UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

UNITED STATES OF AMERICA,

v.

PHILIP ESFORMES, *et al.,*

ESFORMES' REPLY TO [ECF 312] GOVERNMENT'S OPPOSITION TO [ECF 275] MOTION TO DISQUALIFY THE PROSECUTION TEAM

The Prosecution Team asks the Court to summarily deny the Motion to Disqualify and just accept their unsworn denials. Of course, "[i]f denials by the prosecuting officer were conclusive, few hearings would be held." *Wright v. Dickson*, 336 F.2d 878, 883 (9th Cir. 1964), *cert. denied*, 386 U.S. 1012 (1967). As demonstrated below, there are a multitude of assertions made by the prosecutors that cannot be reconciled with the documents, proffers (attorneys Markus and Kaplan-Eliani) and sworn declarations (attorneys Pasano, Descalzo and Perczek) in support of the Motion and this Reply, which will be filed separately.[1]

A. Ignoring DOJ Policies and Misleading the Magistrate Judge

It is undisputed that the prosecutors did not inform Magistrate Judge McAliley that the goal of the search was to seize the records of Mr. Esformes' long-time civil attorney, Norman Ginsparg.[2] In an effort to justify their conduct, the prosecutors contend Mr. Ginsparg (referred to as "Manager 1") was a "non-practicing attorney" who worked only as Mr. Esformes' "business partner" performing only business, not legal, functions. GO, pp. 12-13, 39-40. However, that claim is refuted

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[1/] This Reply discusses only the privilege issues stemming from the search of Eden Gardens. Issues pertaining to the exploitation of the Joint Defense Agreement ("JDA") are addressed in the Reply pertaining to the motion to dismiss.

[2/] DOJ's law office search policies expressly apply "to searches of business organizations where such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization." *See* USAM, § 9-13.420.

by a host of evidence known to the prosecutors. Indeed, the prosecutors concede that they knew he was a lawyer but dismiss the significance of that fact by pointing out that he is not licensed to practice law in Florida. They simply ignore that Florida law nevertheless allowed him to represent the facilities and Mr. Esformes before administrative agencies,[3] including the U.S. Equal Employment Opportunity Commission and even AHCA, an agency that is part of the Prosecution Team and that identified himself as "Director of Legal Affairs." *See* **Composite Ex. 1**.[4] And, he wrote letters and documents using that same title. *See* **Composite Ex. 2**. The Delgados themselves told the prosecutors that Ginsparg did "legal work" at Eden Gardens, including "legal acquisition work for ESFORMES." *See* FBI 302, April 26, 2016, at p. 6; *see also* FBI 302, July 11, 2016. When Delgado recorded Mr. Ginsparg on June 24, 2015, Mr. Ginsparg discussed handling mediations, noting that he "can represent the corporation[s] as-as well as anyone else can." *See* **Ex. 3**, Transcript Excerpts, June 24, 2015, at p. 9. Later in the conversation, Mr. Ginsparg stated that he had to attend an ABA seminar because he "need[ed] to keep my-my–[UI] license" so his bar memberships would remain "active." *Id.* at p. 49. Also in the discovery is the 2011 transcript of Mr. Esformes' deposition in the *Omnicare* case in which Mr. Pasano stated that Mr. Ginsparg was "an attorney" and had been assisting the Esformes Defense Team in witness preparation. *See* **Ex. 4**, Deposition Excerpts, at pp. 15-17. And, undersigned counsels' Declarations also explain counsels' many contacts with Mr. Ginsparg over the years as an attorney for both the facilities and Mr. Esformes. *See* **Ex. 5**, Declaration of Marissel Descalzo; **Ex. 6**, Declaration of Michael S. Pasano. How the prosecutors

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[3/] Out-of-state attorneys may perform a variety of legal services in Florida, *see generally The Florida Bar v. Savitt*, 363 So.2d 559, 560 (Fla. 1978), including appearing before certain state and federal agencies. *See The Fla. Bar re: Advisory Opinion - Nonlawyer Representation in Securities Arbitration*, 696 So.2d 1178 (Fla. 1997); *The Florida Bar v. Moses*, 380 So.2d 412 (1980).

[4/] At least one of the AHCA documents is a public record available on its own website.

could seriously contend that Mr. Ginsparg was a "non-practicing attorney" performing only business tasks is perplexing to say the least.[5]

In a last ditch effort to convince the Court that Mr. Ginsparg was not really acting as an attorney, the prosecutors misrepresent the meaning of one of Mr. Esformes' taped conversations with the Delgados, claiming that they "discussed *the fact* that [Mr. Ginsparg] *was* a 'co-conspirator.'" GO, pp. 2, 11 n. 3 (emphasis added). However, the prosecutors well know that the conversation was about the fact that Mr. Ginsparg's name appeared on the government's sealed Bill of Particulars in the *Delgado* case. Thus, the conversation was not about what *Mr. Esformes and the Delgados* thought about Mr. Ginsparg; it was about what *the prosecutors* thought about him.[6] In an effort to mask the true meaning of the conversation, the prosecutors then attach a copy of the *still sealed* Bill of Particulars to their Response (ECF 312-2), redacted to remove Mr. Ginsparg's name (among others).

