UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re GRAND JURY INVESTIGATION	Grand Jury Action No. 19-15 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL**

MEMORANDUM OPINION

With less than one month until lapse of the applicable statute of limitations, the government filed a motion, on February 13, 2019, seeking an expedited ruling that the Target of an ongoing Grand Jury investigation had no attorney-client relationship during the time period of December 2012 through January 2014 ("Relevant Period"), with his former law firm ("Law Firm"), where the Target was a partner, nor with two of his former partners, the firm's General Counsel ("Partner 1") and a Foreign Agents Registration Act ("FARA") practitioner ("Partner 2"). Gov't's Mot. For a Ruling That Attorney-Client Privilege and Duty of Confidentiality Do Not Bar the Gov't From Seeking Attorneys' Testimony ("Gov't's Mot."), ECF No. 1.[1] The government has issued subpoenas for the testimony of these two partners before the Grand Jury regarding the Target's representations, in 2013 and 2014, in response to inquiries from the FARA Unit of the U.S. Department of Justice's ("DOJ") National Security Division ("NSD") regarding the Target's work on behalf of a foreign government, in connection with the investigation of the Target for possible violations of the FARA, 22 U.S.C. §§ 612, 618(a)(l), and

[1] In this opinion, the "Target" refers to Gregory B. Craig; "Law Firm" refers to Skadden, Arps, Meagher, Slate & Flom LLP ("Skadden"); "Partner 1" refers to Lawrence S. Spiegel, partner and General Counsel of Skadden; "Partner 2" refers to Kenneth A. Gross, a partner of Skadden; and the "Co-Author" is Clifford Sloan, a partner of Skadden during the Relevant Period.

618(e); false statements, 18 U.S.C. § 1001; false statements in a document furnished to the Attorney General under FARA, 22 U.S.C. § 618(a)(2); and obstruction of justice, 18 U.S.C. § l505.[2] The Target raised objection to the government interviewing or compelling the testimony of the subpoenaed partners on the ground that he reasonably believed he had an attorney-client relationship with his former Law Firm and Partners 1 and 2 during the Relevant Period in connection with the FARA Unit inquiries.[3]

In the face of the Target's claim of a privileged relationship with the Law Firm and the Partners during the Relevant Period, the government seeks an expedited ruling that no such relationship existed that would preclude the subpoenaed partners from providing testimony. In this regard, the Law Firm and the two subpoenaed partners flatly deny that they had any attorney-client relationship with the Target at that time, but rather aver that their communications then with the Target and the FARA Unit were on behalf of only the Law Firm. *See* Resp. of Subpoena Recipients to Gov't's Mot. ("Law Firm's Resp.") at 2, ECF No. 4 ("Neither [Partner 1] nor any other [Law Firm] attorney represented [the Target] personally in 2013."); *see also*

[2] The statute of limitations for various offenses under investigation "potentially expires on or about March 19, 2019," Gov't's Mot. at 3, with the last date the relevant grand jury sits on March 7, 2019, *id.* at n.1, but having already agreed to three waivers of the limitations period, the Target "has made clear that he will not enter into any further tolling agreements," *id*. Despite the approaching lapse of the statute of limitations period, the government has indicated that a final decision on whether to seek return of an indictment and for which charges remains under consideration. *See* Gov't's Mot. at 8 n.2 ("[T]he government is still assessing whether it can and should charge the false statement crimes under investigation."); Transcript of Motion Hearing, Feb. 27, 2019 ("Feb. 27 Hr'g Tr.") at 5:23-24, ECF No. 34 (averring that "we [the government] are trying to evaluate the evidence and whether, in fact, to charge [the Target]").

[3] During consideration of the government's motion, the Target moved to compel "the [DOJ to] produce to counsel for [the Target] all communications (including documents reflecting communications, including notes, e-mails or memoranda) between [the Law Firm] or its counsel, on the one hand, and any representatives of the government on the other, in connection with the negotiation, preparation, and/or execution of the settlement agreement between [the Law Firm] and the National Security Division dated January 15, 2019 [], to the extent those communications refer or relate to [the Target]." Proposed Order Granting [the Target's] Motion to Compel, ECF No. 6-3. The Target averred that this was necessary to determine whether, *inter alia*, "[the Law Firm's] motivation for turning on its former client was solely to achieve leniency for itself," and "whether [the Law Firm] took any steps to try to protect the interests of its former client." Motion to Compel at 2, ECF No. 6. At the Feb. 25, 2019 hearing, however, the Target orally moved to withdraw this motion, without prejudice, which motion was granted. *See* Minute Order (Feb. 25, 2019).

Supp. Resp. of Law Firm and Subpoena Recipients Concerning the Gov't's Mot. ("Law Firm's Supp. Resp."), Attach. A, Decl. of Julie A. Turner ("Turner Decl.") ¶ 9, ECF No. 17 (stating that the Office of General Counsel of [the Law Firm] represented [the Target] "[b]eginning in October 2017 until no later than March 5, 2018").

The government's explanation for the "fire drill" pace to resolve this motion before lapse of the limitations period is two-fold. *See* Gov't's Mot. at 4 (noting that "[t]ime is of the essence"). First, the investigation of the Target for potential FARA and related federal offenses was only recently transferred, in late December 2018 or early January 2019, to the U.S. Attorney's Office for the District of Columbia, following review by several other federal prosecuting authorities, including DOJ's NSD, the Office of Special Counsel Robert S. Mueller, Jr. ("SCO"), and the U.S. Attorney's Office for the Southern District of New York ("USAO-SDNY"). Tr. of Mot. Hr'g, Feb. 25, 2019 ("Feb. 25 Hr'g Tr.") at 42:4–43:6, ECF No. 33. Second, the Target only recently raised, on January 17, 2019, for the first time this "eleventh hour claim," Gov't's Mot. at 15, that he had an attorney-client relationship during 2013 with the Law Firm and the two partners subpoenaed to testify before the Grand Jury, and, until resolved, this claim has impeded the government's review and presentation of evidence to the Grand Jury, to avoid inducing the partners violation of the "attorney-client privilege or their professional duty of confidentiality," *id*. at 1.

While the government's request for a ruling on whether a privileged relationship existed in the Relevant Period between the Target and his former Law Firm and the subpoenaed partners appears straightforward, even if no privileged relationship then existed, the contours of the testimony to be elicited from the partners is somewhat more complicated due to the undisputed attorney-client relationship subsequently entered into by the Target with the Law Firm and

Partner 1. This acknowledged privileged relationship lasted from at least October 2017 to March 5, 2018, when the Target executed, after consultation with his current counsel, a letter terminating the Law Firm's personal representation of him. *See* Gov't's Mot., Attach. 1, Letter from Partner 1 to the Target (Mar. 5, 2018) ("Termination of Representation Letter"), ECF No. 1. Due to the Law Firm and Partner 1's continuing duty of confidentiality owed to the Target, even after termination of their privileged relationship, "to preserve the client's confidences and secrets," D.C. RULES OF PROF'L CONDUCT r. 1.6(g), the government indicates that any testimony elicited from the two partners would be limited to what they recall from the Relevant Period, with an instruction given to them not to share any additional information gained thereafter. Tr. of Mot. Hr'g, Feb. 27, 2019 ("Feb. 27 Hr'g Tr.") at 10:10-15, ECF No. 34 (government summarizing "the warning that the government is contemplating to [Partner 1 and 2], cautioning them to reflect about whether the source of information that they have could be an attorney-client privileged communication from [the Target] in 2017 to 2018 and, if so, not to answer the question protects [the Target]."); *id.* at 38:17-20 (government assuring that if Partners 1 and 2 are unable "to separate in their minds the 2017 and 2018 privileged information from everything else . . . we don't want them to answer the questions"); Jt. Status Report on Government's Pending Mot. for Ruling About [Target]'s Assertion of Attorney-Client Privilege ("JSR"), Ex. B at 1 (Gov't's Outline for Partner 1) and Ex. C at 1 (Gov't's Outline for Partner 2), ECF Nos. 22-2, 22-3.[4]

Given the limitation that the government agrees would be used in any questions posed to the subpoenaed partners, and upon consideration of the expedited briefing and arguments heard

[4] The subpoena recipients' counsel provided assurances that "[the subpoena recipients] are fully capable of [] either saying [they] can segregate out what [they are] recalling from that point of time and none other, [] or [they] can't segregate and, therefore, [they cannot] answer your question." Feb. 27 Hr'g Tr. at 28:24-29:3.

at two hearings, at which the government, and counsel for the Target, the Law Firm and the firm's two subpoenaed partners participated, the Court issued an oral ruling on February 27, 2018, granting the government's motion in part, in so far as the government's motion seeks a finding that the Target did not have an attorney-client relationship with the subpoenaed partners during the Relevant Period in connection with inquiries from the FARA Unit. *See* Minute Order (Feb. 27, 2019).[5] The reasons for this finding are detailed below.

