No. 21-____

IN THE

Supreme Court of the United States

MORDECHAI KORF ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The court of appeals allowed a Department of Justice "filter team" consisting of government attorneys not conducting the investigation to review assertedly privileged materials of petitioners' lawyers, seized during a search, before any court ruled on petitioners' assertions of attorney-client privilege and work-product protection—and without requiring any showing that an exception to privilege may apply. The question presented is:

Whether filter-team procedures like the ones in this case are invalid because they undermine the attorney-client privilege and work-product protection.

PARTIES TO THE PROCEEDING

Petitioners are Mordechai Korf, Uriel Laber, Chaim Shochet, CC Metals and Alloys, LLC, Felman Productions, LLC, Felman Trading, Inc., Georgian American Alloys, Inc., Optima Acquisitions, LLC, Optima Fixed Income, LLC, Optima Ventures, LLC, Optima International, LLC, Optima Management Group, LLC, Optima Group, Felman Trading Americas, Inc., Georgian American Alloys Sarl, Georgian American Alloys Management, LLC, Optima Hospitality, LLC, Optima 777, LLC, Optima 925, LLC, Optima 1300, LLC, Optima 1375, LLC, Optima 1375 II, LLC, Optima 55 Public Square, LLC, Optima 7171, LLC, Optima 500, LLC, Optima CBD Investments, LLC and CBD 500, LLC. Additional entities who were parties in the court of appeals are Niagara Lasalle and Optima 925 II LLC.

Respondent is the United States of America.

CORPORATE DISCLOSURE STATEMENT

None of the entities above has a parent corporation, nor does any publicly held company own 10% or more of any corporate entity's stock.

DIRECTLY RELATED PROCEEDINGS

United States Magistrate Judge

In re: Sealed Search Warrant and Application for a Warrant, No. 20-mj-03278-O'Sullivan (S.D. Fla.) (order signed September 23, 2020)

United States District Court

In re: Sealed Search Warrant and Application for a Warrant by Telephone or Other Reliable Electronic Means, No. 1:20-mj-03278-JJO-1 (S.D. Fla.) (judgment entered November 2, 2020)

United States Court of Appeals

United States of America v. Mordechai Korf, et al., No. 20-14223 (11th Cir.) (judgment affirmed and opinion issued August 30, 2021; rehearing and rehearing en banc denied January 19, 2022; mandate issued January 27, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Mordechai Korf *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 11 F.4th 1235 and reprinted in the Appendix to the Petition at Pet. App., *infra,* 1a-31a. The opinion of the district court is unpublished and is reprinted at *id.* at 32a-40a. The decision of the magistrate judge is unpublished, and is reprinted at *id.* at 41a-65a.

JURISDICTION

The court of appeals entered its judgment on August 30, 2021, Pet. App. 2a, and denied rehearing on January 19, 2022, *id.* at 67a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

This case involves the legality of government "filter-team" protocols. Under such protocols, teams of federal prosecutors and agents not involved in a particular criminal investigation review assertedly privileged documents seized during the investigation—before any court has resolved whether privilege applies. In this case, the government seized voluminous documents from petitioners' lawyers' offices, and petitioners claim the protection of the attorney-client privilege and work-product doctrine for many of these documents. Petitioners must provide a detailed privilege log of these documents so that their claims can be tested. Yet the filter-team protocol in this case allows filter-team prosecutors and agents to review the content of the seized documents—with no threshold factual showing to anyone that the privilege does not apply. The sole purpose of this intrusive review is to allow the government to make arguments challenging petitioners' privilege assertions. Only after the filter team has reviewed the documents would a court rule on whether privilege applies. That procedure needlessly and harmfully exposes assertedly privileged communications to the government's eyes. It undermines essential protections for the adversary system. And it jeopardizes the confidentiality needed for the applicable privileges to serve their vital purposes.

The Eleventh Circuit's decision upholding that filter-team protocol runs counter to the careful procedural protections for the attorney-client privilege adopted in *United States v. Zolin*, 491 U.S. 554 (1989). *Zolin* held that a *court* may not conduct *in camera* review of assertedly privileged documents until the government has made a threshold showing that an exception to privilege likely applies based on non-privileged facts. The decision below, however, allows *government agents* to review assertedly privileged documents before any court has ruled on the privilege assertion—and without requiring any threshold showing at all. That rule infringes the privacy interests underlying the attorney-client privilege and work-product doctrine. It will inevitably chill free discussion between attorneys and their clients to the detriment of the legal process.

Other courts have recognized the potential for filter-team abuses and have installed strong procedural safeguards. In contrast to the decision below, the Fourth and Sixth Circuits have recognized the risks that particular filter-team protocols posed to the attorney-client and work-product privileges and have enjoined those protocols. And unlike the Eleventh Circuit, the Ninth Circuit has recognized the importance of applying *Zolin*'s framework where, as here, the government seizes potentially privileged materials. Yet the Eleventh Circuit ignored *Zolin* and the hazards of the filter-team protocols here. The disparate judicial approaches create uncertainty in an area where predictability is paramount.

This Court should settle the basic principles that apply when the government seizes large volumes of

assertedly privileged materials and seeks to challenge claims of privilege. Proper procedures include requiring privilege logs and *in camera* judicial review—or reliance on special masters—rather than licensing free-rein filter-team review of assertedly privileged documents before a court rules on the privilege assertion. And the Court should address these issues now: the Department of Justice recently created an institutionalized national filter team within the Criminal Division, which presumably will apply standardized nationwide procedures. The uncertainty over the appropriate procedures, and the Justice Department's claim that it can use filter-teams to review assertedly privileged documents before any court addresses the privilege question, creates a pressing need for this Court's intervention. To address the legality of filter-team protocols, and to provide guidance about how filter teams may operate consistent with the attorney-client privilege and work-product doctrine, certiorari should be granted.

STATEMENT

A. Legal Background

1. The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law," *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), with roots as far "back [as] the Tudor dynasty," *In re Grand Jury Subpoenas*, 454 F.3d 511, 519 (6th Cir. 2006). It protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance," *Fisher v. United States*, 425 U.S. 391, 403 (1976), as well as "the giving of professional advice to those who can act on it," *Upjohn*, 449 U.S. at 390. Its purpose is to "encourage

full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* at 389. For the privilege to accomplish its objectives, "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected"—"[a]n uncertain privilege … is little better than no privilege at all." *Id.* at 393.

The work-product doctrine protects "certain materials prepared by an attorney 'acting for his client in anticipation of litigation.'" *United States v. Nobles*, 422 U.S. 225, 238 (1975) (quoting *Hickman v. Taylor*, 329 U.S. 495, 508 (1947)). "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *Id.* This doctrine—embodied in the Federal Rules of Criminal Procedure, *see* Fed. R. Crim. P. 16(a)(2), (b)(2)—plays a critical "role in assuring the proper functioning of the criminal justice system," *Nobles*, 422 U.S. at 238. "The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." *Id.*

2. When the government executes a search warrant or subpoenas documents, documents swept up in the investigation may be subject to the attorney-client privilege and work-product protection described above. Privilege issues are virtually inevitable when law firms or in-house counsel are subjects or targets of the investigation. In this situation, the government

has often used so-called filter teams (also known as "taint teams" or "privilege teams"), under which the government establishes a team of "government attorneys who are not involved in the [relevant] investigation . . . to segregate privileged documents from the residue of non-privileged material." *In re Grand Jury Subpoenas*, 454 F.3d at 515. Filter teams operate under various protocols. *See Justice Manual* § 9-13.420(D) (Jan. 2021) (searches of attorney's documents in certain circumstances should be guided by "[p]rocedures . . . to ensure that privileged materials are not improperly viewed, seized or retained during the course of the search"; "the procedures to be followed should be tailored to the facts of each case and the requirements and judicial preferences and precedents of each district"; and "in all cases a prosecutor must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized"). But they are uniform in allowing *ex ante* review by government officials before judicial determinations of the privilege.[1]

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[1] Even the Justice Department's vague guidelines are unenforceable by courts or privilege holders. The Justice Manual's "guidelines are set forth solely for the purpose of internal Department of Justice guidance"; "[t]hey are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice." *Justice Manual* § 9-13.420 (Jan. 2021) (final paragraph). Courts heed those disclaimers of unenforceability. *See, e.g.*,

B. Factual and Procedural Background

1. The U.S. Attorney's Office for the Northern District of Ohio is conducting a federal grand-jury investigation into money laundering, conspiracy to commit money laundering, and wire fraud. Pet. App. 3a. The grand-jury investigation overlaps factually with allegations in a civil fraud and racketeering complaint brought against petitioners in Delaware Chancery Court by a Ukrainian commercial bank called PrivatBank. *See id.* at 7a-8a; *Joint Stock Co. Commercial Bank PrivatBank v. Kolomoisky*, Del. Ch. C.A. No. 2019-0377-JRS (May 21, 2019). The Delaware civil action alleges that certain Ukrainian persons used their positions at PrivatBank to misappropriate corporate-loan proceeds and then launder those proceeds into the United States. Pet. App. 8a n.2. Since 2019, petitioners have been defending against this Delaware action through their litigation counsel. *Id.*

As part of the grand-jury investigation, the government sought and obtained a search warrant for the Miami offices of certain Optima Family Companies. *Id.* at 4a. Petitioners own, control, or manage these companies and have offices at the Miami location that was the subject of the warrant. *Id.* at 3a-4a. The Miami location also includes offices of Optima's in-house counsel, *id.* at 6a, and offices of Roche, Cyrulnik, and Freedman LLP (RCF), a law firm that leases space from Optima, *id.* at 43a. RCF represents Optima in

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United States v. Mahdi, 598 F.3d 863, 897 (D.C. Cir. 2010) (applying that principle to a different provision of the U.S. Attorney's Manual).

the Delaware action and also regularly provides legal advice to certain of petitioners. *Id.*

In a sworn declaration, Optima's in-house counsel stated that Optima's Miami offices house "legal memo pads, physical documents and computers containing information protected by the attorney-client and work-product privileges." Dkt. 4-6, at 2.[2] In addition, she stated that other Optima in-house lawyers have worked in the same offices since 2008 and likewise "sen[t], receiv[ed], and generat[ed] countless electronic documents and email communications covered by the attorney-client and work product privileges." *Id.* The documents in the Miami offices include those related to the Delaware action that overlaps with the grand-jury investigation. According to Optima's in-house counsel, she has "collated documents and assisted outside counsel and [petitioners] in preparation of evidence and defenses in the" Delaware action. *Id.* at 3.

