# 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 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 See generally Mem.

Op. ("October 26, 2021 Decision"), In re Grand Jury Subpoena 2020-070764729, Case No. 21-gj-23, ECF No. 14. In the investigation's latest turn, the government has the government 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.

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

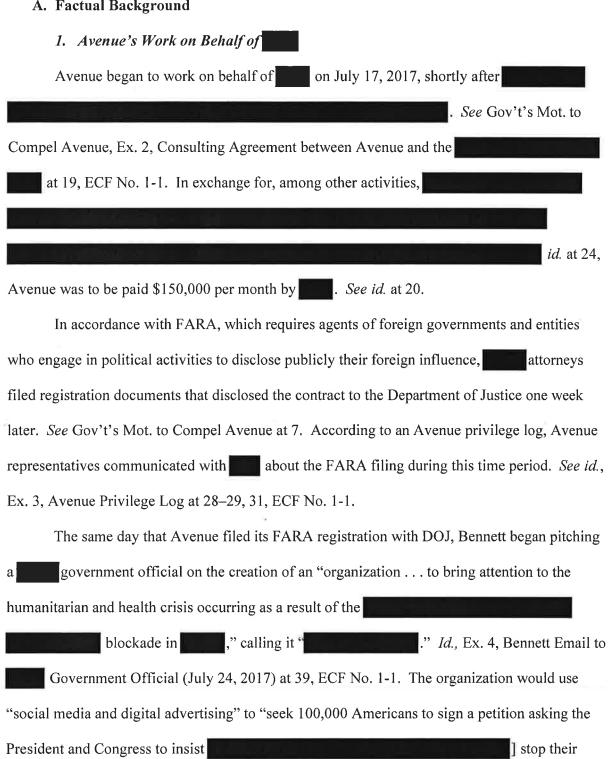
As detailed in this Court's earlier decision related to this investigation, see October 26, 2021 Decision, Avenue's claim to attorney-client privilege is vitiated by the crime-fraud exception, leaving no question as to obligation to produce those documents. As to the email over which claims its own attorney-client privilege, identified as the first email in the chain contained in Document No. on 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

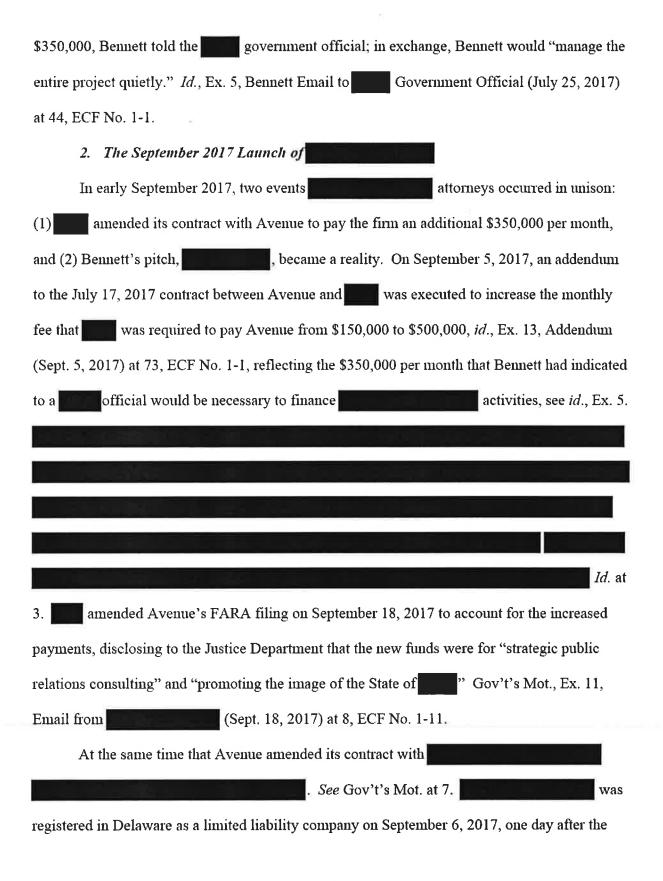
Set out below is the factual background of the investigation of Avenue and with many relevant facts derived from the government's motion to compel filed on July 7, 2021 in an earlier stage of the grand jury investigation, *see* Gov't's Mot. to Compel ("Gov't's Mot. to Compel Avenue"), Case No. 21-gj-23,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