I. BACKGROUND

The events and communications underlying the Target's claimed privileged relationship with the Law Firm and subpoenaed partners are described in some detail.[6]

A. The Report: April – December 2012

In early April 2012, the Law Firm was retained by a foreign government to prepare a report about whether the process used in a specific instance comported with American principles of due process ("the Report"). Decl. of [the Target] ("Target's Decl.") ¶ 5, ECF No. 16.[7] This report was completed in September 2012 and released by an agency of the foreign government in December 2012, *id*. ¶ 6. From the outset of this engagement, attorneys at the Law Firm

[5] The government's motion made multiple requests, with only the request for a ruling on the existence of an attorney-client relationship in the Relevant Period resolved, as the government's ultimate request. Feb. 27 Hr'g Tr. at 38:24-25 (requesting only ruling on existence of attorney-client relationship in Relevant Period); *see, e.g.*, Gov't's Mot. at 3 (requesting alternative finding that "any attorney-client privilege and duty of confidentiality have been vitiated or waived"); *id*. at 13 (requesting "ruling on whether the government can accept and review these additional documents" from Relevant Period previously withheld by Law Firm on basis of firm's privilege); *id*. at 26 (requesting "a determination that it may use the documents previously produced to it in connection with this investigation, because [Target] has waived any privilege that might have pertained to them, and because the crime-fraud exception likewise applies").

[6] The Target submitted both an *ex parte*, unredacted declaration, ECF No. 16, and a redacted declaration, ECF No. 38, with only the redacted version made available to the government, the Law Firm, and the subpoena recipients. Without addressing the merits or need for the Target's redactions, the redactions are respected in this Memorandum Opinion, which generally does not reveal information included in the redacted portions of the Target's declaration.

[7] Specifically, the Law Firm was retained by the Government of Ukraine to prepare a report "on the due process issues implicated by the 2011 trial of the former prime minister of Ukraine, Yulia Tymoshenko." Target's Decl. ¶ 5.

considered whether this work would require FARA registration. For example, in an email to the Target and Co-Author, dated April 17, 2012, an associate of the Law Firm relayed Partner 2's view that:

> [O]ur work writing a report evaluating the Ukrainian proceedings would not trigger FARA obligations. However, if we were to perform public relations work aimed at the US, if our London lawyers were to do so, or if we were to subcontract with a PR firm to do so, then we would be obligated to register under FARA. (If the Ukrainian Government were to hire the PR firm directly, then FARA would not come into play for us.)

Target's Decl., Ex. 31, Email from a Law Firm Associate to Target and Co-Author (Apr. 17, 2012, 12:26 PM) at 1, ECF No. 16-30. In a reply email the same day to the associate and the Target, the Co-Author agreed that the Law Firm should not provide, or hire outside consultants to provide, public relations services on behalf of the foreign government:

> Thanks very much, [associate]. [Target 1] -- I think our engagement should not include PR advice. … someone else can hire the PR team and manage that. I say this for two reasons. First, it will create a FARA problem. Second, I actually think it's much better for our representation to be "rule of law" advisers, not "rule of law"-and-PR advisers. Including a PR component as part of our representation has the potential to undermine our work. We're in this representation as lawyers, not spin doctors, and I think it's important we be able to say that. In any event, the FARA issue looks insurmountable. (And, of course we can provide information and answer questions for the PR firm, at the client's direction. *[sic]*

Id., Email from Co-Author to an Associate and Target (Apr. 17, 2012, 12:30 PM). The Target agreed with the Co-Author, stating in an email the same day, "Good advice." *Id.*, Email from Target to Co-Author (Apr. 17, 2012 6:32 PM). As these email communications show, by April 2012, the Law Firm's attorneys had concluded that FARA registration would not be required "[i]f the [foreign] Government were to hire the PR firm directly" but that the Law Firm could nonetheless "provide information and answer questions for the PR firm, at the client's direction."

After completion of the Report, the Target and Co-Author communicated directly with the public relations ("PR") firm hired by the foreign government. The Target became concerned that the foreign government "planned to use [the PR firm] to 'spin' the Report in ways that

would not accurately characterize its essential conclusions, and [he] wanted to prevent that from occurring." Target's Decl. ¶ 13. For example, in an email dated September 25, 2012, the Target told the PR firm that:

> There is a lot of stuff in here that is just wrong. I understand your desire to spin this report in a way that supports Ukraine's view of this trial, but much of what you say is not accurate. Actually if I read this or heard this I would think that [the Law Firm] had been bought and paid for, and that this report was indeed a total whitewash. As just one example, it is not accurate to say that Tymoshenko produced no evidence to support her defense. That is flatly wrong and if you think this report says that, we have real problems. I am on a plane now and cannot talk. I will call you this afternoon. Meanwhile I am sending this to [the Co-Author] to look at as well.

Target's Decl., Ex. 22, Email from Target to PR firm (Sept. 25, 2012, 12:35 PM) at 1, ECF No. 16-21.

Closer to the time that the Report was to be publicly released by an agency of the foreign government, the Target corresponded, on December 11, 2012, with a *New York Times* journalist before the Report was published, emailing and hand-delivering a hard pre-publication copy of the Report to the journalist. Target's Decl., Ex. 24, Email from the Target to a *New York Times* Journalist (Dec. 11, 2012, 11:16 AM) at 1, ECF No. 16-23; Target's Decl., Ex. 25, Email from the Target to a *New York Times* Journalist (Dec. 11, 2012, 6:58 PM) at 1, ECF No. 16-24; Target's Decl., Ex. 26, Email from the Target to a *New York Times* Journalist (Dec. 11, 2012, 5:46 PM) at 1, ECF No. 16-25. The Target "wanted to make sure, . . . that if the [New York] Times decided to write an article about the Report that it would do so based on an interview with [him]." Target's Decl. ¶ 13.

On December 12, 2012, the *New York Times* published an article about the Report, which, according to the *Times*, "concluded that important legal rights of the jailed former prime minister, Yulia V. Tymoshenko, were violated during her trial last year on charges of abusing her official power, and that she was wrongly imprisoned even before her conviction and sentencing."

Target's Decl., Ex. 30, David M. Herszenhorn and David E. Sanger, *Failings Found in Trial of Ukrainian Ex-Premier,* N.Y. TIMES (Dec. 12, 2012) at 1, ECF No. 16-29. The Report was made public the next day, on December 13, 2012, on the foreign government's website. *See* Target's Decl., Ex. 34, Press Release, Ministry of Justice, Ukraine, Leading International Law Firm Skadden, Arps, Slate, Meagher & Flom LLP Did Not Find Evidence of Political Motivation in Judgement of Tymoshenko (Dec. 13, 2012), ECF No. 16-33 (indicating that the report was "published today on the Ministry's website without amendment"). The *Los Angeles Times* and the *National Law Journal* published articles about the Report on December 13, 2012. *See* Target's Decl., Ex. 1, Letter from Heather H. Hunt, FARA Unit, to the Law Firm's Managing Director (Dec. 18, 2012), ECF No. 16-1 ("1st FARA Letter"); Target's Decl., Ex. 36, Letter from the Target, to Heather H. Hunt, FARA Unit (Oct. 10, 2013) at 2 n.2, ECF No. 16-35. The Target spoke with journalists from these publications as well, to "correct mischaracterizations." *Id.* at 1. The *National Law Journal* then "issued a correction to an earlier article based on [the Target's] interview with their reporter." Target's Decl. ¶ 19.

