UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA 2020-070764729	Grand Jury Action No. 21-23 (BAH) Chief Judge Beryl A. Howell **UNDER SEAL**

MEMORANDUM AND ORDER

Rather than promptly producing to the government, in compliance with this Court's October 26, 2021 Order ("October Order"), ECF No. 13, [redacted] documents responsive to a grand jury subpoena but withheld by respondent Avenue Strategies, LLC ("respondent") as attorney-client privileged, respondent continues to withhold these documents, now requesting: (1) Court approval of the protocol to be employed by the government's privilege review team as it undertakes compliance with the October Order's direction, at p. 1, "to exclude any privileged material falling outside the scope of this Order," *see* Resp't's Mot. for Clarification or in the Alternative to Compel or for a Stay ("Resp't's Mot."), at 10-12, ECF No. 15; (2) a stay of the October Order until the government discloses, and the Court approves, the privilege review team's staffing and protocol, *id.* at 4; and (3) judicial *in camera* review of the [redacted] documents "themselves to determine they are related to the alleged crime or fraud," *id.* at 5, before they are produced to the government, Resp't's Reply at 2, ECF No. 22, a process sure to add further delay, due to the Court's busy schedule, in producing the [redacted] withheld documents to the government's privilege review team.

Seeking to create ambiguity where there is none, respondent repeatedly misconstrues the government's position as "that there is no need, purpose, or role for the taint team." Resp't's Mot. at 3; *id.* at 8-9; *see also* Resp't's Reply at 4 (misrepresenting government's position to be

that "there is no need for a taint team and[] thereby no need for processes and procedures that can be reviewed by the Court"); *id.* at 6 (misrepresenting "[g]overnment's interpretation of this Court's opinion as eliminating any further need for taint team review of the documents"). This blatantly ignores the role for the privilege review team contemplated by the October Order and the government's planned compliance with that Order, as described in its Opposition to Respondent's Motion for Clarification ("Gov't's Opp'n"), at 4, ECF No. 18, by which only those communications included among the [redacted] documents listed in respondent's privilege log that this Court found subject to the crime-fraud exception—namely, any responsive communications with [redacted] attorneys from August 2017 to March 2018 and all communications related to [redacted] or its activities irrespective of date—will be turned over to the prosecution team, *id.* Thus, because nothing about the October Order necessitates further clarification and, as respondent concedes, upon this finding the Court should "deny the pending stay application," Resp't's Reply at 1, respondent's motion is denied in its entirety for reasons more fully explained below.

The October Order unambiguously directed that "respondent produce to the government the records . . . described in the Privilege Log as withheld" on attorney-client privilege grounds and "that the government use a privilege filter team to exclude any privileged material falling outside the scope of this Order." October Order at 1. Respondent is correct up to a point that neither the October Order nor the accompanying Memorandum Opinion ("Mem. Op."), ECF No. 14, required the government's privilege review team "to indicate the process they will be using to 'review' or to turn over the documents they receive from Respondent" to the prosecution team. Resp't's Mot. at 8. Yet, as anticipated, in accord with standard privilege review protocol, the government's privilege review team, separate from the prosecution team, will "review the

[redacted] documents from Respondent's privilege log that Respondent is obligated to produce and will [thereafter] turn over to the prosecution team only those documents that fall into . . . the categories" identified in the Memorandum Opinion as subject to the crime-fraud exception without revealing any communications or confidences falling beyond the scope of the Court's ruling. Gov't's Opp'n at 4. This approach comports with clearly outlined Department of Justice ("DOJ") policy, *see* Justice Manual § 9-13.420(E) (explaining that a "privilege team . . . consist[s] of agents and lawyers not involved in the underlying investigation" and that they are required to employ "procedures designed to minimize the intrusion into privileged material"), and fully complies with the October Order.

