UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

UNITED STATES OF AMERICA, )
)
*Plaintiff,* )
)
PHILIP ESFORMES, *et al.,* )
)
*Defendants*. )
_____)

**ESFORMES' RESPONSE IN OPPOSITION TO GOVERNMENT'S MOTION FOR APPROVAL OF FILTER PROCESS [DE 227] AND INCORPORATED MEMORANDUM OF LAW**

The Defendant, PHILIP ESFORMES, through undersigned counsel, respectfully opposes the Prosecution Team's motion [DE 227] for permission to use "filter teams" run by their colleagues at the DOJ Fraud Section, because those teams have proven woefully inadequate to protect Mr. Esformes' privileges and constitutional rights. Pursuant to Rule 53 of the Federal Rules of Civil Procedure, as well as the Court's inherent authority to manage litigation before it, the attorney-client privilege, the work-product privilege, the joint defense or common interest privilege, and the Fifth and Sixth Amendments of the United States Constitution, Mr. Esformes requests the appointment of a Special Master or United States Magistrate Judge to take custody and control of: (A) all records seized from the Eden Gardens Assisted Living Facility ("ALF") on July 22, 2016; (B) all text messages on the iPhones, as well as the notepad, and (C) any other potentially privileged documents currently in the possession of the Prosecution Team. In support of these requests, Mr. Esformes submits the following:

1. As set forth in more detail in the accompanying *Motion to Disqualify the Prosecution Team for Systematic Violations of the Attorney-Client, Work Product, and Joint Defense Privileges*,

the current Prosecution Team has inappropriately obtained, stored and used privileged information and documents from various sources, primarily from: (a) interviews/debriefings of Guillermo and Gabriel Delgado; (b) communications with one or more of the Delgados' attorneys; (c) the wholesale seizure of records from the law office of Mr. Esformes' long-time civil attorney, Norman Ginsparg; (d) the search of Mr. Esformes' home, and (e) a search of the text messages from the iPhones seized from Mr. Esformes' home.

2. The *Motion to Disqualify* also documents in detail how the DOJ Fraud Section and Miami Field Office of the FBI have seized, stored and used this privileged information without (1) search protocols, (2) notification to Mr. Esformes that privileged documents had been seized, and (3) without affording Mr. Esformes an opportunity to challenge the Prosecution Team's conduct before this Court.

3. The *Motion to Disqualify* further documents how the DOJ Fraud Section and FBI Miami Field Office have been involved in several other cases in this District in which privilege violations have recently occurred and how both offices have tried to circumvent the privilege violations by self-appointing various prosecutors and agents as members of "taint teams" in one case, while shifting them to "prosecution teams" in other cases in a dizzying *ad hoc* approach. The end result is that the same group of prosecutors – all but one of whom share the same office building located in the same building at 1400 New York Avenue, N.W., Washington, D.C. – and agents have held conflicting roles in the different cases, often simultaneously, despite working together shoulder-to-shoulder in the same buildings and offices.

4. As discussed in the ensuing Memorandum, while some courts have permitted the use of "taint" or "filter" teams consisting of government officials, others (including several in this

District) have insisted on the use of either Special Masters or Magistrate Judges who do not have the inherent conflict of interest possessed by government-run "taint teams" in government-run prosecutions. Moreover, even when courts have approved the use of government-run "taint teams," Courts have insisted on a meaningful separation of roles and often offices so as to maintain both the reality and appearance of "independence."

5. To date, the DOJ Fraud Section prosecutors – both those assigned to the Prosecution and Taint Teams – have refused to even identify which prosecutors and agents belong to which "team" and who the purported "taint" agents report to.

6. In this case, no taint team was used at all with respect to the Delgados – who were members of a Joint Defense Agreement ("JDA") with Mr. Esformes and his lawyers from May 2014 through the end of September 2015 – with the exception of a roughly one month period in June 2015 when a Fraud Section prosecutor was briefly used to monitor tape recordings made by the Delgados. No taint team was used before, during or at any time after the July 2016 search of Mr. Ginsparg's law office until approximately February 2017 – and only then because undersigned counsel began raising questions about privilege violations. And, that new "taint team" has apparently taken custody of only a fraction of the Eden Gardens materials, while undersigned counsel have continued to find privileged material scattered throughout the discovery.