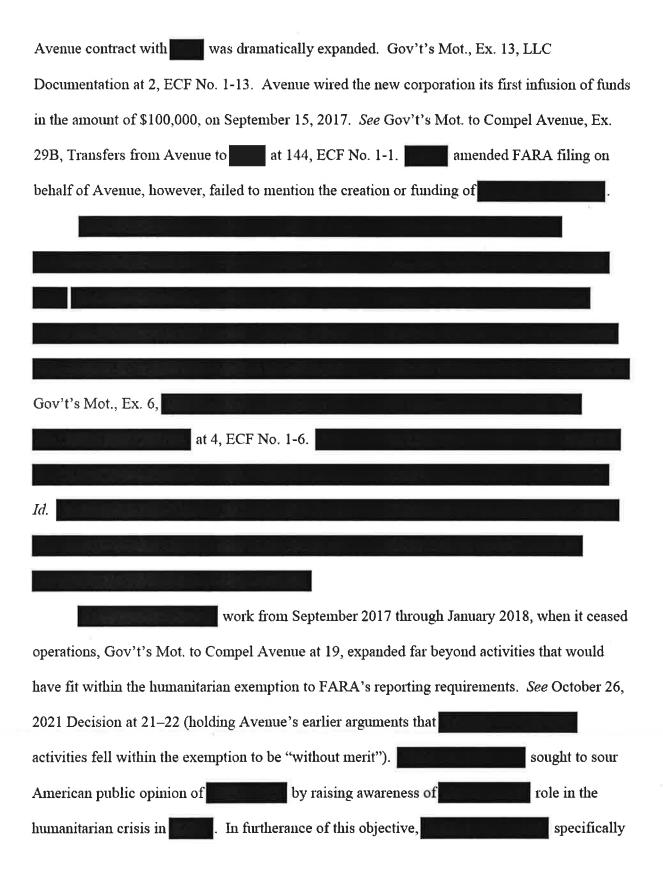
# A. Factual Background

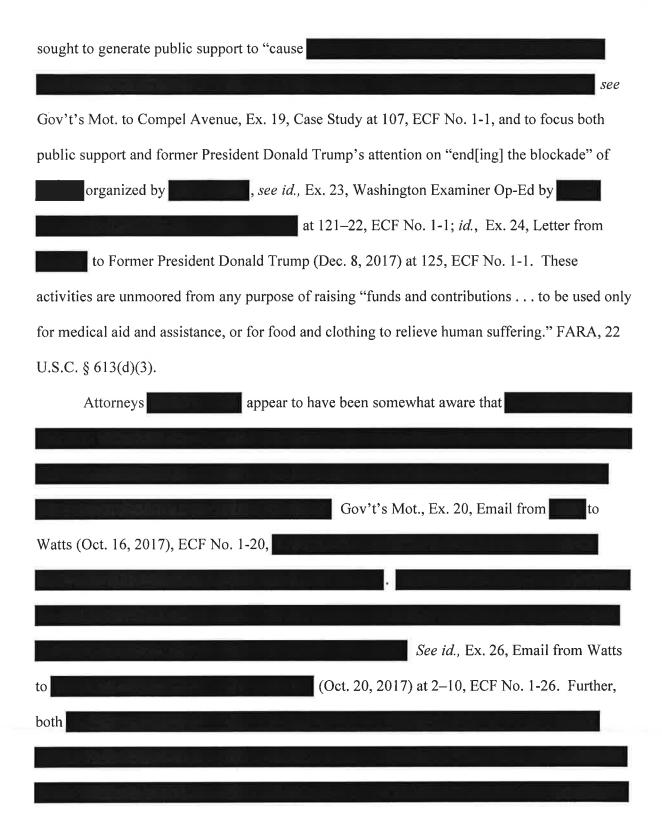
campaign and end the suffering" in



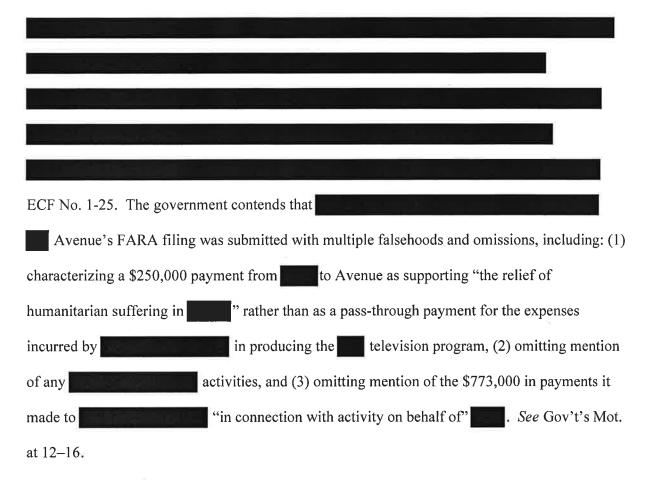
. *Id.* This new project would require a budget of