The search warrant identified the items to be seized from Optima's offices, including records of petitioners. Pet. App. 4a. In particular, the warrant allowed the government to seize "all documents" from petitioners from "2008 to the present," including "[r]ecords of receipt of income," "[r]ecords of all accounts and transactions at financial institutions," "records of loans and financing transactions," and "all communications between [petitioners] and any employee or agent of" the Optima-family companies. *Id.*

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[2] Citations to "Dkt." refer to the district court's docket in this case: 1:20-mj-03278-JJO (S.D. Fla.).

In addition to the seizure of paper records, the warrant authorized seizure, imaging, or copying of all computer or other electronic-storage media that might contain the evidence described in the warrant. *Id.* at 5a.

The warrant also contained a section entitled "Filter for Privileged Materials," which established a filter-team protocol. *Id.* That section stated that "a filter team of government attorneys and agents" who are uninvolved in the investigation would "review all seized communications and segregate communications to/from attorneys, which may or may not be subject to attorney-client privilege." *Id.* at 5a-6a. "The filter team then will provide all communications that do not involve an attorney to the investigative team." *Id.* at 6a. And "[i]f the filter team decides that any of the communications to/from attorneys are not actually privileged (e.g. the communication includes a third party or the crime-fraud exception applies), the filter team must obtain a court order before providing these attorney communications to the investigative team." *Id.* (alterations omitted)

On August 4, 2020, federal agents executed the search warrant at Optima's Miami offices. *Id.* Agents searched the offices of Optima's in-house counsel and the RCF law firm. *Id.*; *see id.* at 44a n.4. The government seized approximately 125,000 pages of paper documents, including 7,688 pages from the in-house counsel's office. *Id.* at 33a. It also seized computers, flash drives, disks, and other electronic media. *Id.* at 44a. Optima's in-house counsel, who was present during the search, has stated that "[t]he government is indisputably in possession of countless

privileged documents and communications involving" petitioners and entities in which they have ownership interests. Dkt. 4-6, at 4.[3]

2. After the search, petitioners immediately contacted the government to object to its filter-team protocol. Pet. App. 45a. When the government refused to modify its protocol, petitioners moved in the district court to preliminarily enjoin the government from reviewing any privileged materials. *Id.* at 7a. As an alternative to the government's filter-team protocol, petitioners proposed the following procedure: petitioners' counsel would have 45 days to review the seized documents, identify ones subject to privilege, and submit a privilege log identifying privileged documents with sufficient information to allow the government to evaluate the privilege assertion; the government would review the privilege log and raise any objections to petitioners' privilege assertions; and the magistrate judge (or an appointed special master) would then review the disputed documents *in camera* to adjudicate whether privilege applies. *See* Dkt. 4, at 17-18.

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[3] Two days after executing the search warrant, the government initiated two civil-forfeiture actions in the Southern District of Florida, which relate to "assets that facilitated, were involved in, and are traceable to an international conspiracy to launder money embezzled and fraudulently obtained from PrivatBank." *See* No. 20-cv-23278, Dkt. 1 (S.D. Fla. Aug. 6, 2020); No. 20-cv-23279, Dkt. 1 (S.D. Fla. Aug. 6, 2020); *see also* Pet. App. 43a-44a. The allegations in these civil-forfeiture actions largely mirror those in the Delaware action brought by PrivatBank, and the civil-forfeiture actions name petitioners as interested persons. No American court has ruled on those allegations.

The magistrate judge granted petitioners' motion in part and denied it in part. At the outset, the magistrate judge rejected the "argument that the use of government filter teams to conduct privilege review is *per se* legally flawed." Pet. App. 50a. "Nonetheless," the judge explained that he "ha[d] reservations about the initial filter team protocol set forth in the search warrant"—namely, because the "segregation process only requires the filter team to review for possible privilege those items which are 'to/from attorneys[,]' at least some items which are protected by the attorney-client privilege or the work product doctrine may be inadvertently disclosed to the investigative team." *Id.* at 52a-53a.

To address that concern, the magistrate judge established a modified filter-team protocol, but this modified protocol still failed to resolve petitioners' core objections. Under the modified protocol, petitioners would "conduct the initial privilege review of all seized items" and "provide a privilege log to the government's filter team." *Id.* at 62a. The filter team would then "review any item on the privilege log"—that is, it would review the assertedly privileged item itself—"in order to formulate a challenge." *Id.* If the filter team challenged petitioners' privilege assertion, the court or a special master would rule on the privilege dispute. *Id.* at 63a. Finally, the magistrate judge required that the filter team be composed "of attorneys and staff from outside the United States Attorney's Office for the Northern District of Ohio's Cleveland branch"—although filter-team members could be from other branches within the Northern District of Ohio, meaning that prosecutors from the same U.S.

Attorney's Office could serve on the investigative team and filter team. *Id.* at 62a n.13.

Petitioners appealed the magistrate judge's decision to the district court, arguing that the modified filter-team protocol ran counter to *United States v. Zolin*, 491 U.S. 554 (1989), *see* Dkt. 24, at 13-14, but the district court affirmed. Pet. App. 40a. The court stated that filter teams "are routinely employed to conduct privilege reviews" and observed that "the Assistant U.S. Attorney appointed to the filter team is not, and will not, be a part of the investigative team on the case." *Id.* at 36a. The district court was not troubled by petitioners' apprehension that "privileged information may be improperly revealed to the prosecution team." *Id.* at 37a.

Petitioners then appealed to the Eleventh Circuit, which also affirmed. The Eleventh Circuit held that petitioners had "not showed a substantial likelihood of success on their argument that government filter teams *per se* violate privilege holders' rights." *Id.* at 3a. The court acknowledged that "any filter protocol must appropriately take into account the importance" of the attorney-client privilege and work-product doctrine. *Id.* at 25a. But "[f]or three reasons," the court concluded that the filter-team protocol in this case "suffices under the law." *Id.* at 26a. First, the court observed that "some of our sister circuits have approved of the use of a walled-off government filter team to review documents for privilege." *Id.* Second, the court noted that petitioners "cite no cases" holding that government agents may not review assertedly privileged documents "until after a court has ruled on

the privilege assertion." *Id.* And third, the court reasoned that "to the extent that courts have disapproved of particular filter-team protocols, the [protocol here] suffers from none of the defects those courts found disqualifying." *Id.* at 27a (citing *In re Grand Jury Subpoenas*, 454 F.3d 511 (6th Cir. 2006); *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019)). In the court's view, "there is no possibility here that privileged documents will mistakenly be provided to the investigative team." Pet. App. 28a. The Eleventh Circuit never cited *Zolin*, even though petitioners relied on it. *See* Br. of Appellants, *United States v. Korf*, 2020 WL 7641877, at *33-34 (11th Cir. Dec. 21, 2020).

The Eleventh Circuit denied petitioners' petition for rehearing and rehearing en banc. Pet. App. 67a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's approach to filter teams runs counter to this Court's privilege-protective approach in *Zolin*. It threatens valued confidentiality interests that are vital to the operation of the adversary system. And it sits uncomfortably alongside Fourth and Sixth Circuit decisions that have recognized the risks of filter teams and have enjoined particular filter-team protocols, as well as a Ninth Circuit decision correctly applying *Zolin*'s framework to the seizure of large amounts of potentially privileged materials. This Court's intervention is needed to vindicate the policies underlying the attorney-client privilege and work-product doctrine that the decision below overrides. And the Department of Justice's recent creation of a centralized filter-team structure heightens the need for this Court's review. Only this

Court can set nationwide standards to prevent erosion of these vital protections to the justice system and personal liberty. And this case is the right vehicle for articulating those standards. This Court should grant certiorari and reverse.

A. The Decision Below Is Incorrect

1. a. In resolving questions about the scope of a privilege, the Federal Rules of Evidence require federal courts to apply "principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." Fed. R. Evid. 501; *see United States v. Zolin*, 491 U.S. 554, 562 (1989). In so doing, courts assess whether a particular rule is "[]consistent with the policies underlying the privilege." *Id.* at 568.

In *Zolin*, this Court considered the procedures required where the government seeks assertedly privileged documents and argues that such documents fall within an exception to privilege. There, the Internal Revenue Service (IRS) obtained via summons materials that had been filed under seal in state court. *Id.* at 557. The owners of the materials asserted attorney-client privilege, while the IRS argued that the materials fell within the privilege's crime-fraud exception, which bars application of the privilege to "communications made for the purpose of getting advice for the commission of a fraud or crime." *Id.* at 563 (internal quotation marks omitted).

This Court adopted a nuanced approach that neither prohibited *in camera* review of potentially privileged materials, nor permitted it as a blanket matter. While acknowledging that *in camera* review may be

necessary, the Court recognized that "[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect" and "would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk." *Id.* at 570-71. "There is no reason," the Court explained, "to permit opponents of the privilege to engage in groundless fishing expeditions." *Id.* at 571. As a result, the Court held "that before a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the [crime-fraud] exception's applicability." *Id.* at 574. And privileged evidence may not be used to make that determination; "[t]he party opposing the privilege may use any *nonprivileged* evidence in support of its request for *in camera* review." *Id.* (emphasis added).