7. By early March 2017, undersigned counsel alerted the Prosecution Team to concerns about their exposure to privileged material. Undersigned suggested that such exposure compelled disqualification and notified the Prosecution Team that we would be circulating a draft motion/memoranda regarding disqualification for their thoughtful consideration. In a pre-emptive strike, the Prosecution Team filed its *Motion For Approval of Filter Process* [DE 227], stating that

"***the government had no reason to believe that [Mr. Ginsparg] served as a lawyer for the Defendant***." *Id.* at p. 3 n. 2 (emphasis added). As demonstrated in the *Motion to Disqualify*, that assertion is not credible for multiple reasons – among them, that an FBI-302 report documents that Delgado told the Prosecution Team that Ginsparg is Esformes' attorney.

8. The Prosecution Team's motion also states that "[t]he search team was advised that to the extent any even *potentially* privileged, relevant documents were identified during the search, those documents should be segregated into a clearly marked "taint" box." *Id.* at p. 3 (emphasis by the Prosecution Team). That did not happen, and the Prosecution Team knows it, because they themselves admit that "[o]n December 7, 2016, . . . a member of the prosecution team . . . observed a document that may have implicated the attorney-client privilege." *Id* at p.4. Meanwhile undersigned counsel have identified many "potentially privileged" documents scattered throughout the seized boxes, including many clearly marked privileged.

9. The Prosecution Team's motion further states that Mr. Esformes' counsel Marissel Descalzo "was also present during the search." *Id*. That statement is misleading unless by "present" the Prosecution Team means that she was restricted to the parking lot outside of the building being searched. As the Prosecution Team knows, Ms. Descalzo ***was not allowed to even enter the building***, let alone be "present during the search."

10. The Prosecution Team has been making use of these privileged materials since July 22, 2016. Indeed, one of the documents the Prosecution Team has marked as a trial exhibit is a law review article seized from attorney Ginsparg's desk. The Prosecution Team attached another privileged document to one of its pleadings in support of Mr. Esformes' detention. Other documents

were used by the Prosecution Team to confront Mr. Ginsparg in an effort to sway him to cooperate against his client, Mr. Esformes.

11. For more than six months, no effort whatsoever was made by the Prosecution Team to implement a traditional taint team protocol. And the Prosecution Team only acted after the Esformes Defense Team pressed the Prosecution Team for straight answers. Until it filed its *Motion For Approval of Filter Process* [DE 227] on March 10, 2017, the Fraud Section never disclosed its exposure to potentially privileged material. Until March 10, 2017, the Prosecution Team never sought permission from the Court to review/use any of the materials seized from Mr. Ginsparg's law office.[1]

12. Neither the DOJ Fraud Section, the USAO nor the Miami Field Office of the FBI can be allowed to police themselves. Rulings and public chastisements by at least two judges of this Court (Judge Gold and Judge Gayles) have seemingly gone unheeded. Recent intrusions into the attorney-client privilege in the *Arreza* and *Schapiro* cases, as described in Mr. Esformes' *Memorandum in Support of the Motion To Disqualify The Prosecution Team*, also cast doubt on the integrity of the government's proposed taint team protocol – by which the DOJ Fraud Section assigns some prosecutors to work on the Prosecution Team (after they already reviewed/used privileged material) while their colleagues (with whom they share office space *and report to the same supervisor who previously approved the actions of the Prosecution Team*) work on the filter/taint team. The Court should deny the Prosecution Team's motion and instead should appoint a Special

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[1/] On one occasion, a fellow DOJ Fraud Section Trial Attorney was used as a taint prosecutor with respect to tape recordings made by the Delgados. He sought permission from Judge Ungaro to use the recordings but did so entirely *ex parte* – i.e., without giving Mr. Esformes an opportunity to be heard in Court about his attorney-client and joint defense privileges.

Master or Magistrate Judge to take possession and control over all the Eden Gardens documents, the iPhone data, and the note pad, so that a legitimate, bona fide taint review can take place.