The Target has averred that, in speaking to these media outlets, the "purpose was to defend the integrity of the Report and the law firm, and to counter the impression, generated by the [the foreign government agency]'s misstatements, . . . [and] to make necessary clarifications and corrections." Target's Decl. ¶ 15.

B. FARA Unit Inquiries: December 2012 – January 2014

During the Relevant Period, the FARA Unit sent four separate letters to the Law Firm. "At issue" in the government's motion "are communications and representations that [the Target], then a partner at the law firm [], made regarding his work for Ukraine while responding to the FARA Unit inquiries throughout 2013, including at an in-person meeting with the FARA Unit on October 9, 2013." Gov't's Mot. at 2. The Target relies heavily on these same

communications within the Law Firm for his assertion that, while the Law Firm's subpoenaed partners were certainly representing the Law Firm during this period, he, too, was being personally represented by them.

1. First FARA Letter

Five days after publication of the Report and related press coverage, on December 18, 2012, the FARA Unit sent a letter addressed to the Law Firm's managing director requesting four broad categories of information about the Law Firm and its activities in preparing the Report. Specifically, the letter requested:

> (1) a complete statement of the ownership and control of the firm, (2) a description of the nature of the firm's regular business and/or activity, (3) a description of the activities the firm has engaged in or the services it has rendered to the Ministry of Justice of the Government of Ukraine or any other foreign entity and (4) a copy of the existing or proposed written agreement, if any, or a full description of the terms and conditions of each existing or proposed oral agreement, if any, the firm may have with the Ministry of Justice of the Government of Ukraine or any other foreign entity.

1st FARA Letter. The letter was forwarded from the Law Firm's managing director, a non-lawyer, to Partner 1, as the firm's General Counsel, and then from Partner 1 to the Target, who "was the principal author of" the Report, and to the Target's co-author of the Report (the "Co-Author"). *See* Target's Decl. ¶ 7; Target's Decl., Ex. 2, Email from Partner 1 to Target and Co-Author (Dec. 22, 2012, 2:22 AM), ECF No. 16-2. In his email, Partner 1 told the Target that he was "not familiar with the obligations under FARA, but available to discuss and review [the] response, as appropriate." *Id*.

In a subsequent email to Partner 1 on January 4, 2013, the Target and the Co-Author sent their draft response to the third and fourth categories of requested information in FARA's first letter, *see* Target's Decl. ¶¶ 7-8; Target's Decl., Ex. 3, Email from Target to Partner 1 and Co-Author (Jan. 4, 2013, 6:03 PM), ECF No. 16-3, and Partner 1 replied the next day, January 5,

2013, that he has "people gathering the information for questions 1 and 2, and they will circulate a draft response shortly," Target's Decl., Ex. 3, Email from Partner 1 to Target and Co-Author (Jan. 5, 2013, 12:32 AM), ECF No. 16-3. Eleven days later, on January 15, 2013, Partner 1 forwarded the Target and the Co-Author "a complete draft answer," Target's Decl. ¶ 8, "for [their] review," Target's Decl., Ex. 4, Email from Partner 1 to Target and Co-Author (Jan. 15, 2013, 9:39 PM), ECF No. 16-4. Then, "[o]ver the next several days, [Partner 1, the Target, and the Co-Author] continued to revise the draft response." Target's Decl. ¶ 8. In sum, this response sought to explain that "from the very beginning, [the Law Firm's] work was conditioned on the understanding with the client that the Firm would not provide any services that would be covered by the Foreign Agent Registration Act ("FARA") or would require registration under FARA." Target's Decl., Ex. 7, Letter from Target, to Heather H. Hunt, FARA Unit (Feb. 6, 2013) ("1st Law Firm Letter") at 2, ECF No. 16-7. The letter was sent to the FARA Unit, signed by the Target, *id.* at 3, because another partner at the Law Firm suggested that the signatory to the letter should be from the Target, rather than Partner 1, as General Counsel of the firm, to seem "less defensive," Target's Decl. ¶ 8; Target's Decl., Ex. 6, Email from Co-Author to Target (Feb. 5, 2013, 10:23 PM), ECF No. 16-6.

2. Second FARA Letter

On April 9, 2013, the FARA Unit sent a second letter, this time addressed to the Target, requesting additional information responsive to seven specific questions, namely:

> (1) To whom, if anyone, did your firm release or distribute the report and when? (2) When was the report released to the Ukrainian Ministry of Justice? (3) Did your firm give the report to the Los Angeles Times? (4) Did your firm know that [a law firm] or [a lobbying firm] would be agents of [a foreign individual] in advocating in the United States for the Ukraine? (4) *[sic]* Because your firm was aware of the requirements of FARA and mentioned that it would not engage in any political activity in connection with the Tymoshenko case, what safeguards or agreements, if any, did your firm have with the Ukrainian Ministry of Justice about limiting the use of this report in the United States?

> (5) What was your firm's understanding of what would happen to the report when it was released to the Ukrainian Ministry of Justice? (6) Did you or anyone in your firm have any media interviews or comments to the media, public, or government officials about the report and the findings of your firm?

Target's Decl., Ex. 8, Letter from Heather H. Hunt, FARA Unit, to Target (Apr. 9, 2012) ("2nd FARA Letter") at 2, ECF No. 16-8. Over the course of April and May 2013, the Target and the Co-Author formulated their response to the 2nd FARA letter, without any apparent input from Partner 1. *See, e.g.*, Target's Decl., Ex. 9, Email from Target to Co-Author (Apr. 29, 2013, 11:12 PM), ECF No. 16-9 ("I will bring down a copy of the letter from DOJ. This is a draft response."); Target's Decl., Ex. 10, Email from Target to Co-Author (May 1, 2013, 6:57 PM), ECF No. 16-10 ("[Subject]: Next draft – with some embellishments."); Target's Decl., Ex. 12, Email from Target to Co-Author (May 15, 2013, 6:19 PM), ECF No. 16-12 ("I have added stuff. And included a reference at the end of the new agreement(s). This is for your information and editing pleasure[.]"). Shortly before the Target was going to send his response to the FARA Unit, the Co-Author suggested, on May 28, 2013, that the Target "send it to [Partner 1] before sending (and tell him that you want to get it out right away)." Target's Resp. to the Gov't's Mot., Ex. 14, Email from Co-Author to Target (May 28, 2013, 4:02 PM), ECF No. 7-14. The Target then caused the draft response to the FARA Unit's 2nd letter to be forwarded to Partner 1, who then requested to see the FARA Unit's 2nd letter. *See* Law Firm's Resp., Ex. 7, Email from Partner 1 to Law Firm Employee (May 28, 2013, 8:23 PM) ("Partner 1's May 28, 2013 Email Requesting 2nd FARA Letter") at 1, ECF No. 4 ("Can you ask [the Target] to send me the underlying letter that he is responding to. I do not believe that I ever received a copy.").

Partner 1 and another partner subsequently suggested the addition of a single line to the draft response—what the Target described as "minor changes." Target's Decl., Ex. 14, Email from Target to Law Firm Employee and Co-Author (May 31, 2013, 2:57 PM), ECF No. 16-13.

The response was then sent to the FARA Unit on June 3, 2013. Target's Decl., Ex. 15, Letter from Target to Heather H. Hunt, FARA Unit (June 3, 2013) ("2nd Law Firm Letter"), ECF No. 16-14. This response to the FARA Unit's 2nd Letter disclosed that "the law firm on December 12-13 provided a copy of the report" to the subject of the Report, a representative of the individual funder of the report, and to journalists at the *New York Times*, the *National Law Journal*, and the *Los Angeles Times*. *Id.* at 2. The response further acknowledged that the Target made "brief clarifying statements about the report" to three journalists, noting that "one purpose of the statements was to correct misinformation that the media had received – and was reporting – from the Ministry of Justice and from the Tymoshenko legal team in Ukraine. Neither the law firm nor its lawyers sought to influence American public opinion or US government policy." *Id.* at 3.

