UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-20549-CR-LENARD/OTAZO-REYES(s)(s)
CASE NO. 16-23148-CV-WILLIAMS

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

ESFORMES' MOTION TO DISQUALIFY THE PROSECUTION TEAM FOR SYSTEMATIC VIOLATIONS OF THE ATTORNEY-CLIENT, WORK PRODUCT AND JOINT DEFENSE PRIVILEGES

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INTRODUCTION

The defendant, PHILIP ESFORMES, moves this Court, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, the Fourth, Fifth and Sixth Amendments to the United States Constitution, Rule 501 of the Federal Rules of Evidence, the attorney-client, work-product and joint-defense privileges, and the Court's supervisory power, for an order disqualifying the Prosecution Team in this case.[1] A list of the prosecutors, agents and their assistants currently known to be members of the Prosecution Team will be filed separately as **Exhibit 1** to this motion.[2]

Mr. Esformes further requests an evidentiary hearing on this motion following the production of the discovery requested in his *Motion To Compel Discovery re Prosecution Team's Exposure to Attorney-Client Privileged Materials*.

As demonstrated below, the Prosecution Team's case against Mr. Esformes has been infected by a series of privilege violations beginning as early as April 2015. In addition to violating Mr. Esformes' constitutional rights and privileges, the violations have breached: (1) Department of Justice ("DOJ") policies, (2) policies of the United States Attorneys Office for the Southern District of Florida ("USAO"),[3] (3) previous assurances given to Judge Gold about the policies of the USAO,[4] and (4) Judge Gold's order in *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1325 (S.D. Fla.

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[1]Because this motion affects both the criminal and civil cases, we are filing this motion in both cases virtually simultaneously and include both case numbers in the caption.

[2] The prosecutors have refused to provide counsel with a list of who they consider part of the "Prosecution Team" and who they consider part of any supposedly independent "Taint Teams."

[3] The U.S. Attorney for the Southern District of Florida is also counsel of record, having signed all the indictments in this case. See Local Rule 11.1(d). As set forth in **Exhibit 1**, several Assistant U.S. Attorneys ("AUSAs") have been involved in the investigation and several other AUSAs have been involved in the parallel civil case before Judge Williams and in the forfeiture aspect of the case. Moreover, DOJ policies require traveling Trial Attorneys to comply with local policies and practices when prosecuting cases outside of their home base in the District of Columbia.

[4] *See* **Exhibit 2**, *Ex Parte* Motion For an Order That Certain Communications and Documents Made in Furtherance of a Crime are Not Privileged, Case No. FGJ 13-02 (MIA) (S.D. Fla. Sept. 10, 2015).

2009), *rev'd on other grounds*, 652 F.3d 1297 (11th Cir. 2011). The violations discovered to date include:

● The Prosecution Team's violation of the joint defense or common interest privilege created by the oral and written Joint Defense Agreement ("JDA") between (1) Guillermo and Gabriel Delgado and their criminal defense counsel ("the Delgado Defense Team"), and Mr. Esformes and his defense counsel, Michael Pasano and Marissel Descalzo ("the Esformes Defense Team"), to invade the defense camp and record Mr. Esformes, his defense counsel and his civil attorney, Norman Ginsparg – all without prior consultation with or approval by any judge of this Court and without taking any meaningful steps to protect Mr. Esformes' privileges and constitutional rights.

● The Prosecution Team's warrantless seizure of Mr. Esformes' iPhones and one or more documents containing privileged information and subsequent search of the iPhones for privileged text messages after persuading a Magistrate Judge to authorize a warrant for those searches without disclosing that the Prosecution Team knew that the iPhones contained privileged information.[5]

● The July 22, 2016, search of the "Eden Gardens" Assisted Living Facility ("ALF") where the Prosecution Team knew that Mr. Ginsparg maintained his law office without: (1) notice to or approval by DOJ or the USAO; (2) the use, either before or after the search (until early February 2017), of any privilege protocols or independent "taint teams," as required by DOJ and USAO policies and numerous court opinions; and (3) without disclosing to the Magistrate Judge who authorized the search that the Prosecution Team *knew, when it applied for the warrant,* that Mr. Ginsparg's law office was located in the building and that the Prosecution Team intended to search it.

● The Prosecution Team's failure to disclose that it had acquired privileged material from Mr. Ginsparg's law office until the Esformes Defense Team demanded to review the materials and

[5] Mr. Esformes is separately moving to suppress both the initial seizure and subsequent search.

discovered the intrusion.

● The use, over repeated objections by the Esformes Defense Team, of FBI agents – who were either part of or reported to agents from the Prosecution Team – to monitor members of the Esformes Defense Team as they reviewed discovery in a warehouse in Miramar designated by the Prosecution Team as the location where the Esformes Defense Team had to review discovery.[6]

Not surprisingly, the Prosecution Team's case is riddled with privileged information and documents, including the following examples of how the Prosecution Team has made affirmative use of privileged information in this case:

1. During the grand jury phase, the Prosecution Team used JDA-privileged material to support: (1) the obstruction of justice charges in Counts 32 and 33 in the Second Superseding Indictment; and (2) two aspects of the kickback allegations – alleged payments for transportation services and to charities – that the Esformes Defense Team informed the Delgado Defense Team were areas of concern during two privileged joint-defense meetings.

2. The Prosecution Team use of these same allegations to obtain Mr. Esformes' pretrial detention both before this Court and in the Eleventh Circuit.

3. On September 22, 2016, during the detention litigation, the Prosecution Team also filed *Government's Response To Defendant's Declarations Regarding Asset Transfer Documents* (DE 120) and attached as Exhibit B (DE 120-1, p. 4), a typed document which the Prosecution Team described as a "document obtained during the search of *Defendant's office* showing that Greystone and Co. provided managements services for Defendant's health care companies in the past." (DE 120, p. 3; emphasis added). The Prosecution Team well knew that this document was actually

[6] Mr. Esformes is filing a separate motion concerning the warehouse abuses and adopts that discussion herein.

seized from *Mr. Ginsparg's law office.*[7]

4. The Prosecution Team has identified at least one *trial exhibit* that consists of legal research by Mr. Ginsparg – *i.e.*, Mr. Ginsparg's work product: a law review article by Richard Horwood and Jeffery Zaluda, entitled *Asset Protection by Design*, 19 TAX MGMT. EST., GIFTS & TR. J. 119 (1994). The article's description provided by the Prosecution Team shows that the article was seized from Mr. Ginsparg's desk during the search of Eden Gardens.

5. Many other privileged documents seized from Mr. Ginsparg's law office have infected the discovery including: (1) years of detailed billing records from numerous law firms in Miami, Saint Louis and Orlando and at least one private investigator, discussing litigation strategy, areas of "concern," "issues that have been uncovered," the focus of legal research, and the identities of potential witnesses;[8] and (2) a nine-page, single-spaced memo from two of Mr. Esformes' attorneys outlining "Potential Defenses" to False Claims Act and kickback allegations involving Larkin Hospital and Total Pharmacy – allegations that the Prosecution Team incorporated into the indictments.

6. The Prosecution Team improperly seized and has had full access to the hand-written answers to questions posed by Esformes attorney Descalzo to Bruce D. Paler, a partner in Total Pharmacy who, along with his attorney Mark V. Cester of the Chicago law firm Johnson & Colmar, were part of a JDA with the Esformes Defense Team in the case of *United States ex rel. Nehls v. Ominicare, Morris Esformes, and Philip Esformes*, No. 07 C 05777 (N.D. Ill.).

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[7] The Prosecution Team tried to use this privileged document to claim that the proposed purchase of some of Mr. Esformes' facilities to Greystone and Co., a Chicago-based investment company, was somehow nefarious.

[8] For example, in one Eden Gardens box counsel found invoices submitted by a private investigator to another Esformes' attorney Teresa Van Vliet, discussing "issues that have been uncovered." Mr. Esformes will be submitting a sealed set of these and other materials for the Court's *in camera* review.

7. Also found in the materials seized from Eden Gardens were notes, data, and drafts relating to an ongoing defense project that Ms. Descalzo had requested Mr. Ginsparg's law office prepare in 2015 to assist her in defending Mr. Esformes against the Delgados' then-newly-alleged accusations concerning certain payments to the ALFs. Mr. Ginsparg and his legal assistant, Jacob Bengio, undertook that project and produced drafts of that work product to Mr. Esformes' criminal defense team. After the return of the indictment, the Prosecution Team conducted proffers and/or reverse proffers with Mr. Ginsparg and his legal assistant, Jacob Bengio, in September and October 2016, in an effort to convince them to cooperate with the Prosecution Team against Mr. Esformes, their client. When undersigned counsel asked counsel for Messrs. Ginsparg and Bengio about those meetings, they declined to identify documents used by the Prosecution Team to confront their clients, citing a promise of "confidentiality" that the Prosecution Team extracted from Mr. Ginsparg's counsel. The Prosecution Team did not withdraw the confidentially requirement[9] until after undersigned counsel issued a subpoena to Mr. Ginsparg's counsel. Then we discovered that the Prosecution Team had confronted Norman Ginsparg and Jacob Bengio with the work product they had created for the Esformes defense team to try to persuade Mr. Ginsparg and his legal assistant Jacob Bengio to cooperate against their client Mr. Esformes. None of this was disclosed to Mr. Esformes by the Prosecution Team.

Rather than implement a filter process following the seizure of attorney client materials at Eden Gardens in July 2016, the Prosecution Team used the Eden Gardens materials to prepare for trial. In January 2017, undersigned contacted the Prosecution Team to request access to the materials seized from Eden Gardens. In response, in what undersigned understood to be an act of professional courtesy, the Prosecution Team advised that those materials had been scanned and that the

[9] We know of no legal or ethical authority that would justify prosecutors conditioning the disclosure of information to an attorney on a requirement that the attorney conceal from his own client that they possessed and were using privileged material.

Prosecution Team would mail a thumb drive containing scans of the seized materials, rather than require undersigned to travel to the FBI warehouse to sift through the 70 boxes containing the original paper documents seized from Eden Gardens. Undersigned thereafter received by mail a thumb drive labeled "USB #8" with a cover letter stating, "Please find enclosed USB #8 containing scans from the Eden Gardens search warrant." The thumb drive contained more than 17,000 documents, exceeding 179,000 pages of scanned materials.

Upon reviewing the contents of USB #8, undersigned contacted the Prosecution Team to report that the thumb drive contained attorney-client materials seized from Eden Gardens and requested that no one from either the Prosecution or Taint Teams access the materials until the issues could be resolved. Undersigned made arrangements to inspect the original boxes of Eden Gardens documents. At the government warehouse, undersigned inspected many boxes, including "Box 6," which contained privileged materials not reproduced on USB #8, including (1) the Greystone document used by the Prosecution Team during the detention litigation that the Prosecution Team had inaccurately identified as coming from Mr. Esformes' office; (2) the law review article marked as a Prosecution Team trial exhibit (without identifying its source); and (3) drafts of the project that the Esformes Defense Team had asked Mr. Ginsparg and his legal assistant, Jacob Bengio, to prepare in 2015 – which the Prosecution Team used to confront Ginsparg and Bengio during reverse proffer/debriefing sessions in 2016. Undersigned notified the Prosecution Team of its concern that the Prosecution Team was in possession and making use of privileged materials as part of its trial preparation. Only then did a "taint" or "filter" prosecutor finally produce Box 6 on March 10, 2017. Also on that date, the Prosecution Team filed *Government Motion To Approve Filter Process*, [DE 227], disclosing for the first time that three months earlier, back on December 7, 2016, while going through the seized Eden Gardens materials, the Prosecution Team had discovered attorney-client documents.

Between April 2015 and early February 2017, the Prosecution Team summoned a purportedly "independent" prosecutor on three occasions. However, on all three occasions, the "independent" prosecutor was simply a fellow colleague from the DOJ Fraud Section. In Mr. Esformes' *Response in Opposition to Government's Motion For Approval of Filter Process,* he explains how the events outlined in this case are not an aberration. In several recent cases investigated by the FBI Medicare fraud unit, defendants have raised concerns about intrusions into defense work product. The taint procedure unilaterally adopted by the Prosecution Team – *i.e.*, without Court approval or input from the Esformes Defense Team until now – has been to rotate agents and prosecutors from the same unit in and out of Prosecution Teams and Taint Teams from case-to-case, nearly simultaneously, in a game of prosecutorial "musical chairs" similar to the defense version condemned by the Court in *Trejo v. United States*, 66 F. Supp. 2d 1274 (S.D. Fla. 1999).

