UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF GRAND JURY SUBPOENA	Grand Jury Action No. 19-gj-34 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL AND EX PARTE**

MEMORANDUM OPINION

The government has moved to compel an attorney (the "Witness") to comply with a grand jury subpoena, issued on January 3, 2019 ("January 2019 Subpoena"), for production of documents and testimony as part of an ongoing grand jury investigation of the attorney's former clients, a Company ("Subject Company") and the Company's president/chief executive officer ("Target"), for making false statements, obstructing an official proceeding, and falsifying records in a federal investigation, in violation of 18 U.S.C. §§ 1001, 1512, 1519, and 2. Gov't's Mot. Compel Produc. Docs. & Test. to the Grand Jury ("Gov't's Mot.") at 1, ECF No. 1; Gov't's *Ex Parte* Mem. with Exs. Supp. Gov't's Mot. ("Gov't's *Ex Parte* Submission") at 2, ECF No. 1-1.[1] As detailed in the government's *ex parte* submission in support of the motion to compel, the government has uncovered highly probative evidence that the Target and Subject Company produced false documents, through the Witness, who was their counsel at the time, to the Securities and Exchange Commission ("SEC") during an official investigation by that agency.

The government seeks to compel the Witness to produce documents and testify before the grand jury regarding the creation and production of the fraudulent documents to the SEC on

[1] The Witness is Andrew J. Ceresney, Esq., a partner at the law firm of Debevoise & Plimpton LLP. The Target is Mykalai Kontilai, also known as Michael Contile, and the Subject Company is Collectors Coffee Inc., also known as Ultimate Collector Inc. At the motions hearing held on May 2, 2019, the government confirmed that Kontilai is a target of the grand jury investigation and that his company is a subject. Rough Tr. of H'rg (May 2, 2019) ("H'rg Tr. (Rough)") at 4:5-16.

behalf of the Target and Subject Company. The Witness has produced in response to the January 2019 Subpoena a mere six records of correspondence with the SEC on behalf of the Target and his company. *See* Gov't's *Ex Parte* Submission at 3; *id.*, Ex. C, Letter from Witness to Gov't (Feb. 28, 2019) ("Witness Production Letter") at 1, ECF No. 2-2; H'rg Tr. (Rough) at 25:13-23 (government summarizing production by Witness).[2] He has, however, withheld 567 responsive records based on his former clients' assertions of the attorney-client and work product privileges and, for two withheld records, the Witness explained, "[p]ortions of these documents independently are privileged because they reflect the intent to seek legal advice, and/or legal advice, from" his law firm's "general counsel." *See* Witness Production Letter at 1 n.1.

The government contends that the Target and Subject Company's privileges should yield to the crime-fraud exception. The Witness "take[s] no position" on the applicability of the crime-fraud exception as to any of the withheld records, other than the two records withheld on the Witness's law firm's own privilege, *see* Letter from Witness's Counsel to Court (Apr. 15, 2019), ECF No. 8 ("We take no position on the Government's Motion to Compel and do not intend to file opposition papers to the Motion."), which two records the government has confirmed need not be produced, H'rg Tr. (Rough) at 3:25–4:1. The Target, who was permitted to intervene in this action, vehemently contests the government's motion to compel and seeks disclosure of the government's *ex parte* submission in order to respond more effectively to the factual proffer supporting application of the crime-fraud exception. *See* Target's Cross-Mot. for Disclosure of *Ex Parte* Submission at 1, ECF No. 9.

[2] All citations to the May 2, 2019 hearing transcript cite to a rough draft of the transcript, since the court reporter has not made a final transcript available. When the final transcript is available, the transcript will be posted on this case's docket. Discrepancies in page numbers between the rough and final transcripts may exist.

Following completion of the briefing on the two pending motions and a hearing held on May 2, 2019, the Court issued an oral ruling denying the Target's motion for disclosure of the government's *ex parte* submission and granting the government's motion to compel the Witness to comply with the January 2019 Subpoena. This Memorandum Opinion more fully explains the reasons for this ruling.

I. BACKGROUND

The events giving rise to the January 2019 Subpoena and the instant dispute are described below.

A. The Formation of the Subject Company in 2007

The Target founded the Subject Company in 2007, with the aim of creating a website to facilitate the sale of collectible items. Gov't's *Ex Parte* Submission at 3, 4. Thereafter, the Target and his employees pitched the company to private investors to obtain funding, *id.* at 3, with promises of a fully functioning website, hundreds of collectible dealers under contract, $3.25 billion in collectible inventory, and a television show to feature the collectible items that would be for sale online, *id.* at 3–4. These fundraising efforts were successful and pulled in over $20 million from investors. *Id.* at 4. Although the Subject Company paid some "legitimate expenses towards the production of" the television show and the website, "no meaningful revenue has materialized," and less than $250,000 has been "returned to investors who . . . have not sued, or threatened to sue" the Target and Subject Company. *Id.*

B. The 2017 Investor Lawsuit

On May 18, 2017, two investors filed a shareholder lawsuit in the United States District Court for the District of Nevada against the Target and Subject Company. *See generally* Gov't's *Ex Parte* Submission, Ex. D, Compl., *Blue Sunsets LLC v.* [*Target*], 17-cv-1418 (D. Nev. May 18, 2017), ECF No. 2-3. According to the complaint, the Subject Company was riddled with

mismanagement and fraud. Specifically, the Target allegedly used the Subject Company's money for his own personal expenses. *See id.* ¶¶ 97, 100. The Target and Subject Company also allegedly "made numerous material misstatements and omissions" to the two investors in connection with the offer and sale of certain Subject Company shares, to secure $1.5 million in investments from them in 2014 and 2015, *id.* ¶¶ 1, 2, 38, 43, 80, 87, which material misstatements "grossly" inflated the value of the Subject Company's assets, including collectible inventory and dealer contracts, that were to serve as collateral for the $1.5 million in investments, *id.* ¶¶ 1–2.

In addition, the Target and Subject Company allegedly provided the two investors, in 2014 and 2015, with different Private Placement Memoranda ("PPMs"), each dated April 28, 2008. *Id.* ¶ 3. Even though the two PPMs described the same offering of the Subject Company's shares, the PPMs had "irreconcilable and material differences," such as "the number of shares offered, the identity of the founders of [the Subject Company] and the use of the proceeds of the offering." *Id.* ¶ 3. The PPMs also "contained materially different information" about the money owed by the Subject Company to the Target. *Id.* One PPM stated that the Subject Company owed the Target $600,000 in promissory notes, and that the Target would receive $300,000 for "compensation for past services" upon funding, while the other PPM omitted this information entirely. *Id.* ¶¶ 3, 36, 82.