Nevertheless, respondent insists on misconstruing the government's position as that "there is no need for a taint team" because "attorney-client privilege claims in this case *are completely vitiated regardless of content*." Resp't's Reply at 4 (emphasis added). Not only does this overlook the aforementioned role for the privilege review team that the government has already articulated consistent with DOJ policy, *see* Gov't's Opp'n at 4, but also plainly ignores the key holding of the Court's October 26, 2021 Memorandum Opinion: that the crime-fraud exception vitiates respondent's privilege claim only as to (1) respondent's responsive communications with [redacted] attorneys from August 30, 2017 to at least March 12, 2018, and (2) all communications with any attorney related to [redacted] or its activities, irrespective of date. Mem. Op. at 18. Accordingly, the government filter team will only turn over to the prosecution team, from the [redacted] documents listed in respondent's privilege log, "those documents that fall into either of these two categories." Gov't's Opp'n at 4.

In what can only be interpreted as yet another attempt to delay the grand jury investigation and respondent's compliance with the October Order "by throwing up legal

arguments like spaghetti on a wall to see what sticks," Mem. and Order at 1-2, ECF No. 21, respondent also asserts that the Court was required to examine the withheld communications *in camera* before determining whether any were subject to the crime-fraud exception in the first instance. *See* Resp't's Mot. at 5; Resp't's Reply at 5-6. Respondent—despite never requesting *in camera* review of the disputed documents while the government's Motion to Compel, ECF No. 1, was pending—now demands such judicial examination of the documents as legally required. Resp't's Mot. at 11; Resp't's Reply at 2.[1]

Such *ex parte*, *in camera* review of disputed records is by no means required. Over thirty years ago in *United States v. Zolin*, the Supreme Court explicitly rejected "[a] blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception" and instead held that "the decision whether to engage in *in camera* review rests in the sound discretion of the district court" based on its review of the available record. 491 U.S. 554, 571-572 (1989). The *Zolin* court observed further that a district court is not required to conduct "*in camera* review if it concludes that additional evidence in support of the crime-fraud exception" is available and not privileged. *Id.* at 572. That was the case here, where the government's proffered, non-privileged evidence in support of its motion to compel was fully disclosed to respondent, who was then permitted to share this evidentiary support more broadly with prior counsel and declined to make even "a feeble effort to rebut the government's overwhelming evidence demonstrating that Target 1 and Target 2 created and operated [redacted] to aid the [redacted] government, not the [redacted] people, without ever disclosing so in

[1] Respondent's sole mention of *in camera* review in its Opposition to the Government's Motion to Compel, ECF No. 7, was to criticize the government for "not ask[ing] this Court to consider reviewing the disputed documents in camera in order to make a crime-fraud determination" and instead aiming "at the higher burden [of] a complete adjudication of the crime-fraud exception based solely upon the non-privileged documents it has presented." *Id.* at 26-27.

its FARA filings." Mem. Op. at 21. The Court was thus able rule on the applicability of the crime-fraud exception, without requiring inspection of any privileged materials, based on its review of the government's independent and extensive evidentiary proffer "supported by 36 exhibits mainly derived from the records already produced by respondent in response to the grand jury subpoena," *id.* at 2. This is far different from the circumstances identified by the D.C. Circuit, consistent with *Zolin*, that may counsel *ex parte*, *in camera* inspection of the privileged documents at issue when independent, non-privileged evidence is unavailable "to determine whether the crime-fraud exception applies." *In re Sealed Case*, 107 F.3d 46, 50 n.6 (D.C. Cir. 1997); *see also In re Application for an rder Pursuant to U.S.C. o Conduct iscovery for Use in a oreign Proceeding*, 286 F. Supp. 3d 1, 10-12 (D.D.C. 2017) (denying request for *in camera* review where petitioners' independent proffer, consisting of "[o]ver 130 pages of exhibits," sufficiently provided a basis for the Court to rule on the applicability of the crime-fraud exception).