First, in June 2015, DOJ Fraud Section Trial Attorney Chris Hunter was summoned to oversee the recordings of Mr. Esformes and his criminal defense attorneys by the Delgados.[10] The Prosecution Team never notified or sought permission from a judge or the U.S. Attorney to record privileged conversations, notwithstanding USAO policies and contrary assurances made to Judge Gold in *Shaygan*.[11] Notably, Mr. Hunter works for the same section of DOJ as the Prosecution Team.

Second, on or about February 1, 2017, six months after the search at Eden Gardens, the

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[10] The emails of the Delgados' attorneys reflect that the first time Mr. Hunter's name appears is June 5, 2015, the day the recordings began.

[11] Long before the *Shaygan* debacle, the Eleventh Circuit questioned the propriety of wiring a criminal defense attorney to record conversations with his client "without approval of the United States Attorney's Office or the United States District Court in Miami, Florida." *United States v. Ofshe*, 817 F.2d 150, 1511 n. 3 (11th Cir 1987). Due to the lack of demonstrable prejudice, the Eleventh Circuit declined to reverse Ofshe's conviction but characterized the prosecutor's conduct as "reprehensible" and referred him to the Illinois bar for disciplinary action. 817 F.2d at 1516, n. 6 and 1517.

Prosecution Team belatedly summoned Mr. Hunter to undertake a review of the contents of *one* box of Eden Gardens documents – the box that had been labeled "TAINT" by an unidentified agent – and did so only *after* undersigned counsel uncovered that no taint or filter procedures had been in place with the Eden Gardens materials and complained to the Prosecution Team that privileged materials had been found in the Eden Gardens discovery.

Third, later that month and also belatedly, the Prosecution Team enlisted two other DOJ Fraud Section Trial Attorneys, Leo Tsao and Leslie Garthwaite,[12] to review three additional Eden Gardens boxes – labeled "Court Documents," "Contracts/Legal/Carlton Fields" and "Legal/bank" – but, again, only *after* counsel complained that attorney-client documents were in the Eden Gardens discovery and were apparently accessible to the Prosecution Team.[13] In short, the "Taint Teams" used to date have been chimeras, brought in only to give the appearance of a safeguard for what were already long-standing privilege violations.

PRELIMINARY STATEMENT OF FACTS

I. PRE-INDICTMENT

A. The Indictment of the Delgado Brothers and the Beginning of the Joint Defense Agreement

Sometime in 2014, if not earlier, the Prosecution Team began investigating the Delgado brothers. On May 9, 2014, DOJ Fraud Section Trial Attorneys Allan J. Medina and Elizabeth Young – who also headed the Esformes Prosecution Team – filed a Criminal Complaint and later the first of two indictments against the Delgado brothers. *See United States v. Guillermo and Gabriel Delgado*, Case No. 14-CR-20359-Martinez (S.D. Fla.) (hereinafter the "*Delgado* case" or

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[12] Mr. Tsao and Ms. Garthwaite list their offices as *the same building* in Washington, D.C., as the Prosecution Team prosecutors.

[13] As previously noted, counsel later found privileged material in *additional* Eden Gardens boxes that the Prosecution Team has had full access to since July 2016.

"*Delgado*"). For purposes of deciding this motion, Mr. Esformes requests that the Court take judicial notice of the entire *Delgado* case.

By the end of May 2014, the Esformes Defense Team entered into an oral JDA with the Delgado Defense Team. Between May and December 2014, the defense teams freely shared a variety of strategic information.[14] Among other things, the Esformes Defense Team shared the fruits of numerous witness interviews with the Delgado Defense Team, expressly cautioning: "This will be in the nature of a privileged internal investigation." *See* **Exhibit 3**, Email, June 6, 2014 (4:29 p.m.). In subsequent conversations and emails, the fruits of the interviews were shared with the Delgado Defense Team, including information about someone who was "not a good witness" for the defense.[15]

Although the law does not require JDAs to be in writing, in January 2015, the oral JDA was reduced to writing.[16] One of the Delgados' attorneys emailed a draft of the agreement to Mr. Pasano

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[14] JDA meetings between counsel occurred on May 30, July 17 and August 21, 2014.

[15] *See* Email, Sept. 25, 2014 (12:14 p.m.) (not attached). The details of these communications and emails will be provided to the Court *in camera*.

[16] *See United States v. Schwimmer*, 892 F. 2d 237, 237 (2d Cir. 1989). *See also Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13, 16 (D. D.C. 2005) ("Obviously, a written agreement is the most effective method of establishing the existence of a joint defense agreement, although an oral agreement whose existence, terms and scope are proved by the party asserting it, may be enforceable as well."); *United States v. LeCroy*, 348 F. Supp.2d 375, 381 (E.D. Pa. 2004) ("courts have found that an oral joint defense agreement may be valid") (citations omitted); *United States v. Stepney*, 246 F. Supp.2d 1069, 1080 (N.D. Cal., 2003) ("No written agreement is generally required to invoke the joint defense privilege."); *LaSalle Bank Nat. Ass'n v. Lehman Bros. Holdings, Inc*., 209 F.R.D. 112, 116 (D. Md., 2002) (written joint defense agreement "does no more than confirm the existence of the common legal interest" existing between two parties); *Power Mosfet Technologies v. Siemens AG*, 206 F.R.D. 422, 425 (E.D. Tex., 2000) (written joint defense agreement "not a necessary document"); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 217 (Tenn. App. 2002) ("While a well-drafted joint defense agreement makes it simple for the courts to determine whether the parties intended to participate in a joint defense, an executed agreement is not a necessary ingredient to a common interest privilege claim," citing *Power Mosfet*). *See also* 2 Stephen A. Saltzburg, *et al.*, *Federal Rules of Evidence Manual* at 501-35-36 (8th ed. 2002) ("The parties need not agree in writing to pursue a common interest [...]"). The Restatement has adopted this position as well, stating, "Exchanging communications may be predicated on an express agreement, but formality is (continued...)

who signed it on January 6, 2015. *See* **Exhibit 4**. The JDA specifically provided that if or when the clients' interests became adverse – presumably, for example, *if the Delgados began pursing cooperation agreements with the Prosecution Team* – the Delgado Defense Team was required to "promptly" and/or "within five (5) days" and/or "within two (2) business days," depending on the circumstances, notify the Esformes Defense Team.[17]

Although the Delgados and their lawyers did not provide the Esformes Defense Team with signed copies of the JDA, they were bound to it both through their counsel under agency principles[18] and by their continuous acceptance of the benefits of the agreement.[19] Between December 2014

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[16](...continued)
not required." *See Restatement (Third) of the Law Governing Lawyers* § 76, comment c. *Cf. United States v. Almeida*, 341 F.3d 1318, 1327 n. 21 (11th Cir. 2003) (recommending use of written JDAs).

[17] Paragraphs 5-6 and 11 of the JDA contained notification provisions:

> 5. If any Counsel learns that there has been any willful, accidental, involuntary or other improper disclosure of Joint Defense Information, that *Counsel shall* ***promptly*** *notify all other Counsel who are parties to the Agreement of such disclosure*. The Counsel responsible for such disclosure shall act promptly to retrieve the Joint Defense Information and, to the extent possible, remedy any impact of the disclosure. Such disclosure shall not waive the rights of any Party under the Agreement.
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> 6. If any person or entity requests or demands, by subpoena or otherwise, any Joint Defense Information that has been shared pursuant to the Agreement, Counsel for the Client receiving the request shall, ***within five (5) days****, notify each Party who created and produced or received such Joint Defense Information* (the "Affected Party")....
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> 11. In the event that any Counsel determines that his Client no longer has a mutuality of interest in a joint defense, such Counsel will, ***within two (2) business days*** *of such determination, provide written notice to the other Counsel* of such determination and the Agreement will thereupon be terminated as to that Client.

(Emphasis added.)

[18] Paragraph 20 of the JDA makes this point crystal clear: "By executing this Agreement, all Counsel certify that they have explained the contents of the Agreement to their Clients, that it is their understanding that the Clients understand and agree to abide by the representations made in the Agreement, and that the Clients have authorized Counsel to execute the Agreement."

[19] *See Hemispherx Biopharma, Inc. v. Mid-South Capital, Inc.*, 690 F.3d 1216, 1226 (11th Cir. 2012)
(continued...)

through June 2, 2015, the Delgado Defense Team itself labeled numerous emails sent to the Esformes Defense team as either "attorney client" or "joint defense" privileged, and freely exchanged otherwise confidential material, including information learned from the Prosecution Team's discovery in the *Delgado* case. *See* **Composite Exhibit 5**. One of the Delgado's attorneys also emailed copies of the JDA to the Delgados at least twice. *See* **Exhibit 6**, Undated Email (ESF-45-1300-0000031-44).[20] Finally, the JDA expressly provided that ***"its protections shall be construed and be enforceable to the broadest extent recognized by any reported decision in any Court of the United States***." *See* **Composite Exhibit 4**, JDA, p. 7, ¶ 22 (emphasis added).

In addition to frequently labeling their emails "joint defense," the Delgado and Esformes Defense Teams continued to have meetings to share information pursuant to their common interests. During a JDA meeting on January 19, 2015, for example, the Esformes Defense Team provided the Delgado Defense Team with a summary of numerous witness interviews they had conducted of Mr.

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[19](...continued)
(enforcing unsigned contract based on estoppel principles where there has been performance by other party); *Fonseca v. Taverna Imports, Inc.*, No. 3D15-737, 2017 WL 36264, at *6 (Fla. 3d DCA Jan. 4, 2017) ("'A contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract'") (quoting *Integrated Health Servs. Of Green Briar, Inc. V. Lopez-Silvero*, 827 So.2d 338, 339 (Fla. 3rd DCA 2002)). *Accord CT Miami, LLC v. Samsung Electronics Latinoamerica Miami, Inc.*, 201 So.3d 85, 95-96 (Fla. 3d DCA 2015) *(*"[A] document executed by the party against whom the contract is sought to be enforced is presumptively valid even in the absence of the enforcing party's signature where the events surrounding the contract's execution support a valid contract."); *Alterra Healthcare Corp. v. Bryant*, 937 So.2d 263, 270 (Fla. 4th DCA 2006) (holding that a trial court correctly determined an agreement was binding despite one party's failure to sign the document where the parties performed under the terms of the contract); *Integrated Health Servs. of Green Briar, Inc. v. Lopez–Silvero*, 827 So.2d 338, 339 (Fla. 3d DCA 2002) ("A contract is binding, despite the fact that one party did not sign the contract, where both parties have performed under the contract."); *Dodge of Winter Park, Inc. v. Morley*, 756 So.2d 1085, 1085–86 (Fla. 5th DCA 2000) (holding that a seller could enforce an arbitration provision against a buyer even though only the buyer had signed the provision); *Gateway Cable T.V., Inc. v. Vikoa Constr. Corp.*, 253 So.2d 461, 463 (Fla. 1st DCA 1971) ("A contract may be binding on a party despite the absence of a party's signature. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, for example, by the acts or conduct of the parties."); *Boyd*, 88 S.W.3d at 217 (enforcing unsigned draft of a JDA).

[20] The Prosecution Team produced this email in discovery but someone *removed the date* and names of other recipients.

Esformes' employees, allegations being made by Nelson Salazar, the circumstances surrounding the acquisition of the La Covadonga ALF, and information about a possible witness. *See* **Composite Exhibit 5**, Email, March 10, 2015 (11:27 p.m.).[21] During that same meeting, the Esformes Defense Team revealed to the Delgado Defense Team two specific areas of concern with respect to potential kickback accusations – payments for limousine services and requests for contributions to a charity. *See also* **Composite Exhibit 5**, Emails, Feb. 4, 2015 (5:17 p.m.); Feb. 26, 2015 (9:48 a.m.).