The prosecutors also try to minimize their abandonment of DOJ's search policies by stating that the search was conducted by "agents who were not part of the prosecution team." GO, p. 14. That terminology implies that these were true *taint team* agents, but later the prosecutors concede that no "filter team" was "establish[ed]" until after **Dec. 15**, 2016. GO, p. 16. Moreover, these agents searched the premises without a government lawyer present to guide their purported privilege review.

[5/] Equally perplexing is the assertion that it was "bizarre" for Mr. Esformes to characterize Jacob Bengio as Mr. Ginsparg's legal assistant, claiming that title would be "news to the government and almost certainly to" Mr. Bengio. GO, p. 13, n. 5. Yet, in the discovery is a July 21, 2015, demand letter that Mr. Bengio sent to Diversified Medical Group accusing Delgado of misappropriating $97,098.26 and threatening "to take appropriate legal action." Bengio signed the letter "Assistant Director of Legal Affairs." *See* **Ex. 7**.

[6/] The prosecutors admit that the Delgados were told by the Moscowitzes that Mr. Esformes was on the list. *See* GO, 4, 46. In the transcript excerpt cited by the prosecutors (ECF 312-22), the Delgados and Mr. Esformes were discussing that Mr. Ginsparg did not know that he too was on the list but the Delgado and Esformes Defense Teams had "decided not to" tell him, joking that if Mr. Ginsparg ever found out, he would be so worried he would need "a pair of diapers."

And, the prosecutors' list of search agents (ECF 312-27) contains four agents who their own discovery shows participated in witness interviews connected to this case – one of whom, HHS-OIG Agent Julie Rivera, participated in some *fifteen* interviews.[7]

Finally, the prosecutors do not provide a plausible explanation for why they chose agents who (supposedly) were not connected to the case to conduct the search if they truly believed that Mr. Ginsparg was only a "non-practicing" attorney. Perhaps perceiving the contradiction, the prosecutors claim the non-participant agents were used only "[o]ut of an abundance of caution." GO, at p. 14. Yet, real "caution" would have dictated following DOJ policies by obtaining permission from DOJ to conduct the search and establishing a truly independent taint team comprised of both prosecutors and agents who had no connection whatsoever to this case. True "caution" also would have included being fully candid with Magistrate Judge McAliley. And, true "caution" would have meant establishing a true taint team *before,* not *after,* prosecutor Young "began reviewing" the documents on **Dec. 7**, 2016. *See* GO, p. 16.

B. The Prosecution Team was "Alerted" Promptly that the Search Agents were seizing Privileged Materials from Eden Gardens

The prosecutors next try to blame counsel for their "utter failure to take any post-search steps *to alert the government to the possibility* that the Eden Gardens materials contained privileged documents." GO, p. 49 (emphasis added). But counsel did not even wait until the search was over to sound the "alert." *On the morning of the search itself*, Ms. Descalzo arrived and informed two

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[7/] Agent Julie Rivera's name appears on interview reports with: Carlos Morales (Sept. 6 and Oct. 17, 2012, Feb. 26, July 16, and Oct. 7, 2014); Ricardo Salgo (June 5, June 18, Aug. 19, Sept. 17, 2014); Sonia Gil (July 9, 2014); Dean Butler (July 17, 2015); Margarita Acevedo (Jan. 21, 2015); Nelson Duran (Oct.22, 2010); Mathis Moore (Feb. 15, 2011), and Joseph Valdes (March 16, 2011). HHS-OIG agent Radu Pisano's name appears on an interview report of Carlos Morales (Sept. 2, 2014). Mark McCormick wrote a report on ATC and Medlink (Oct. 21, 2010); and Shandon Ray's name is on reports for Pedro Sosa (Feb. 15, 2011), and Doran (Oct. 22, 2010).

agents that Mr. Ginsparg's office "contained privileged materials belonging to Mr. Esformes" and others and "demanded that the search stop until proper taint protocols were put in place." *See* **Ex. 5**, p. 3. After being told that "nothing was privileged and there was no need for a taint team," she finally was able to reiterate her demands to the case agent, who promptly called someone who we assume was one of the prosecutors. After the call, the case agent "assured [Ms. Descalzo] that a proper protocol was in place." *Id*. However, she was not allowed inside the building. Although Mr. Ginsparg was escorted inside, he did not stay very long and left while the search was still in progress. *Id.*, p. 4. Relying on the case agent's assurance that a taint protocol was in place, Ms. Descalzo assumed that the materials would be kept away from the Prosecution Team until further notice. So did Mr. Pasano, whom Ms. Descalzo had phoned from the parking lot of Eden Gardens. Ms. Descalzo also "contacted DOJ Fraud Section Prosecutor Elizabeth Young and notified her that the agents who were executing a search warrant on Eden Gardens were seizing attorney client privileged materials, that Mr. Ginsparg was an attorney, that he was counsel to Mr. Esformes and others, and that Mr. Esformes was not waiving privilege." Declaration of Marissel Descalzo at para. 14, 20.