The decision below runs counter to the principles animating *Zolin*. As noted, the Court in *Zolin* expressed concerns that allowing even *judges* to conduct automatic *in camera* review of attorney-client communications would undermine the attorney-client privilege. *Id.* at 571. It therefore required the government to make a "factual" showing "adequate to support a good faith belief by a reasonable person" that an exception to the privilege applies before such judicial review becomes permissible. *Id.* at 572. Yet here, the Eleventh Circuit allowed *federal prosecutors*—members of the same U.S. Attorney's Office investigating petitioners, albeit not on the investigatory team—to review assertedly privileged attorney-client

communications and work product without requiring the government to make *any* factual showing at all. That holding is irreconcilable with *Zolin*'s solicitude for the privilege and its rejection of automatic *judicial* review.

The court of appeals' approach also works appreciable damage to the policies underlying the attorney-client privilege and work-product doctrine. The decision below will make clients far more reluctant to share sensitive or incriminating information with their lawyers, out of fear that federal prosecutors will review that information during the course of an investigation. *See Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998) ("Without assurance of the privilege's . . . application, the client may very well not have made disclosures to his attorney at all."). To provide legal advice, a lawyer—especially in a criminal investigation—must be able to assure her client that the privilege is sacrosanct; otherwise, clients would hardly feel "free to make full disclosure to their attorneys of past wrongdoings." *Zolin*, 491 U.S. at 562 (internal quotation marks omitted). Chilling client disclosures thwarts the attorney-client privilege's central purpose of "encourag[ing] full and frank communication between attorneys and their clients." *Upjohn v. United States*, 449 U.S. 383, 389 (1981). And incomplete or no disclosure by clients will have a devastating effect on counsel's ability to provide "sound legal advice" and fulfill her "professional mission," frustrating the "public interests in the observance of law and administration of justice." *Id.* The same is true for work-product protection: allowing prosecutors to review attorney work product (especially opinion

work product and mental impressions) disregards the "degree of privacy, free from unnecessary intrusion by opposing parties," that criminal-defense attorneys need to prepare their case. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

b. The Eleventh Circuit cited no other context in which the government is permitted to review assertedly privileged documents in order to develop arguments contesting the privilege assertion. As one court has explained when addressing a filter-team protocol, allowing the government to "intentionally review privileged communications in order to develop the factual basis supporting an *in camera* review" is "tantamount to allowing police officers to conduct a warrantless search and then use the fruits of that search as the basis for a search warrant." *United States v. Pedersen*, 2014 WL 3871197, at *30 (D. Or. Aug. 6, 2014). In the similar context of the Fifth Amendment's privilege against compelled self-incrimination, courts have held that "the required inquiry [into whether privilege applies] is best made in an *in camera* proceeding"—before the government has reviewed the privileged materials—"where the defendant is given 'the opportunity to substantiate his claims of the privilege and the district court is able to consider the questions asked and the documents requested.'" *United States v. Drollinger*, 80 F.3d 389, 393 (9th Cir. 1996) (quoting *United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991)); *see Estate of Fisher v. C.I.R.*, 905 F.2d 645, 650 (2d Cir. 1990) (collecting cases and noting that "[t]he Supreme Court has repeatedly looked with favor upon the practice of *in*

camera review of various privileges against disclosure").

2. The court of appeals reached the contrary result for three principal reasons, but none is persuasive.

a. First, the court relied on the filter team's supposed independence from the investigation team. The court noted that the filter team is composed of federal prosecutors who are not actively investigating petitioners, and it emphasized that before any assertedly privileged materials "may be provided to the investigative team, either the [petitioners] or the court must approve." Pet. App. 31a.

This reasoning cannot justify use of the filter team to review assertedly privileged communications before a court has ruled on the privilege assertion. The attorney-client privilege "serves much broader purposes" than simply ensuring that privileged communications will not be used by a litigation adversary as evidence against the privilege holder. *Swidler & Berlin*, 524 U.S. at 407. Rather, "[t]he whole point of privilege is privacy," *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 599 (5th Cir. 2021), because "[k]nowing that communications will remain confidential … encourages the client to communicate fully and frankly with counsel," *Swidler & Berlin*, 524 U.S. at 407. That is why communications remain privileged even after the privilege holder has died, *id.*, when the threat of litigation against the privilege holder no longer exists. Here, allowing disclosure of petitioners' attorney-client communications to the filter team will destroy petitioners' privacy interests in those communications. That privacy harm is severe

and irreparable even assuming that the investigative team never views those communications.

The Eleventh Circuit disregarded that privacy harm altogether, instead asserting that "there is no possibility here that privileged documents will mistakenly be provided to the investigative team." Pet. App. 28a. But the court's trust that the barrier between the filter team and investigative team is impermeable does not accord with human experience. The best of fail-safe procedures routinely fail. "[T]aint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors." *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

While a filter team "may have an interest in preserving privilege," it may "also possess[] a conflicting interest in pursuing the investigation, and human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations." *Id.* "It is thus logical to suppose that taint teams pose a serious risk to holders of privilege, and this supposition is substantiated by past experience." *Id.*; *see also, e.g.*, *In re Search Warrant for Law Offices Executed on Mar. 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) ("It is a great leap of faith to expect that members of the general public would believe any . . . wall [between a filter team and prosecution team] would be impenetrable; this notwithstanding our own trust in the honor of an AUSA."). Indeed, as explained below, filter-team protocols have broken down in numerous cases, allowing the investigative team to view

privileged materials. *See infra* at 30-32. The prevalence of filter-team breakdowns highlights the "obvious flaw in the taint team procedure: the government's fox is left in charge of [the privilege holder's] henhouse." *In re Grand Jury Subpoenas*, 454 F.3d at 523.

In this case, the consequences of a filter-team breakdown would be particularly stark. The government has seized large swaths of documents over which petitioners will assert or have asserted privilege. And many of these documents concern the Delaware action against petitioners, which involves allegations that are substantively identical to those involved in the government's grand-jury investigation. *See supra* at 7. If the filter-team protocol were to falter and these Delaware documents were to be revealed, the investigative team would likely learn core features of petitioners' defense strategy.

b. Second, the court suggested that filter teams are commonplace and have been approved by several courts, whereas petitioners' proposed approach is novel. *See* Pet. App. 26a. That suggestion is incorrect.

The court of appeals' implication that a broad consensus of courts has validated filter teams is not accurate. One of the cases the court cited did not even involve the use of a filter team, but rather simply acknowledged that the government sometimes uses such teams. *See S.E.C. v. Rajaratnam*, 622 F.3d 159, 183 n.24 (2d Cir. 2010). Others involved a filter team, but the privilege holder did "not argue that the use of a taint team [was] inappropriate," giving the courts "no occasion to consider" limits on their use. *In re*

Search of Elec. Commc'ns, 802 F.3d 516, 530 n.53 (3d Cir. 2015).[4] And two of the cited cases support *petitioners'* argument. In *United States v. Christensen*, 828 F.3d 763 (9th Cir. 2015), the Ninth Circuit concluded that the district court erred by failing to follow "the correct *Zolin* framework" when allowing a filter team to conduct an initial review of potentially privileged recordings, and the Ninth Circuit found the error harmless only because the district court subsequently "reconsidered privilege and crime-fraud issues under" *Zolin*. *Id.* at 799. Similarly, in *United States v. Myers*, 593 F.3d 338 (4th Cir. 2010), the district court approved filter-team review of documents only after the court had itself reviewed the documents and concluded that the government had "made a prima facie case under the crime fraud exception." *Id.* at 341 & n.5.

The Eleventh Circuit also incorrectly implied that petitioners' proposed approach—preparation of a privilege log, followed by *in camera* judicial review where privilege disputes arise and the government has met its burden under *Zolin*—would be novel. Pet. App. 26a. In fact, litigants routinely prepare privilege logs "documenting materials for which they claim the protection of privilege" and providing "sufficient information about the privilege claims [so] that the government [can] intelligently evaluate [the] assertions [of privilege] by reviewing the log." *In re Grand Jury Subpoenas*, 454 F.3d at 516; *see* Fed. R. Civ. P.

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[4] *See also United States v. Proano*, 912 F.3d 431, 437 (7th Cir. 2019); *United States v. Jarman*, 847 F.3d 259, 266-67 (5th Cir. 2017); *United States v. Howard*, 540 F.3d 905, 906 (8th Cir. 2008); *United States v. Ary*, 518 F.3d 775, 780 (10th Cir. 2008).

26(b)(5)(A) & 45(e)(2)(A)(ii) (similar privilege log procedure for civil litigation). That procedure—under which the government does not review potentially privileged materials just so it may formulate arguments—is the norm when the government subpoenas documents that the responding party deems privileged. And *in camera* review of sensitive materials is standard practice in other criminal contexts. For instance, courts regularly conduct *in camera* review of documents to determine whether they contain exculpatory material subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), or witness statements subject to disclosure under the Jencks Act, 18 U.S.C. § 3500(b). *See, e.g.*, *United States v. Alvarez*, 358 F.3d 1194, 1207-08 (9th Cir. 2004) (*Brady*); *United States v. Smith*, 31 F.3d 1294, 1302-03 (4th Cir. 1994) (Jencks Act).