B. The Prosecution Team's Exploitation of the JDA

The original indictment against the Delgados did not include a drug trafficking charge. *See Delgado*, DE 23. On October 10, 2014, a superseding indictment was returned adding Counts 15 and 16 which charged Guillermo Delgado and co-conspirator Emerson Carmona with conspiring to commit health care fraud based on fraudulent prescriptions for oxycodone and oxymorphone and conspiring to distribute those same narcotics in violation of 21 U.S.C. § 846. *See Delgado*, DE 93:12-15. The Delgados' attorneys sought to sever the narcotics charges but on March 25, 2015, Judge Martinez denied the severance motion. *See Delgado*, DE 169. Two days later, the Prosecution Team filed Carmona's plea agreement and "factual proffer," demonstrating that Carmona would be the primary witness against Guillermo Delgado on the narcotics charges. *Id.*, DE 172, 173. Within a matter of days, on or about March 30, 2015, the Delgados retained another attorney to pursue covert plea negotiations with the Prosecution Team. *See also* **Exhibit 2**, at p. 2 (stating that by sometime in April 2015, "[t]he Delgados decided to plead guilty ... and cooperate...."). The Delgado Defense Team did not notify the Esformes Defense Team that a new attorney had been retained to pursue back-channel plea negotiations. Thus, contrary to the express terms of the JDA, the Delgado Defense Team did not "notify" the Esformes Defense Team that the JDA was over – either

[21] The chart has redacted the substance of many of the emails since the information remains privileged. Counsel will show that unredacted emails and explain their significance to the Court *in camera*.

"promptly," within two business days, or within five days. Indeed, no notification was ever given.

On April 29, 2015, Mr. Esformes' counsel met with the Delgados' counsel still under the belief that their conversations were privileged and protected by the JDA. During that meeting, Mr. Pasano and Ms. Descalzo reiterated their concerns about the transportation services and charitable donations, as well as concerns about at least one of the ALFs. However, sensing a change in the Delgados' demeanor since the denial of the severance motion, Mr. Pasano requested that the Delgados sign declarations confirming that their interests were still aligned and stating generally that they had never known Mr. Esformes to be involved in anything "wrong," "illegal" or "improper."[22]

The next day, on April 30, 2015, the Delgados' new plea bargain attorney emailed DOJ Trial Attorneys Allan Medina and Dustin Davis under the "subject" heading "Urgent Delgado Matter" and asked them to call him "to discuss a matter pertaining to this cause that may require immediate attention." *See* **Exhibit 7**, Email, April 30, 2015, 9:59 a.m.[23] Later that day, presumably after the requested discussion, the Delgados' attorneys emailed prosecutors Medina and Davis and confirmed that the plea bargain attorney was authorized to negotiate for the Delgados "without limitation" but would not "at this time, be entering his appearance in this case *and we ask that his representation of Messrs. Delgado not be disclosed to anyone*." *See* **Exhibit 8**, Email, April 30, 2015, 5:03 p.m. (emphasis added). The "anyone" obviously included the Esformes Defense Team, despite the notification provisions of the JDA. Given that the Prosecution Team joined in the covert plan to conceal from the Court and Mr. Esformes that a new attorney was retained to pursue back-channel plea negotiations, the Prosecution Team by then knew that the Delgado and Esformes Defense Teams had been collaborating pursuant to a JDA. Thus, the Prosecution Team ratified both the

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[22]As discussed in the accompanying *Motion to Dismiss*, Mr. Pasano had the right and indeed the duty under the Sixth Amendment to seek such sworn statements. *See Almeida*, 341 F.3d at 1321 n. 8.

[23] The informality of this email demonstrates that the Prosecution Team and the Delgados' plea bargain attorney had already been engaged in plea negotiations, probably for some time.

violation of the notification provision and use of the JDA to inveigle the Esformes Defense Team into unwittingly providing additional privileged information to the Prosecution Team through the conduit of the Delgados' pretend adherence to the JDA.[24]

Subsequent email exchanges on May 1-4, 2015, reflect ongoing discussions between the Delgado lawyers and prosecutors Medina and Davis, presumably about the "urgent" matter. On May 7, 2015, the Delgados' plea bargain attorney emailed the Prosecution Team concerning the contents of a proposed plea agreement. The Delgado lawyer also forwarded a draft of a lengthy motion to dismiss that the Delgados' defense attorneys had planned to file attacking the legitimacy of the kickback allegations, stating that the motion to dismiss would be filed "if it does not appear that we can resolve this matter very quickly." *See* **Exhibit 9**, Email, May 7, 2015, 3:22 p.m. By May 9, 2015, the Delgados' plea bargain attorney emailed prosecutor Medina to assure him that "I'm quite sure G [Gabriel Delgado] is a wrap, but I'm still getting my brain around W's [Guillermo or Willy Delgado's] situation...." *See* **Exhibit 10**, Email, May 9, 2015, 9:44 a.m. Finally, on May 14, 2015, prosecutors Medina and Davis emailed the Delgados' plea bargain attorney, confirming that they were "in the midst of good-faith plea negotiations, and for the reasons articulated by you earlier today on the telephone, the government does not oppose the defendants filing their Motion to Dismiss the indictment, provided both defendants agree not to oppose any forthcoming motion by the government to enlarge the response date by no less than four weeks." *See* **Exhibit 11**, Email,

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[24] *See generally Davenport Recycling Associates v. Comm. of Internal Revenue*, 220 F.3d 1255, 1261 (11th Cir. 2000) ("A ratification occurs when the benefits of the purportedly unauthorized acts are accepted with full knowledge of the facts under circumstances demonstrating the intent to adopt the unauthorized arrangement.") (citations omitted). Ratification can occur "by express affirmation, acceptance of the benefits of the transaction, or silence." or through "a course of dealings." *United States v. Fulcher*, 188 F. Supp. 2d 627, 636 (D. Va. 2002). These principles applies not only to private parties but also to the government. *See, e.g., Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984), and even when the government is not acting in a proprietary manner. *See, e.g., United States v. Flemmi*, 225 F.3d 78, 90 (1st Cir. 2000) (ratification occurs "when the ratifying official knows of the agreement, fails to repudiate it in a timely manner, and accepts benefits under it.) (citations omitted), *cert. denied*, 531 U.S. 1170 (1986).

May 14, 2015, 1:40 p.m.

The only apparent reason why the Delgado Defense Team would need the Prosecution Team's "permission" to file the motion to dismiss was because the Delgados were now firmly aligned with the Prosecution Team and *not* the Esformes Defense Team. That conclusion, of course, was confirmed by the fact that the Delgados' plea bargain attorney viewed Gabriel Delgado's deal as "a wrap" and the Delgados' defense attorneys' stated desire to keep the plea bargain attorney's involvement a secret from the Esformes Defense Team. But the cooperation between the Delgado and Prosecution Teams went beyond mere secrecy of the plea negotiations. They maneuvered to keep the Esformes Defense Team under the mistaken belief that their discussions with the Delgado Defense Team *would still be privileged under the JDA* so that more privileged information could be extracted from the Esformes Defense Team. To further the ruse, the Delgado Defense Team and the Prosecution Team agreed that the Delgados would file the motion to dismiss, thereby conveying the false impression that the Delgados' interests were still aligned with Mr. Esformes' interests – *but with the understanding that the Prosecution Team would never have to prepare a response*. We don't know whether Judge Martinez was alerted to the ruse, or whether he was informed that the motion to dismiss, and the Prosecution Team's extension requests that followed, were unnecessary pleadings designed to keep the Prosecution Team's ploy going.

To further the Prosecution Team's dual-track plan with the Delgados, on May 14, 2015, the Delgado Defense Team filed the lengthy motion to dismiss, memorandum and numerous exhibits, arguing that the Delgados had done nothing wrong, illegal or improper and that their business practices were, in fact, *legal and protected* by both a "safe harbor" for personal services contracts under 42 U.S.C. § 1320a-7b(b)(3)(E), 42 C.F.R. § 1001.952(d) and the First Amendment. *See Delgado* (DE187, 188). In support of the motion, the Delgado Defense Team also filed as exhibits a "business contract" and an "Independent Contractor Agreement," which the Delgado Defense

Team presented as legitimate. *See Delgado*, DE187-2; 187-3. These were the same contracts that the Prosecution Team now contends were "shams."

Between May 14 and early June 2015, the Prosecution and Delgado Defense Teams hammered out the final terms of the plea agreement. On June 5, 2015, the Delgados signed plea and cooperation agreements with the Prosecution Team and agreed to wear a wire and record Mr. Esformes and his defense lawyers. DE208:12. To keep the cooperation secret from the Esformes Defense Team and continue the ploy with the JDA, the Prosecution Team chose not to file the plea agreements in court.

The same day the cooperation agreements were secretly executed, June 5, the Prosecution Team arranged for the Delgados to record conversations with Mr. Esformes and his JDA attorneys. Prior to the taping, however, the Prosecution Team enlisted a colleague in the DOJ Fraud Section, Christopher Hunter, to monitor the recordings. *See* **Exhibit 2**, at p. 4. No court approval was sought to record conversations with the Esformes Defense Team, and the Prosecution drafted two Miami-based FBI agents, Special Agents Alethea N. Duncan and Kathryn Batt – who shared the same offices as the Prosecution Team FBI agents – to work with prosecutor Hunter. Agent Duncan was, virtually simultaneously, the case agent for a prosecution team in *United States v. Gabriela Raurell-Gomez, et al.*, Case No. 16-20477-Cr-Scola (S.D. Fla.), another case involving the search and seizure of documents at a location that a prosecutor was told was functioning as a law office.[25]

According to an ex parte motion filed by prosecutor Hunter with Judge Ungaro (in her capacity as a Duty Judge) months after all the recordings were completed, prosecutor Hunter and

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[25] In that case, on October 3, 2016, another DOJ Fraud Section prosecutor and Miami-based FBI agents executed a post-indictment search warrant at a location that the prosecutor had been told was being used as satellite law office for counsel to prepare for trial. The contents of the satellite law office were nonetheless seized. *See Defendants' Joint Motion To Dismiss the Superseding Indictment Based on the Government's Deliberate Invasion of the Defense Camp*, *United States v. Gabriela Raurell-Gomez, et al.*, Case No. 16-20477-Cr-Scola (S.D. Fla. Oct. 21, 2016) (DE 66). During that litigation, it was revealed that Agent Duncan participated in the search, even though, as noted in the text, she was the case agent for the prosecution team in that case.

Agents Duncan and Batt were acting as a so-called "Taint Team." Acknowledging to Judge Ungaro the existence of a JDA, prosecutor Hunter represented that the Delgado Defense Team "believe[d]" that it was "not bound" by any of the provisions of the JDA because it "believed Attorney #1" – obviously referring to Mr. Pasano – "breached it," presumably by seeking the exculpatory declarations during the April 29th JDA meeting. *See* **Exhibit 2**, at p. 3. The ex parte motion never disclosed to Judge Ungaro, however, that the Prosecution Team's ploy was to make sure that the Delgado Defense Team *continued to operate as if no breach had occurred* so that the Prosecution Team could continue using the JDA as a vehicle for gathering evidence against Mr. Esformes and eavesdropping on the Esformes Defense Team. Under well established principles of contract law, the decision by the Delgados and the Prosecution Team to continue accepting the benefits of the JDA effectively waived any alleged breach and ratified the JDA.[26] Indeed, we know of no legal

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[26] *See, e.g., ITEL Capital Corp. v. Cups Coal Co., Inc.*, 707 F.2d 1253, 1257 (11th Cir. 1983) (affirming ITEL's claim that even if it committed a fraud, Cups thereafter ratified the agreement by continuing to accept the benefits of the bargain after discovering the alleged fraud by ITEL); *Davenport Recycling Associates v. Comm. of Internal Revenue*, 220 F.3d 1255, 1261 (11th Cir. 2000) ("A ratification occurs when the benefits of the purportedly unauthorized acts are accepted with full knowledge of the facts under circumstances demonstrating the intent to adopt the unauthorized arrangement.") (citation omitted); *Kobatake v. E.I. Dupont De Nemours & Co.*, 162 F.3d 619, 627 (11th Cir. 1998) (per curiam) (affirming dismissal of fraud claims where plaintiffs discovered defendant's alleged fraud two years before commencing action and applying "the general rule that 'accepting and retaining the benefits under the contract alleged to be fraudulent after discovering the alleged fraud constitutes an affirmance'") (citations omitted); *Cities Service Helex, Inc. v. United States*, 211 Ct. Cl. 222, 234-35; 543 F.2d 1306, 1313-14 (1976) (material breach did not end the contract where non-breaching party elected to continue performance); *Precision Pine & Timber, Inc. v. United States*, 62 Fed. Cl. 635,650, *2004 U.S. Claims LEXIS 288,* at **49-53 (2004) (holding that Precision Pine waived its right to discontinue performance under a government contract when it "continued performance" on the contracts, at least when it did so without notifying the government that "it continued to reserve its right to terminate for the Government's material breach") (relying on *Cities Service Helex*). *See generally* Restatement (Second) of Contracts § 246(1) ("Except as stated in Subsection (2), an obligor's acceptance or his retention for an unreasonable time of the obligee's performance, with knowledge of or reason to know of the non-occurrence of a condition of the obligor's duty, operates as a promise to perform in spite of that non-occurrence....").