3. Third FARA Letter

In a letter again addressed to the Target, received on Thursday, September 5, 2013, the FARA Unit concluded that the Law Firm was required to register as a foreign agent, stating that:

> Our review of the documentation concludes that [the Law Firm] was an agent of the Ministry [of Justice of the Government of Ukraine ("the Ministry")] and was engaged in political activities in the United States for the Ministry. You indicate that your firm was paid by the Ukraine to produce an independent report on the Tymoshenko prosecution, and that the report was disseminated to news media by your firm. You further state that you spoke with representatives of the media to correct misinformation regarding the report. The dissemination of the report to the media and your communications with the media were political activities as defined in 22 U.S.C. § 611(o) of FARA.

Target's Decl., Ex. 16, Letter from Heather H. Hunt, FARA Unit, to Target (Sept. 5, 2013) ("3rd FARA Letter") at 1, ECF No. 16-15. Four days later, on Monday, September 9, 2013, the Target emailed the 3rd FARA Letter to Partner 1, alerting him that "DOJ has concluded that we should register under FARA. I am looking at what options are available, if any." Target's Decl., Ex. 17,

Email from Target to Partner 1, Co-Author and another Law Firm partner (Sept. 9, 2013, 11:00 PM), ECF No. 16-16.

Ten days later, on September 19, 2013, Partner 1 asked in an email: "Do you have time tomorrow to catch up re: the FARA registration issue." Target's Decl., Ex. 18, Email from Partner 1 to Target (Sept. 19, 2013, 3:41 AM), ECF No. 16-17. That same day, on September 19, 2013, the Target sent an email, with the subject line "[j]ust for the record," to Partner 1 making three points disputing FARA's conclusions that the Law Firm (1) had "disseminate[d] the report to news media," (2) had "contact[ed] the media," and (3) had made statements to the press "about Ukraine." Target's Decl., Ex. 19, Email from Target to Partner 1 (Sept. 19, 2013, 4:37 PM), ECF No. 16-18.

The next day, September 20, 2019, the Target sent Partner 1 a "first shot" draft letter response to the 3rd FARA Letter contesting the FARA Unit's conclusion about the Law Firm being required to register as a foreign agent and requesting a meeting with the Attorney General. Target's Decl., Ex. 20, Email from Target to Partner 1 and a Law Firm associate (Sept. 20, 2013), ECF No. 16-19. This draft letter was never sent. Target's Decl. ¶ 16. Instead, on the advice of Partners 1 and 2 that "a frank exchange" at "an 'informal' meeting with the FARA Unit," *id*. ¶ 17, would be better, the Target sent, on September 26, 2013, a short letter to the FARA Unit acknowledging receipt of the 3rd FARA Letter and indicating that Partner 1, who is identified as a "partner in the New York office of [the Law Firm]" and "the General Counsel for the law firm," would be requesting a meeting "to discuss the basis for the conclusions" set out in the 3rd FARA letter. Target's Decl., Ex. 33, Letter from Target, to Heather H. Hunt, FARA Unit (Sept. 26, 2013), ECF No. 16-32.

The requested meeting with the FARA Unit occurred on October 9, 2013, with the Target and the subpoenaed Partners 1 and 2 in attendance. Target's Decl. ¶ 19. The FARA Unit Chief Heather H. Hunt asked the Target to prepare a follow-up letter to the FARA Unit "summarizing our arguments so that there would be a written record upon which to base a change in the FARA Unit's previous guidance." *Id*. ¶ 20. The Target drafted the requested follow-up letter and sent it to Partners 1 and 2 for review, asking "Is this okay?" Target's Decl., Ex. 35, Email from Target to Partner 1 and Co-Author (Oct. 10, 2013), ECF No. 16-34. While Partner 2 replied with a minor proposed addition, Target's Decl., Ex. 35, Email from Partner 2 to Target and Partner 1 (Oct. 10, 2013, 11:45 PM), the record reflects no reaction from Partner 1 to the draft letter. On October 10, 2013, the Target sent to the FARA Unit the requested letter, which reiterated that the Law Firm provided copies of the Report to certain U.S. media outlets "in response to requests from the media," and made statements "to correct mischaracterizations of the Report," Target's Decl., Ex. 36, Letter from Target, to Heather H. Hunt, FARA Unit (Oct. 10, 2013) at 1, ECF No. 16-35.

4. Fourth and Final FARA Letter

On January 16, 2014, the FARA Unit sent a fourth letter, addressed to the Target, reversing the earlier finding and concluding that "based upon the information you brought to our attention [] your firm has no present obligation to register under FARA." Target's Decl., Ex. 37, Letter from Heather H. Hunt, FARA Unit, to Target (Jan. 16, 2014) ("4th FARA Letter"), ECF No. 16-36. At that point, the issue of whether the Law Firm, the Target, or others working at the Law Firm, should have registered pursuant to FARA lay dormant until 2017, although the Law Firm's engagement in preparing the Report continued to receive some attention from the foreign government and the DOJ, as described next.

C. The Foreign Government's Investigation: 2015 – 2017

In July and August 2015, the Law Firm received requests for information about its work on the Report from the foreign government, which requests were forwarded to Partner 1. *Id.* ¶ 27 (citing *id.*, Ex. 39, Email from a Law Firm associate to Partner 1, Target, and other Law Firm employees (Aug. 18, 2015, 1:06 PM), ECF No. 16-38 (attaching letters from the foreign government agency)).[8] Thereafter, on April 8, 2016, a representative from the foreign government wrote to the Target, asking for information about the Law Firm's engagement during 2012. Target's Decl. ¶ 27 (citing *id.*, Ex. 40, Email from foreign government's representative to Target (Apr. 8, 2016, 11:50 AM), ECF No. 16-39). The Target has expressed the belief that Partner 1 was representing him in this matter. Target's Decl. ¶ 27.

"At some point in 2017," DOJ's Office of International Affairs in the Criminal Division approached the Law Firm to arrange for the Target's deposition at the behest of the foreign government, pursuant to a Mutual Legal Assistance Treaty ("MLAT"). *Id.* ¶ 29. The Target indicates that Partner 1 represented him in connection with this request, and that "[o]n multiple occasions, [Partner 1] spoke to and met with attorneys from the [DOJ] on [the Target's] behalf," *id.* No deposition of the Target was taken in connection with this MLAT request. *Id.*

D. The Special Counsel's Office: 2017 – 2018

The Target "was aware that both during the MLAT proceedings initiated by Ukraine and the SCO's investigation of Russian interference in the 2016 presidential campaign, [the Law Firm] received document requests from the [DOJ] and the SCO for materials related to" its work for the foreign government. *Id.* ¶ 30. It is undisputed that the Law Firm represented the Target

[8] In July 2015, a new Prosecutor General in the foreign government opened a criminal investigation of the previous Minister of Justice ("MOJ") and his Deputy, both of whom had been involved in engaging the Law Firm for preparation of the Report. Target's Decl. ¶ 26.

in connection with the SCO's investigation in this matter from at least October 2017 through March 5, 2018. *See* Gov't's Mot. at 11; *id.* at 19 ("It is undisputed that [Partner 1] and [the Law Firm] represented [the Target] in 2017–18 in connection with the SCO investigation.").

The Target was interviewed by the SCO on October 19, 2017, Target's Decl. ¶ 32, which was followed, on February 22, 2018, by Partner 1 making an "off the record proffer" to SCO, *id.* ¶ 33. For "approximately two weeks," Target's new counsel and the Law Firm "jointly represented" him, in preparation for his second interview with the SCO. *Id.* ¶ 34.