By 2016, nine years after its founding, the Subject Company still had not launched a website "with many millions of dollars of dealer inventory" or a television show. *Id.* ¶ 89. The investors, by this point, had grown suspicious of the company's operations for lack of any "meaningful business." *Id.* Plus, the investors had been stonewalled by the Target, who was not

responsive to requests for basic information, such as "the status of the Business Model," and who "makes up the [Subject Company] Management Team." *Id.* ¶¶ 60, 78.

In December 2016, a former consultant for the Subject Company began organizing a "consortium of investors" to discuss the Target's "mismanagement" of the Company. *Id.* ¶ 91. The two investors learned that the Subject Company was "paying the bills for" the Target's "lavish hotels, meals and living expenses," including "hotels and housing" in Las Vegas, New York, and Miami. *Id.* ¶ 97. The two investors thus sued for violations of federal securities laws, based on the Target and Subject Company's "fraudulent scheme to entice [them] to invest under false pretenses." *Id.* ¶ 100.

C. The SEC Investigation

Following the filing of the investors' shareholder lawsuit, the SEC and the Department of Justice ("DOJ") initiated separate investigations into the allegations of investor fraud. Gov't's *Ex Parte* Submission at 3. The SEC's ongoing investigation revealed "scant record-keeping by" the Subject Company to account for the company's expenses or income. *Id.* at 5. Indeed, bank records reveal, without justification, "millions of dollars moving into" the Subject Company's accounts, and then out of those accounts into accounts held by the Target and Individual 1, who served as chief operating officer of the Subject Company from 2014-2016.[3] *Id.* at 4, 5. Company credit card records also show "thousands of dollars in personal expenses charged by" the Target and his wife. *Id.* at 5. As detailed below, over the course of investigating this questionable movement of money, the SEC uncovered that the Target, Subject Company, and Individual 1 produced to the agency fake documents that purported to justify these personal uses of the Company's funds. *See id.* at 5–9.

[3] Individual 1 is Gail Holt.

1. The SEC's Subpoena

On September 21, 2017, the SEC subpoenaed the Subject Company for documents, pursuant to a formal order of investigation, 17 C.F.R. § 203.8. *Id.* at 5; *id.*, Ex. H, SEC Subpoena to Subject Company (Sept. 21, 2017) ("SEC Subpoena for Documents"), ECF No. 2-9. The SEC's subpoena requested, *inter alia*, "Copies of all employment agreements," "Documents concerning all sources of funding for [the Subject Company] since January 1, 2008, including without limitation, documents regarding all outstanding loans, debt obligations, and/or financings," and "Documents concerning all transactions, agreements, and/or affiliations entered into by [Subject Company] . . . ." *See* SEC Subpoena for Documents ¶¶ 23, 25, 27.

The Witness—who at the time represented the Target, Subject Company, and Individual 1 in the SEC investigation—oversaw most of the document productions to the SEC. Gov't's *Ex Parte* Submission at 1, 4, 5. On May 14, 2018, the Witness produced certain responsive documents to the SEC on behalf of the Subject Company. *See id.*, Ex. E-1, Letter from the Witness to Staff Attorney, SEC Division of Enforcement (May 14, 2018), ECF No. 2-4. This production included, in relevant part, "A copy of a convertible note evidencing [the Target's] loan to [the Subject Company]," and a "copy of [the Target's] employment agreement." *Id.* at 1; *see also* Gov't's *Ex Parte* Submission, Ex. E-2, Convertible Note Agreement Between Subject Company, Individual 1, and Target (June 11, 2007) ("Note"), ECF No. 2-5 (produced to SEC bearing Bates-stamp SEC-CC00162517–SEC-CC00162522); *id.*, Ex. E-3, Employment Contract Between Subject Company and Target (May 14, 2007) ("Employment Agreement"), ECF No. 2-6 (produced to SEC bearing Bates-stamp SEC-CC00162523–SEC-CC00162535).

Shortly after this production of documents, the Target, still represented by the Witness, testified, on May 16 and 17, 2018, before the SEC pursuant to an SEC subpoena. Gov't's *Ex Parte* Submission at 6; *see also id.*, Exs. I-1 & I-2, Tr. of Target's Testimony Before SEC (May

16-17, 2018) ("Target's SEC Testimony Tr."), ECF Nos. 2-10, 2-11. During this testimony, the Target stated that the Subject Company owed him back payments for his salary, under the terms of the Employment Agreement. *See* Target's SEC Testimony Tr. at 327:18-20 ("[T]he company also owes me back payment – a deferred compensation payment for salary over the years, as well."); *see also id.* at 350:7-11. The Target also testified that, when the Subject Company started in 2007, he loaned the company $5 million of his own money through a convertible note. *Id.* at 152:25–153:7. The Witness confirmed that the note about which the Target was testifying was the Note produced in the May 14, 2018 production. *Id.* at 153:8-9 (Witness clarifying that the $5 million note referenced "was in the production we made Monday").

The Target explained that "[t]he company repaid me money that it owed me through paying some . . . personal credit card expenses." *Id.* at 349:9-11. In addition, the Target "took money out" of the company's bank accounts "to repay" money owed. *Id.* at 363:15-22. The Target, however, did not "have a personal record of how much money" the company owed him, under the Employment Agreement or the Note. *See id.* at 326:25–327:2; *see also id.* at 326:22–328:17. In fact, the Target was not aware of any documents that tracked what he had been paid by the Subject Company to date. *Id.* at 327:22–328:3 (Target stating, in response to SEC question about whether there was a document "keeping a tally of what the company has paid you to date," "I have no document in my possession of that, nor am I aware of one."). Nonetheless, the Target believed he was "owed millions of dollars more than" he had "taken out." *Id.* at 350:4-5.

2. The SEC Questions the Authenticity of the Documents Produced

Subsequently, the SEC questioned the authenticity of the documents produced in the investigation, focusing on (1) the Employment Agreement; and (2) the Note.

The first questionable document, the Employment Agreement, states that the Target would be paid a salary of $300,000 per year, and shows signatures of the Target and Individual 1, as "Chairman." Employment Agreement ¶ 7; *id.* at 13. This document, dated May 14, 2007, however, is labeled with a post-dated copyright marker, "©2002-2018 LawDepot.com®." *Compare id.* at 1 (dating agreement May 14, 2007), *with id.* at 13 (showing post-dated copyright marker). Due to this discrepancy, the SEC advised the Witness about the questionable authenticity of this document. Gov't's *Ex Parte* Submission at 7.