Other courts have characterized the effect of the non-breaching party's continued acceptance of the benefits of a contract after learning of the other party's breach as "ratification. *See, e.g., United States v. Fulcher*, 188 F. Supp. 2d 627, 636 (D. Va. 2002). *See generally* Restatement (Second) of

(continued...)

authority supporting the proposition that a breach by one party in a JDA – even assuming *arguendo* that an Esformes' attorney''s effort to seek the declarations was a breach[27] – *voids* the JDA *entirely*, thereby not only excusing the Delgados from complying with the JDA's notification provisions but

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[26](...continued)
Contracts § 380(2) ("The power of a party to avoid a contract for mistake or misrepresentation is lost if after he knows or has reason to know of the mistake or of the misrepresentation if it is non-fraudulent or knows of the misrepresentation if it is fraudulent, he manifests to the other party his intention to affirm it or acts with respect to anything that he has received in a manner inconsistent with disaffirmance.").

Still other courts have reached similar conclusions under a "waiver" theory. *See, e.g., Jackson v. Bellsouth Telecom.*, 372 F.3d 1250, 1279 (11th Cir. 2004) (a party's right to rescind "is subject to waiver if he retains the benefits of a contract after discovering the grounds for rescission"); *SAC Osage Electric Cooperative, Inc.*, 857 F.2d 486, 490 (8th Cir. 1988) ("Where a contracting party, with knowledge of the breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach" and holding breach waived by the plaintiff's "acceptance" of compensation); *Dahlstrom Corp. v. State Highway Comm. of the State of Mississippi*, 590 F.2d 614, 616 (5th Cir. 1979) (holding that a highway contractor "waived" any right to dispute reduced payments by the Mississippi State Highway Commission due to delays in the construction "by accepting the tendered progress payments"), citing with approval *Wood Naval Stores Export Ass'n v. Latimer*, 220 Miss. 652, 664, 71 So.2d 425, 430 (1954) ("Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he ratifies the transaction, is bound by it, and cannot avoid its obligation or effect by taking a position inconsistent therewith"); *Western Transmission Corp. v. Colorado Mainline, Inc.*, 376 F.2d 470, 472 (10th Cir. 1967) ("It is elementary that an innocent party may waive a breach of a contract and continue performance on his party" and that "[i]f such performance is continued with no conditions attached, the innocent party has made an election and waived the breach"); *First Heights Bank, FSB v. United States*, 51 Fed. Cl. 659, 663-64, *2001 U.S. Claims LEXIS 160* (2001), at **14-15 (upon discovery of contract breach the non-breaching party "has the choice to continue to perform under the contract or to cease to perform, and conduct indicating an intention to continue the contract in effect will constitute a conclusive election, in effect waiving the right to assert that the breach discharged any obligation to perform") (citations omitted); *Blackburn & Associates Constr. & Develop. Co, Inc. v. Carman*, No. 3:06-CV-00573-LRH-VPC (D. Nev. Jan. 9, 2009), *2009 U.S. Dist. LEXIS 1365*, at *11 (holding that "by accepting further performance from Blackburn, Verdi waived its right to stop work on the project and sue Blackburn for total breach of the Agreement")(citing *Restat 2d of Contracts*, §246(1)). *See also HSBC Bank USA, v. Adelphia Comm. Corp.*, Case No. 07-CV-553A (W.D.N.Y. Feb. 12, 2009), *2009 U.S. Dist. LEXIS 10675*, at ** 50-51 (applying quasi-estoppel to bar Adelphia's attempt to void prior conveyances as fraudulent where "Adelphia had knowledge of facts putting it on notice" but "instead of trying to repudiate the allegedly fraudulent conveyances, it chose to remain silent" and "[t]hus, Adelphia acquiesced" to the conveyances that "although perhaps 'originally impeachable, became unimpeachable in equity'") (citation omitted).

[27] As discussed in the accompanying *Consolidated Motions To Dismiss the Second Superseding Indictment In Whole or In Part, Suppress Evidence and/or Sever Counts 32 and 33*, Mr. Pasano's attempt to secure declarations from the Delgados was entirely proper.

also (1) permitting them to cooperate with the Prosecution Team in a hoax that the JDA *was still operative,* thereby goading the Esformes Defense Team into discussing privileged matters with the Delgado Team; and (2) permitting the Delgados to disclose privileged information learned *before* the alleged breach to the Prosecution Team.

As noted above, the same day the plea agreements were secretly executed, June 5, 2015, the Prosecution Team wired the Delgados to begin recording their conversations with Mr. Esformes. Additional recordings occurred or were attempted on June 7, 8, 9, 12 and 19, 2015. In the calls on June 5-7, the Delgados began expressing a reluctance to sign the declarations. On June 7, 2015, with the recordings well underway notwithstanding the JDA, the Delgados' counsel-of-record advised the Prosecution Team that they "believe that we may now be required to promptly withdraw. We want to make sure, however, that we don't do anything which could prejudice our clients. Please call us at home today, if possible, to discuss so we can proceed...." *See* **Exhibit 12**, Email, June 7, 2015, 3:42 p.m.

By 11:51 a.m. the next morning, June 8, 2015, the Delgados' counsel-of-record emailed the Prosecution Team that "[w]e have reconsidered moving for leave to withdraw.... Thanks for responding so quickly." *See* **Exhibit 13**, Email, June 8, 2015, 11:51 a.m. Less than 15 minutes earlier, the Delgados' plea bargain attorney emailed Mr. Hunter, stating: "Chris, since we spoke this morning, I believe all issues have been worked out and we're back to business as usual...." *See* **Exhibit 14**, Email, June 8, 2015, 11:37 a.m. Approximately two hours later, at 1:27 p.m., Mr. Pasano sent the Delgados' counsel-of-record the following email:

> As discussed in our meeting in May, your clients, Gaby and Willy Delgado, and our client, Philip Esformes, have discussed the execution of a declaration memorializing Philip Esformes' good faith and lack of criminal intent. While as lawyers we can debate how significant such declarations would be in court, in truth these are important for our client's peace of mind.
>
> We have gone ahead and drafted a declaration for each one of your clients. [T]he drafts are attached.

> ***If these declarations are accurate, as we understand they are, we ask that your clients sign them and return to us. Or make any appropriate changes*** and then execute and send along. We appreciate your hesitation about your clients signing anything, but urge you to present these documents to your clients and let them decide (after hearing your good advice).

See **Exhibit 15** , Email, June 8, 2015, 1:27 p.m. The declarations merely proposed that the Delgados affirm what they and their counsel-of-record had been consistently maintaining during the joint defense meetings and in publicly-filed pleadings – that there was nothing "improper," "wrong" or "illegal" about the Delgados' relationship with Mr. Esformes. *See* **Exhibit 16.**

Later that afternoon, at 4:27 p.m. on June 8, 2015, Mr. Esformes handed Gabriel Delgado Esformes' iPhone to speak directly with Ms. Descalzo who was on the line.[28] However, the recording device malfunctioned and the only voice heard on the recording is Delgado's. Now working for the Prosecution Team pursuant to a signed plea agreement, Delgado falsely claimed that his lawyers viewed the declarations as "an illegal paper" allegedly because Mr. Esformes' lawyers had informed his lawyers on January 15 and May 29, 2015, about "a wrong doing" concerning "the transportation stuff ... this limo service" and "about donations" including "paying, uh, for-for coaches.... They went over there and they said this, this and this...." *See* **Exhibit 18**, Transcript, June 8, 2015, 4:27 p.m. Later in the same call, Delgado continued in the same vein:

> – what you need to I think tell them, ... 'cause they're under the impression you went over there and-and that, you know, 'cause they confronted me and told them, "Listen, you didn't tell me anything about all these wrongdoings that you're paying [II] limo-limo service. You were paying, uh-uh, donations that they wanted, that you're paying for a coach and all this shit. And that's when the whole thing broke loose that I was at Mercy [Hospital] with Philip. So I mean if you could just speak to them....

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[28] The Prosecution Team knew that it was Esformes' counsel who were preparing the declarations and, therefore, that the conversations were likely to entail privileged communications – indeed, that was presumably why the Prosecution Team brought in Mr. Hunter. The Prosecution Team also knew or should have known that during the debacle described by Judge Gold in *Shaygan* that the USAO had assured Judge Gold that before tape recording counsel, office policy required prosecutors to seek "prior notification and approval of the United States Attorney...." and that the failure to do so in *Shaygan* had been a "mistake" that would not happen again. *See* **Exhibit 17**, *Government's Response To Motion For Sanctions*, *United States v. Shaygan*, No. 08-20112-Cr-Gold (S.D. Fla. March 25, 2009), at pp. 2-3.

Id. In a second call less than one hour later, Delgado repeats the complaint directly to Mr. Pasano:

> Okay, I mean I-I really ... appreciate it ... if you could speak to him [Delgado's counsel-of-record] 'cause, um, you know, they're under the impression of whatever, certain transactions and stuff like that which like, you know, brought up to them by [you].

See **Exhibit 19**, Transcript, June 8, 2015, 4:59-5:19 p.m. These conversations establish that the Delgados and the Prosecution Team were capitalizing on the confidentiality promised by the JDA by directly ***using*** the privileged information that the Delgado Defense Team learned from the Esformes Defense Team on January 19 and May 29 in an effort to elicit incriminating statements from Mr. Esformes and/or his attorneys.

Shortly after the taping ended on June 8, Mr. Hunter emailed the Delgados' plea bargain attorney obviously concerned about exploiting the JDA in this fashion and tried to make the Delgado Defense Team assume responsibility for any fallout from the ruse:

> [F]ollowing up on our conversation this afternoon, it is my understanding from speaking with you that neither the Delgados (Guillermo and Gabriel) nor their attorneys ... are party to, or in any way bound by, any joint defense agreement with Philip Esformes and/or Mr. Esformes' counsel. If this is correct, could you [and the Delgados' defense attorneys] please confirm? If correction or clarification is needed, could you ... please correct or clarify as needed?

See **Exhibit 20**, Email, June 8, 2015, 6:04 p.m.

Approximately three hours later, the Delgados' plea bargain attorney responded, stating that the Delgados' counsel-of-record would contact him shortly and urging the Prosecution Team to have the Delgados sign the declarations because otherwise "Philip will cut them off, not take their calls, etc., and the guys' efforts at cooperation will be cut off as well." *See* **Exhibit 21**, Email, June 8, 2015, 8:50 p.m. In other words, maintaining the illusion that the JDA was fully operative was vital to the scheme orchestrated by the Prosecution and Delgado Defense Teams. Yet, a half hour later, the Delgados' counsel-of-record emailed Mr. Hunter to say that "[w]e are parties to a joint defense agreement" but that it had "not been fully executed" and that "to the extent that it is even arguably

applicable to what is now taking place between our clients and Esformes and his counsel, it has been materially beached by Esformes and his counsel and we do not consider ourselves bound by its notice/withdrawal provisions." *See* **Exhibit 22**, Email, June 8, 2015, 9:19 p.m. As previously demonstrated, those positions were legally unsupportable in light of the fact that the Delgado Defense and Prosecution Teams had elected to continue acting as if the JDA was fully operative.