Respondent relies heavily on a non-binding, out-of-Circuit case to support its demand for *in camera* review. *See* Resp't's Mot. at 5 (discussing *In re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986)); Resp't's Reply at 4-6 (same). As respondent describes this case, the Sixth Circuit announced a rigid rule requiring *ex parte*, *in camera* review—in all circumstances—before ruling on the applicability of the crime-fraud exception. *See id.* Respondent, however, entirely neglects to acknowledge that this decision predated the Supreme Court's clear pronouncement in *Zolin* rejecting a "blanket rule" commanding district courts to engage in *in camera* review before determining whether the crime-fraud exception vitiates a privilege claim. *See Zolin*, 491 U.S. at 571. In any event, respondent also misconstrues the precise holding of the Sixth Circuit in that case, which found *in camera* review appropriate because, to support

application of the claim of crime-fraud exception, the "government's *only* evidence [was] grand jury testimony not subject to disclosure" and "*in camera* review of the documents could have assisted the court in determining whether a *prima facie* violation had been made." *In re Antitrust Grand Jury*, 805 F.2d at 168 (emphasis added).[2] By contrast, the government's ample evidentiary proffer in support of its motion to compel here did not rely on sealed grand jury testimony, was "mostly derived from the documents respondent produced in response to the grand jury subpoena," Mem. Op. at 20 n.10, and was made fully available to respondent, as the privilege holder, and therefore subjected to the rigors of the adversarial process. This instant set of circumstances obviates the necessity for judicial *in camera* review.

Respondent's belated call now for this Court to expend limited resources in conducting an *in camera* review of the [redacted] documents at issue before production to the government's privilege review team is both legally and factually unnecessary. Such *in camera* proceedings would only compound the ongoing delay of the grand jury investigation and expenditure of judicial resources already occasioned by respondent's apparent continued defiance of the October Order three weeks after its issuance. *See In re Sealed Case*, 676 F.2d 793, 814 (D.C. Cir. 1982) ("When a grand jury's subpoena is at stake, the standard for evaluating a[] [crime-fraud] exception argument must be simple enough for courts to administer swiftly and efficiently, without obstructing the grand jury's mission or squandering judicial resources."); *see also U.S. v. ionisio*, 410 U.S. 1, 17 (1973) ("Any holding that would saddle a grand jury with

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2 Further distorting its referenced case law, respondent suggests that the D.C. Circuit follows "the uniform position . . . that judicial review of documents is necessary before documents subject to claims of privilege may be released after a crime-fraud determination" simply because "the D.C. Circuit subsequently cited the [Sixth Circuit's] *Antitrust Grand Jury* opinion as being in 'accord' with [its] crime-fraud precedent" in *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989). Resp't's Reply at 5. The D.C. Circuit's single reference in *White* to *In re Antitrust Grand Jury*, however, had nothing to do with requiring *in camera* review of documents to ensure proper application of the crime-fraud exception, but simply supported the well-established proposition, not disputed here, that "[t]o subject the attorney-client communications to disclosure, they must actually have been made with an intent to further an unlawful act." *See* 887 F.2d at 271.

minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws."). This delaying effort must come to an end.

For the foregoing reasons, it is therefore

ORDERED that respondent's Motion for Clarification or in the Alternative to Compel or for a Stay, ECF No. 15, is **DENIED**; and it is further

ORDERED that, to avoid additional delay in effectuating the October Order, respondent produce to the government's filter team, by **PM on No e er 1 2 21**, the [redacted] documents listed in its privilege log and determined to be subject to the crime-fraud exception; and it is further

ORDERED that, to the extent the privilege review team encounters any communications that appear to implicate legal advice or representations and do not relate to the two categories of information identified both above and in the Memorandum Opinion, *see* Mem. Op. at 18, the filter team shall withhold those communications from the prosecution team and accord them the protection required by law; and it is further

ORDERED that the parties, within 14 days of issuance of this Memorandum and Order, confer and submit a joint report advising whether any portions may be unsealed to the public in whole or in part and, if so, proposing any redactions.

SO ORDERED.

Date: November 17, 2021

Beryl A. Howell

BERYL A. HOWELL
Chief Judge