Individual 1 then obtained new individual counsel, and the Witness and Individual 1's new counsel called the SEC together. *Id.* at 7–8. During their call with the SEC, Individual 1's new counsel "confirmed the document was not original to 2007." *Id.* at 8. Individual 1's new counsel further represented to the SEC that Individual 1 "recreated" the Employment Agreement "from memory and other notes in 2018 in response to a request from [the Target] for a copy of the employment agreement." *Id.* Afterward, the Witness withdrew as counsel for the Target and Subject Company, and Individual 1's new counsel withdrew from representation of Individual 1. *Id.*

Individual 1 then retained her present counsel, who represented her in a meeting with the SEC and DOJ on March 20, 2019. *Id.* When shown the Employment Agreement with her signature, Individual 1 denied executing the document in 2007 or at any other time, and denied that she was ever "the board chairman" of the Subject Company, contrary to her title shown in the Employment Agreement. *Id.* Individual 1's present counsel explained the discrepancy between Individual 1's statements to investigators and the Employment Agreement, stating that in 2018, the Target "asked [Individual 1] for a copy of her signature so that he could copy it onto

documents for [the Witness] to give to the SEC," and Individual 1 confirmed that she provided the Target, a "former friend," with a copy of her signature. *Id.*

The second questionable document, the Note, includes terms of a $5 million loan, by the Target to the Subject Company, on June 11, 2007. *See* Note at 1. The SEC questioned this document's authenticity because an "Attached Proof of Funds" for the loan—a bank account statement appended to the Note ("Appended Bank Statement")—is obviously different than the version of the same statement produced by Bank of America. Gov't's *Ex Parte* Submission at 7. Specifically, the Appended Bank Statement appears to be a Bank of America "June 11 through June 29, 2007" statement for a Subject Company account, XXXXX-X8011, and includes a summary reflecting $5 million of "Total Deposits and Other Credits" into the account on June 11, 2007. *See* Note at 5 (Appended Bank Statement). Bank of America, however, produced the June 11 through June 29, 2007 statement for the same account, and this version of the statement shows only $1,000 in "Total Deposits and Other Credits" on June 11, 2007. *See* Gov't's *Ex Parte* Submission, Ex. F, Bank of America Statement (June 11-29, 2007) ("Bank of America Statement") at 1, ECF No. 2-7. The Target's current counsel conceded at the motions hearing that the Appended Bank Statement was "clearly a forgery or altered." H'rg Tr. (Rough) at 8:5.

Furthermore, at the March 20, 2019 meeting with the DOJ and the SEC, Individual 1 denied executing the Note, despite her signature appearing on the Note's final page. *See* Gov't's *Ex Parte* Submission at 8; Note at 4. The Note, too, identifies Individual 1 as "Chairman," the role Individual 1 denied ever holding. *See* Gov't's *Ex Parte* Submission at 8; Note at 4. In fact, contradicting the Target's testimony before the SEC that Individual 1 was the Subject Company's Board Chairman in 2007 and a substantial investor in the company, *see* Target's SEC Testimony Tr. at 328:18-24; *id.* at 329:3-6, Individual 1 told investigators at the same

meeting that "she was never the board chairman or an investor in the company," Gov't's *Ex Parte* Submission at 8.

In addition to the Employment Agreement and the Note, which are the focus of the January 2019 Subpoena, the government has found that certain board resolutions and convertible note agreements, separately produced to the government by Individual 1, were absent from the Target and Subject Company's productions to the SEC. *See id.* Individual 1's present counsel has produced to the DOJ, pursuant to a grand jury subpoena, and to the SEC, pursuant to an administrative subpoena, "documents that purport to be [Subject Company's] 'board resolutions' and other convertible note agreements, in the names of [the Target and Individual 1] from the 2007 timeframe." *Id.* Individual 1's present counsel "represented that it obtained these documents from" Individual 1's prior individual counsel in the SEC investigation." *Id.* These documents, however, "were never produced to the SEC by [the Witness] or any other counsel for the" Target or Subject Company. *Id.*

Individual 1 has denied creating and signing these "board resolutions" and "convertible note agreements," or ever loaning money to the Subject Company, even though her signature appears on these documents above her typewritten name. *See* Gov't's *Ex Parte* Submission at 8–9; *see also generally id.*, Ex. G, Board Resolutions and Convertible Note Agreements Produced by Individual 1, ECF No. 2-8. Moreover, one of these documents, appearing to be a $4 million convertible note agreement between Individual 1 and the Subject Company, dated August 1, 2007, references a residential address in Apple Valley, California. *See id.* at 45, 48. Credit bureau records, to the contrary, show that Individual 1 did not hold this residential address "until sometime in 2010." Gov't's *Ex Parte* Submission at 9.

D. The January 3, 2019 Grand Jury Subpoena

On December 19, 2018, a grand jury began investigating the Target and Subject Company for providing false documents and testimony to the SEC during that agency's investigation. *See id.* at 2 (citing 18 U.S.C. § 1001 (making false statements), *id.* § 1512 (obstructing an official proceeding), and *id.* § 1519 (falsifying records in a federal investigation)). Approximately two weeks later, the January 2019 Subpoena for testimony and documents was served on the Witness, with a return date of January 18, 2019. *Id.* at 2; *see also id.*, Ex. A, January 2019 Subpoena to Witness (Dec. 20, 2018), ECF No. 2. The subpoena requested production of two categories of documents and communications "related to the circumstances surrounding the creation and production of" the Note and the Employment Agreement to the SEC:

> 1. All documents and communications, including but not limited to, notes, emails, recorded telephone conversations or voicemails, text messages, letters, facsimiles, related to the circumstances surrounding the creation and production of the convertible note and attachments to the Securities and Exchange Commission on or about May 14, 2018 by [the Witness], bearing the Bates number range SEC-CC00162517 – SECCC00162522.
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> 2. All documents and communications, including but not limited to, notes, emails, recorded telephone conversations or voicemails, text messages, letters, facsimiles, related to the circumstances surrounding the creation and production of [the Target's] employment agreement to the Securities and Exchange Commission on or about May 14, 2018 by [the Witness], bearing the Bates number range SEC-CC00162523 – SECCC00162535.

January 2019 Subpoena to Witness at 2. After receiving this subpoena, the Witness's counsel told the government that the Witness "needed additional time to confer with his former clients" on whether they would assert "privilege over the information sought." Gov't's *Ex Parte* Submission at 2.

Two months later, on February 28, 2019—after separate counsel for the Witness, the Target, and the Subject Company, reviewed documents for relevance to the two categories of

information in the January 2019 Subpoena and for privilege—the Witness produced a few responsive pages consisting of correspondence with the SEC that was sent on behalf of the Target and Subject Company. *Id.* at 3; *see also* Target's Mem. Supp. Cross-Mot. & Opp'n Gov't's Mot. ("Target's Opp'n") at 1–2, ECF No. 9-1. The Witness also provided a twenty-page privilege log, identifying 565 responsive documents withheld based on the attorney-client and work-product privileges on the instructions of counsel for the Target and Subject Company. *See* Gov't's *Ex Parte* Submission, Ex. B, Witness's Privilege Log, ECF No. 2-1; Witness Production Letter at 1. The Witness has not appeared to testify before the grand jury pursuant to the January 2019 Subpoena. Gov't's *Ex Parte* Submission at 3.