At 10:41 p.m., still on June 8, the Delgados' counsel-of-record finally responded to Mr. Pasano's email about the declaration, stating only that "[w]e don't agree, or consent, to our clients signing declarations" but not quarreling with their accuracy. *See* **Exhibit 23**, Email, June 8, 2015, 10:41 p.m. Shortly thereafter, Mr. Pasano responded by email:

> So we understand. Appreciate, however, the firestorm this creates for [us]. As always, we know it is not our business how you advise your clients. And we stay out of that. But we both have client relation issues to handle. I urge you to consider some other wording that could satisfy this request.
>
> ***And at this moment we continue to act per a joint defense understanding that is predicated on the notion that none of the clients are adverse to the others. If your clients are saying things that are adverse to Philip E's position, I must insist we be so advised***. It is up to you to tell us the specific or not. ***But we deserve to be told if we are directly or potentially adverse***.

See **Exhibit 24**, Email, June 8, 2015, 11:34 p.m. (emphasis added).

The next morning, June 9, 2015, with no further response to the email or any other notice that the Delgado Team had withdrawn from the JDA, Delgado recorded Mr. Esformes discussing the declarations and Mr. Pasano, their author. That evening, DOJ Trial Attorney Medina emailed the Delgados' counsel-of-record (following a telephone conversation with them) concerning the JDA in which he again tried to foist all responsibility for the exploitation of the JDA on the Delgado Defense Team. Thus, Mr. Medina wanted the Delgados' counsel-of-record to confirm that: (1) *they* did not sign the JDA; (2) *they* did not consider themselves or the Delgados "bound by the express terms set forth in any joint defense agreement .... including any provision requiring notice of withdrawal" from the agreement; and (3) *they* did nonetheless "consider any communications

between you and your clients and Philip Esformes and his counsel to be privileged communications as they were made in furtherance of a possible joint defense." *See* **Exhibit 25**, Email, June 9, 2015, 6:27 p.m. The Delgados' counsel-of-record responded the next day, stating:

> As we have informed other Government counsel, we are parties to a joint defense agreement, which has not been fully executed. However, to the extent it is even arguably applicable to what is now taking place between our clients and Esformes ***and his counsel***, it has been materially breached by Esformes ***and his counsel*** and we do not consider ourselves bound by its notice/withdrawal provisions.

See **Exhibit 26**, Email, June 10, 2015, 12:19 p.m. (emphasis added).

Again, there is no legal support for the legal positions, ratified by the Prosecution Team: (1) that the JDA was unenforceable because it was not fully signed by all the parties; or (2) that any breach of the JDA by Mr. Esformes or his counsel eliminated the duties of the Delgado Defense Team under the JDA after the Delgado Defense Team elected to continue acting as if they were bound by the JDA in order to induce the Esformes Defense Team into waiving privileges.

On June 12, 2015, the Delgados again recorded Mr. Esformes. The Delgados continued to complain about Mr. Esformes' attorneys having "big mouth[s]" – again referring to the JDA protected communications previously discussed. *See* **Exhibit 27**, Transcript Excerpt #1, June 12, 2015. Mr. Esformes noted that it was his attorneys who "drew up" the declarations, and he agreed to sign a similar one for the Delgados, noting that they had "already signed an agreement to do joint defense, so that's the same thing, isn't it?" *Id.*, Transcript Excerpt #2. Midway through the conversation, Mr. Esformes called attorney Descalzo and allowed Delgado to listen to the call.[29] After Ms. Descalzo left the conversation, (Guillermo) Delgado turned to Mr. Esformes and stated that "my lawyers are saying, 'okay Gaby and Willy you're signing these false documents,'" to which Mr. Esformes responded, "They are not false." *Id.*, Transcript Excerpt #3. This was not the first time that Mr. Esformes stated to the Delgados that the declarations were not false. Mr. Esformes made

[29] As discussed *infra*, Judge Ungaro later found this portion of the conversation to be privileged and ordered it removed before the Prosecution Team could use the recordings.

the same statement during part of the recording that was redacted by Judge Ungaro, which we can submit that to the Court for in camera review.

Even after the June 2015 taping, the Prosecution Team continued to maintain the pretense that the Prosecution Team was "adverse" to the Delgados – and thus that the Delgado Defense Team was still part of the JDA with the Esformes Defense Team – by not requiring the Delgados' to withdraw the motion to dismiss. The Prosecution Team, in turn, continued to seek and obtain what were, in effect, unnecessary court orders from Judge Martinez extending the time for filing a response they knew was never going to be filed due to the already-signed Delgado plea agreements. Again, it is unclear whether Judge Martinez knew the motion to dismiss and extension motions were unnecessary pleadings. *Cf. United States v. Sterba*, 22 F. Supp. 2d 1333 (M.D. Fla. 1998) (finding prosecutorial misconduct for not informing court that witness was using an alias to conceal her true identity).

On July 21, 2015, Mr. Pasano emailed the Delgados' counsel-of-record for the last time, offering to "share" some new information on the "Delgado case" but wanting them "to confirm that we are still operating in a joint defense. Hope all is well. Please let me hear back." *See* **Exhibit 28**, Email, July 21, 2015, 2:11 a.m. The next day, the Delgados' counsel-of-record emailed Mr. Hunter concerning the email from Mr. Pasano about the JDA but had not responded to it. *See* **Exhibit 29**, Email, July 22, 2015, 11:15 a.m. The Delgados' attorneys never did respond to the July 21st email.

On July 21, 2015, the Delgados' withdrew a pending discovery motion. *See Delgado*, DE 199. No record activity occurred in the *Delgado* case thereafter until September 24, 2015, when the Delgados' plea bargain attorney finally entered his appearance and the Delgados appeared in court to change their pleas. *See Delgado*, DE 204, 205, 206, 210. A few days later, the Delgados' plea agreements and "factual" proffers were also publicly filed. *See Delgado*, DE 207, 211, 212. Gabriel Delgado's "factual proffer" included additional references (both direct and indirect) to the privileged

information conveyed to the Delgado Defense Team by the Esformes Defense Team under the protection of the JDA. *See* DE211:2 (Delgado agreeing that there were "kickbacks disguised as inflated 'lease' payments, *charitable donations, and other conduits*....") (emphasis added).[30] That same day, Judge Martinez denied the Delgados' motion to dismiss as "moot." *See* Docket Sheet, *Delgado* (order without a docket entry number).

On multiple occasions thereafter, but prior to the return of the initial indictment against Mr. Esformes, the Delgados continued to share information about the "concerns" conveyed to the Delgado Defense Team by the Esformes Defense Team under the JDA on January 19 and May 20, 2015:

> ● **Exhibit 31**, Report of Interview with Gabriel Delgado, December 16, 2015: "Gabriel Delgado was contacted by the owner of Majestic limousines Robert Lopez about Lopez meeting with Philip ESFORMES' attorney. Majestic Limousines has detailed billing regarding all of the transportation that was done for DELGADO and ESFORMES. ESFORMES would tell DELGADO in person or phone to get transportation for him In one instance ESFORMES asked DELGADO to get him a yacht. DELGADO would pay for all of these transportation requests from ESFORMES in order to not lose the business from ESFORMES' network of ALF's and Nursing homes."
>
> ● **Exhibit 32**, FBI 302 Report, July 11, 2016: "DELGADO would donate to charities for ESFORMES. DELGADO would donate money for ESFORMES to DEANS KIDS because ESFORMES wanted a certain amount donated to this particular charity...."

C. The Unauthorized Recording of Attorney Ginsparg

On June 19 and again on June 24, 2015, the Prosecution Team sent the Delgados to record Mr. Esformes' civil attorney, Norman Ginsparg. To counsels' knowledge, no supervisory officials at the USAO were notified that one of Mr. Esformes' attorneys was about to be recorded or

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[30] Shortly before the pleas and proffers were filed, on September 18, 2015, Gabriel Delgado was also questioned by Miami FBI Special Agents Jonathan Ostroman and Terence Reilly about "a limo service" that Mr. Esformes used but Delgado allegedly paid for. *See* **Exhibit 30**, FBI 302, Sept. 18, 2015, at p. 5.

investigated.[31] Nor was any Court approval sought or obtained for this effort to intrude on Mr. Esformes' attorney-client privilege. Although no prejudicial privileged information was ultimately revealed during these recordings of attorney Ginsparg in June 2015, the Prosecution Team did learn from these recordings – which took place on full year before the July 2016 search of Mr. Ginsparg's law office at Eden Gardens – that Mr. Ginsparg was a lawyer who handled court mediations, a lawsuit in Chicago, and attended an ABA seminar to obtain CLE credits. *See* **Exhibit 33**, at pp. 9-12, 47, 49.

The Prosecution Team's unilateral taping of an attorney was particularly egregious when put in context. In 2008, a local criminal defense attorney represented Dr. Ali Shaygan in a "pill mill" prosecution. Prior to trial, the AUSAs in charge of the case commenced a collateral investigation into the conduct of the attorney, using two informants to tape record him and his investigator. When the AUSAs discovered that neither had done anything wrong, they tried to conceal the taping but one of the informants inadvertently disclosed it on cross-examination. Dr. Shaygan was acquitted, and the presiding judge, the Hon. Alan S. Gold, issued a scathing opinion sanctioning both the government and the individual AUSAs. *See United States v. Shaygan*, 661 F. Supp. 2d 1289 (S.D. Fla. 2009), *rev'd*, 652 F.3d 1297 (11th Cir. 2011).

During the sanction litigation, the USAO admitted that the taping was "in violation of the [USAO's] policy regarding the prior notification and approval of the United States Attorney (Office Circular on Attorney Investigations, Court's Exhibit 5)" and was a "serious mistake." *See* **Exhibit 17**, at pp. 2-3. The "Office Circular," **Exhibit 34**, explicitly requires that the U.S. Attorney, the First Assistant U.S. Attorney and the Chief of the Criminal Division be "advised anytime an attorney becomes a target or subject of an investigation...." The Circular adds that it "should be interpreted

[31] The Prosecution Team has ignored repeated requests for disclosure of the USAO's office policies (including the "enhanced" one ordered by Judge Gold) and whether they were followed or violated in this case. Accordingly, we can only assume the latter at this juncture. Mr. Esformes is separately moving to compel this information.

to mean" that *all three officials* "should be notified of any matter which could negatively reflect on an attorney." *Id*. Judge Gold, plainly infuriated that the policy had been violated, closed his opinion by ordering that the USAO "advise the Court within 30 days ... as to the procedures that have been instituted *to enhance supervision of collateral investigations*" and to "similarly report on any enhancements to the USAO's 'taint wall' policy and its enforcement." *Shaygan*, 661 F. Supp. 2d at 1325 (emphasis added).[32]

D. The Prosecution Team's *Ex Parte* Use of a Duty Judge To Gain Access To Privileged Material Without Affording Mr. Esformes An Opportunity To Be Heard

As noted above, the Delgado tapes contained both references to the legal advice given to Mr. Esformes and conversations with his attorneys. On September 10, 2015, Mr. Hunter filed an "*Ex Parte Motion For an Order That Certain Communications and Documents Made in Furtherance of a Crime are Not Privileged*," **Exhibit 2**. The *Ex Parte Motion* was assigned to Judge Ursula Ungaro as the "duty judge." An *ex parte* motion should inform the court of adverse facts and adverse authority so that the court can make an informed decision.[33] The *Ex Parte Motion*, however, repeatedly claimed that none of the conversations involving the declarations (including those in which Mr. Esformes' attorneys were recorded) were privileged "under any circumstances," allegedly

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[32]Although the Eleventh Circuit reversed some of the sanctions levied against the government and AUSAs, it did not reverse these aspects of Judge Gold's opinion.