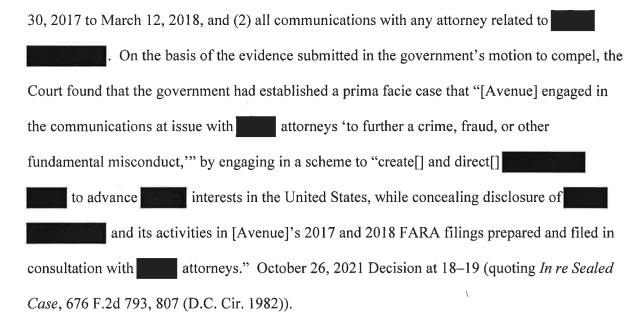
	Id., Ex. 21, Email from Watts to Oct. 25,
2017) at 1–3, ECF No. 1-21.	
3. Misrepresentat	ions After Launch of Yemen Crisis Watch
drafted two regulatory	filings on behalf of Avenue and
that the government alleges included	statements: (1)
	and (2) Avenue's 2018
supplemental FARA statement. See Gov't's N	
supplemental PARA statement. Bee Gov 1 s h	710t. at 8–10, 11–10.
Indeed, Avenue was the sole funder of	, to the tune of \$773,000 between
September 2017 to January 2018, which the go	overnment alleges reflects pass-through payments
from the fees that paid Avenue. See Oct	tober 26, 2021 Decision at 10.
As to the second filing, in February and	d March 2018, prepared Avenue's
semi-annual mandatory FARA filing, which materially omitted any reference to	
In the course of preparing this filing,	



#### B. Procedural Background

# 1. Government's First Motion to Compel

The grand jury's investigation into Avenue and first surfaced before this Court in July 2021, when the government sought to compel Avenue to produce documents involving communications with 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 attorneys from August



Avenue delayed its production of those 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 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 involvement in Avenue's scheme, the government served subpoenas on

The subpoenas sought: (1) communications between the respondents and Bennett, Watts, and Avenue employees related to ; (2) communications between Avenue or its agents, and Watts related to and Avenue's work on behalf of between August 30, 2017 and March 12, 2018; and (3) time and expense reports related to work for Avenue, Bennett, or Watts. See Subpoena ( Subpoena ( 2022); Subpoena ( 2022). Three months after receiving the subpoenas, 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, produced, on September 1, 2022, documents responsive to the Subpoena, including documents "associated with legal work or legal advice to waived attorney-client privilege; duplicates of for which former client documents already produced by Avenue pursuant to the Court's earlier Order; and other nonprivileged responsive documents. s Opp'n to Gov't's Mot. to Compel (" Opp'n") at 1 n.1, 2–3, Case No. 22-gj-38, ECF No. 13. also produced a privilege log, listing responsive documents that it withheld. Of those documents, it claims " own attorneyclient 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

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

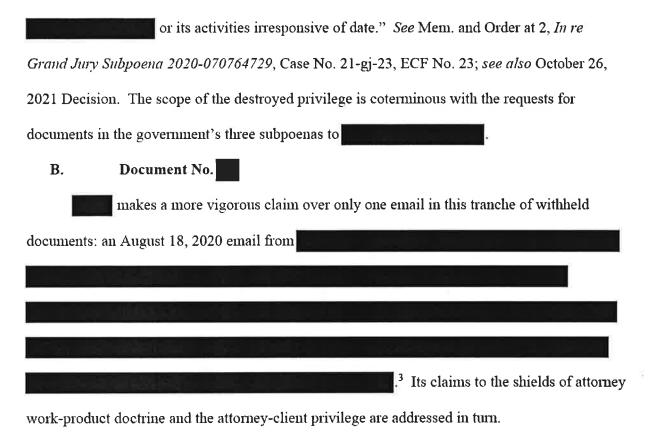
# A. Documents Implicating Avenue's Attorney-Client Privilege

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 were not part of the tranche of documents withheld by Avenue in 2021 and subject to the Court's order. *See*Opp'n at 4–5. Essentially, asks this Court explicitly to extend its prior ruling vitiating the privilege to additional communications between 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); Opp'n at 3–4. Avenue has declined to waive any privilege claim or to consent to the disclosure of the documents withheld by as a result, 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*Opp'n at 4–5.<sup>2</sup>

The responsive documents in 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 attorneys from August 2017 to March 2018 and all communications related to

The professional necessity cites to seek a specific court order to disclose these 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").