E. The Government's Motion to Compel Compliance by the Witness and the Target's Cross-Motion to Compel Disclosure by the Government

The government filed the instant Motion to Compel, seeking an order that the Witness, and any attorneys working at his direction on behalf of the Target and the Subject Company, produce the withheld documents claimed as privileged, and that the Witness testify before the grand jury. *See* Gov't's Mot. at 1; *see also* Gov't's Reply Supp. Mot. Compel & Opp'n Target's Cross-Mot. ("Gov't's Reply") at 1; Gov't's Response to Min. Order for Clarification, ECF No. 15 ("[T]he Government seeks an order to compel only [the Witness] to testify and for [the Witness] and any attorneys acting under [the Witness's] supervision in his representation of [the Subject Company] and/or [the Target], to produce documents and communications to the grand jury . . . ."). The government contends that the asserted privileges should yield because the crime-fraud exception applies to the two categories of information requested in the government's January 2019 Subpoena based on the evidence detailed in its *ex parte* submission demonstrating that the Target and Subject Company used the Witness to produce fake and fraudulent documents to the SEC during an official investigation. *See* Gov't's Mot. at 6. According to the

government, "the crime-fraud exception applies to any privileged communications or work product relating to" the Note and Employment Agreement, produced by the Witness, on behalf of the Target and Subject Company, to the SEC. *Id.* at 7.

The Target, whose request to intervene as the privilege-holder was granted, cross-moved to compel the disclosure of the government's *ex parte* submission supporting the Motion to Compel. *See generally* Target's Opp'n.[4] Following a hearing on the two pending motions on May 2, 2019, the Court granted the government's motion to compel the Witness to comply with the January 2019 Subpoena and denied the Target's cross-motion for disclosure of the government's *ex parte* submission. H'rg Tr. (Rough) at 41:2-21. This Memorandum Opinion explains the basis for the Court's oral ruling.[5]

II. LEGAL STANDARD

"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 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). The attorney-client privilege is not absolute, however, and may be vitiated in certain circumstances "to make sure that privileges do not serve ends for which they were not intended." *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982).

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." *Id.* Simply put,

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[4] The Subject Company has not sought to intervene or otherwise appeared in this action.

[5] The Witness's counsel's request to be excused from the May 2, 2019 hearing, for personal reasons, was granted. *See* Min. Order (Apr. 16, 2019). Although an attorney was present to observe the hearing on behalf of the Witness, this observer did not attend the hearing "to participate." H'rg Tr. (Rough) at 3:5-11 (Target's Counsel).

"[a]ttorney-client communications are not privileged if they 'are made in furtherance of a crime, fraud, or other misconduct.'" *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007) (quoting *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)). In this way, the crime-fraud exception recognizes that "the centrality of open client and attorney communication to the proper functioning of our adversary system of justice" ceases "to operate" when "desired advice refers *not to prior wrongdoing,* but to *future wrongdoing*." *United States v. Zolin*, 491 U.S. 554, 562–63 (1989) (emphasis in original) (internal quotation marks and citations omitted).

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).[6]

III. DISCUSSION

The Target's motion for disclosure of the government's *ex parte* submission supporting application of the crime-fraud exception is addressed first, before turning to the merits of the government's motion to compel the Witness to produce otherwise privileged documents and testimony regarding his former clients.

A. THE TARGET'S CROSS-MOTION TO COMPEL DISCLOSURE OF THE GOVERNMENT'S *EX PARTE* SUBMISSION

The Target concedes that his request for disclosure of the government's *ex parte* submission supporting application of the crime-fraud exception faces a significant obstacle, in light of binding precedent in this jurisdiction "approv[ing] 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." Target's Opp'n at 4 (internal quotation marks omitted) (quoting *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1179 (D.C. Cir. 2006), and *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998)); *see also United States v. Zolin*, 491 U.S. 554, 568–69 (1989); *In re Grand Jury Subpoena*, 912 F.3d 623, 632 (D.C. Cir. 2019) ("We have repeatedly approved the use of [*ex parte*] information when 'necessary to ensure the secrecy of ongoing grand jury proceedings.'" (quoting *In re Sealed Case No. 98-3077*, 151 F.3d at 1075)).

[6] Although "the Supreme Court mentioned in *Zolin* that 'prima facie' evokes the concept, familiar in civil litigation, of shifting the burden from one party to another," *In re Sealed Case*, 107 F.3d at 50 (internal citation omitted) (quoting *Zolin*, 491 U.S. at 565 n.7), "it is altogether clear where the burden in these cases lies—on the party invoking the crime-fraud exception," *id.*

Undaunted, the Target attempts to clear this high hurdle by emphatically contending that (1) Federal Rule of Criminal Procedure 6(e), concerning grand jury secrecy, "does not apply to" the *ex parte* submission, Target's Opp'n at 6; (2) the Target needs the *ex parte* submission to "actually have an opportunity to respond to" the government's *prima facie* case for application of the crime-fraud exception, *id.* at 1; and (3) "the only fair thing to do" is disclose the *ex parte* submission, *id.* at 7. None of these arguments warrants disclosure of the government's *ex parte* submission to the Target.

The Target's first argument that Rule 6(e) "does not apply to" the *ex parte* submission is predicated on the Target's guess that "the only basis" for the government's invocation of the crime-fraud exception is a "recent debriefing of" Individual 1, which debriefing would not be "covered by the grand jury secrecy rule." Target's Opp'n at 6–7; *see also* H'rg Tr. (Rough) at 9:10-13 (Target's counsel stating, "I am sure it is simply [Individual 1's] new and potentially improved version of what supposedly happened back then implicating [Target] . . . ."). This predicate is factually incorrect and otherwise without merit. As the government expressly clarified at the motions hearing, the *ex parte* submission is not based solely on information provided by Individual 1 or that person's counsel. H'rg Tr. (Rough) at 16:21-25.