[33] *See* RULES REGULATING THE FLORIDA BAR, RULE 4-3.3(d) (stating that 'in an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decisions, whether or not the facts are adverse."); RULE 4-3.3(a)(3) (prohibiting attorneys from "fail[ing] to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel"). *See, e.g., International Beauty Exchange, Inc. v. Tony Dollar Kingdom, Inc.*, 199 F.R.D. 700 (S.D. Fla. 2001) (dismissing case and vacating *ex parte* seizure order after discovering that plaintiff's counsel had not informed the court about three related cases already pending before other judges and stating that "counsel's behavior appears to be a prima facie violation of his duty of candor to the tribunal" under Rule 4-3.3(d)); *Plant v. Various John Does*, 19 F. Supp. 2d 1316, 1319 (S.D. Fla. 1998) (denying *ex parte* TRO on the merits but criticizing plaintiff's counsel for failing to disclose adverse authorities).

because no attorney was present for them,[34] but did not alert Judge Ungaro to an entire line of cases holding that client-beneficiaries of a JDA may confer with each other outside the presence of attorneys when the discussion relates to the joint defense such as the strategy, driven by Mr. Esformes' attorneys, of obtaining declarations from the Delgados.[35] Similarly, the *Ex Parte Motion* repeated without criticisms the unsupportable contention that the JDA was only a "purported" JDA either because it had not be fully signed or because "Attorney #1 [Mr. Pasano] breached it," *id.* at p. 3, even though well established case law, not cited in the motion, contradicts both arguments. And, the *Ex Parte Motion* unequivocally claimed that the attorneys' efforts to secure favorable declarations amounted to "obstruction of justice," when Eleventh Circuit law approves of an attorney cross-examining / confronting a witness with a favorable, prior inconsistent statement made by the witness to the attorney while they both were parties to a joint defense agreement.[36]

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[34] *See* **Exhibit 2**, at p. 1 ("the Delgados and Subject #1 are not lawyers and their communications enjoy no protection" and the "purported joint defense agreement does not change the unprotected nature of their communications"); *id.* at p. 6 (arguing that the joint defense privilege did not apply because "[t]he communications are ... between the Delgados and Subject #1, not the Delgados and Subject #1's attorney"); *id.* at p. 8 ("the communications between the Delgados and Subject #1 were not communications involving attorneys and, as a result, are not protected").

[35] *See Crane Security Technologies, Inc. and Visual Physics, LLC v. Rolling Optics*, No. 14-12428-LTS, 2017 WL 470890 (D. Mass. Feb. 3, 2017); *Invista North America S.a.r.l. v. M&G USE Corp.*, No. 11lp-1007-SLR-CJB, 2013 WL 12171721 (D. Del. June 25, 2013); *Zitzka v. Village of Westmont*, No. 07 C 0949, 2009 WL 12346256 (N.D. Ill. May 13, 2009); *Beneficial Franchise Co., Inc. v. Bank One, N.A.*, 205 F.R.D. 212 (N.D. Ill. 2001); *IBJ Whitehall Bank & Trust Co. v. Cory & Associates, Inc.*, No. 97 C 5827, 1999 WL 617842 (N.D. Ill. 1999).

[36] The Eleventh Circuit in *United States v. Almeida*, 341 F.3d 1318, 1321 n. 8 (11th Cir. 2003), expressly found that an attorney in a joint defense had the right to impeach a testifying co-defendant, who was formerly a party to the JDA, with exculpatory declarations the co-defendant made during the joint defense:

> Suppose, for example, that Fainberg [here the Delgados] made proclamations of Almeida's [here Mr. Esformes'] innocence during the joint defense strategy sessions. Such hypothetical statements would have been inconsistent with the position Fainberg [the Delgados] maintained while on the witness stand [at a trial of Mr. Esformes] and might have revealed the existence of bias stemming from the Government's offer to advocate a reduction in Fainberg's [the Delgados'] (continued...)

The *Ex Parte Motion* also did not reveal that, while the Delgado attorneys supposedly did not feel bound by the JDA, the government's ploy was to make the Esformes Defense Team believe that the JDA remained in effect so that Esformes and his lawyers would continue to meet with the Delgado Team, thus allowing the Prosecution Team to use the JDA as a vehicle for obtaining information against Esformes. Finally, the *Ex Parte Motion* stated that "the Delgados openly discussed with [Mr. Esformes] that the affidavits were, in fact, false," but did not reveal to Judge Ungaro that Mr. Esformes repeatedly denied that the declarations were false, that the declarations were drafted by Mr. Pasano and were consistent with the position taken by the Delgado Defense Team in private meetings pursuant to the JDA and in pleadings publicly filed by the Delgados' counsel-of-record.[37]

On September 21, 2015, Judge Ungaro entered a sealed order (later unsealed) adopting all of arguments advanced in the *Ex Parte Motion*. *See* **Exhibit 35**. Judge Ungaro, however, requested that Mr. Hunter submit for her *in camera* review portions of the tapes where attorneys were present or recorded. On January 8 and 13, 2016, Mr. Hunter submitted two letters to Judge Ungaro explaining that Ms. Descalzo was recorded for eight seconds on June 12. *See* **Exhibit 36**. On May 6, 2016, Judge Ungaro issued a second order approving the Prosecution Team's use of the

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[36](...continued)

> sentence[s]. To be sure, evidence of a plea agreement might, standing alone, tend to show bias. But the existence of a plea agreement *in conjunction with an inconsistent story would be much more effective in establishing bias*....

See also United States v. Brand, 775 F.2d 1460, 1470 (11th Cir. 1985) (reversing convictions for obstruction of justice where defendant acted pursuant to counsel's strategy in seeking affidavits from customers stating that they were aware of altered odometers, and holding "the mere attempt to secure a statement from a potential witness falls short of even being within the outer limits of § 1503"); *see also Harrington v. United States*, 267 F. 97, 101 (8th Cir. 1920) (reversing an attorney's conviction for obstruction of justice for attempting to get a witness to sign a statement a statement contradicting grand jury testimony that the witness already given that conflicted with the statement).

[37] Shortly before the plea agreements were made public, Mr. Hunter claimed that Judge Martinez had "been made aware that the Delgados have signed plea agreements and have been cooperating," *see* **Exhibit 2**, at p. 2, but it remains unclear when Judge Martinez was informed.

recordings *except* for the recording of Ms. Descalzo on June 12, 2015, which Judge Ungaro ordered "minimized or removed" from the recording. *See* **Exhibit 37**. The entire "approval" process was conducted *ex parte* – without providing Mr. Esformes an opportunity to object, explain the protected nature of the entire subject matter or submit the authorities cited above. *Cf.* USAM, § 9-13.420(F) (recommending, for law office searches, that the target or his attorney be "afforded an opportunity to participate in the process of submitting disputed documents to the court....").

The material ordered redacted by Judge Ungaro was removed from the original discovery produced by the Prosecution Team. However, on Oct. 12 and Nov. 21, 2016, as part of the Prosecution Team's discovery, copies of the **un**redacted version were sent to the Esformes Defense Team ***and*** counsel for co-defendants Odette Barcha and Arnaldo Carmouze. *See* **Exhibit 38**, Letters of Oct. 12 and Nov. 21, 2016. Mr. Esformes never agreed to any privilege waiver.

As to the remaining conversations, the Prosecution Team received *all* the recordings in which the Delgados repeated privileged joint defense discussions between the Esformes and the Delgado Defense Teams concerning the limos, charities, and coaches, that had taken place on January 19 and May 29, 2015 under the JDA. The Prosecution Team never should have received those recordings.

II. POST-INDICTMENT

A. The Prosecution Team Knew That Mr. Ginsparg Was "Esformes' Attorney" and Maintained His Law Office at Eden Gardens

On March 10, 2017, the Prosecution Team filed a pleading entitled *Motion for Approval of Filter Process* in which DOJ Trial Attorneys Young and Bradylyons represented to the Court that when they sought a search warrant for the Eden Gardens ALF on **July 21, 2016**, they "had no reason to believe that [Mr. Ginsparg] served as a lawyer for the Defendant." *Motion for Approval of Filter Process,* DE 227, at p. 4. That representation was designed to excuse their conduct in not following

DOJ guidelines and court precedents mandating the creation and use of "taint" or "filter" teams when searching premises *known* to contain privileged material. *See, e.g., United States v. Musto*, No. 3:16cr90, 2017 WL 1078179, at *3, n. 5 (M.D. Penn. March 22, 2017) (approving formation and use of a filter team "[p]rior to executing five search warrants to review potentially privileged material and return protected materials to defense counsel). The Prosecution Team's representation is easily refuted by facts not disclosed in the motion, including the following:

On **September 18, 2015**, FBI Agents Terence G. Reilly and Jonathan Ostroman, along with DOJ Trial Attorney Allan Medina (who later signed the *Esformes* indictment), interviewed Gabriel Delgado. During the interview, Delgado explicitly described Norman Ginsparg as ***"Esformes' attorney***." *See* **Exhibit 30**, at p. 2 (emphasis added).

Two months later, when the Delgados were sentenced on **December 18, 2015**, Agent Reilly and DOJ Trial Attorney Medina were present when the Delgados' plea bargain attorney described the Delgados' cooperation, including that they had been involved in a series of undercover recordings of "a very wealthy individual who is extremely active and powerful in the healthcare business ***and his attorney***...." *See Delgado* case, DE 246 at p. 23 (emphasis added).

On **March 21, 2016**, Guillermo Delgado was interviewed by DOJ Trial Attorneys Medina and Young and various agents. During that interview, Delgado repeatedly indicated that Mr. Ginsparg was the attorney who drafted various contracts. *See* **Exhibit 39**, FBI 302 Report, March 21, 2016, at pp. 3, 6, 8.

On **July 11, 2016** – just 10 days before applying for the Eden Garden's warrant – DOJ Trial Attorney Young (who also signed the Esformes indictment) and Prosecution Team Agents Reilly and Ostroman interviewed Gabriel Delgado. He told them that "GINSPARG's office" was inside Eden Garden's, that Mr. Ginsparg went there "every day" and "handle[d] lawsuits and the legal paperwork in his office" there and the Mr. Esformes' "office is at his residence":

> GINSPARG was at EDEN GARDENS every day. When you first walk into the main building of EDEN GARDENS, you make a right immediately to get to GINSPARG's office. GINSPARG handles lawsuits and the legal paperwork in his office. There are three offices down that hallway; the first two offices are GINGSPARG's and BENGIO'S.... ESFORMES' office is at his residence.

See **Exhibits 32**, at p. 3.

The Prosecution Team also knew that Mr. Ginsparg was an attorney who performed legal work for both Mr. Esformes personally and for various facilities from his business card, found in the Prosecution Team's discovery. The card identified Mr. Ginsparg as "Director of Legal Affairs." *See* **Exhibit 40**.

Finally, when the Delgados recorded Mr. Ginsparg in June 2015, Mr. Ginsparg discussed mediations, a lawsuit in Chicago, and an ABA conference and CLE credits he needed.

How the Prosecution Team could represent to this Court that it "had no reason to believe that [Mr. Ginsparg] served as a lawyer for the Defendant" is inexplicable and extremely troubling.

B. The Misleading Eden Garden's Search Warrant Application

On July 21, 2016, the grand jury returned the first indictment. That same day, the Prosecution Team decided to seek a search warrant for Eden Gardens. Knowing that Mr. Ginsparg maintained his law office on the premises and intending to search it, DOJ policies required the Prosecution Team to seek formal approval from either the U.S. Attorney or an Assistant Attorney General. *See* **Exhibit 41**, USAM, § 9-13.420.[38] Along with the form itself, the Manual requires prosecutors to submit copies of the proposed search warrant and application "and any special instructions to the searching agents regarding search procedures and procedures to be followed to ensure that the prosecution team is not 'tainted' by any privileged material..." *Id*.

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[38] Section 9-13.420 provides: "No application for such a search warrant may be made to a court without the express approval of the United States Attorney or pertinent Assistant Attorney General." *Id*. Prosecutors, therefore, "must consult with the Criminal Division" using a form found in the Criminal Resource Manual. *See* **Exhibit 42**, Attorney Search Warrant (updated July 2016). In the accompanying motion to compel, Mr. Esformes is seeking an order compelling disclosure of whether the form was submitted by the Prosecution Team.