Petitioners' proposed approach is fully administrable. To prevent delay, courts can impose deadlines by which litigants must complete their privilege log (here, petitioners proposed 45 days). If district court judges lack time to conduct *in camera* review themselves, they can "engage a magistrate judge or special master to review the potentially privileged documents." *Harbor Healthcare*, 5 F.4th at 598, 601 n.4. Courts have frequently taken this step with successful results.[5] For example, in one recent case involving

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[5] *See, e.g.*, *In re Grand Jury Subpoenas*, 454 F.3d at 524 (remanding for "the district court [to] employ a Special Master to perform th[e] first segregation of documents"); *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 962 (3d Cir. 1984) (recommending appointment of special master for *in camera* privilege determination); *United States v. Gallego*, 2018 WL 4257967, at *3 (D.

the seizure of privileged materials from Michael Cohen, Donald Trump's former lawyer, a district court rejected the government's filter-team proposal and appointed a special master. *See Cohen v. United States*, No. 1:18-mj-03161, ECF 30 (S.D.N.Y. Apr. 27, 2018). And even when a court engages a special master, resolving privilege disputes does not "entail reviewing each and every document; [the privilege holder's] privilege logs should allow for recommendations or rulings based on categories of documents." *Harbor Healthcare*, 5 F.4th at 598, 601 n.4.[6]

c. Finally, the Eleventh Circuit apparently drew comfort from the notion that using a filter team "constitutes an action respectful of, rather than injurious to, the protection of privilege." Pet. App. 27a. That might be true if the only alternative were allowing the government's *investigative* team to review the assertedly privileged documents. But as just explained, that is not the only alternative. Privilege holders can prepare privilege logs, the government can review

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Ariz. Sept. 6, 2018) (appointing "Special Master to review the items seized from Defendant's law office for privilege"); *United States v. Stewart*, 2002 WL 1300059, at *10 (S.D.N.Y. June 11, 2002) (appointing "Special Master to perform an initial review of the materials for privilege").

[6] To the extent that a court finds it essential to have an advocate who has reviewed the privileged materials present arguments opposing privilege, an alternative solution would be to appoint an *amicus* such as a former prosecutor, rather than allowing current federal prosecutors to invade the privilege on their own. Appointing an *amicus* would not necessarily cost the court anything and would spare the expense incurred by current government attorneys diverting their attention to privilege review and away from other cases.

those logs and raise objections (or seek more detailed descriptions if necessary), and district courts (sometimes through magistrate judges or special masters) can conduct *in camera* review of assertedly privileged documents if the government clears the threshold under *Zolin*. Those procedures are workable and appropriately respectful of the privilege. *See*, *e.g.*, *In re Grand Jury Investigation*, 974 F.2d 1068 (9th Cir. 1992). Compared to those well-established practices, filter teams *are* highly "injurious to the protection of privilege." Pet. App. 28a (punctuation omitted).

B. The Decision Below Is In Tension With Decisions Of Other Courts Of Appeals

The decision below is in tension with decisions from two other circuits enjoining filter-team protocols. And it is also in tension with a decision from the Ninth Circuit holding that *Zolin* applies under circumstances similar to those there.

1. Unlike the Eleventh Circuit, the Fourth and Sixth Circuits have recognized the inherent risks that filter teams pose to the attorney-client privilege and work-product doctrine, and they have favored use of privilege logs and *in camera* review over filter teams.

a. In *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (4th Cir. 2019), federal law-enforcement agents obtained a warrant to search a law firm. *Id.* at 165. As in this case, the magistrate judge approved use of a filter team of lawyers from a different division of the same U.S. Attorney's Office as the investigative team. *Id.* Under the protocol there, the filter team would separate privileged from nonprivileged materials, forward nonprivileged materials directly to the

investigative team, and raise potentially privileged materials for adjudication by a court. *Id.* at 166. When agents executed the search warrant, they seized "voluminous materials," including a substantial amount of attorney-client communications that were unrelated to the alleged crimes and subjects under investigation. *Id.* at 166-67.

The Fourth Circuit preliminarily enjoined the filter-team protocol, holding that the law firm had made "a clear showing that the Filter Team and its Protocol are legally flawed." *Id.* at 175-76 (internal quotation marks omitted). The court identified three primary flaws in the district court's decision upholding the filter-team protocol: the filter-team protocol "assign[ed] judicial functions to the executive branch," *id.* at 176;[7] the magistrate judge authorized that protocol "in *ex parte* proceedings," *id.* at 178; and the district court "gave no indication that she had weighed any of the important legal principles that protect attorney-client relationships," *id.* at 179. In reaching this result, the court emphasized "the possibility that a filter team—even if composed entirely of trained lawyers—will make errors . . . in transmitting seized materials to an investigation or prosecution team." *Id.* at 177. And it reasoned that the district court's "authorization of such an extensive review of client communications

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[7] While the case was pending on appeal, the district court entered a modified protocol under which "the Filter Team's forwarding of seized materials to the Prosecution Team [must] be first approved by the Law Firm or by the court." *Id.* at 170. The majority opinion does not suggest that this modified protocol would impermissibly delegate a judicial function. *See id.* at 184 (Rushing, J., concurring).

and lawyer discussions by government agents and prosecutors was made in disregard of the attorney-client privilege, the work-product doctrine, and the Sixth Amendment." *Id.* at 179. "Unlike the Filter Team," the court noted, "a magistrate judge and a special master are judicial officers and *neutral* arbiters that have no stake in the outcome of the privilege decisions." *Id.* at 181 n.19. Accordingly, the court concluded "that the magistrate judge (or an appointed special master)—rather than the Filter Team—must perform the privilege review of the seized materials." *Id.* at 181.

b. Similarly, in *In re Grand Jury Subpoenas*, 454 F.3d 511 (6th Cir. 2006), the federal government issued a grand-jury subpoena to a business "demand[ing] production of some documents that, all sides concede[d], may be protected by either [the] attorney-client or work-product privileges." *Id.* at 514. The district court approved a "taint team" protocol, under which the taint team (composed of prosecutors from the same U.S. Attorney's Office as the investigative team) would submit any documents it deemed privileged or potentially privileged to the court for a final determination and would send any documents it deemed nonprivileged directly to the grand jury and investigative team. *See id.* at 517-518 & n.5.

The Sixth Circuit enjoined this protocol, holding that "the possible damage to the appellants' interest in protecting privilege exceeds the possible damage to the government's interest in grand jury secrecy and exigency in this case." *Id.* at 523. Citing *Zolin*, the court noted that "even inspections by the district judge, which do not destroy privilege, require a prior

showing that is weakly analogous to probable cause," whereas "a government taint team's review of documents is far riskier to the non-moving party's privilege than is a judge's *in camera* review." *Id.* at 520. The court emphasized that "taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors." *Id.* at 523. The "obvious flaw in the taint team procedure," the court reasoned, is that the government "may err by neglect or malice, as well as by honest differences of opinion." *Id.* As a remedy, the Sixth Circuit "mandate[d] that the district court employ a Special Master to perform th[e] first segregation of documents," followed by preparation of a "standard privilege log" by the privilege holders. *Id.* at 524.

c. As the decision below notes, Pet. App. 27a-31a, the procedures at issue in the Fourth and Sixth Circuit cases just discussed differ in certain respects from the procedures upheld here. For instance, the protocols in those cases allowed the filter teams to conduct the initial privilege review and send materials it deemed nonprivileged directly to the investigative team, *see In re Search Warrant*, 942 F.3d at 166; *In re Grand Jury Subpoenas*, 454 F.3d at 515, whereas the modified protocol here allows petitioners to conduct the initial privilege review, Pet. App. 30a. In addition, the Sixth Circuit case arose from a grand-jury subpoena, where "the potentially-privileged documents [were not] already in the government's possession," *In re Grand Jury Subpoenas*, 454 F.3d at 522, whereas this case arises from the government's

seizure of potentially privileged documents under a search warrant, Pet. App. 28a.

But those factual variances do not erase the fundamental difference in these other courts' approaches to filter teams. Unlike the Eleventh Circuit, which thought "there [was] no possibility here that privileged documents will mistakenly be provided to the investigative team," Pet. App. 28a, the Fourth and Sixth Circuits recognized that filter teams pose an "*inevitable*" risk of unauthorized disclosure, *In re Grand Jury Subpoenas*, 454 F.3d at 523 (emphasis added); *see In re Search Warrant*, 942 F.3d at 179, 182. And both the Fourth and Sixth Circuits found remedies similar to the one proposed by petitioners here—a privilege log, with *in camera* review to resolve disputes—to be the appropriate way to protect privilege. *See In re Search Warrant*, 942 F.3d at 181; *In re Grand Jury Subpoenas*, 454 F.3d at 523-24.

Nor do the factual variances between this case and these other cases make a legal difference under petitioners' theory. The core problem with filter-team protocols is that they authorize government review of assertedly privileged documents *before a court* has resolved the privilege assertion. *See supra* at 5-6. That problem exists under the protocol in this case just as much as it does under the protocols in the Fourth and Sixth Circuit cases. And it exists regardless of whether the government subpoenas materials or seizes them through a search warrant.

2. The decision below is also in tension with a decision from the Ninth Circuit holding that *Zolin* applies in similar circumstances. In *United States v.*

Christensen, 828 F.3d 763 (9th Cir. 2015), law-enforcement agents obtained potentially privileged recordings pursuant to a warrant and established a filter team "to screen the recordings for privilege"; after the screening, the filter team was permitted by the district court "to release the recordings" to the investigative team. *Id.* at 798-99. The Ninth Circuit held that the district court erred by failing to "follow the correct process under *Zolin* to determine that the . . . recordings were not privileged." *Id.* at 799. Critically, the court held that *Zolin* required the government to make "a preliminary showing" of the crime-fraud exception "*based on evidence other than the potentially privileged materials themselves*"; only then may "the court . . . conduct an *in camera* review to determine whether the materials are privileged and, if so, whether the crime-fraud exception applies." *Id.* (emphasis added).

In contrast, the Eleventh Circuit here upheld the disclosure of assertedly privileged documents to a filter team to allow the government to use those potentially privileged materials to formulate arguments to the court. And it did so without applying (or even citing) *Zolin*, even though petitioners invoked *Zolin* before that court. *See* Br. of Appellants, *United States v. Korf*, 2020 WL 7641877, at *33-34 (11th Cir. Dec. 21, 2020). That approach is inconsistent with the Ninth Circuit's procedure in *Christensen*, which correctly barred the government from using the potentially privileged materials themselves to challenge the privilege-holders' claims.