C. The Prosecution Team Assured Counsel That a Filter Process Was in Place

The prosecutors also complain that counsel waited too long to start reviewing the Eden Gardens materials and thereby somehow "waived" the privilege claims. GO, pp. 48-49. However, the prosecutors admit that the documents were only available for anyone to review for two weeks between August 17-30, 2016. The prosecutors then shipped the materials to Washington for scanning and they were not returned until Dec. 5, 2016. GO, pp. 15-16. From July 2016 through the end of December, defense counsel was diligently reviewing the batches of voluminous discovery arriving on a rolling basis, with the understanding that the alleged taint team was still performing their

preliminary review of the Eden Gardens materials and that counsel would be contacted so that they could take any disputes about what was and was not considered privileged to the Court for resolution before the Prosecution Team would be given access to it.

On Jan. 13, 2017, counsel proposed to start reviewing the Eden Gardens materials for our own purposes and emailed Ms. Young to ask about them. *See* **Ex. 8**, Declaration of Jackie Perczek; see also ECF 329-51 at 2-3 (Emails, January - March, 2017).[8] Ms. Young responded that the "process" for "preparing the documents" was not yet finished but that she would provide them to us in electronic form – never mentioning that she had already reviewed the Eden Gardens materials and had found at least one privileged document among them on December 7. On Jan. 23, 2017, she finally sent counsel the Eden Gardens documents on a thumb drive labeled "USB8," but they were not correlated to the box labels on the search inventory. *See* **Ex. 8**.[9] On Feb. 8, 2017, counsel also learned (1) that prosecutor Hunter (the taint team prosecutor in charge of the June 2015 tapings) had *only* box 70 and (2) that USB8 sent to counsel by prosecutor Young included the materials from boxes 61 ("Court Documents'), 62 ("Contracts/Legal/Carlton Fields) and 68 (Legal/bank). When counsel inquired about obviously privileged materials being on the thumb drive, Ms. Young directed counsel to prosecutor Tsao, the so-called filter prosecutor in charge of the Eden Gardens privilege review process. *Id*. Yet, when counsel contacted Tsao on Feb. 13, 2017, he disclosed that his involvement had only started about one week before.

[8/] Counsel had not been notified of the identity of any taint prosecutor, so all communication about the Eden Gardens materials were directed at the trial prosecutors.

[9/] It was not until later that counsel discovered that missing from USB8 were the contents of Box 6, containing privileged documents including Ms. Descalzo's work product that the prosecutors had already been using to question potential witnesses.

D. The Esformes Team Acted Reasonably

The prosecutors concede that counsel were assured on July 22, 2016, that a "filter team" was safely in place but ask this Court to hold that relying on those assurances was so unreasonable that it amounted to a "waiver" of the privilege. *See* GO, pp. 38, pp. 48-49. However, federal judges routinely require defendants to rely on the word of prosecutors with respect to their *Brady* obligations.[10] The criminal justice system would simply grind to a halt if defense counsel could not rely on the word of federal agents and prosecutors. *Cf. United States v. San Pedro*, 781 F. Supp. 761, 776 (S.D. Fla. 1991) (dismissing indictment noting that "[t]he foundation of the Republic ... will shatter ... if the American people come to believe that their government is not to be trusted").

The prosecutors knowingly took the risk that their violation of DOJ policies and their misleading of the Esformes Defense Team over the course of many months would have no adverse consequences. They cannot avoid those consequences by blaming the victim for trusting in their integrity.

E. The Prosecution Team Did Not Follow the Proper Taint / Filter Protocol

As a consequence of abandoning DOJ policies and disregarding case law regarding taint team protocols, the Prosecution Team exposed itself to obviously privileged material. The attached index of the 69 boxes "cleared" by the agents' unsupervised review makes startlingly clear that hundreds of documents whose privileged status should have been obvious to anyone made it through the alleged "filter." *See* **Ex. 9**, Draft Index.[11]

[10/] *See Banks v. Dretke*, 540 U.S. 668, 695 (2004); *Strickler v. Green*, 527 U.S. 263, 283 n. 23 (1999).