Moreover, even if the Target were correct about the basis for the government's motion—which he is not—the Target's position that the *ex parte* submission would not contain grand jury material covered by Rule 6(e) is plainly wrong. The *ex parte* submission directly addresses the reasons to believe the Target and Subject Company committed crimes under investigation by the grand jury, and collects and attaches evidence being considered by the grand jury. *See generally* Gov't's *Ex Parte* Submission; *see also* H'rg Tr. (Rough) at 17:7-12 (Gov't) ("The information that's contained in the *ex parte* memorandum and supporting exhibits is a collection of

information that by . . . disclosing that information to [the Target] would disclose the direction, strategy, the thought process of the grand jury investigation."). Due to the *ex parte* submission's description of the direction and strategy of the grand jury's investigation, this submission continues to be protected by the secrecy attached to ongoing grand jury proceedings. *Lopez v. Dep't of Justice*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) ("The relevant inquiry for this Court is whether disclosure of the information requested would tend to reveal some secret aspect of the grand jury's investigation, such matters as . . . the strategy or direction of the investigation . . . ." (internal quotation marks and citation omitted)); *accord SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (en banc).[7]

Second, the Target protests that he needs the government's *ex parte* submission so that he may obtain the government's underlying evidence, and rebut the government's *prima facie* case by attacking Individual 1's credibility *See* Target's Opp'n at 8 ("It is only by learning what [Individual 1] is presumably now telling the Government that defense counsel can address the allegations being made" in the *ex parte* submission); H'rg Tr. (Rough) at 10:8-9 ("I don't know

[7] Relatedly, the Target's counsel repeatedly referenced the lack of a "compelling interest" for the *ex parte* submission, based on his assessment that the Target already knows what the grand jury is investigating. *See* H'rg Tr. (Rough) at 7:14-17 (Target's counsel noting that the grand jury is investigating a "potential obstruction charge relating to the submission of three question [sic] documents, one of which [the Appended Bank Statement] is clearly a forgery."); *id.* at 10:20 ("It has to be a compelling interest, [and] it's not here we all know what this is about."); *id.* at 24:17-18 ("It's obvious what this case is about, there is no compelling interest . . . ."); *see also* Target's Opp'n at 4 ("[T]he D.C. Circuit has acknowledged 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.'" (quoting *In re Sealed Case No. 98-3077*, 151 F.3d at 1075)). In making this argument, the Target ignores the key contextual holding of these cases that an "ongoing grand jury investigation," standing alone, provides "such a compelling interest" for use of an *ex parte* application to preserve grand jury secrecy. *In re Sealed Case No. 98-3077*, 151 F.3d at 1075; *see also In re Grand Jury Investigation*, No. 17-mc-2336 (BAH), 2017 WL 4898143, at *7 (D.D.C. Oct. 2, 2017) (explaining, "[t]he D.C. Circuit has approved the use of *in camera, ex parte* proceedings to determine . . . 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." (internal quotation marks omitted)). As the government points out, the Target's knowledge about the existence of the grand jury investigation, based on "other sources of information," is necessarily limited and, in any event, does not entitle him to be privy to a fuller description of the grand jury's "process" described in the *ex parte* submission. H'rg Tr. (Rough) at 17:22-23; *id.* at 18:2-5.

why we can't know what [Individual 1] is saying now so we can address that."). The Target's position is untethered from the law.

The D.C. Circuit has explained that "[w]hen 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." *In re Sealed Case*, 676 F.2d at 814. "Because of the need for speed and simplicity at the grand jury stage, courts should not employ a standard that requires them to hear testimony or to determine facts from conflicting evidence." *Id.* at 815 n.88. Any other process would risk "saddl[ing] a grand jury with minitrials and preliminary showings [that] would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Id.* (internal quotation marks omitted) (quoting *United States v. Dionisio*, 410 U.S. 1, 17 (1973)); *see also Costello v. United States*, 350 U.S. 359, 363 (1956); *In re Grand Jury Proceedings #5 Empanelled Jan. 28, 2004*, 401 F.3d 247, 251 n.2 (4th Cir. 2005) ("[W]e have explicitly held that the necessary secrecy of the grand jury process prevents the party asserting the privilege from viewing the government's *in camera* evidence."); *In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991*, 33 F.3d 342, 351–53 (4th Cir. 1994) (rejecting, "[h]owever appealing it may sound," the argument that *in camera* submissions forming the basis of a crime-fraud ruling be released to privilege-holders who are otherwise "completely unable to answer or to refute the government's allegations" because "the government has the right to preserve the secrecy of its submission because it pertains to an on-going investigation"). The Target's request for disclosure of the *ex parte* submission now, to challenge the government's *prima facie* showing with a mini-trial on Individual 1's credibility at this pre-indictment stage of proceedings, is patently premature.

Third, the Target criticizes the government's motion for "contain[ing] only two paragraphs of summary argument," Target's Opp'n at 2, and then leapfrogs to the conclusion, without citing any legal authority, that "the only fair thing to do under these circumstances would be disclose the *ex parte*" submission to the Target, *see id.* at 7. The Target's conclusory assertion that general fairness entitles him to disclosure of the *ex parte* submission is flatly contradicted by clear precedent in this jurisdiction. The D.C. Circuit has squarely held that denying a privilege-holder access to *ex parte* submissions in grand jury proceedings, in order to protect grand jury secrecy, does not violate the party's Fifth Amendment Due Process rights. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d at 1150 (denying request by news media representatives to access the government's "secret evidentiary submission in support of the enforcement of the subpoenas" so that they could challenge the subpoenas on privilege grounds).[8]

The Target's vague and unsupported claim of fairness also completely overlooks that the Target has received more information and opportunity to be heard than is necessarily required since resolution of the government's motion could have been accomplished in an *ex parte* proceeding. Before the Target intervened in this action, however, the Court authorized disclosure of the motion to the Target, upon the Witness's request. *See* Min. Order (Apr. 9, 2019) (granting Witness's request to share the government's motion with the Target and Subject

[8] To bolster his fairness argument, the Target turns to *Metlife, Inc. v. Financial Stability Oversight Council*, 865 F.3d 661 (D.C. Cir. 2017), but this case undermines rather than helps the Target's position. Target's Opp'n at 5. *Metlife* highlighted, in the context of a civil case, that the common law "right of public access is a fundamental element of the rule of law, important to maintaining the integrity and legitimacy of an independent Judicial Branch," *Metlife, Inc.*, 865 F.3d at 663, but noted that in the grand jury context, "even if there were once a common law right of access to materials . . ., the common law has been supplanted by" Rule 6(e)(5)–(6)'s provisions for closed hearings and sealed records in grand jury matters, *id.* at 673 n.14 (internal quotation marks and citations omitted); *see also In re Grand Jury Subpoena, Judith Miller*, 493 F.3d at 154 ("[T]here is no First Amendment right of access to grand jury proceedings, nor do First Amendment protections extend to ancillary materials dealing with grand jury matters." (internal quotation marks and citation omitted)).