The Manual then discusses the types of procedures and adds that DOJ's recommendations "*should be tailored to ... the requirements and judicial preferences and precedents of each district*." *Id*. (emphasis added). The Manual thus required the Fraud Section prosecutors to comply with all USAO policies, including the ones ordered by Judge Gold in *Shaygan*. Moreover, the Manual states clearly that "in *all* cases, a prosecutor *must* employ adequate precautions to ensure that the materials are reviewed for privilege claims." *Id.* (emphasis added). To that end, the Manual strongly recommends the use of a separate "privilege" team "consisting of agents and lawyers not involved in the underlying investigation." *Id*. The designated agents should be given "instructions" on how to "minimize the intrusion into privileged material" and the "privilege team" prosecutor should be available for consultation "either on or off-site." Moreover, the Manual recommends that the search warrant application *itself* "attach any written instructions or, at a minimum, should generally state the government's intention to employ procedures designed to ensure that attorney-client privileges are not violated." *Id. See, e.g. United States v. Hunter*, 13 F. Supp. 2d 574, 585 (D. Vt. 1998) (noting that a "comprehensive plan" for screening privileged materials was "included in the search warrant application" which "informed the magistrate judge's evaluation of the warrant's validity"). Finally, the Manual recommends that the target or his attorney have an opportunity to challenge the decisions of the "privilege team" in court, *before* documents are handed over to the Prosecution Team. *Id.* The obvious reason for this is that once a privileged communication is wrongfully disclosed, there is no way to take it back.

The Manual closes by stating that when computers are likely to be seized, prosecutors "are expected to follow" the procedures in a related manual – United States Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, ch. 2(F)(2)(b)(3d ed. 2009). *Id.* This manual likewise *requires* implementation of a taint procedure independent of the prosecution team. *Id.* at pp. 110-111 (emphasis added). Although the Manual

states that its recommendations do not create any rights enforceable by third parties, courts have consistently recommended that similar screening procedures be followed and included in warrant applications and warrants.[39] Since the Manual requires that prosecutors also follow local procedures and practices, the Prosecution Team either knew or should have known that judges in the Southern District of Florida have frequently required *more* protection than merely having the Prosecution Team self-appoint an unidentified "filter team" to decide what can be turned over to the Prosecution Team without input from the defendant or any judicial review. *See, e.g., Black v. United States*, 172 F.R.D. 511 (S.D. Fla. 1997) (requiring prior court review of potentially privileged materials); *United States v. Abbell*, 914 F. Supp. 519 (S.D. Fla. 1995) (appointing special master). DOJ Tax Division prosecutors know how to do it right. *See United States v. Musto*, No. 3:16cr90, 2017 WL 1078179 (M.D. Penn. March 22, 2017).

Yet, when Prosecution Team Agent Reilly submitted his sworn declaration in support of the warrant Application for Eden Gardens, he represented that, "[a]ccording to Gabriel Delgado, ***the corporate offices of Philip Esformes' businesses*** are directly to the right upon entering the front facade of the building," *see* **Exhibit 43**, when in fact what Delgado had specifically told him and Prosecutor Young was that upon entering the premises "you make a right immediately to get to GINSPARG'S office." Delgado had also told them that Mr. Ginsparg went there "every day," that he "handle[d] lawsuits and the legal paperwork ***in his office***," and that ***Mr. Esformes' "office is at his residence."*** *See* p. 33 *supra*. Furthermore, in contravention of the USAM and court precedents, no taint protocol was included and no other measures were taken to shield privileged material from the Prosecution Team. Kept in ignorance, Magistrate Judge McAliley authorized what she had been led to believe was a routine warrant. *See* **Exhibit 44.**

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[39] These authorities are cited in the accompanying Memorandum of Law.

Prosecution Team Agents Reilly, Mitchell, Warren, Myers[40] and others executed the warrant the next day, July 22, 2016, with no prosecutor from any "taint team" present to monitor the search or answer any privilege-related questions. Because one room of Mr. Ginsparg's law office was locked, agents were sent to Mr. Ginsparg's home to escort him back to the scene where he was ordered to unlock the door. Mr. Ginsparg cautioned the search team that he was one of Mr. Esformes' attorneys and that his offices contained privileged materials. Ms. Descalzo, who had been summoned by Mr. Ginsparg, promptly arrived at the scene and reminded the search team that Mr. Ginsparg was an attorney who represented Mr. Esformes; she cautioned them that the offices in Eden Gardens contained privileged materials; and she expressly requested that a taint team be used to secure the materials seized from premises. *Agents would not permit her to enter the building or observe the search.*[41]

Trusting that DOJ and USAO policies were being followed, Ms. Descalzo left the scene, as did Mr. Ginsparg. Counsel's trust proved to be misguided. The unsupervised Prosecution Team agents seized materials filling 70 banker's boxes, both from Mr. Ginsparg's immediate office, the adjacent office of his assistant, Jacob Bengio, and file cabinets lining the hallway outside their offices. As reflected in the search warrant inventory, **Exhibit 45**, the agents labeled the boxes #1 through #70. Four of those labels reflected that the agents *knew* that they were seizing potentially privileged material: "Box # 61 Court Documents," "Box #62 Contracts/legal/Carlton Fields," "Box #63 Legal/Bank," and "Box #70 TAINT." Counsel have since found privileged material scattered among other boxes, as well. *Cf. Musto*, 2017 WL 1078179, at *4 (approving conduct of prosecution team agent who, "[w]ithin seconds of reviewing" a document marked attorney-client privileged

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[40] Agent Myers was working virtually simultaneously with the Taint Team in *Raurell-Gomez*. *See* p. 13 *supra*.

[41] As discussed in Mr. Esformes' *Response in Opposition to Government's Motion For Approval of Filter Process*, the Prosecution Team falsely represented in its motion for a government-run filter team that Ms. Descalzo "was also present during the search."

"understood that he could no longer participate in the investigation" and "[i]nstead ... walled himself off from the investigation....").

With no protocol or instructions on how to handle privileged material, and no prosecutor present to supervise them or answer questions, Prosecution Team agents seized hundreds of privileged documents, many clearly marked "attorney-client privileged" or "work product" and randomly placed them into various boxes. *Cf. Musto*, 2017 WL 1078179, at *4 (approving conduct of searching agent who, upon discovering a notebook marked "privileged" Placed it "into an evidence envelope and appropriately labeled the envelop attorney-client privilege" and "removed the envelope" from the premises being searched "and transported it to the federal building in Scranton....").

The agents did place some privileged documents into Box #70, which they labeled "TAINT." Of course, agents would have had to have read the documents in order to distinguish between those viewed as wholly unprotected and those viewed as possibly privileged. Even that box remained in the possession of the Prosecution Team for months. *See infra*. And, with no supervision or guidance, the result was predictable. Only a small fraction of the privileged documents were placed into the "TAINT" box, while most of the privileged documents were not.[42] As discussed at the outset, the Prosecution Team has listed as a trial exhibit a law review article seized from Mr. Ginsparg's desk. Even his ABA CLE materials, referred to in the June 24, 2015, taping of Mr. Ginsparg, *see supra*, have been found in the discovery produced by the Prosecution Team.

At least five additional boxes have now been found to contain privileged documents – many of which were quite obvious. Indeed, the Prosecution Team's belated motion for the use of a filter

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[42] The haphazard and arbitrary nature of the agents' decision-making was underscored by how they treated legal billing invoices sent to Mr. Ginsparg from several law firms representing Mr. Esformes, including many years of billing records from Carlton Fields (Miami), Gray Robinson (Orlando) and Husch Blackwell (St. Louis). Inexplicably, only a small percentage of the billing records were placed into the "TAINT" box, while most were not.

team, not filed until March 10, 2017 (and only *after* the Esformes Defense Team discovered the intrusion and notified the Prosecution Team), states that on December 7, 2016, "a member of the prosecution team performed a preliminary review of the scanned Eden Gardens documents and observed a document that may have implicated the attorney-client privilege." *Motion for Approval of Filter Process*, DE 227 at 4. Yet, *no one from the Prosecution Team notified the Esformes Defense Team of this intrusion for months*. *Cf. Musto*, 2017 WL 1078179, at *3 (noting that a document marked "attorney-client privilege" was "returned ... to defense counsel the very next day" and the prosecution team agent who found the document "immediately" transferred it "from the prosecution team to the filter team" and "ceased all communication with" other prosecution team agents and prosecutors "regarding the defendant's criminal prosecution"). The Prosecution Team has not offered any explanation ***for why it failed to promptly disclose this to the Court or to the Esformes Defense Team***.

C. The Seizure of Privileged Material From Mr. Esformes' iPhones

Mr. Esformes was arrested at his home on July 22, 2016. Although the Prosecution Team had no *search* warrant, they nonetheless searched the home and seized, among other things, three iPhones, a date book which the Prosecution Team calls Mr. Esformes's work book, and a notepad containing Mr. Esformes' notes of a privileged conversation with Ms. Descalzo. On August 12, 2016, Prosecution Team agent Mark Myers submitted a search warrant application to Magistrate Judge John O'Sullivan seeking permission to examine the contents of the cell phones, specifically including text messages. *See* **Exhibit 46**. The warrant was issued that same day. *See* **Exhibit 47**.

In his application to search Mr. Esformes' iPhones, Agent Myers (a Taint Team agent in *Raurell-Gomez*) did not disclose to Magistrate Judge O'Sullivan that Mr. Esformes had been represented by counsel for many months, that the Prosecution Team knew from interviews with the

Delgados that Mr. Esformes rarely communicated by email[43] and, therefore, that his iPhones were likely to include – as, in fact, they did – privileged text messages with many of Mr. Esformes' criminal and civil attorneys.[44] Since the Prosecution Team has included all the text messages in discovery, its members have presumably had full access to those privileged materials since late August 2016.

On October 4, 2016, Mr. Pasano visited a government storage facility in Miramar to review discovery. During that visit, Mr. Pasano reminded Prosecution Team prosecutor Elizabeth Young that there likely were privileged communications on one or more of the phones. *See* **Exhibit 49**, Email chain, October 2016. That same day, Ms. Young emailed Mr. Pasano asking for a list of people who might have had privileged communications with Mr. Esformes, claiming that the list would "assist us in our taint review." *Id.* Mr. Pasano emailed back a list of names and numbers. *Id*. This would have been the proper course of action except for one problem: *There were no independent prosecutors or agents involved in any "taint review" of the iPhone.* The text messages are all part of the discovery, as noted above. By representing to the Esformes Defense Team that a "taint review" was occurring, the Prosecution Team lulled the Esformes Defense Team into the false belief that the Prosecution Team had been acting in accordance with DOJ policies and court precedents by instituting procedures to safeguard Mr. Esformes' privileges when, in fact, no "taint review" was being conducted at all with respect to *any* of the seizures.

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[43] For example, in an April 27, 2016, FBI 302 Report, Gabriel Delgado told DOJ Trial Attorney Young that "Esformes didn't use email." *See* **Exhibit 48** (ESF-49-00000827).

[44] Five pages of the Application were devoted to summarizing other information learned from the Delgados, including that Gabriel Delgado informed the agents that Mr. Esformes "communicated about the scheme with" him "via text and phone calls" using those phones. *See* **Exhibit 46**, at pp. 4-7, 15. Indeed, during the search itself, the Application stated that a text message appeared on two of the three iPhones from an alleged patient recruiter. *Id*. at 17. And, the agents allowed Mr. Esformes to contact his lawyers on the way to jail using the iPhones. *Id.* at 18.

D. Monitoring Counsels' Document Review and Selection

White collar fraud cases typically involve a massive amount of discovery. Few clients – or the judiciary in CJA cases – are willing and able to pay for the photocopying and storage of such massive amounts of material. Therefore, in most such cases the government maintains possession and control of the discovery, forcing criminal defense lawyers (1) to review the materials at government-controlled locations and (2) to be selective in segregating and photocopying (or scanning) documents they perceive as most important (both inculpatory and exculpatory). Counsels' document review and selection process is protected by the work product privilege and the Sixth Amendment. *See United States v. Horn*, 811 F. Supp. 739 (D. N.H. 1992) (where prosecutor and agent secretly kept track of discovery documents copied by defense counsel, work product privilege violated, ordering disqualification of both the prosecutor and agent), *aff'd in part and rev'd in part* 29 F.3d 754, 758 (1st Cir. 1994) (affirming disqualification order).[45]

In May 2016, undersigned counsel learned during the course of preparing for trial in *United States v. Salo Schapiro*, No. 14-cr-20715-MGC (S.D. Fla.) – another health care fraud case in this District being handled by a DOJ Fraud Section prosecutor – that the copy service the USAO and FBI required all defense counsel in this District to use had sent to the FBI duplicates of all the documents selected for copying by defense counsel. *See Schapiro* (DE 176, 184, 188, 194, 223, 224).[46] The Prosecution Team in *Schapiro* also insisted on having an FBI agent present during the review process (purportedly for "security" reasons and to "assist" in retrieving the boxes).