C. The Question Presented Is Exceptionally Important And Merits Review Here

The question presented has surpassing significance for the administration of criminal investigations; the need for this Court to resolve it now is pressing; and this case is the right vehicle.

1. The attorney-client privilege and work-product protections are sacrosanct, and they are eroded whenever someone outside the privilege circle is permitted to see privileged material. The intrusion is at its apex when the unwanted eyes are those of the government. That is why filter-team review infringes the policies underlying these critical protections even when privileged materials do not fall into the hands of the investigative team.

And in practice, filter teams do predictably break down, leading to disclosure of privileged materials to the investigative team. In certain cases, filter-team protocols have been deemed "grossly deficient" or have "not [been] followed" (or both). *United States v. Pedersen*, 2014 WL 3871197, at *29 (D. Or. Aug. 4, 2014); *see also, e.g.*, *United States v. Esformes*, 2018 WL 5919517, at *23 (S.D. Fla. Nov. 13, 2018) ("[I]t is apparent that the taint agents were either provided inadequate instructions or ignored those instructions, and the search was conducted in a way that can best be described as clumsy and border-line incompetent.") In others, filter-team members have displayed a "callous disregard" for the privilege-holder's rights. *Harbor Healthcare Sys. L.P. v. United States*, 5 F.4th 593, 599 (5th Cir. 2021) (taint team "refused to destroy or return the copies of documents that [it] ha[d] identi-

fied as privileged"); *see also, e.g.*, *United States v. Sullivan*, 2020 WL 1815220, at *8 (D. Haw. Apr. 9, 2020) (when filter-team investigator could not open a certain type of electronic file, "instead of seeking IT assistance or even simply conducting a Google search to determine why the file would not open, he presumed the documents were not privileged and thus provided them to the prosecution team").

Even when investigators act in good faith and with due diligence, unauthorized disclosures remain a genuine, unavoidable human risk when handling sensitive information. *See In re Grand Jury Subpoenas*, 454 F.3d at 523 ("[H]uman nature being what it is, occasionally some taint-team attorneys will make mistakes"). Filter teams have, for instance, missed material "obviously protected by attorney-client privilege," leading the material to end up in the prosecution's hands. *Id.* (describing improper disclosure of recorded attorney-client conversations in *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991)); *S.E.C. v. Lek Securities Corp.*, 2018 WL 417596, at *1-*2 (S.D.N.Y. Jan. 16, 2018) (despite use of search terms and filters, federal prosecutors on filter team repeatedly turned over privileged documents to the Securities and Exchange Commission). They have also missed warnings that certain materials are "unfiltered and could contain potentially privileged materials," causing these materials to be turned over to the prosecution. *United States v. Elbaz*, 396 F. Supp. 3d 583, 589 (D. Md. 2019).

Confusion in the filter-team process, uncertainty about the nature of the seized materials, and inevitable contact between the filter and investigative agents

can likewise lead to improper disclosures. In one instance, the filter team did not screen a hard drive before disclosing it to prosecutors because the prosecutors "did not request that it undergo filtering." *Id.* Privileged materials may be overlooked because a document that does not contain the name of the client still may be privileged. *See, e.g.*, *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 217 (S.D.N.Y. 2001) ("the attorney-client privilege protects communications between lawyers and *agents* of a client where such communications are for the purpose of rendering legal advice" (emphasis added)). And it is unrealistic to assume that the filter team will be entirely segregated from the prosecution team. To understand the case and the materials at issue, the filter team would ordinarily communicate with the prosecution team. For all these reasons, the risk of inadvertent disclosure of privileged information is both "reasonably foreseeable" and "inevitable." *In re Grand Jury Subpoenas*, 454 F.3d at 523.

Those circumstances explain why several courts have come to regret using a filter team to conduct the initial privilege review. *See United States v. Stewart*, 2002 WL 1300059, at *6 (S.D.N.Y. June 11, 2002) ("[A]t least three courts that have allowed for review by a government privilege team have opined, in retrospect, that the use of other methods of review would have been better.") (citing *United States v. Skeddle*, 989 F. Supp. 890, 898 n.6 (N.D. Ohio 1997); *United States v. Hunter*, 13 F. Supp. 2d 574, 583 & n.2 (D. Vt. 1998); *United States v. Neill*, 952 F. Supp. 834, 841 & n.14 (D.D.C. 1997)). This Court's guidance to use

privilege logs and apply the *Zolin* procedures would prevent recurrences of those breakdowns.

2. Despite the track record of problems with filter teams, the Department of Justice is doubling down on its use of them. This Court's immediate guidance is therefore critical.

In 2020, the Department created a new Special Matters Unit (SMU)—an institutionalized filter-team unit within the Criminal Division's Fraud Section. The SMU's principal responsibilities are: "(1) conduct[ing] filter reviews to ensure that prosecutors are not exposed to potentially privileged material," and "(2) litigat[ing] privilege-related issues in connection with Fraud Section cases."[8] The Department's creation of the SMU signals its commitment to the use of filter teams in major federal investigations—without any assurance that courts, rather than prosecutors, will make the initial determination that potentially privileged materials are in fact unprotected *before* the government reviews them.

Although the SMU may bring specialized knowledge and centralized process to filter teams, it cannot eliminate the inherent risks those teams pose. Like the filter teams that came before it, the SMU is still part of the Department of Justice. Its members are Department of Justice attorneys. And the same conflicting incentives and "human nature" will be present as those attorneys review privileged documents. *In re Grand Jury Subpoenas*, 454 F.3d at 523. In

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[8] DOJ, *Fraud Section: Year in Review* at 4 (2020), https://www.justice.gov/criminal-fraud/file/1370171/download.

other words, the SMU still leaves "the government's fox . . . in charge of the [privilege holder's] henhouse." *Id.*

3. This case is the right vehicle for review of these prevalent and increasingly important filter-team issues. From the outset of this litigation, petitioners raised and preserved their legal objections to filter-team review of documents claimed to be privileged. They have vociferously sought to protect the confidentiality of their privileged communications and attorney work product in matters that run parallel to the allegations that the government is actively investigating. And this litigation poses a pure question of law: does a procedure under which government filter-team prosecutors and agents review assertedly privileged materials *without any threshold showing to a court that the privilege does not apply* pose an unjustifiable threat to the policies underlying the applicable protections? This Court's review and resolution of that legal question will be of incalculable benefit to the lower courts facing recurring issues involving filter teams.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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April 18, 2022

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-14223

D.C. Docket No. 1:20-mj-03278-JJO-1

In re:

Sealed Search Warrant and Application for a Warrant by Telephone or Other Reliable Electronic Means.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MORDECHAI KORF,
URIEL LABER,
CHAIM SHOCHET,
OPTIMA INTERNATINAL, LLC,
OPTIMA VENTURES, LLC,
OPTIMA MANAGEMENT GROUP, LLC,
OPTIMA ACQUISITIONS, LLC,
NIAGARA LASALLE CORPORATION,
OPTIMA GROUP,
GEORGIAN AMERICAN ALLOYS, INC.,
CC METALS AND ALLOYS, LLC,
FELMAN PRODUCTIONS, LLC,
FELMAN TRADING, INC.,
FELMAN TRADING AMERICAS, INC.,
GEORGIAN AMERICAN ALLOYS SARL,
GEORGIAN AMERICAN ALLOYS
MANAGEMENT, LLC,

OPTIMA FIXED INCOME, LLC,
OPTIMA HOSPITALITY, LLC,
OPTIMA 777, LLC,
OPTIMA 925, LLC,
OPTIMA 925 II, LLC,
OPTIMA 1300, LLC,
OPTIMA 1375, LLC,
OPTIMA 1375 II, LLC,
OPTIMA 55 PUBLIC SQUARE, LLC,
OPTIMA 7171, LLC,
OPTIMA 500, LLC,
OPTIMA CBD INVESTMENTS, LLC,
CBD 500, LLC,

Movants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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(August 30, 2021)

Before MARTIN, ROSENBAUM and LUCK, Circuit Judges.

PER CURIAM:

This case requires us to consider whether the use of a government filter team to review seized materials that are claimed to be privileged necessarily violates the privilege holder's rights. Here, the government obtained and executed a search warrant at a suite of offices where the Optima Family Businesses were located. Among the materials seized were items from the office of an in-house attorney. The Optima Family Businesses and their owners, managers and controllers (collectively, the "Intervenors") assert

attorney-client and work-product privilege over at least some of these documents.

They filed a motion under Rule 41(g), Fed. R. Crim. P., to obtain injunctive relief prohibiting the United States's filter team—which included attorneys and staff who were not involved in the criminal investigation of the Optima Family Companies and the individual owners, managers, and controllers—from reviewing any potentially privileged documents unless either the Intervenors agree or the court, after conducting its own privilege review, orders disclosure.

The district court held a hearing on the Intervenors' motion and imposed a modified filter protocol but denied the Intervenors' request to prohibit anyone from the government from reviewing potentially privileged documents unless the Intervenors agree or the court orders disclosure. The Intervenors now appeal that denial. After careful consideration and with the benefit of oral argument, we now affirm the district court's order denying the Intervenors' motion to enjoin the use of a filter team. We agree with the district court that the Intervenors have not showed a substantial likelihood of success on their argument that government filter teams *per se* violate privilege holders' rights.

I.

The Northern District of Ohio was conducting a criminal investigation into money laundering, conspiracy to money launder, and wire fraud. As it followed its leads, it decided it needed to search a suite of offices in Miami, Florida. So the Federal Bureau of Investigation ("FBI") applied for a search warrant in the Southern District of Florida.