Company, with the government's consent). The government then jointly proposed with the Witness a briefing schedule to include time for the Target to respond to the government's motion. *See* Jt. Proposed Briefing Schedule at 1, ECF No. 5. When the Target moved to intervene, the government did not oppose the Target's motion. *See* Gov't's Opp'n to Target's Request for Additional Time at 7, ECF No. 7 ("The Government does not oppose [the Target's] request to be heard . . . ."). In short, contrary to the Target's characterization, the government's efforts have facilitated the Target's opportunity to participate, albeit in a limited fashion protective of ongoing grand jury proceedings. The Target's invocation of a general notion of fairness fails.

Ultimately, the Target's claim that he is entitled to "secret evidentiary submissions in support of the enforcement of . . . subpoenas" is "without merit." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d at 1150. The Target has "offered nothing to take the present grand jury investigation outside the general rule [of secrecy]." *Id.* at 1151. "[N]othing in the law of the District of Columbia Circuit requires or has ever required a district court to interrupt the grand jury while a recalcitrant witness enjoys a series of mini trials over his access to materials cloaked by grand jury secrecy." *Id.* The Target's cross-motion for disclosure of the government's *ex parte* submission is denied.

B. THE GOVERNMENT'S MOTION TO COMPEL

The grand jury is investigating whether the Target and Subject Company obstructed the SEC's investigation by using the Witness, their attorney at the time, to produce fake documents to the agency.[9] In aid of that investigation, the government moves to compel the Witness to

[9] The SEC began investigating the Target and Subject Company after two private investors in the Target Company alleged in a civil complaint that the CEO and Company defrauded them. *See supra* Section I.B. The grand jury's investigation, and the instant dispute, however, concern the narrower subject of whether the Target and

produce documents and testify before the grand jury about the "circumstances surrounding the creation and production of" the (1) Note and (2) Employment Agreement. *See* Gov't's Mot. at 7–8. The government's motion is granted as to both categories of information sought.[10]

The Witness has withheld 565 documents responsive to the two categories of information, concerning the circumstances surrounding the creation and production of the Note and the Employment Agreement to the SEC, and the Witness has not appeared to testify before the grand jury. *See id.* at 2. As noted, the Witness claims no stake in the outcome of this dispute over the Target's assertion that the withheld documents and testimony are protected by the attorney-client and work-product privileges. The government argues that the Witness should be compelled to comply with the grand jury subpoena because the crime-fraud exception vitiates the attorney-client and work-product privileges asserted by the Target and Subject Company, *see* Gov't's Mot. at 1, who are "truly one and the same," H'rg Tr. (Rough) at 35:9-11.

The government has proffered evidence in the *ex parte* submission and accompanying exhibits, demonstrating that the Target and Subject Company used the Witness to produce the Employment Agreement and Note, documents that are fraudulent on their face, to the SEC during the SEC's investigation. *See* Gov't Reply at 1. The May 14, 2007 Employment Agreement's post-dated copyright marker, "©2002-2018 LawDepot.com®," demonstrates that the Employment Agreement was created eleven years after-the-fact. *See* Employment Agreement at 1, 13. Likewise, the Note's Appended Bank Statement purports to serve as proof

Subject Company obstructed the SEC's investigation by providing fake documents and making false statements to the agency during its investigation.

[10] The government proposed issuing the Witness a revised subpoena, requesting the same information as the January 2019 Subpoena, plus a new third category of information, concerning "the circumstances surrounding the creation and production of any documents that [the Witness] obtained from [the Subject Company] or any of its employees that [the Witness] had reason to suspect were altered or fictious." *See* Gov't's Reply, Ex. 1, Revised Grand Jury Subpoena to Witness at 2, ECF No. 12-1. Whether this proposed subpoena was actually served is unclear.

that the Target deposited $5 million into a Subject Company account, on June 11, 2007. *See* Note at 5 (Appended Bank Statement). This Appended Bank Statement is obviously doctored, when compared to the version of the same statement produced by Bank of America, showing only a $1,000 deposit on June 11, 2007. *See* Bank of America Statement at 1.

The fraudulent nature of the documents produced is further corroborated by witnesses with relevant information. The Target himself has conceded that the Appended Bank Statement is "clearly a forgery or altered" because "it has $5 million inserted in it." H'rg Tr. (Rough) at 8:4-6. The Target further conceded that "one of the questioned documents was not original," and that Individual 1 "'recreated' that document for production to the SEC. *See* Target's Opp'n, Ex., Aff. of Edward J.M. Little Supp. Target's Opp'n ¶ 5, ECF No. 9-2. Even more telling, Individual 1 explained that the Note and Employment Agreement are fake, and that she gave the Target her signature, at his request, so that the Target could copy her signature onto documents for the Witness to produce to the SEC. *See* Gov't's *Ex Parte* Submission at 8.

Although the Target has not reviewed the government's *ex parte* submission, he predicted the government's reliance, in part, on Individual 1's statements, and challenges her credibility due to her shifting stories and because she faces criminal exposure for her admission that she recreated at least one of the documents produced to SEC. *See* Target's Opp'n at 7, 8–9. As fully discussed, *supra* in Section III.A, however, this pre-indictment stage of proceedings is not the appropriate time for the Target to try to rebut the government's *prima facie* showing through a mini-trial on Individual 1's credibility.

Furthermore, when assessing the crime-fraud exception, "[t]he point is not to convict anyone of a crime or to anticipate the grand jury, but only to determine whether the possibility that a privileged relationship has been abused is sufficient to alter the balance of costs and

benefits that supports the privilege." *In re Sealed Case*, 676 F.2d at 814. The sufficiency of the government's *prima facie* case is abundantly clear. As the government points out, "[e]ven assuming another company employee provided the fake documents to [the Witness], there is no doubt that [the Target] knew the fake documents had been provided to the SEC because [the Target] testified in an SEC investigative deposition as though the fake documents were accurate." Gov't's Reply at 1. Indeed, the Target "has not denied involvement in the creation or transmission of the fake documents to the SEC, nor could he," since he "would know the true contents of his own employment agreement and whether he loaned the company $5 million." *Id.* at 2.

Documents and communications related to the circumstances surrounding the creation and production of the Employment Agreement and the Note, which were in fact ultimately produced to the SEC, were in furtherance of the Target and Subject Company's "crime, fraud, or other fundamental misconduct." *In re Sealed Case*, 676 F.2d at 807. The Target and Subject Company's use of the unwitting Witness to "verify the authenticity of false documents," through production of the documents to the SEC "cannot whitewash" these actions. *In re Sealed Case*, 754 F.2d at 402. On the evidence presented, the government has made "a *prima facie* showing of a violation sufficiently serious to defeat" the Target and Subject Company's attorney-client privileges. *In re Grand Jury*, 475 F.3d at 1305.