## MEMORANDUM OF LAW

### I. THE COURT SHOULD APPOINT A SPECIAL MASTER OR A MAGISTRATE JUDGE TO TAKE CUSTODY OF ALL PRIVILEGED MATERIALS

As discussed in detail in the *Motion to Disqualify* and *Memorandum of Law* in support thereof, the United States Attorneys Manual ("USAM"), polices of the USAO and the virtually unanimous views of federal courts recommend, if not require, that all DOJ prosecutors conduct searches and other investigatory techniques in a professional manner that preserves privileged material and creates or permits a procedure that affords the defendant, or the target of a criminal investigation, a meaningful opportunity to contest in court the government's access to and review of privileged materials. That procedure is intended to be in place before, not after, privileged material is seized. And, if privileged material is seized inadvertently, prosecutors and agents are required to halt their review until such a procedure is in place. That plainly did not happen here.

Instead, the Prosecution Team seized first and then did nothing later, despite knowing that privileged material had been seized. The Prosecution Team even left their own agents to seize and review the fruits of a law office search with *no taint attorney present* to oversee any privilege review.[2] Courts have also roundly condemned the government for creating a taint or filter team with

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[2/] The Third Circuit has squarely rejected the use of a non-attorney federal agent as the first level reviewer for privilege, even when that agent's decisions were subsequently reviewed by "independent federal agents." *In re Search of Electronic Communications in the Account of Chakafattah@Gmail.cojm,* 802 F.3d 516 (3d Cir 2015). As the Third Circuit explained:

> Fattah maintains that only attorneys should be involved in this type of privilege review and that the District Court did not realize a non-attorney agent would be the

(continued...)

the same prosecutor or agent working on *both* teams. For example, the court in *United States v. Pedersen*, No. 3:12-cr-00431-HA, 2014 WL 3871197, at *29 (D. Ore. Aug. 6, 2014), explained:

> The second serious problem with the filter team protocol was that it allowed [the filter AUSA] to assist the prosecution team. The protocol specifically tasked her with reviewing privileged materials and then allowed her "to assist [the prosecution team] with other legal research, writing, and analysis, at the district court level and in any appeals." Ex. 12 at 3. Even under the best of circumstances, there is a risk that privileged material may flow from the taint team to the prosecution. [*United States v. Renzi*, 722 F. Supp. 2d 1100, 1112 (D. Ariz. 2010)] ("the government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations") (citation and quotation omitted). The provision allowing [the filter AUSA] to serve in dual roles, which she in fact did, is difficult to understand and anathema to the very purpose of a taint team.

*Id.* at *30. No court to counsel's knowledge has ever knowingly approved such a procedure.[3]

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[2/](...continued)

> first line review. Thus, Fattah argues that "eliminated from the initial determination of what may be privileged is the only professional qualified to make that determination." Fattah also argues that he should have an opportunity to work with prosecutors to identify privileged documents and that he should be entitled to a court ruling on any documents he claims are privileged before the filter agents turn these documents over to the prosecutorial arm of the Department of Justice (DOJ). Because of the legal nature of the privilege issues involved, *we agree that the first level of privilege review should be conducted by* ***an independent DOJ attorney*** *acceptable to the District Court*. Fattah's remaining arguments regarding the structure of the review process, we believe, are more appropriately addressed by a district court in the first instance on a case-by-case basis. On remand, the District Court may thus, in its discretion, implement those procedures it deems necessary to protect Fattah's privileges.

802 F.3d at 530 (emphasis added).

[3/] In *United States v. Derman*, 211 F.3d 175 (1st Cir. 2000), criminal investigators were allowed to conduct a law office search, where the lawyer himself was the target of the investigation, guided by specific instructions in the warrant for segregating targeted files from unrelated clients of the firm. However, the investigators were supervised on the scene by "a 'privilege team' composed of attorneys separate from the team of searching agents" who were "on hand 'to answer any questions'" and to conduct a thorough review of all items seized for privileged information. 211 F.3d at 181. (continued...)

The Prosecution Team's use of non-lawyer agents from the Prosecution Team to conduct the review also violated DOJ policies. *See* USAM, Department of Justice, § 9-13.000.

Even without this history of throwing caution to the wind by the Prosecution Team, courts have criticized the use of government-run taint teams due to the inherent conflict-of-interest they create. For example, in rejecting the taint team approach, the Sixth Circuit in *In re: Grand Jury Subpoenas*, 454 F.3d 511 (6th Cir. 2006), ruled that the presumed good faith of prosecutors and agents was not enough:

> ....[T]he government taint team may have an interest in preserving the privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations.... [A]n obvious flaw in the taint team procedure ... [is that] the government's fox is left in charge of the appellant's henhouse, and may err by neglect or malice, as well as by honest differences of opinion.