As in *Schapiro*, the DOJ-led Prosecution Team in this case has insisted on conditioning

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[45] *See also Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (selection process of defense counsel in grouping documents together out of thousands produced is entitled to protection as attorney work product); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (notebooks representing "counsel's ordering of 'facts,' referring to the prospective proofs, organizing, aligning, and marshaling empirical data" categorized as work product).

[46] The documents were stored in the same warehouse in Miramar, Florida, used by DOJ and the FBI in the instant case.

counsels' access to discovery on the presence of an FBI agent. In order to safeguard Mr. Esformes' rights, counsel have repeatedly insisted that any such agents be entirely independent from the Prosecution Team and have also repeatedly requested lists specifying which group of agents worked for which team – Prosecution or Taint – and the identities of the supervisory agents and prosecutors to whom they reported. As set forth in the accompanying *Motion For a Protective Order*, the Prosecution Team has refused these requests, and counsel have learned that most, if not all, of the FBI agents monitoring the discovery review and selection process have worked with and/or are reporting to members of the Prosecution Team – despite their frequent assertions of "independence" from the case.

E. Stonewalling By the Prosecution Team

In an effort to get to the bottom of how the Prosecution Team has manipulated the JDA and committed wholesale privilege violations concerning both the Eden Gardens and iphone searches, on December 9, 2016, counsel emailed the Prosecution Team requesting: (1) copies of the taint team protocols, if any, that were used in this case; (2) copies of any instructions, if any, given to agents reviewing potentially privileged materials; (3) the identities of all members of the Prosecution Team and any "Taint Teams"; (4) communications between members of the Taint Team and Prosecution Team; and (5) any instructions or "requests" (oral or written) conveyed to the Delgados' attorneys to keep their cooperation a secret from the Esformes Defense Team and/or to pretend that the JDA was still in existence. *See* **Exhibit 50**, Email, Dec. 9, 2016. Ironically, this December 9th email was sent just two days after the Prosecution Team now admits it encountered privileged documents during its review of the Eden Gardens materials.

Counsel repeated these requests on more than one occasion since. However, neither the Prosecution Team nor any of the purported taint prosecutors have provided answers, despite the fact that counsels' emails specifically referred to both Judge Gayles' ruling in *Pisoni* and Judge Gold's

ruling in *Shaygan*. As counsel have been preparing these motions, additional privilege violations have been uncovered.

F. The Eden Gardens Discovery

After Mr. Esformes was indicted, his attorneys made arrangements to download all electronic discovery onto a searchable server and eventually downloaded numerous electronic media containing all the Esformes' discovery. Because the electronic discovery provided by the Prosecution Team did not include *any* of the materials seized from Eden Gardens, on January 13, 2017, counsel emailed prosecutor Young requesting a time to review those materials. *See* **Exhibit 51** (Email chain January-March, 2017, between the Prosecution Team, the Taint Team and Esformes Defense Team concerning Eden Gardens materials, re-organized in chronological order for the reader's convenience).

On January 24, 2017, prosecutor Young provided counsel with USB #8, a thumb drive which purportedly contained all of the seized Eden Gardens material. Only later did the Esformes Defense Team uncover that USB #8, which contained over 179,000 scanned pages, happened to be missing Box6, which contained the very privileged documents that the Prosecution Team had been using without disclosing their source or privileged nature to the Esformes Defense Team. USB #8 was also missing all the documents in Box 70, the so-called "TAINT" box.

Because the approximately 17,000 documents on the thumb drive were unorganized, on January 24, 2017, counsel again emailed prosecutor Young, pointing out that the documents had no file names and no indication of the corresponding box number in the inventory (**Exhibit 45**) from which they came, and requested that they be grouped by box number. *See* **Exhibit 51**. On February 1, 2017, counsel followed up with a second email, this time specifically asking to review the four boxes which appeared (by their labels) to contain privileged material, boxes 61, 62, 68 and 70. *See id*. In response, on February 8, 2017, prosecutor Young emailed the bate numbers for three of the

four boxes to counsel but excluded the "TAINT" box (Box #70), which she indicated – *for the first time* – had been given (at a date unknown at this time) to prosecutor Hunter. *See id.* Mr. Hunter, however, had not been involved in the Eden Gardens search, and his role as a "taint" prosecutor was made known to the Esformes Defense Team only *after* Ms. Young knew that Mr. Esformes' counsel were inquiring about the four boxes containing privileged material. In February 2017, Mr. Hunter sent counsel a new thumb drive with the "TAINT" box material, but the original documents have not been returned from whoever is in possession of them, and all of the DOJ Fraud Section prosecutors – whether deemed part of the Prosecution or Taint Teams – have refused to disclose the chain of custody of the "TAINT" box.

Upon review of the material contained in the other three boxes labeled by the searching agents to reflect that their contents related to legal representation (boxes 61, 62, 68), counsel confirmed that they contained many obviously privileged documents. Accordingly, on February 10, 2017, counsel sent Ms. Young the following email:

> ...We started to review the three boxes identified below (61, 62, and 68) and realize that they contain documents that are attorney-client and work-product privileged, such as legal memos of witness interviews, correspondence among joint defense lawyers, documents marked attorney work-product or attorney-client privileged, detailed legal invoices outline work that was done, and other similar materials. We request that the government immediately seal and segregate these boxes, and that ***no one from the government*** continue to have access to these documents (or copies) ***until the Court can address this issue***....

See **Exhibit 51**, Email, Feb. 10, 2017 (emphasis added).

Among the materials referred to by counsel were billing records of several law firms who had been working for Mr. Esformes and his facilities from 2011-2015, including Carlton Fields (Miami), Husch Blackwell (St. Louis, Missouri) and Gray Robinson (Orlando). Many of these billing records contained detailed descriptions of Mr. Esformes' strategies and defenses (specifically including "defenses to anti-kickback statute," the "certification theory of liability," the "advice of counsel" defense, safe harbor defenses), potential witnesses (including experts), references to JDA

meetings, specific areas of concern for additional legal research, issues that the defense believed required additional investigation. As previously noted, counsel have since discovered privileged material seized from Eden Gardens but which were in boxes other than the four previously mentioned. In addition to Box 6, another box, contained a memorandum clearly marked "attorney-client privileged" from Harvey M. Tettlebaum of the firm Husch Blackwell LLP, one of the firms working with Carlton Fields on Mr. Esformes' case, to Morris Esformes discussing *in detail* various defenses to the Omnicare litigation.[47]

Two days later, on February 12, 2017, after receiving counsel's email expressing concern over the privileged documents, Ms. Young emailed back, indicating that instead of preserving the *status quo* until the Court could be informed of these issues, the Prosecution Team had summoned an entirely new "filter team" headed by another Fraud Section colleague Leo Tsao, who also happens to work in the same building in Washington, D.C. as the Prosecution Team Trial Attorneys. *See* **Exhibit 52**, Email Chain, Feb. 12, 2017. Counsel immediately responded: "I reiterate that we object to anyone from the government, *including [the existing taint prosecutors] or anyone on their teams*, from accessing the materials in these boxes until the matter is addressed by the Court." *Id.* (emphasis added).

On February 13, 2017, counsel arranged a conference call with DOJ Fraud Section Trial Attorneys Tsao and Garthwaithe.[48] They conceded that they had only recently, in the past week or so, been brought into the case and were just "getting up to speed." After informing counsel that it was DOJ policy to use filter teams when prosecutors believed a search would encounter potentially

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[47] *See generally United States ex rel. Nehls v. Omnicare, Inc.*, Case NO. 07 C 05777, 2013 WL 3819671 (N.D. Ill. July 23, 2013); *United States ex rel. Nehls v. Omnicare, Inc.*, Case NO. 07 C 05777, 2011 WL 1059148 (N.D. Ill. March 21, 2011). The criminal charges in the instant case stem, in part, from the allegations made in *Omnicare*. Mr. Tettlebaum currently also represents the 22 "Civil Intervenors" in this case. *See* DE 116-1.

[48] Ms. Young was invited to participate in the call, but chose not to do so.

privileged material – a rather ironic statement in light of the Prosecution Team's behavior vis-a-vis Eden Gardens – Mr. Tsao and Ms. Garthwaithe asked why the Esformes Defense Team would not agree to accept them (or presumably other Fraud Section prosecutors) as a "filter team." After counsel informed them about the circumstances preceding and surrounding the Eden Gardens search, Mr. Tsao declined to explain how and when Mr. Hunter acquired the "TAINT" box materials or what specific materials his new team was reviewing and when and from whom they obtained those materials. Nor could Mr. Tsao explain how the Prosecution Team had come to use as a trial exhibit a law review article seized from Mr. Ginsparg's desk at Eden Gardens.

In calls and email exchanges with Ms. Young, Mr. Bradylyons, and "filter" prosecutors Tsao and Garthwaite, undersigned counsel repeatedly requested that *no one* from the government, not even a taint or filter team, access the Eden Gardens materials until the privilege issues could be addressed by the Court. Counsel understood that all the prosecutors agreed with that procedure. Yet on March 9, 2017, counsel received an email from Mr. Bradylyons, stating that an unnamed government "filter" paralegal had accessed the Eden Gardens materials and was scanning them, including specifically Box 6, which, as previously discussed, contains privileged pertaining to the defense of Mr. Esformes against allegations in this case. *See* **Exhibit 51**.

G. The Use of Privileged Documents To Persuade Mr. Ginsparg and His Legal Assistant To Cooperate Against Mr. Esformes

As previously discussed, Mr. Ginsparg was tape recorded in June 2015 and had his law office searched in July 2016. Among the privileged documents seized during the search was a series of QuickBooks printouts and handwritten notes prepared by Messrs. Ginsparg and Bengio at the request of Ms. Descalzo in 2015 in response to the accusations in *Delgado*. *See* p. 5 *supra*. In September and October 2016, the Prosecution Team met separately with Mr. Ginsparg and his assistant Mr. Bengio in an effort to convince them to cooperate with the Prosecution Team against their client, Mr. Esformes. The Esformes Defense Team inquired about those meetings, but the

attorneys representing Messrs. Ginsparg and Bengio would not identify which documents the Prosecution Team had used during these proffer meetings. In response to a subpoena issued to Mr. Ginsparg's lawyer, the Prosecution Team produced the work product documents seized from Ginsparg's office at Eden Gardens prepared by Messrs. Ginsparg and Bengio for Ms. Descalzo, which confirmed that the Prosecution Team used these privileged documents during proffers/debriefings of Bengio and Mr. Ginsparg without notice to Mr. Esformes or permission from any Court to do so.[49]

At no time did the Prosecution Team inform the Esformes Defense Team that it possessed and was using privileged documents, *and that it bound Mr. Ginsparg and his counsel to conceal the privilege violation from the privilege-holder, Mr. Esformes*. We know of no legal authority supporting the investigatory tactic of demanding that an attorney (Mr. Ginsparg) conceal from his own client (Mr. Esformes) intrusions by the Prosecution Team of the attorney-client/work-product privileges and using privileged documents to solicit the attorney to cooperate against his own client.

CONCLUSION

For all of the foregoing reasons as well as those set forth in the accompanying Memorandum of Law, the Court should disqualify the Prosecution Team, including prosecutors and agents contaminated by exposure to and/or investigatory use of privileged materials.

CERTIFICATION PURSUANT TO LOCAL RULE 88.9

Pursuant to the Local Rule 88.9, in a good faith effort to resolve the issues raised in the instant motion, undersigned counsel emailed a draft of this motion to opposing counsel who thereafter indicated that they opposed disqualification.

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[49] Counsel will disclose and more fully explain the significance of these and other privileged documents to the Court *in camera*.

CERTIFICATE OF SERVICE

This pleading was served on all counsel of record by transmission of Notices of Electronic Filing generated by CM/ECF on the date electronically stamped by the Clerk on the top line.

Respectfully submitted,

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