UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-20549-CR-LENARD/OTAZO-REYES(s)(s)

UNITED STATES OF AMERICA,

Plaintiff,

v.

PHILIP ESFORMES, *et al.*,

Defendant.
_____/

ESFORMES' MOTION TO STRIKE DISCUSSION OF PRIVILEGED MATERIAL, I.E., EXHIBIT 21 RE: GOVERNMENT'S RESPONSE [ECF 312] TO ESFORMES' MOTION TO DISQUALIFY [ECF 275]

In light of Mr. Esformes' objections to the Prosecution Team's storage and use of privileged materials, on April 25, 2017, Magistrate Judge Otazo-Reyes ordered the Prosecution Team to transfer custody and control of the documents seized in the July 2016 search of Eden Gardens. [ECF 295].

On April 28, 2017, after purportedly surrendering all the Eden Gardens materials to Magistrate Judge Otazo-Reyes, the Prosecution Team filed its *Opposition To Defendant's Motion to Disqualify the Prosecution Team, Etc.,* with references to Exhibit 21 (filed under seal), see ECF 312 at 28, documents seized from Eden Gardens, which were created by Norman Ginsparg, Esq. and his legal assistant Jacob Bengio, at the direction of Esformes' criminal defense counsel. In its Opposition, the Government argued that those documents identified as privileged in Mr. Esformes' motion to disqualify were not really privileged due

to the "crime-fraud" exception. The Prosecution Team then criticized Mr. Esformes for not sua sponte addressing their crime-fraud claim: "Incredibly, Defendant entirely ***fails to address the crime-fraud exception*** to the attorney-client privilege in his lengthy papers." ECF 312 at 26 (emphasis added).

As a threshold matter, the burden was on the government to raise a crime-fraud claim by bringing that claim ***to a judge before*** any contested documents would be reviewed by the Prosecution Team or their contents made part of the public record. Instead, the Prosecution Team made its own determination without approval by any Court and publicly discussed the contents of the contested documents – e.g., the project undertaken by attorney Ginsparg and his assistant Jacob Bengio in collaboration with defense attorney Descalzo ("the Descalzo work product") – in its publicly-filed pleading. ECF 312 at 28. This conduct is particularly troubling because the Prosecution Team had been on notice of the privileged nature of the Descalzo work product no later than September 2016, when Bengio's counsel and later Ginsparg's counsel informed prosecutors Young and Bradylyons of the privileged nature of those documents. See Proffers of David Markus (ECF 346-10) and Robin Kaplan-Eliani (ECF 346-11); see also Declarations of Michael Pasano (ECF 346-6) and Marissel Descalzo (ECF 346-5).[1/]

At that point, after having been put on notice of the privilege claim, the Prosecution Team had only *one* option: Notify the privilege holder (Mr. Esformes) that the Prosecution

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[1/] Counsel have redacted from the public filing the portions of the declaration that describe in detail the nature of the assignment but will be providing the Court with the unredacted version *in camera*.

Team was in possession of the document and also notify the Court, so that ***the Court***, not the Prosecution Team, could resolve any crime-fraud dispute ***before*** the Prosecution Team continued using the document.[2/] The Prosecution Team usurped both Mr. Esformes' right to have a meaningful opportunity to contest the crime-fraud claim[3/] and this Court's authority to make the crime-fraud determination before the Prosecution Team used the contested documents again. *See United States v. Abbell*, 914 F. Supp. 519, 521-22 (S.D. Fla. 1995) ("The prosecution team shall not examine" the potentially privileged material "prior to this Court's approval of recommendations made by the Special Master as to the responsiveness and privilege issues with the exception of any documents to which Defendants ... to assert any privilege."); *United States v. Pedersen*, No. 3:12-cr-00431-HA, 2014 WL 3871197, at *29 (D. Ore. Aug. 6, 2014) ("it is obvious that no government entity should intentionally review privileged materials without the express approval of the court"); *United States v Taylor*, No. 10-86-P-H, 2010 WL 2924414 (D. Maine July 16, 2010), approving use of government taint team but with "a proviso that [the defendant] be afforded the opportunity

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[2/] *See generally United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1039 (D. Nev. 2006) ("Because the Government did not provide or implement any procedure for notifying SDI of the taint attorney's privilege decisions or afford SDI an opportunity to challenge those determinations in court before the documents were provided to the Prosecution Team, it is doubtful that the court would have approved the Government's taint procedures if SDI had challenged them.") (citations omitted).

[3/] *See United States v. Trenk*, 385 Fed. Appx. 254 (3d Cir. 2010) ("where a fact finder undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has the absolute right to be heard by testimony and argument"); *See In re: Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (where holders of privilege would have had no opportunity to dispute taint team's privilege determination, court "[did] not see any check in the proposed taint team review procedure against the possibility that the government's team might make some false negative conclusions, finding validly privileged documents to be otherwise").

to seek court review prior to the turnover of any arguably privileged documents to the prosecution"); *In re Search of 5444 Westheimer Rd. Suite 1570*, Misc. Action No. H-06-238, 2006 WL 1881370, at *3 (S.D. Tex. July 6, 2006) (noting that courts have upheld "taint team" review in circumstances in which, inter alia, "the members of the taint team would not be involved in the prosecution, and the defendants would have the opportunity to object to any privilege determinations made by the taint team[,]" with such objections ultimately being resolved by the court before materials were turned over to the prosecution team).[4/]

The Prosecution Team compounded the improper use of the Descalzo work product by not including all copies of it with the Eden Gardens materials surrendered to Magistrate Judge Otazo-Reyes. See ECF 295, 339. That conduct not only contradicted the assurances given to Magistrate Judge Otazo-Reyes that "nobody is going to see" the Eden Gardens documents but also the assurances given to this Court on May 5, 2017, that the prosecutors had "agreed not to review [them] until the above described pending motions are resolved." Response, ECF 328, at p. 2.

[4/] *See also United States v. Taylor*, 764 F. Supp. 2d 230, 235 (D. Me. 2011) ("I conclude that the government behaved reasonably here by immediately seeking judicial instructions once its agent noticed that e-mail headers reflected communications between lawyer and client." Even the cases cited by the government in its *Motion for Approval of Filter Process,* ECF 227 at 6, require judicial review. *E.g.*, *In re Ingram*, 915 F. Supp. 2d 761, 763 (E.D. La. 2012) ("After the filter AUSA determines which e-mails are subject to the attorney-client or work product privileges ("privileged e-mails") and those which are not ("non-privileged e-mails"), Ingram's attorneys will review the non-privileged e-mails and they will be given the opportunity to challenge the filter AUSA's determination. If the filter AUSA and Ingram's attorneys cannot agree as to whether an e-mail is or is not privileged, the Court shall resolve the dispute.").

D. The Requested Relief

The Court should strike all discussions of the contents of the work product from the pleadings already filed, direct that the Clerk's Office seal those pleadings, and order that the pleadings be re-filed with the contested material removed.

CERTIFICATE OF SERVICE

This document was served via CM/ECF on the date stamped above.

Respectfully submitted,

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