A. The Search Warrant and Filter Team Protocol

On July 31, 2020, a magistrate judge in the Southern District of Florida issued that search warrant to be executed at the Miami offices of some of the entities that comprise the Optima Family Companies. The offices that were the subject of the warrant were located in a business suite.

The warrant identified the items to be seized, including records of and concerning Ukrainian nationals Ihor Kolomoisky and Gennadiy Bogolyubov and American citizens Mordechai Korf, Uriel Laber, and Chaim Schochet. Korf, Laber, and Schochet allegedly own, control, or manage the more than thirty entities that fall under the name "Optima" and have offices in the Miami suite that was the subject of the warrant.

Among the documents sought concerning the five individuals were "all documents for Ihor Kolomoisky, Gennadiy Bogolyubov, Mordechai Korf, Uriel Laber, and Chaim Schochet," from "2008 to the present," including "[r]ecords of receipt of income," "[r]ecords of all accounts and transactions at financial institutions," "[r]ecords of loans and financing transactions," and "all communications between [these persons] and any employee or agent of [any of the entities, persons, or properties of the Optima Family Companies and Subsidiaries and other entities and properties identified in Attachment B.3 to the warrant[1]]. " The warrant also authorized

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[1] The Optima Family Companies and Subsidiaries identified in Attachment B.3 to the warrant included Optima International, LLC, also known and operated as Optima International of Miami; Optima Ventures, LLC; Optima Management Group LLC; Optima Acquisitions, LLC; Optima Specialty Steel; Kentucky Electric Steel; Corey Steel Company; Niagara LaSalle Corporation; Michigan Seamless Tube, LLC; Optima Group;

seizure of "all emails sent to or from any of the above-referenced Optima-family companies, [and entities, persons, or properties] outlined in Attachment B.3." Besides the seizure of paper records, the warrant authorized seizure, imaging, or copying of all computers or other electronic storage media that might contain the evidence described in the warrant.

If the government identified seized communications that were to or from an attorney during the seizure, the warrant outlined a protocol that would be followed concerning the handling of those materials. That protocol required the following:

> **Filter for Privileged Materials:** If the government identifies seized communications to/from an attorney, the investigative team will discontinue review until a filter team of government attorneys and agents is established. The filter team will have no previous or future involvement in the investigation of this matter. The filter team will review all seized communications and segregate communications to/from attorneys, which may or may not be subject

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Georgian American Alloys, Inc.; CC Metals and Alloys, LLC; Felman Production, LLC; Felman Trading, Inc.; Felman Trading Americas, Inc.; Georgian American Alloys Sarl; Georgian Manganese, LLC; Georgian American Alloys Management, LLC; Vartisikhe 2005, LLC; Optima Fixed Income, LLC; Optima Hospitality, LLC; Optima 777 LLC; Optima 925 LLC; Optima 925 II LLC; Optima Harvard Facility LLC; Optima 1300 LLC; Optima 1375 LLC; Optima 1375 II LLC; Optima 55 Public Square LLC; Optima 7171 LLC; Optima 500 LLC; Optima Stemmons LLC; Optima CBD Investments LLC; CBD 500 LLC. Attachment B.3 also identified a number of United States properties, third-party companies, foreign companies, and additional ownership entities.

> to attorney-client privilege. At no time will the filter team advise the investigative team of the substance of any of the communications to/from attorneys. The filter team then will provide all communications that do not involve an attorney to the investigative team and the investigative team may resume its review. If the filter team decides that any of the communications to/from attorneys are not actually privileged (e.g., the communication includes a third party or the crime-fraud exception applies), the filter team must obtain a court order before providing these attorney communications to the investigative team.

(the "Original Filter-Team Protocol").

Federal law enforcement agents executed the search warrant on August 4, 2020. As part of that process, agents seized various documents and equipment, including internal servers containing electronic documents and correspondence. In-house lawyers and paralegals worked (or had worked) in the business suite for the Optima Family Companies and other affiliated individuals, and for Korf, Laber, and Schochet. And the seized documents contained some items that were allegedly privileged.

B. Motion to Intervene and Motion for Injunctive Relief

Following the seizure, Korf, Laber, Schochet and various Optima Family Companies and Subsidiaries (whom we have previously described as the intervenors) filed a motion to intervene in the search-warrant proceedings in the United States District

Court for the Southern District of Florida. The motion advised that the electronic data the government had seized when it executed the warrant contained privileged documents. Contemporaneously with the motion to intervene, the parties filed a document entitled Motion for Preliminary Injunction to Prohibit Law Enforcement Review of Seized Materials Until an Appropriate Procedure for Review of Privileged Items is Established ("Motion for Injunctive Relief").

Asserting that the execution of the search warrant was the functional equivalent of a law-office search, the Motion for Injunctive Relief primarily challenged the use of the filter team to review privileged documents. The Intervenors objected to the protocol's limited provision of judicial review for potentially privileged documents since review was available only if a communication was clearly sent "to/from attorneys." In the Intervenors' view, this exception for judicial review was inadequate because (1) the substance of the privileged information would initially be exposed to filter attorneys before judicial review, and (2) the scope of the documents subject to judicial review was underinclusive. The Intervenors contended that the protocol did not account for the existence of documents subject to the work-product doctrine, nor did it account for the existence of communications between non-lawyers reasonably necessary for the transmission of attorney-client communication.

The Intervenors also expressed particular concern over the government's review of the privileged documents because in May of 2019, a bank filed suit in Delaware against Korf, Laber, Schochet, and various Optima Family Companies, alleging

fraudulent activity.[2] *See Joint Stock Co Comm. Bank PrivatBank v. Igor Valeryevich Kolomoisky*, *et al.*, Del. Ch. C.A. No. 2019-0377-JRS (May 21, 2019). According to the Intervenors, the transactions and occurrences in the Delaware case overlapped with and were "substantively identical to the factual predicate for the grand jury investigation [in the Northern District of Ohio]" associated with the search warrant here.[3] Based on this overlap, the Intervenors claimed a "clear risk" existed that "the government will be able to view a roadmap to the privilege- holders[']defenses." To prevent these alleged harms, the Intervenors sought to perform their own privilege review of the documents and, more generally, they sought an injunction to prohibit law enforcement from reviewing the seized materials until a more protective protocol was put into place.

In mid-August 2020, the magistrate judge granted the motion to intervene and ordered the parties to meet and confer to see if they could narrow the issues addressed in the Motion for Injunctive Relief. In the

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[2] The PrivatBank lawsuit alleges Racketeer Influenced and Corrupt Organization ("RICO") violations that arise out of "a series of brazen fraudulent schemes orchestrated by Ukranian oligarchs and . . . Kolomoisky and . . . Bogolyubov . . . and their agents . . . to acquire hundreds of millions of dollars-worth of U.S. assets through the laundering and misappropriation of corporate loan proceeds issued by PrivatBank." The Intervenors note that Korf, Laber, Schochet, and the Optima Family Companies have been defending against the lawsuit since it was filed on May 21, 2019.

[3] The Intervenors also claimed that the Delaware case overlapped with civil forfeiture claims filed in the Southern District of Florida. Those claims sought forfeiture of the properties listed in Attachment B.3 of the search warrant, which were owned by many of the Intervenors.

meantime, with the agreement of the Intervenors, the government continued processing the seized materials, which meant it could arrange to have the materials copied and scanned, but it could not review their contents. Within forty-eight hours of processing any particular record, the court required, the government was to provide a copy of that record to counsel for the Intervenors.

In the government's response to the Motion for Injunctive Relief, the government expressed deep concern over the Intervenors' proposal that they be trusted with the task of reviewing for privilege on their own. According to the government, that type of approach would cause its investigation to cease in its tracks.

The government also pushed back on the Intervenors' assertion that the search was the equivalent of a law-office search. It emphasized that within the multi-office complex, only a single office was used by a single in-house lawyer, and although three other lawyers had previously served as in-house counsel over the past decade, they no longer had offices there. Besides that, the government noted, it had seized only three boxes of materials from the in-house lawyer's office, and those boxes had been segregated and marked.[4] Ultimately, the government

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[4] In its opposition to the Motion for Injunctive Relief, the government discussed how agents "carefully watched for potentially privileged materials" on the day the search warrant was executed. And when they came across information that might be privileged, they stopped searching and separately designated "filter agents" (*i.e.*, non-investigative agents) to review and segregate the materials. Additionally, *only filter agents* searched the in-house lawyer's office, from where the three boxes of materials were seized. As we have noted, those materials were segregated, and the filter team informed the

asked that the district court deny the Motion for Injunctive Relief or, in the alternative, limit the scope of the Intervenors' proposed review of the documents seized. It further requested that its own filter team be afforded an opportunity to review all the documents seized.

In late August 2020, the parties attempted to resolve the issues relating to the document review. During the course of these efforts, the government provided an inventory of the items seized. Ultimately, though, the parties were not able to agree on a modified approach.

C. Resolution of Motion for Injunctive Relief

Because the parties were unable to resolve the dispute, the magistrate judge heard arguments by the parties in mid-September. A few days later, the magistrate judge entered an order granting in part and denying in part the Motion for Injunctive Relief.

First, the magistrate judge rejected the Intervenors' argument that the use of government filter teams to conduct privilege reviews is *per se* legally flawed. Nevertheless, the magistrate judge voiced reservations about the Original Filter- Team Protocol and concluded it did not provide sufficient protection. He found the case differed from the ordinary search of a business since the Intervenors anticipated asserting the attorney-client or work-product privileges over numerous communications relating to matters at issue in the Delaware RICO

FBI's document processors that they were to be treated as potentially privileged. Of the three offices occupied by unrelated lawyers, only one had relevant material, which was collected in a single box.

litigation and the two civil forfeiture actions brought in the Southern District of Florida. And he expressed concern that if the documents were inadvertently disclosed to the investigation and prosecution team, the government could become privy to privileged materials concerning the Delaware litigation. For these reasons, the magistrate judge concluded that the Intervenors had showed a likelihood of success on the merits with respect to the Original Filter-Team Protocol as applied to the seized items. To address the perceived problem, the magistrate judge decided that allowing the Intervenors to conduct the initial privilege review would protect both the Intervenors and the government from the inadvertent disclosure of privileged materials to the investigation and prosecution team.