On March 2, 2018, Partner 1 and another Law Firm attorney informed the Target's new counsel that the Law Firm would withdraw from its joint representation of the Target in the SCO matter. *Id.* ¶ 37. By letter, dated March 5, 2018, from Partner 1 to the Target, and countersigned by the Target "after having consulted with [Target's Counsel]," the Law Firm's representation of the Target was terminated. Termination of Representation Letter at 1, 3. The letter stated that the Law Firm "represented you in connection with your October 2017 voluntary interview by [the SCO]," that, "[o]n February 22, 2018, following the proffer [the Law Firm] made to [the SCO] on your behalf, [Target's Counsel] was engaged . . . as co-counsel . . . [and thus,] for a limited period of time, [the Law Firm] and [Target's Counsel] had been jointly representing you," but "you think it appropriate that [the Law Firm] no longer represent you and that [Target's Counsel] solely represent you." *Id.* at 1–2. In addition, the letter states that the Target "waived any potential or actual conflict of interest or breach of duty associated with those concurrent representations" identified in the letter and that the Law Firm "can continue to represent the Firm and [others] and, in doing so, does not breach any duty owed to" the Target. *Id.* at 2.

II. DISCUSSION

As noted, the government seeks "to take the voluntary or compelled testimony of two [Law Firm] attorneys [Partner 1 and Partner 2] with relevant information," Gov't's Mot. at 1, but the Target has indicated "that in pursuing these attorneys' testimony, the government would be inducing them to violate attorney-client privilege or their professional duty of confidentiality," *id.* Accordingly, the government "seeks a ruling from the Court that neither the attorney-client privilege nor the duty of confidentiality bars the government from pursuing" the attorneys' testimony, *id.* at 14, regarding "representations that [the Target] made to the FARA Unit on October 9, 2013, as well as related communications and interactions that [the Target] had with [the subpoenaed Partners 1 and 2] in 2013," *id.* Before reaching the critical issue of whether an attorney-client relationship existed between the Target and the Law Firm and subpoenaed Partners 1 and 2 during the Relevant Period, the Court addresses the threshold issue raised by the Target whether issuance of any ruling in this procedural posture—absent a motion to quash or compel compliance with a grand jury subpoena—is appropriate or instead amounts to an improper "advisory opinion about the consequences of matters that already have occurred or that are not yet ripe for disposition." Target's Resp. to the Gov't's Mot. ("Target's Resp.") at 7, ECF No. 7.

A. The Controversy Is Ripe for Review

The Target posits that Partner 1 and others at the Law Firm "already have breached professional obligations . . . in their formal and informal discussions with [government attorneys]," *id.* at 2, and that the government's motion is an "effort to obtain retrospective absolution for the sins committed by the [Law Firm] attorneys," *id.* at 5. Further, the Target contends that "the government's motion is not ripe because nowhere does the government state that [the Law Firm] has refused to testify," *id.* at 16, and even if the Law Firm were to refuse to

testify, the pending motion "really is seeking absolution rather than evidence," *id.* at 17, as "[t]here is nothing for the government to learn that it does not already know, and no evidence for the government to obtain that it does not already possess," *id.* According to the Target, the government has "manufactured this proceeding," including "last-minute subpoenas," as a prophylactic measure against the "likelihood that any indictment would be dismissed due to prosecutorial misconduct," or that "crucial evidence" would be "excluded at trial." *Id.* at 18.

The Target's arguments on this threshold issue are contradictory and unmoored from long-standing federal court practice. As a starting point, the Target's claim that "[t]here is nothing for the government to learn that it does not already know, and no evidence for the government to obtain that it does not already possess," *id.* at 17, is hard to square with his vigorous attempts to prevent the subpoenaed partners from testifying. The law is well-settled that "the public . . . has a right to every man's evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974) (internal quotation marks and citations omitted). In the pursuit of public responsibility, "the law vests the grand jury with substantial powers . . . [i]ndispensible to the exercise [of which] is the authority to compel the attendance and the testimony of witnesses . . . and to require the production of evidence." *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (internal citations omitted). At the same time, "[t]he right of the public to every man's evidence is, of course, subject to 'except[ion] for those persons protected by a constitutional, common-law, or statutory privilege.'" *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007) (alteration in original) (quoting *Nixon*, 418 U.S. at 709).

"Each of the recognized privileges protects a substantial individual interest or a relationship in which society has an interest, at the expense of the public interest in the search for truth." *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982); *see also Fisher v. United States*,

425 U.S. 391, 403 (1976) (noting that the attorney-client privilege "has the effect of withholding relevant information from the fact-finder"). "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). In light of the attorney-client privilege, grand jury subpoenas that are directed at attorneys "raise special concerns." *See* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:10 (2d ed., rev. Dec. 2018).

Precisely because privileges, such as the attorney-client privilege, are the only bulwarks to the grand jury's substantial authority to compel the attendance and testimony of witnesses, courts and prosecutors have developed procedures for determining whether the attorney-client privilege applies, and, if so, whether an exception enables a person to testify. For example, DOJ's guidelines for issuing grand jury or trial subpoenas to attorneys for information relating to the representation of clients generally require prior authorization of the Assistant Attorney General or a Deputy Assistant Attorney General for the Criminal Division unless certain exceptions are met. *See* U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-13.410. Prior to granting a request for a subpoena, DOJ supervisors consider, *inter alia*, whether a valid claim of privilege exists, whether the information is reasonably needed for the successful completion of the investigation or prosecution, and whether the subpoena is narrowly drawn. *Id.* Prosecutors are encouraged to make "all reasonable attempts" to obtain the information "from alternative sources

before issuing the subpoena . . . unless such efforts would compromise the investigation or case. These attempts shall include reasonable efforts to first obtain the information voluntarily." *Id.*

Although DOJ guidelines encourage prosecutors to tread cautiously when considering subpoenaing an attorney, no law, statute, or ethical rule requires court approval prior to the government taking such an investigative step. Nor should they. In the context of grand jury investigations, which are time-sensitive and unbound from evidentiary and procedural rules that apply elsewhere, "[a]ny holding that would saddle a grand jury with 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." *United States v. Dionisio*, 410 U.S. 1, 17 (1973).

That the government is not required to obtain court approval prior to compelling an attorney to testify before a grand jury does not, however, prohibit federal prosecutors from doing so. Indeed, the D.C. Circuit has, in the context of the crime-fraud exception, approved the use of *in camera, ex parte* proceedings to determine the propriety of a grand jury subpoena issued to an attorney "when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1179 (D.C. Cir. 2006) (internal quotation marks omitted) (quoting *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998)). "[T]he very purpose of conducting an in camera review is to determine which, if any, of a group of documents are privileged. Given this prudential purpose, in camera reviews should be encouraged, not discouraged. In that spirit, federal courts commonly—and appropriately—conduct such reviews to determine whether particular documents are or are not privileged." *In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65, 70 (1st Cir. 2011) (suggesting that district courts are well advised to take this step even if the parties do not request it). The

Supreme Court approved this well-established practice in federal courts as an appropriate method of balancing the need to resolve privilege disputes with the time-sensitive and secret nature of grand jury investigations. *See United States v. Zolin*, 491 U.S. 554, 568–69 (1989); *see also In re Grand Jury Proceedings #5 Empanelled Jan. 28, 2004*, 401 F.3d 247, 256 (4th Cir. 2005) ("[W]hen a grand jury's subpoena is at stake, the standard for evaluating an exception argument must be simple enough for courts to administer swiftly and efficiently, without obstructing the grand jury's mission or squandering judicial resources." (quoting *In re Sealed Case*, 676 F.2d at 814)).

Against this background, the Target's quibbling with the procedural posture of this case rings quite hollow. The Target has been given *more* information and *more* opportunity for adversarial briefing than would be required had the government sought an *ex parte* ruling, without notice, that any attorney-client privilege was waived or vitiated. In response to privilege concerns that the Target has recently raised, the government has prudently, with notice to the Target, sought judicial guidance as to whether the Target's claimed privileged relationship has merit. In the face of a time-sensitive grand jury investigation and the potential that witness testimony might violate attorney-client privilege or ethical rules, the government's motion is plainly not asking the court to "decide questions that cannot affect the rights of the litigants," *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (internal quotation marks and citation omitted), or that "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests," *Flast v. Cohen*, 392 U.S. 83, 96–97 (1968) (internal quotation marks and citation omitted).