In closely analogous circumstances, the D.C. Circuit has ruled, with respect to the attorney-client privilege, that a "*prima facie* case has been made . . . that the crime-fraud exception applies" where the government has presented evidence that a "fraudulent document" was "produced to mislead the government in connection with" an ongoing investigation. *See id.* The Circuit highlighted that the government had shown the fraudulent document at issue was

"back-dated," and had secured an admission that the document was created around the time the government asked the privilege-holder to search his files for responsive documents. *See id.* In turn, "conversations between" the privilege-holder and counsel "concerning creation of the [fraudulent document] were not protected from disclosure as the crime-fraud exception to the attorney-client privilege applied." *Id.* at 1303.

As in *In re Grand Jury*, the government here has shown that the crime-fraud exception vitiates attorney-client privilege for communications between the Target, Subject Company, and the Witness concerning the creation and production of the Employment Agreement and the Note. These conversations were evidently part of the Target and Subject Company's scheme to create documents after-the-fact and mislead the SEC about the documentary authorization for the Target's use of the Subject Company's funds for his personal expenses.

The government further argues that the Target and Subject Company's claims of work-product privilege also succumb to the crime-fraud exception. *See* Gov't's Mot. at 5. The "work product privilege is broader" than the attorney-client privilege, since work product "is not limited to communications," and "applies to material obtained or prepared by an adversary's counsel in the course of his legal duties, provided that the work was done with an eye toward litigation." *In re Sealed Case*, 676 F.2d at 808–09 (internal quotation marks and citation omitted). Even so, the work-product privilege, like the attorney-client privilege, is "overcome when the client uses the attorney to further a crime or fraud," *In re Sealed Case*, 107 F.3d at 51, if "some valid relationship between the work product under subpoena and the prima facie violation" is present. *In re Sealed Case*, 676 F.2d at 814–15. "A finding that the work product reasonably relates to the subject matter of the possible violation should suffice." *Id.* at 815.

The work product under subpoena—concerning the circumstances surrounding the creation and production of the Note and Employment Agreement to the SEC—clearly has a "valid relationship" to the *prima facie* violation established. For example, the D.C. Circuit has found that a "valid relationship" exists between a *prima facie* showing that a company's officers "lied to or attempted to mislead the IRS" about certain payments and contributions, and work product that was "primarily concerned with the state of knowledge of various Company officers about" those payments and contributions. *Id.* at 815–16.

Likewise, here, the work product materials requested concern what the Target and Subject Company's employees told the Witness about the creation of the Employment Agreement and the Note, bearing on what the Target and Subject Company knew about these documents, and whether they "lied to or attempted to mislead" the SEC when they convinced the Witness to produce both of those documents to the agency as if they were authentic. *See id.* Since the Employment Agreement and Note were undisputedly produced to the SEC, "[t]here is a substantial likelihood that the work reflected in" the withheld work product "was performed in furtherance of a crime or fraud" by the Target and Subject Company, and as a result, these documents need not be withheld from the "grand jury on the ground that they are protected by" the work-product privilege. *Id.* at 816.[11]

[11] The government makes two arguments, independent of the crime-fraud exception, in support of its motion to compel. First, the government contends that factual work product concerning the creation and production of the Note and the Employment Agreement is obtainable because "adequate reasons" exist for overcoming the work-product privilege. *See* Gov't's Mot. at 6, 7 (citing *In re Grand Jury Investigation*, 2017 WL 4898143, at *12, and *FTC v. Boehringer Ingelheim Pharms., Inc.*, 778 F.3d 142, 153 (D.C. Cir. 2015)). Since the crime-fraud exception applies, this alternative basis for the government's access to the Witness' work product records need not be considered. *See In re Sealed Case*, 676 F.2d at 812 n.74 ("The exception for crime or fraud, however, stands apart from the basic qualification of the work product doctrine that a party may obtain work product on a showing of sufficient cause."). Second, the government mentions that the Witness "may" have waived privilege as to the subject matter of the of the Employment Agreement and the Note, but the Target disputes any waiver. *See* Gov't's Reply at 3 & n.1; Target's Reply at 3, ECF No. 14. Again, this alternative waiver theory need not be addressed. *See* H'rg Tr. (Rough) at 38:3 (government stating "This case very squarely fits [the] crime-fraud exception.").

The Target raised a "distinction between" fact and opinion work product at the motions hearing, unconnected to any withheld documents at issue here, and intimated that he sought to avoid the disclosure of the Witness's opinion work product. *See* H'rg Tr. (Rough) 39:12-19 ("Your Honor actually cited the Vincent Elkins case," and stated opinion work product "is virtually undiscoverable because that really goes beyond facts that goes beyond -- asking a lawyer, talking about invading the attorney-client privilege . . . ."). In support, the Target cited a previous decision by this Court, *In re Grand Jury Investigation*, which decision noted the D.C. Circuit's observation that opinion work product "is virtually undiscoverable." *Id.* (citing *In re Grand Jury Investigation*, 2017 WL 4898143, at *12 ("Opinion work product, in contrast, 'is virtually undiscoverable.'" (quoting *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997))).

Although opinion work product is "virtually undiscoverable," *Vinson & Elkins, LLP*, 124 F.3d at 1307, "[w]hen clients have used attorneys' efforts in furtherance of an ongoing crime or fraud, they are not entitled to protection from the courts," *In re Sealed Case*, 676 F.2d at 812 n.74. "Once a sufficient showing of crime or fraud has been made, the privilege vanishes as to all material related to the ongoing violation." *Id.* Notably, "the work product privilege belongs to the lawyer as well as the client," *id.* at 812 n.75, and "in some situations an attorney may be able to claim the privilege even though he or she was consulted in furtherance of the client's crime or fraud," *id.* For example, an attorney may assert the "opinion work product" privilege and "withstand[] even the force of the crime fraud exception . . . unless the attorney knows of or participates in the crime or fraud," *see In re Grand Jury Investigation*, 2017 WL 4898143, at *12 n.14 (citing *In re Grand Jury Subpoena*, 870 F.3d 312, 316 (4th Cir. 2017)). When an unwitting attorney fails to assert his own claim to work product privilege, however, "a guilty client may not

use the innocence or ignorance of its attorney to claim the court's protection against a grand jury subpoena." *In re Sealed Case*, 676 F.2d at 812. "Unless the blameless attorney is before the court with an independent claim of privilege, the client's use of an attorney's efforts in furtherance of crime or fraud negates the privilege." *Id.*

Here, the Witness expressly disavowed any stake in the outcome of this dispute. *See* Letter from Witness's Counsel to Court (Apr. 15, 2019). As a result, he relinquished any "independent claim[s] of privilege" by failing to press them here. *See In re Sealed Case*, 676 F.2d at 812 & n.75. The Target and Subject Company's "use of an attorney's efforts in furtherance of crime or fraud negates the privilege," *id.* at 812, and the Target may not use the Witness to shield himself.