Second, the magistrate judge determined that the Intervenors showed a danger of irreparable harm with respect to the Original Filter-Team Protocol, since it required the filter team to segregate only communications that were "to/from attorneys." Because of the potentially underinclusive way of identifying privileged communications, the magistrate judge reasoned, the Original Filter-Team Protocol presented a danger that some items protected by the attorney-client or work-product privileges might be inadvertently disclosed to the investigative team.

Third, when the magistrate judge analyzed the balance of the harms, he found them to favor enjoining the Original Filter-Team Protocol.

Finally, although the magistrate judge concluded that the parties had identified important competing public interests, he ruled that the public interest

would be best served by applying a modified filter-team protocol, which he then described. Under the new protocol, the Intervenors were to conduct an "initial privilege review of all seized items [and] provide a privilege log to the government's filter team." Then the government's filter team, which the magistrate judge required to be composed of attorneys and staff from outside the investigating office (the United States Attorney's Office for the Northern District of Ohio's Cleveland branch office), would have the opportunity to challenge any privilege designation on that log. Although the filter team would be "permitted to review any item on the privilege log in order to formulate a challenge[,]" the investigation and prosecution team would be prohibited from receiving any items on the privilege log "unless agreed to by the parties or the Court/special master ha[d] overruled the privilege."

The more specific details of the modified filter-team protocol the magistrate judge imposed are set forth below:

> a. The government shall process the items and provide them to the movants, on a rolling basis, so that the movants may perform the initial privilege review. Within **forty-five (45) days of receipt** of these items, the movants shall release all non-privileged items to the government's investigative/prosecution team and provide a privilege log to the government's filter team for all items for which they assert a privilege.
>
> b. The government's filter team shall be comprised of attorneys and staff from

outside the United States Attorney's Office for the Northern District of Ohio's Cleveland branch office. The filter team shall not share a first level supervisor with anyone on the investigative/prosecution team. Any supervisor involved in the filter team review shall be walled off from the underlying investigation.

c. The government's filter team is permitted to review any items listed on the movants' privilege log and may challenge any of the movants' privilege designations.

d. The government's filter team and the movants' counsel shall confer and attempt to reach a resolution as to those items challenged by the government's filter team.

e. If the parties are unable to reach a resolution, the parties shall file a joint notice with the Court. Either the Court or a special master shall rule on the parties' privilege disputes.

f. The filter team will provide to the investigative team only those items for which the parties agree or for which the privilege has been overruled.

(the "Modified Filter-Team Protocol").

D. Objection to the Order and Appeal to the District Court Judge

With the district court, the Intervenors filed an appeal from and objections to the magistrate judge's

order and revised protocol. The Intervenors suggested the court should review materials first or use a special master to evaluate claims of privilege. They sought for the district court to vacate the portion of the Modified Filter-Team Protocol that authorized a filter team composed of government employees to review documents identified as privileged.

The district court set a hearing on the matter and after hearing from the parties, entered an order overruling the Intervenors' objections and affirming the magistrate judge's revised protocol. Among other conclusions, the district court reasoned that improper disclosure of privileged documents to the prosecution team was not a concern since "[n]ot only do [the Intervenors] have the opportunity to review the documents before the filter team, but any documents identified by the [Intervenors] in their privilege log may not be released to the prosecution team until the parties agree to do so, or the Court or special master has ruled on the privilege objections." In this way, the district court found the Modified Filter-Team Protocol incorporated "several layers of safeguards that prevent[ed] anyone other than the filter team and [the Intervenors] from reviewing the potentially privileged documents." The district court also expressed concern that requiring the district-court judge, magistrate judge, or special master to routinely review lawfully seized documents would be too burdensome. Overall, the district court determined that the Modified Filter-Team Protocol had been carefully crafted to afford protection of the attorney-client and work-product privileges.

This appeal ensued.

II.

A. We have jurisdiction over this appeal

We begin by considering our jurisdiction. We review *de novo* whether we have jurisdiction to decide this interlocutory appeal, before we can address the merits of the case. *Doe No. 1 v. United States*, 749 F.3d 999, 1003 (11th Cir. 2014).

The government contends that we lack jurisdiction because of the procedural posture of this case. In support of this contention, the government notes that the Intervenors invoked Rule 41(g) of the Federal Rules of Criminal Procedure—which governs motions for return of property—as a basis for seeking to bar government employees from reviewing lawfully seized materials. The government relies on *DiBella v. United States*, 369 U.S. 121, 82 S. Ct. 654 (1962), to argue that the Intervenors' case does not involve the "narrow circumstances" under which the denial of a Rule 41(g) motion is immediately appealable. As a result, the government asserts, we do not have jurisdiction over the Intervenors' appeal.

Generally, "courts of appeals 'have jurisdiction of appeals from all final decisions of the district courts of the United States[.]'" *Doe No. 1*, 749 F.3d at 1004 (quoting 28 U.S.C. § 1291) (alteration adopted). In *DiBella*, the Supreme Court considered whether orders on two preindictment motions to suppress the use of evidence in a forthcoming criminal trial (evidence that was allegedly procured through an unreasonable search and seizure) were exceptions to the final-judgment rule and immediately appealable as a final order. 369 U.S. at 121-23. It decided they were not.

To determine whether the district court's orders were immediately appealable as a final judgment, the *DiBella* court said the orders must be "independent" from the judgment. 369 U.S. at 126. In other words, they must be "fairly severable from the context of a larger litigious process." *Id.* at 127 (citation and quotation marks omitted). "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse [(in actual existence)] against the movant can the proceedings be regarded as independent," and an immediate appeal taken therefrom. *See id.* at 131–32. This is known as the *DiBella* test. The Supreme Court held the pre-indictment suppression motions failed that test because motions to suppress will "necessarily determine the conduct of the trial and may vitally affect the result" such that they are intertwined with the entire case. *Id.* at 127 (quotation marks omitted). *DiBella* also considered two other principles that reinforced its determination.

First, it concluded that suppression orders were not of the type "where the damage of error unreviewed before the judgment is definitive and complete." *Id.* at 124. Of course, that is so because if the district court erred in denying the motion to suppress, any damage could be fixed on appeal by excluding the documents at issue and remanding for a new trial or dismissal. Second, noting the "Sixth Amendment guarantees [of] a speedy trial," the Court expressed concerns about "delays and disruptions" that might interfere with "the effective and fair administration of the criminal law," if pre-indictment suppression motions could be

immediately appealed.[5] *Id.* at 126; *see also id.* at 129 ("The fortuity of a pre-indictment motion may make of appeal an instrument of harassment, jeopardizing by delay the availability of other essential evidence."). With these considerations in mind, the Court ruled that "the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability." *Id.* at 131.

Because the Intervenors moved the district court for the return of their property under Rule 41(g), we must apply the *DiBella* test to determine whether we have jurisdiction over their appeal.[6] *See, e.g.*, *Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, slip op. at 6–7 (5th Cir. 2021); *In re Search of Elec. Commc'ns in the Acct. of chakafattah gmail.com at Internet Serv. Provider Google, Inc.*, 802 F.3d 516, 530 (3d Cir. 2015); *In re Sealed Case*, 716 F.3d 603, 605–09 (D.C. Cir. 2013); *In re Grand Jury*, 635 F.3d 101, 103 (3d Cir. 2011). We believe the Intervenors' claims are sufficiently independent from any forthcoming criminal judgment to pass the *DiBella* test here.

The Intervenors clearly seek only the return of their property. They sought to prohibit the

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[5] Both the cases before the Court in *DiBella* involved defendants who had been arrested but not yet indicted when they filed their suppression motions. 368 U.S. at 122-23.

[6] The parties dispute whether the Intervenors actually invoked Rule 41, but we believe this is the proper way to come before the court to seek an injunction regarding the government's use of a filter team to review seized documents. *Cf. Richey v. Smith*, 515 F.2d 1239, 1243 (5th Cir. 1975) (explaining that motions for the return of property are governed by equitable principles, whether viewed as based on Rule 41(g) or on a federal court's general equitable jurisdiction).

government from reviewing seized materials until a protocol protective of the attorney-client privilege was ordered. To protect the privileged materials, they primarily asked for the court to order the return of the seized documents to prevent law enforcement from reviewing the materials and suggested, in the alternative, that an independent party could act as the filter. They do not seek to invalidate the seizure—indeed, the government currently remains in possession of the materials seized. *See* Oral Argument Recording at 2:36–44 (July 1, 2021) ("To be clear as we sit here today hearing the case, the materials are safe. They are in the possession of the government."). Nor do they seek to suppress the seized materials or ask for any other relief. This is sufficient to conclude the motion was solely for the return of property. *See Richey*, 515 F.2d at 1242–44 & n.5 (noting that by abandoning the motion to suppress the "*DiBella* test would seem to be satisfied," and that "prayers for injunctive relief to prevent examining, analyzing, scheduling, or copying of the documents [are] an integral part of the . . . motion for return of property").

Neither was the Intervenors' motion in any way tied to an ongoing criminal prosecution. *See DiBella*, 369 U.S. at 131–32. *DiBella* suggested there was a criminal prosecution "in esse," or in existence, "[w]hen *at the time of the ruling* there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment." *Id.* (emphasis added). There is currently no complaint, arrest, detention, or indictment in this case. Therefore, "according to the literal language of *DiBella*," there is no criminal prosecution in esse. *United States v. Glassman*, 533 F.2d 262, 262–63 (5th Cir. 1976).