[11/] Counsel are in the process of preparing a log identifying the most prejudicial entries of the attorney work product and communications. As the index reflects, the boxes contain invoices from at least 16 law firms, including (1) Carlton Fields, (2) Husch Blackwell, (3) Gray Robinson, (4) Ford

(continued...)

In discussing what was missed, the prosecutors first try to confine what is considered "privileged" to "legal advice" given directly by an attorney. GO, pp. 3, 10. They ignore *work product*, not only of Mr. Ginsparg, but also of 16 law firms that had been defending the Esformes in litigation, including the litigation leading to the settlement in Larkin which the Prosecution Team contends is relevant in this case. In addition to detailed legal invoices, there are many confidential memoranda, including: (1) a 9-page, single spaced Husch Blackwell "Memorandum" containing the first-page warning "Memo Protected by Attorney-Client Privilege/Work-Product Doctrine" and with a section, also on page 1, entitled "Outline of Potential Defenses"; (2) a memorandum from Ms. Descalzo when she worked for Zuckerman Spaeder LLP in which she expresses her personal summary and opinions about a Larkin deposition; and (3) from Mr. Esformes' iPhones, text messages with Mr. Ginsparg, whom the prosecutors knew was one of Mr. Esformes' attorneys, regardless of whether Mr. Pasano included him on a list he gave Ms. Young.[12]

F. The Decision To Unilaterally Make the Crime-Fraud Determinations

As demonstrated in Mr. Esformes' separately filed *Motion to Strike Discussion of Privileged Material*, the prosecutors also took it upon themselves to unilaterally make their own "crime-fraud" determination about Ms. Descalzo's work product-protected project that Mr. Ginsparg and Mr. Bengio had undertaken on her behalf. The proffers of their attorneys, David O. Markus and Robin

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[11/](...continued)
& Harrison, LLP, (5) Genovese Joblove & Batista, (6) Mancuso & Dias, PA, (7) Quintairos Prieto Wood & Boyers PA, (8) Ginsparg, Bolton & Associates, (9), Holland & Knight, PA., (10) Steinger, Iscoe & Greene, PA, (11) Law Offices of Peter Lewis, (12) Kelly Olson Michod Dehaan & Richter, (13), Mark L. Rivlin, P.A., (14) Alters Law Firm, P.A., (15) Fuerst Ittleman David & Joseph PL, and (16) Seyfarth & Shaw LLP. There are also invoices from The McManus Group, an investigative firm doing work for the Alters Law Firm.

[12/] As with the law firm invoices, counsel are in the process of preparing a privilege log singling out the most prejudicial text messages.

Kaplan-Eliani, explain how prosecutor Young used it during interviews and then continued to use it even after being informed that the documents were privileged. **Ex. 10** (Markus) and **Ex. 11** (Kaplan-Eliani). During those meetings, prosecutor Young insisted, as in the Response, that the documents really showed that Mr. Esformes was trying to cook the books. Mr. Bengio, when faced with the Hobson's choice of allowing the prosecutors' misperception of the document (and therefore of him) to color how he would be treated by the government in the future or disclosing Mr. Esformes' privileged information, Mr. Bengio naturally chose that latter course of action.

G. Prejudice Has Been Established

The prosecutors should not have even possessed, much less used, privileged materials to further the prosecution of Mr. Esformes. The prosecutors admit they did just that: they confronted Messrs. Ginsparg and Bengio with Ms. Descalzo's work product in defense of this indictment – even as attorneys Markus and Kaplan-Eliani warned the prosecutors that the documents were privileged. Through that confrontation, the prosecutors learned even more privileged information. That should be enough, standing alone, to require the prosecutors' disqualification. They were exposed to other privileged material, as they admit, but still have not fully disclosed the circumstances. Their contention that they only reviewed a "handful" of privileged documents (GO, p. 15) is not credible unless the Court believes that there is even a mathematical possibility that the *only* privileged documents they actually studied were, miraculously, *only* the ones already pointed out by counsel. Given both the length of time that the Prosecution Team has had free access to the Eden Gardens materials, their failure to disclose their actual use of those materials for months, and the sheer volume of those materials, prejudice has been established, indeed should be presumed, at least for

purposes of the disqualification remedy. *See Richards v. Jain*, 168 F. Supp. 2d 1195, 1200, 1209 (W.D. Wash. 2001); *State v. Lenarz*, 301 Conn. 417, 440, n. 17; 22 A.3d 536, 551, n. 17 (2011).[13]

CERTIFICATE OF SERVICE

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

Respectfully submitted,

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[13/] The prosecutors claim that to justify their disqualification, Mr. Esformes must show the same degree of prejudice that would be required to obtain dismissal of the indictment. If that was true, no prosecutor would ever be disqualified because the case would be dismissed first.

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