454 F.3d at 523.[4]

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[3]/(...continued)
The district court also made a finding that the agents' preliminary review was "cursory" only. *Id.* Non-lawyer IRS agents also began conducting the search of a business in *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027 (D. Nev. 2006), *until* they were informed that privileged materials were on the premises. Once the government learned about the existence of privileged materials, independent agents were then utilized.

[4]/ *See also United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112 (10th Cir. 1998); *In re Seizure of All Funds on Deposit in Accounts in Names of National Electronics, Inc. at JP Morgan Chase Bank*, 2005 WL 2174052, at *3 (S.D.N.Y. 2005) ("reliance on review by a 'wall' assistant in the context of a criminal prosecution should be avoided when possible"); *United States v. Neill*, 952 F. Supp. 834, 841-42 n. 14 (D.D.C.1997) (indicating that "the more traditional alternative[]" is to "submit[] disputed documents under seal for *in camera* review by a neutral and detached magistrate or by court-appointed special masters") (collecting cases in which procedure with *in camera* review was used); *United States v. Hunter*, 13 F. Supp. 2d 574, 583 & n.2 ("It may have been preferable for the screening of potentially privileged records to be left not to a prosecutor behind a 'Chinese Wall,' but to a special master or the magistrate judge.'"), citing *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) ("reliance on the implementation of a [taint team], especially in the context of a criminal prosecution, is highly questionable, and should be discouraged" and (continued...)

In this District, while some courts have approved the use of taint teams, others have been skeptical and required more protection even without the history of violations that exists in this case. *See, e.g., Black v. United States*, 172 F.R.D. 511, 516-17 (S.D. Fla. 1997) (requiring prior court review of potentially privileged materials); *United States v. Abbell*, 914 F. Supp. 519, 520 (S.D. Fla. 1995) (appointing special master).

However the Court might view the merits of this debate in the abstract, the history of this case demands that the Court appoint either a Special Master or a Magistrate Judge to take custody of the Eden Gardens materials and thus restore some semblance of integrity to the process. This Court has the authority under Rule 53(a)(1) of the Federal Rules of Civil Procedure and its inherent authority to manage litigation before it to appoint a Special Master at the government's expense. In *United States v. Black*, No. 16-cr-20032-JAR, 2016 WL 6967120 (D. Kan. Nov. 29, 2016), the court appointed a Special Master, citing its authority to do so under Rule 53(a)(1) and its inherent authority. The Federal Public Defender had discovered that the attorney-client meetings at CCA-Leavenworth were being recorded and then used by the United States Attorney's Office in its cases.

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[4/](...continued)
finding that "[i]t is a great leap of faith to expect that members of the general public would believe that any such Chinese wall would be impenetrable; this notwithstanding our own trust in the honor of an AUSA"). *Cf. Mitchell v. Metro. Life Ins. Co.*, No. 01 Civ. 2112 (WHP), 2002 WL 441194, at *10 (S.D.N.Y. Mar. 21, 2002) ("In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer's chickens. Whether the screen is breached will be virtually impossible to ascertain from outside the firm. On the inside, lawyers whose interests would all be served by creating leaks in the screen and not revealing the leaks would not regularly be chosen as guardians by anyone truly interested in assuring that leaks do not occur.") (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.6.4, at 402 (West 1986)); *Preventive Med. Assocs., Inc. v. Commonwealth.*, 992 N.E.2d 257, 271-72 (Mass. 2013) ("In future cases, before a judge may authorize the use of a taint team procedure that draws on members of the prosecutor's office to be the taint team members, the Commonwealth must establish the necessity of doing so; use of an independent special master offers a far greater appearance of impartiality and protection against unwarranted disclosure and use of an indicted defendant's privileged communications.").

The court appointed a Special Master at the government's expense to assess the damage, rather than allow a government-run filter team to do the work. This Court should do the same in this case.

WHEREFORE, the Court should appoint either a Special Master or Magistrate Judge to take possession of all potentially privileged material and conduct a taint review under established procedures and deny the Prosecution Teams' motion for use of a government-run "filter" team.

## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on April 14, 2017, this pleading was electronically filed with the Clerk of Court using the CM/ECF which served all counsel of record by transmission of Notices of Electronic Filing generated by CM/ECF.

Respectfully submitted,

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