As it stands, the Court would be in precisely the same position if the government had made a motion to compel or the Target had made a motion to quash, and, as the crime-fraud exception cases illustrate, *neither* motion is necessary in order for this Court to determine whether a privilege applies. Moreover, where an assertion of privilege blocks the otherwise broad investigative powers of the grand jury, the government is encouraged to be cautious. In the instant situation, where an investigation has been ongoing for over a year, without the Target raising the claim that an attorney-client privilege existed during the Relevant Period, the government had no reason to seek judicial guidance until the Target's recent assertion of privilege. The government is to be commended for seeking guidance to preserve any viable privileges, rather than be stonewalled by assertions that the controversy the Target belatedly precipitated is not ripe for resolution.

Finally, the Target, in the context of arguing that an attorney-client privilege applies to the testimony and materials at issue, has raised serious allegations of prosecutorial misconduct and ethical lapses on the part of the Law Firm and its attorneys. *See* Target's Resp. at 26–35 (arguing Law Firm has already breached its duties of loyalty and will exacerbate the breach further if permitted to testify); *id.* at 42–43 (seeking disqualification of government counsel for its alleged abetment of these breaches). The government and the Law Firm have responded forcefully to such allegations "because it takes [them] seriously and wants to ensure that the government's attorneys are not violating, or causing [Partner 1] to violate, any valid attorney-client privilege or duty of confidentiality." Gov't's Reply to Target's Resp. ("Gov't's Reply") at 4, ECF No. 10; *see also* Law Firm's Supp. Resp. at 1 ("[The Target has] made a number of serious but false allegations that [the Law Firm], and [Partner 1] in particular, breached professional obligations to [the Target] in 2018."); Feb. 27 Hr'g Tr. at 27:23–28:3 (Law Firm

counsel reiterating that "I have a serious problem with the repeated challenges to the integrity and ethics of my clients [the Law Firm and Partners], even notwithstanding the fact that if you notice in their briefs, and even in the dialogue, it's always prefaced with: [m]aybe, we believe, must have been, apparently, speculative.").

The Target's allegations of misconduct and suggestion that "disqualification [of government attorneys] is . . . urgently warranted," Target's Resp. at 42, even apart from the Court's authority to resolve privilege disputes, squarely invoke the Court's "power to control admission to its bar and to discipline attorneys who appear before it." *Paul v. Judicial Watch, Inc.*, 571 F. Supp. 2d 17, 20 (D.D.C. 2008) (internal quotation marks omitted) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)); *see also Groper v. Taff*, 717 F.2d 1415, 1418 (D.C. Cir. 1983) ("[T]he district court bears responsibility for supervising the members of its bar and its exercise of this supervisory duty is discretionary . . . ."). "Courts must also recognize of course that disqualification motions may be used as procedural weapons to advance purely tactical purposes." *Paul*, 571 F. Supp. 2d at 20 (internal quotation marks omitted) (quoting *In re Am. Airlines, Inc.*, 972 F.2d 605, 611 (5th Cir. 1992)). Thus, the Target's demand for disqualification of government counsel, standing alone, would suffice to create a live controversy for this Court.

Moreover, the Target's allegations of ethical wrongdoing further illustrate why the privilege disputes at issue are ripe. Whether as a question of ripeness or standing, "prosecutors' efforts to avoid sanctions, and the resulting reduction in available evidence in grand-jury and other criminal proceedings, demonstrate sufficient injuries to establish federal-court jurisdiction." *See United States v. Supreme Court of N.M.*, 839 F.3d 888, 900 (10th Cir. 2016) (citing cases considering this issue as a ripeness question). "The threat of ethics enforcement is

genuine, compliance costs are real and immediate, and the chilling effect on attorney subpoena requests constitutes an injury sufficient to support a justiciable controversy." *Stern v. U.S. Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 13 (1st Cir. 2000) (citing *United States v. Colo. Supreme Court*, 87 F.3d 1161, 1165–67 (10th Cir. 1996)).

Accordingly, the Target, in arguing that this dispute is not ripe, illustrates precisely why it is. First, the Target's assertion of privilege with respect to the subpoenaed partners' testimony appropriately prompted the government to follow the well-established practice of seeking judicial guidance as to whether a privilege exists. Second, the Target's allegations of ethical misconduct on the part of government and private attorneys and claim that "disqualification is . . . urgently warranted," Target's Resp. at 42, demand immediate resolution of the privilege issues in this case, especially in the context of a time-sensitive grand jury investigation.

B. No Privileged Relationship Existed Between Target and Law Firm or Subpoenaed Partners during the Relevant Period in Connection with FARA Unit's Inquiries

The Target, as the party asserting the existence of an attorney-client privilege to bar testimony, bears the burden to establish that a privileged relationship existed between himself and the Law Firm and the subpoenaed partners during the Relevant Period in connection with the FARA Unit inquiries. *See FTC v. Boehringer*, 892 F.3d 1264, 1267 (D.C. Cir. 2018) ("The burden is on the proponent of the privilege to demonstrate that it applies."); *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (per curiam) ("It is settled law that the party claiming the privilege bears the burden of proving that the communications are protected."). At the hearing, the Target's counsel indicated that, other than the Target's 21-page *ex parte* declaration, with forty exhibits, as well as other documents submitted in the record, he had no additional evidence to present in support of his claimed privileged relationship and rested on this evidence as sufficient to sustain his burden. Feb. 25 Hr'g Tr. at 22:18-21 (Target's counsel stating: "The

[Target's] declaration, I think, bears his burden of showing that he had an attorney-client relationship with [the Law Firm] starting in 2013 . . . ."). The government disagrees. *See* Feb. 27 Hr'g Tr. at 36:19-23 (government counsel positing that Target's "belief was not reasonable and there's not support for that being a reasonable belief.").

"Whether an attorney-client relationship existed is to be determined by the fact finder based on the circumstances of each case." *Teltschik v. Williams & Jensen, PLLC*, 683 F. Supp. 2d 33, 45 (D.D.C. 2010) (citing *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982)); *see also United States v. Royal Bank of Scot. Int'l, Account No. 2029-56141070* ("*RBS Account*"), 554 F.3d 123, 129 (D.C. Cir. 2009) (explaining that "attribution of a lawyer-client relationship" between a majority shareholder and a corporation's attorneys depends on "the particular facts" (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ("RESTATEMENT") § 14 cmt. f (AM. LAW INST. 2000)); *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006) (observing that an "attorney-client relationship . . . can be formed without any signs of formal 'employment'"). "[N]either a written agreement nor the payment of fees is necessary to create an attorney-client relationship." *In re Lieber*, 442 A.2d at 156.

Replete in the Target's filings, including his *ex parte* declaration, is the Target's expression of his belief that the subpoenaed partners were representing him personally, as well as the Law Firm, during the relevant time period. *See, e.g.*, Target's Resp. at 2–3 ("[The Target] also believes that [the Law Firm] represented him in the underlying 2013 inquiry before the NSD's FARA Unit . . . ."); Target's Decl. ¶¶ 7, 25, 31, 35. Although the client's perception of the relationship is relevant, it is not dispositive, *see In re Dickens*, 174 A.3d 283, 297 (D.C. 2017); *In re Fay*, 111 A.3d 1025, 1030 (D.C. 2015), and the Target concedes that his subjective belief, standing alone, is insufficient to show the existence of an attorney-client relationship. *See*

Target's Resp. at 21 ("An *unreasonable* belief is not enough . . . ."); *see also* Feb. 25 Hr'g Tr. at 24:8-9 (Target's counsel conceding "that actually the test of whether there was an attorney-client relationship is an objective test.").

Indeed, the test for the formation of an attorney-client relationship is one of objective reasonableness. *See* RESTATEMENT § 14 cmt. e ("Even when a lawyer has not communicated willingness to represent a person, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services, and the lawyer, who reasonably should know of this reliance, does not inform the person that the lawyer will not do so . . . ." (internal citation omitted)); *Queen v. Schultz*, No. 11-cv-871 (BAH), 2015 WL 13680823, at *3 (D.D.C. May 7, 2015) ("[T]he subjective belief of a party is of only minimal, if any, relevance to whether the attorney-client relationship formed."); *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 339 (4th Cir. 2005) (stating that "the putative client must show that his subjective belief that an attorney-client relationship existed was reasonable under the circumstances"); *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985) ("[W]e think no individual attorney-client relationship can be inferred without some finding that the potential client's subjective belief is minimally reasonable.").