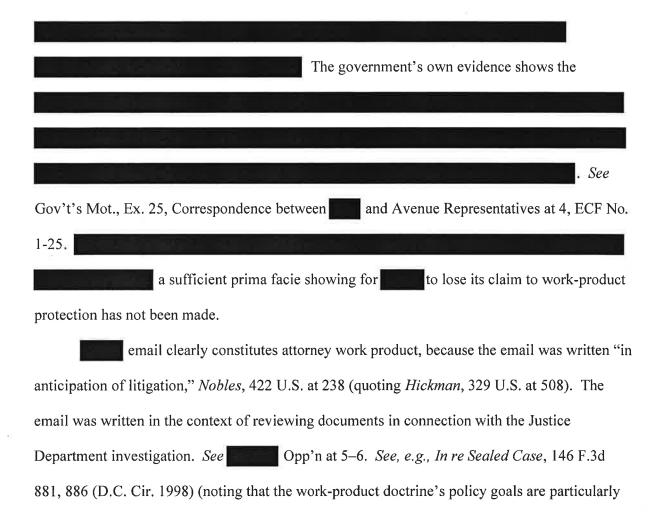
# 1. Attorney Work-Product Doctrine

As a threshold matter, unlike the attorney-client privilege, the work-product doctrine belongs to both the client and attorney, and 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, 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

The solitary nature of this withheld email begs the question as to why has uncovered no additional emails between —or other internal communications within —responsive to the government's subpoena over which the same privilege claim might be invoked. In an email with the government, counsel previously indicated that "we at 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 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 were witting co-conspirators with Avenue and whether the "critical question remain[ing]," Gov't's Mot. at 3, but also argues that "[t]here is reason to believe" that Gov't's Reply at 3–4. For its part, Opp'n at 5.4This Court would only find that attorneys were an entire law firm's loss of work-product protection by the conduct of one or two is a step not to take lightly. At this stage of the government's investigation, the case for

Notably, 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 Opp'n at 5–6; see generally Filing Providing Further Information as to Privilege Assertion Regarding Document for the Court's In Camera, Ex Parte Review ("Suppl. Mem."), ECF No. 16.



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

well-served in the context of a lawyer's advice to a potential grand jury target).

may be disclosed without revealing the attorney's opinions"). This email contains statement reflecting his brief "mental impressions," *Boehringer*, 778 F.3d at 151, as to his obligations vis-à-vis former client statement, see 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 message may be withheld from the government on the basis of work-product doctrine.

#### 2. Attorney-Client Privilege

contends that email is protected by 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." Opp'n at 6.

The government, for its part, contends that any attorney-client privilege claimed by its vitiated by the crime-fraud exception. See Gov't's Reply at 3-4.

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 \_\_\_\_\_\_\_ own email to the government regarding the instant subpoena, \_\_\_\_\_\_\_ counsel indicated that "we at \_\_\_\_\_\_\_ 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 \_\_\_\_\_\_\_ own privilege claim. Gov't's Reply, Ex. 1, Email from \_\_\_\_\_\_\_ to Justice Department Attorneys (June 10, 2022) at 3, ECF No. 14-1. \_\_\_\_\_\_\_\_ has made no effort to prove that \_\_\_\_\_\_\_ 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 Opp'n; Providing Further Information as to Privilege Assertion Regarding Document Court's In Camera, Ex Parte Review (" Suppl. Mem."), ECF No. 16. Further, as the attorneys most entangled with and Avenue, would be odd choices of counsel for 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 interests as an entity (which, relevantly, appears to have severed ties investigation and has failed to meet its burden to earn the protection of the attorney-client with privilege over 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.

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 on Aug. 18, 2020 at 6:18 p.m. incorporated into Document No. 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

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Chief Judge