As a last resort, the Target makes the extraordinary request for an *in camera* interview of the Witness and *in camera* review of the withheld documents, prior to their production to the grand jury, relying on *United States v. Zolin*, 491 U.S. 554 (1989). Target's Opp'n at 5, 10. *Zolin* is inapposite for many reasons. That case concerned a request by the government, not the privilege-holder, for *in camera* review of documents to establish application of the crime-fraud exception, and thus addressed whether this exception had to be based on independent, non-privileged evidence or could also encompass review of the privileged material, *Zolin*, 491 U.S. at 569-70, which is a "rather different" issue "than the one presented here," *In re Sealed Case*, 162 F.3d 670, 674 (D.C. Cir. 1998). *Zolin* held that "before a district court may engage in *in camera* review" of withheld, privileged information to establish the crime-fraud exception's applicability, the government "must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the [crime-fraud] exception's applicability." *Zolin*, 491 U.S. at 574. This threshold, "reasonable belief" standard to obtain *in*

camera review of privileged material is "a lesser evidentiary showing . . . than is required ultimately to overcome the privilege," but was imposed as a prerequisite, in order to strike the "correct balance" between the "intrusion upon the confidentiality of the attorney-client relationship," and the "costs of imposing an absolute bar to consideration of" privileged communications *in camera* that may have been in furtherance of a crime or a fraud. *Id.* at 559, 560.

Here, in stark contrast to the legal question posed in *Zolin*, the government has not made any request for *in camera* review of the withheld, privileged materials that would give rise to concerns about "intrusion upon the confidentiality of the attorney-client relationship." *See id.* Rather, the government established the ultimate, more demanding *prima facie* showing for the crime-fraud exception's applicability by submitting for *in camera* review other, non-privileged materials, a posture that *Zolin* did not address. *See In re Sealed Case*, 162 F.3d at 674; *see also id.* (citing *In re Grand Jury Proceedings*, 33 F.3d at 350 ("*Zolin* is not precisely analogous to the case before us because the district court in the instant case did not conduct an *in camera* review of the requested documents. The government made an *in camera* submission to the district court in order to . . . make a *prima facie* showing . . . ." (footnote omitted))). Where, as in this case, the government has made the crime-fraud exception's ultimate *prima facie* showing through independent, non-privileged materials, the D.C. Circuit has expressly approved of application of the exception, without any need for further *in camera* review of each privileged document withheld. *See In re Sealed Case*, 162 F.3d at 674 (affirming district court's crime-fraud ruling, where "district court reviewed *in camera* not the allegedly privileged material, but other evidence intended to establish that the crime-fraud exception applied").

Even if *Zolin* were applicable, which it is not, the Target concedes that "*Zolin* does not expressly require *in camera* review of documents at this stage." Target's Opp'n at 5. "[T]he decision whether to engage in *in camera* review rests in the sound discretion of the district court." *Zolin*, 491 U.S. at 572. This decision is made "in light of the facts and circumstances of the particular case," such as "the volume of materials the district court has been asked to review," the "relative importance to the case of the alleged privileged information," and whether *in camera* procedures will "unduly disrupt or delay the proceedings." *Id.*

In this case, the Target lacks any persuasive reason for *in camera* review of over 500 withheld documents. The Target's request for *in camera* review is even more puzzling since counsel for each of the Witness, the Subject Company, and the Target already "reviewed" the withheld documents "for relevance and privilege," *see* Target's Opp'n at 2, and thus the withheld documents have already been determined to be responsive. In this circumstance, *in camera* review would only unnecessarily delay the grand jury's investigation. *See* H'rg Tr. (Rough) at 25:13-17 ("[T]he Government's concern is the timeliness. The subpoena issued in January[, and] it took months in order to get a production and the production we received was only a few documents that [were] provided to the SEC.").

Target's counsel raised the possibility that the documents might contain "other attorney-client communications that are not related" to the production or creation of the Note and Employment Agreement. H'rg Tr. (Rough) at 15:1-4; *id.* at 23:7-10 ("I believe that the 500 documents are mostly called for. . . . I don't even know if there is anything in there that goes beyond."). When asked for a proposed procedure to account for the Target's counsel's speculative concern, the government suggested that either the Target's counsel could re-review the withheld documents to redact any privileged material beyond the scope of the crime-fraud

ruling, or the government could use a "filter team." *Id.* at 20:23–21:14. The government preferred to use a filter team because approximately four months have already passed since issuance of the January 2019 Subpoena, and a re-review would simply give the Target's counsel "another opportunity to do what they should have done the first time around." *Id.* at 25:13-17, 26:2-4.

Despite these concerns, the government agreed to confer with the Target's counsel about a production schedule that would permit the Target's counsel to re-review the withheld documents in light of a ruling that the crime-fraud exception applied. *Id.* at 27:3-7. The parties were ordered to submit a joint status report with a proposal for any additional review of the withheld documents and a schedule for their production to the grand jury. H'rg Tr. (Rough) at 27:13-15; *see also* Min. Order (May 2, 2019). After the hearing, however, the Target's counsel declined to submit any proposal for review of the withheld documents. Email from Target's Counsel to Court (May 2, 2019, 4:57 p.m.).

In light of the Target's failure to provide any proposal for review of the withheld documents prior to their production to the grand jury, combined with the government's justified concerns about additional delay and the fact that the Target's re-review would be without the benefit of the *ex parte* content of this crime-fraud ruling to which content he is not privy, the government shall use a filter team to exclude any privileged material falling outside the scope of this ruling.

IV. CONCLUSION

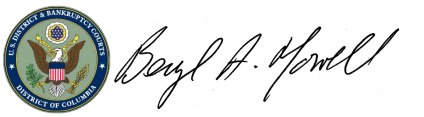
The government's Motion to Compel the Witness is granted, and the Target's Cross-Motion for Disclosure of the government's *ex parte* submission is denied. The government is directed, by May 7, 2019, to review this Memorandum Opinion and propose to the Court any

redactions that should be made prior to making the opinion available under seal, with appropriate redactions, to the Witness and the Target. The order will be stayed until May 8, 2019, on which date, if not earlier, the Witness and the Target will be provided a copy of this Memorandum Opinion, with any necessary redactions, under seal.

The government, the Target, and the Witness are directed, within 30 days of the return of an indictment against the Target, a declination decision, or a lapse in the statute of limitations period, whichever occurs earliest, 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 appropriate Order, which is filed under seal, accompanies this Memorandum Opinion.

Date: May 4, 2019



BERYL A. HOWELL
Chief Judge