To assess the reasonableness of the Target's belief, the ultimate question is whether "a client and an attorney 'explicitly or by their conduct, manifest[ed] an intention to create the attorney/client relationship.'" *Headfirst Baseball LLC v. Elwood*, 999 F. Supp. 2d 199, 209 (D.D.C. 2013) (quoting *In re Ryan*, 670 A.2d 375, 379 (D.C. 1996) and citing RESTATEMENT § 14); *accord United States v. Crowder*, 313 F. Supp. 3d 135, 144 (D.D.C. 2018); *Armenian Genocide Museum & Mem'l, Inc. v. Cafesjian Family Found., Inc.*, 691 F. Supp. 2d 132, 154 (D.D.C. 2010). In analyzing this question, "courts have considered factors," such as (1) "the

character or nature of the information allegedly shared with the attorney," (2) actions taken by the lawyer "on behalf of the client," (3) "the payment of fees" and the "existence of a formal agreement," and (4) "the passage of time between the alleged former representation and the current litigation." *Headfirst Baseball LLC*, 999 F. Supp. 2d at 209 (collecting cases) (internal quotation marks omitted); *see also* RESTATEMENT § 14 cmt. c (stating that a "client's manifestation of intent that a lawyer provide legal services to the client may be explicit," or "manifest from surrounding facts and circumstances").

Certainly, no *explicit* manifestation of an intent for the formation of an attorney-client relationship between the Target and the Law Firm or the subpoenaed partners during the Relevant Period has been presented here. To the contrary, the record contains no agreement or other documentation, no explicit contemporaneous statement, no payment of fees, no testimony or declaration from any witness, other than the Target, affirming the existence of such a relationship, no regular firm practice where such a representation would be expected—or any other clear evidence—to support a finding that the Law Firm, its General Counsel or its other partners were acting as the Target's personal attorney during the Relevant Period in connection with the FARA Unit inquiries.

Instead, the Target's argument that his belief was reasonable is based on (1) his reading of his emails with the Partners and the correspondence with the FARA Unit, and (2) the fact that any need for the Law Firm to register under FARA would likely require him personally to register as well, giving him a "personal stake" in the outcome of the FARA Unit inquiries, in which the General Counsel was involved in resolving. *See* Target Resp. at 21–24; Feb. 25 Hr'g Tr. at 28:21-25 (Target's counsel arguing that the persons who worked on the Report "certainly had a personal stake in the outcome [of the FARA Unit inquiries]; and they were looking to the

firm's lawyers to help represent them, as well as the firm, in resolving that issue in a favorable way."). None of these surrounding circumstances, however, support a finding that his belief was reasonable.

1. Internal Communications and Correspondence with FARA Unit

The internal communications among the Law Firm partners, including the Target, and correspondence with the FARA Unit are far more consistent with a finding that all the partners were working on behalf of the firm as an entity, not for the Target—or any other firm employee—personally.

First, all letters from the FARA Unit were about the Law Firm's possible need to register pursuant to FARA, without reference to any individuals or firm employees. *See, e.g.,* 1st FARA Letter at 1 ("It has come to our attention . . . that *your firm* may be engaged in activities on behalf of the Ministry of Justice of the Government of Ukraine . . . [i]n order that we may determine whether *your organization* is required to register under FARA, please provide . . . a description of the activities *the firm* has engaged in . . . ." (emphasis added)); 2nd FARA Letter at 1 ("This will acknowledge receipt of your letter . . . concerning *your firm's* possible obligation to register . . . . We have reviewed the materials, and need additional information to determine whether *your firm* is obligated to register under the Act." (emphasis added)); 3rd FARA Letter at 1 ("[The Law Firm] must register under FARA as an agent of the Ministry."); 4th FARA Letter at 1 ("We [] find based upon the information you brought to our attention that *your firm* has no present obligation to register under FARA." (emphasis added)). Likewise, the responses to the FARA Unit each expressly addressed only the Law Firm's FARA obligations. *See* 1st Law Firm Letter at 2 ("[*Name of Law Firm*] work was conditioned on the understanding with the client that the *Firm* would not provide any services that would be covered by [FARA] or would require

registration under FARA." (emphasis added)); 2nd Law Firm Letter at 2 ("In addition to giving the report to representatives of the Government of Ukraine, the *law firm* on December 12-13, 2012 provided a copy of the report . . . to [three journalists]." (emphasis added)). The responses were sent over the Target's signature, prompting the FARA Unit to address its last three letters to the Target. The Target's ultimate role as the correspondent with the FARA Unit stems from his role as the primary author of the Report and simply does not support the existence of the privileged relationship claimed by the Target since the Target was responding on behalf of the Law Firm. The substance of the letters focused entirely on whether the *Law Firm's* duties under FARA had been triggered, and the correspondence arises out of the *Law Firm's* need to respond.

Second, with respect to the Law Firm's 2nd FARA Letter, the Target "did not appear to intend to seek [Partner 1's] review at all until [the Co-Author] suggested it shortly before [the Target] planned to send the response [to the FARA Unit]," Gov't's Reply at 9; *see also* Law Firm's Resp. at 6; Target's Resp., Ex. 14, Email from Co-Author to Target (May 28, 2013, 4:02 PM) at 1; Target's Decl. ¶ 9. Moreover, despite having the 2nd FARA Letter for the months of April and May, during which time the Target and the Co-Author drafted a response, Partner 1 did not even have the 2nd FARA Letter until May 29, 2013, *see* Partner 1's May 28, 2013 Email Requesting 2nd FARA Letter, less than one week before the Law Firm submitted its final response to the FARA Unit on June 3, 2013, *see* 2nd Law Firm Letter at 1. The Target's last-minute consultation with Partner 1, prompted at another partner's suggestion, about this key correspondence with the FARA Unit underscores that the Target was not in fact relying on Partner 1 to represent him personally. Indeed, given Partner 1's admitted lack of familiarity with the obligations of FARA, *see* Target's Resp., Ex. 6, Email from Partner 1 to Target and Co-Author (Dec. 22, 2012, 2:22 AM), ECF No. 7-6, and limited knowledge about the Target's work

on the foreign government engagement, which was the focus of the FARA Unit's inquiries, Partner 1's ability to assist with the response was limited. As to Partner 2, the record is bare as to whether he was consulted either. This lack of consultation with the subpoenaed partners underscores that they were not acting as the Target's personal attorneys, but instead were relying on the Target to help them represent the Law Firm's interests.

Third, upon receipt of the 3rd FARA Letter on September 9, 2013, indicating the FARA Unit's conclusion that the Law Firm was required to register, the Target forwarded the letter to Partner 1 and another partner, with the comment that he was reviewing available options to challenge the FARA Unit's determination. Target's Decl. ¶ 11; Target's Decl., Ex. 17 ("DOJ has concluded that we should register under FARA. I am looking at what options are available, if any."). The Target's first reaction, at least, was not to seek these partners' legal counsel either on the Law Firm's behalf or his own, but to analyze the situation himself. The record indicates that Partner 1 responded ten days later, on September 19, 2013, when he asked whether the Target had time to "catch up re: the FARA registration issue." Target's Decl., Ex. 18; Target's Decl. ¶ 11. Partner 1's delayed and minimal response, in combination with the Target's claim that he himself was researching the issue, is more consistent with the conclusion that Partner 1 was not representing the Target in the matter but instead the reliance was the other way around: Partner 1 was relying on the Target to help represent the Law Firm in the face of the FARA Unit's conclusion about the firm's noncompliance with FARA registration requirements.

Fourth, after receiving the 3rd FARA Letter, the Target wrote to FARA indicating that Partner 1 would be calling to request a meeting. In his brief letter, "[the Target] did not identify [Partner 1] as his personal attorney," but rather, as a "partner in the New York office of [the Law Firm]" and "the General Counsel for the law firm." Law Firm's Resp. at 7; *see* Target's Decl.,

Ex. 33. In this response, the Target did not hold Partner 1 out to be his personal attorney but only the firm's attorney.

