.

An order consistent with this Memorandum Opinion will be entered under seal contemporaneously.

Date: October 24, 2022

BERYL A. HOWELL
Chief Judge