In sum, the Target's correspondence with the FARA Unit was plainly on behalf of the Law Firm, and his interactions with Partners 1 and 2 during the preparation of those responses evidence no explicit or even implicit reference to the partners' personal representation of the Target or the Target even seeking their legal counsel on his personal behalf.

2. A Personal Stake in the Outcome

The Target acknowledges his understanding that Partner 1, when discussing the appropriate response to the FARA Unit's initial letter to the Law Firm, was "representing the firm," since, on its face, the letter sought "information to determine whether [the Law Firm] was required to register under FARA." Target's Decl. ¶ 7. At the same time, however, the Target avers to his belief that Partner 1 "was representing me personally as well," *id.*, since if the firm "was required to register as an agent of Ukraine in connection with the preparation and release of the Tymoshenko Report, then [he] would also be required to register as a foreign agent, along with other firm attorneys," and thus "each had a personal stake in the outcome of the FARA inquiry," *id.*, including possible "criminal penalties," Feb. 25 Hr'g Tr. at 31:12.

As a legal matter, the Target cites no cases supporting the proposition that an employee having a personal stake in the same matter as an organization, makes reasonable the assumption that the organization's counsel has a privileged relationship with the employee. To the contrary, the "default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption." *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001); *see also RBS Account*, 554 F.3d at 129 (quoting RESTATEMENT § 96 cmt. b for the proposition that "[b]y

representing the organization, a lawyer does not thereby also form a client-lawyer relationship with all or any individuals . . . who have an ownership or other beneficial interest in it . . . ." (alterations in original) (internal quotation marks omitted)); D.C. RULES OF PROF'L CONDUCT r. 1.13 (providing that "[a] lawyer employed or retained by an organization represents the organization," and not the organization's "directors, officers, employees, members, shareholders, or other constituents"); D.C. RULES OF PROF'L CONDUCT r. 1.7 cmt. 21 (stating that "[o]rdinarily [the] client's affiliates (parents and subsidiaries), other stockholders and owners, partners, members, etc., are not considered to be clients of the lawyer."); *In re Grand Jury Proceedings*, 156 F.3d 1038, 1041 (10th Cir. 1998) (explaining corporate employees "must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities" (internal quotation marks omitted) (quoting *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986), and *United States v. Int'l Bhd. of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997)). "This makes perfect sense because an employee has a duty to assist his employer's counsel in the investigation and defense of matters pertaining to the employer's business." *In re Grand Jury Subpoena*, 274 F.3d at 571.

Despite the default rule that the General Counsel represents the entity and not individuals within the entity, the Target twists the absence of an *Upjohn* warning to the Target as evidence that the subpoenaed partners intended to represent him personally. *See* Target's Resp. at 25–26. This argument mischaracterizes the purposes of an *Upjohn* warning and the circumstances in which an *Upjohn* warning is needed.

An *Upjohn* warning is typically given to an organization's employees at the beginning of an internal investigation or dispute to make clear that corporate counsel is not the personal

counsel of the employees. *See Upjohn Co.*, 449 U.S. at 397. As the government correctly points out, the Law Firm had no reason to suspect that the firm's interests and the Target's interests diverged during the Relevant Period, which would trigger the need for an *Upjohn* warning. *See* Gov't's Mot. at 18; *see also* D.C. RULES OF PROF'L CONDUCT r. 1.13 cmt. 9 ("There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation.").

Even if the Law Firm and the Target's interests had diverged in 2013, the Target, himself a sophisticated attorney, would have no need of an *Upjohn* warning to know that the firm's General Counsel was not his personal attorney and such an assumption would not have been reasonable for an attorney in the Target's position. *See* D.C. RULES OF PROF'L CONDUCT r. 1.13 (providing that "[a] lawyer employed or retained by an organization represents the organization," and not the organization's "directors, officers, employees, members, shareholders, or other constituents"); *RBS Account*, 554 F.3d at 129 (quoting D.C. RULES OF PROF'L CONDUCT r. 1.13 cmts. 1–2, for the proposition "that although an organization can act only through its constituents, 'that does not mean . . . that constituents of an organizational client are the clients of the lawyer'"); *id.* (quoting RESTATEMENT § 96 cmt. b to note that "[b]y representing the organization, a lawyer does not thereby also form a client-lawyer relationship with all or any individuals . . . who have an ownership or other beneficial interest in it . . . ." (alterations in original) (internal quotation marks omitted)). Thus, the absence of an *Upjohn* warning from the

Law Firm's General Counsel, in these circumstances, does not indicate that the Law Firm intended to form an individual attorney-client relationship with the Target.

3. Additional Considerations

Additional circumstances surrounding the claimed privileged relationship demonstrate that none existed during the Relevant Period. For example, the Target contends that the Law Firm's representation of the Target happened as "a continuum," Feb. 25 Hr'g Tr. at 22:25, "starting in 2013, continuing throughout several iterations of different processes that were all raising questions about the very same thing, the Tymoshenko report, the funding for the report, and the media contacts that he had about the report, all of those things . . . into 2017," *id*. at 22:20–23:6. This expansive understanding of the period of representation simply is not reflected in the only contemporaneous record formally acknowledging the representation that indisputably existed. Specifically, the March 5, 2018 Termination of Representation Letter "memorializ[ing] the terms of [the Target's] prior engagement of [the Law Firm]" makes no mention of any representation predating October 2017. *See* Termination of Representation Letter at 1. If the alleged privileged relationship in connection with the same matters had begun prior to October 2017, the Target would, should and could have referenced any earlier period where the privilege attached to preserve his secrets and confidences, but the Termination of Representation Letter makes no reference to any period before October 2017.

Courts have also considered "the passage of time between the alleged former representation and the current litigation," *Headfirst Baseball LLC*, 999 F. Supp. 2d at 209, to determine whether the purported client's belief in an attorney-client relationship was reasonable. As the government, Law Firm, and subpoena recipients note, the Target has raised an argument that the subpoenaed partners were his personal attorneys during the Relevant Period for the first

time at the "eleventh hour," just as the government sought the subpoenaed partners' testimony. *See* Gov't's Mot. at 15; Feb. 27 Hr'g Tr. at 28:5-8 ("[F]or the first time, roughly [three to four] weeks ago, we [the Law Firm and subpoena recipients] heard all of a sudden that there was an attorney-client relationship in 2013" but "[t]hat had never been anyone's position."). Significantly, the Target can point to no earlier, let alone contemporaneous, statement evidencing even his own subjective belief of the attorney-client relationship. Even crediting the Target's sworn declaration as a genuine statement of his subjective belief, from an objective point of view, asserting an attorney-client relationship for the first time six years after the purported representation occurred is far more consistent with a legal argument that was manufactured after the fact than with a reasonable belief based on the circumstances as they existed at the time.

III. CONCLUSION

The Target has failed to show that, on the record presented to the Court, his subjective belief was reasonable that an attorney-client relationship had formed between himself and his former law firm and its partners between December 2012 and January 2014, when the Law Firm responded to FARA Unit inquiries about the Law Firm obligation compliance with FARA registration requirements. Ultimately, the Target's assertion of an attorney-client privilege for this time period is without foundation, and the Target has failed to sustain his burden of showing that an attorney-client relationship existed between the Target and the Law Firm and its partners.

Accordingly, as already ordered, the government's motion is granted in so far as this motion seeks a finding that the Target did not have an attorney-client relationship with the subpoenaed partners during the Relevant Period in connection with inquiries from the FARA Unit. *See* Minute Order (Feb. 27, 2019). In addition, the government, the Target and the Law Firm are directed to confer, within 30 days of the return of an indictment against the Target,

declination decision, or lapse of the statute of limitations period, whichever occurs earliest, and to submit a joint report advising the Court whether any portions of the Memorandum Opinion may be unsealed and, if so, proposing any redactions.

Date: March 4, 2019

BERYL A. HOWELL
Chief Judge