But the inquiry doesn't stop there. In *In re Grand Jury Proceedings* ("*Berry*"), 730 F.2d 716 (11th Cir. 1984) (per curiam), where this Court previously applied *DiBella* to a motion characterized as seeking the return of property, we said that a "pending criminal investigation, even in the absence of a formal charge," may be enough to show that the motion is tied to a criminal prosecution. *Id.* at 717. *Berry* explained that determining whether a motion meets the "no way tied to an ongoing criminal prosecution" rule from *DiBella* may be relatively straightforward from the procedural standpoint of the case. But *Berry* directed us to consider not only the existence of a pending criminal investigation, but also to look to the purpose of the motion for the return of property. *See id.* at 717–18. If it "is obvious from a reading of the motion that appellants are attacking the validity of the search and seizure under the fourth amendment," then it is "clear that the motion is tied to the ongoing criminal investigation and to issues that may be litigated in any subsequent criminal proceedings arising out of the seizure." *Id.* at 718; *see also Glassman*, 533 F.2d at 262–63 ("Only if this motion was a collateral attempt to retrieve property and not an effort to suppress evidence in related criminal proceedings is it appealable.").

The Intervenors are subjects of an ongoing criminal investigation. But under *Berry*, an ongoing criminal investigation isn't—by itself—dispositive. *See Berry*, 730 F.2d at 717 ("A pending criminal investigation, even in the absence of a formal charge, *may* be sufficient to show that the motion is tied to an existing criminal prosecution." (emphasis added)). And for the same reasons we have already described,

the Intervenors' Rule 41(g) motion in no way attacked the validity of the search and seizure of the materials.

The Intervenors sought equitable relief in the form of an injunction in a civil case to prohibit the government from reviewing seized materials until a protocol protective of the attorney-client privilege was ordered. They argued they could prove the four elements required to obtain an injunction in a civil case. And they sought return of the seized documents to protect privileged materials by preventing law enforcement from reviewing the materials, asking in the alternative for an independent party to act as the filter. Both the magistrate judge and the district court treated the motion as a civil preliminary injunction to protect privileged documents. So it is clear that the purpose of the Intervenors' motion is not to attack the validity of the search and seizure under the Fourth Amendment and is therefore not tied to any criminal prosecution. *Cf. Berry*, 730 F.2d at 717–18.

Appellate jurisdiction here also satisfies the concerns underlying the need for appellate review of interlocutory orders as explained in *DiBella*. *See* 369 U.S. at 124–29. The damage from any error in the district court would be "definitive and complete," if interlocutory review is not available, and would outweigh any "disruption caused by the immediate appeal." *Id.* "The whole point of privilege is privacy." *Harbor Healthcare*, 5 F.4th 593, slip op. at 10. So the Intervenors' interests in preventing the government's wrongful review of their privileged materials lie in safeguarding their privacy. *See id.* Once the government improperly reviews privileged materials, the damage to the Intervenors' interests is "definitive and complete." *DiBella*, 369 U.S. at 124.

Contrary to the government's suggestion, suppression is not an adequate remedy for any violations. We cannot know whether criminal charges will be brought against the Intervenors. Yet suppression protects against only "the procedural harm arising from the introduction [at a criminal trial] of unlawfully seized evidence." *Harbor Healthcare*, 5 F.4th 593, slip op. at 12. If the Intervenors are not charged, they will not have suppression available to them as a potential remedy. *See id.* And even if they are charged and may seek suppression, suppression does not redress the government's intrusion into the Intervenors' personal and privileged affairs. *See id.*

In contrast, Rule 41(g) can. It offers the remedy of returning to the Intervenors any improperly seized documents protected by privilege *before* the government has reviewed them. *See* Fed. R. Crim. P. 41(g); *see also Harbor Healthcare*, 5 F.4th 593, slip op. at 12. Unlike suppression, that is a remedy that can redress any potential injury by ensuring it does not occur in the first place. And if a district court incorrectly denies Rule 41(g) relief when it is required, immediate review is necessary to preserve that same remedy of return of the documents before the government reviews them. Review later would be incapable of vindicating the Intervenors' privacy interests. *See Richey*, 515 F.2d at 1243 n.6 ("[A]ppellate review might be appropriate where to deny the right to appeal at a specific time would in effect deny the right to appeal at all on the specific issue.").

Interlocutory review also comports with *DiBella*'s concern that the motion for injunctive relief at issue here is severable and distinct from any other

proceedings. *See DiBella*, 369 U.S. at 126–27. Indeed, the Intervenors' motion, which seeks only to address the review protocol as it relates to allegedly privileged documents and to obtain return of privileged documents, "is a discrete action, not tied to any other civil or criminal proceedings, [so granting] review would not frustrate the policy against piecemeal review in federal cases." *Richey*, 515 F.2d at 1243 n.6.

As for *DiBella*'s concern for delaying criminal proceedings, that can be minimized by expediting review of motions of this type. The merits of a motion seeking only injunctive relief in the form of a preferred protocol for the government's review of allegedly privileged materials and the return of those items that the protocol determines are protected are not complex. A review protocol for privileged documents either does or does not sufficiently protect the interests of the person or entity that owns the allegedly privileged documents. And we are hopeful that our analysis below on the merits, *see infra* at Section II.B., will make that straightforward issue even simpler. In short, the specific motion before us here meets the *DiBella* test.[7]

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[7] The government relies on other cases to further its jurisdiction argument, but each is distinguishable. First, it points to *Sealed Case*, 716 F.3d 603, and *Grand Jury*, 635 F.3d 101, to argue that as in those cases, the purpose of the Intervenor's motion was "to place an additional layer of screening between the government and the seized materials, inevitably causing delays and restrictions that could shape the course of the criminal investigation and the content of the case" the government will eventually present. But both of those cases involved challenges to the validity of the search warrant, so under *Berry*, they *would* be tied to an ongoing criminal prosecution. The D.C. Circuit's and the Third Circuit's holdings that they did not have jurisdiction do not apply here.

B. The district court did not abuse its discretion in issuing the Modified Filter-Team Protocol and denying the Intervenors' motion to the extent it sought to preclude any government review of documents before the Intervenors agreed or the court ordered disclosure

The Intervenors assert that the district court abused its discretion in denying their motion for a preliminary injunction to prohibit any federal prosecutors or their agents—including the filter team—from reviewing documents the Intervenors identify as privileged unless the Intervenors agree or the court permits government review after first conducting its own privilege review. We disagree.

To obtain a preliminary injunction, the movant must clearly establish four showings: (1) it has "a substantial likelihood of success on the merits;" (2) it will suffer "irreparable injury" in the absence of the injunction sought; (3) any threatened harm to the movant that might be inflicted because of the proposed injunction will outweigh any damage to the opposing party; and (4) the injunction sought "would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) (per

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The government also makes a fleeting reference to *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), in which the Supreme Court noted that rulings on privilege are typically not immediately appealable. That case, though, did not involve a claim that the government was invading privilege for the purpose of possibly taking action against the privilege holders. Not only that, but *Mohawk* involved a claimant who was a party to the suit and could appeal a final judgment. The *Mohawk* Court did not address appeals like this one, by privilege claimants who are intervenors in a proceeding ancillary to a criminal investigation. *See Doe No. 1*, 749 F.3d at 1007.

curiam). We have said that a preliminary injunction is an "extraordinary and drastic remedy." *Id.*

On appeal, we review the denial of a preliminary injunction for abuse of discretion. *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016). A district court abuses its discretion if "its factual findings are clearly erroneous, . . . it follows improper procedures, . . . it applies the incorrect legal standard, or . . . it applies the law in an unreasonable or incorrect manner." *Id.* at 1247. Under this standard, a district court may make any of a range of permissible choices. *Id.*

We have recognized that appellate review of a preliminary-injunction decision is "exceedingly narrow" because of the expedited nature of the proceedings. *Wreal*, 840 F.3d at 1248. This means our review is deferential. *Id.* We have commented that appellants face a "tough road" in establishing the four prerequisites to obtain a preliminary injunction. And on appeal, they "must also overcome the steep hurdles of showing that the district court clearly abused its discretion in its consideration of each of the four prerequisites." *Id.* The "failure to meet even one [factor] dooms [an] appeal." *Id.*

While we have described a showing of irreparable injury as "the sine qua non of injunctive relief," *Siegel*, 234 F.3d at 1176, here, we need proceed no further than consideration of the Intervenors' likelihood of success on the merits. We conclude the district court did not abuse its discretion in determining that the Intervenors did not show a substantial likelihood of success on their position that government filter teams are *per se* violative of their rights. Nor did it abuse its discretion in effectively concluding that the

Intervenors did not show a substantial likelihood of success on their argument that the Modified Filter-Team Protocol violates their rights. Indeed, because of the great weight of authority that supports the district court's conclusions here, our holding on this front is not even close.

We begin by recognizing that the attorney-client and work-product privileges play a vital "role in assuring the proper functioning of the criminal justice system" and provide a means for a lawyer to prepare her client's case. *See United States v. Nobles*, 422 U.S. 225, 238 (1975). They are deeply important and must be respected. Nevertheless, they are not inviolate. We have recognized exceptions that allow for their breach. For example, when the crime-fraud exception applies, it effectively invalidates the privileges.[8] *See In re Grand Jury Investigation*, 842 F.2d 1223 (11th Cir. 1987). But to be sure, any filter protocol must appropriately take into account the importance of these privileges.

With that in mind, we turn to the Modified Filter-Team Protocol. Significantly, the Modified Filter-Team Protocol allows the Intervenors to conduct the initial privilege review. It also requires the Intervenors' permission or court order for any purportedly privileged documents to be released to the investigation team. This means that the filter team cannot inadvertently provide the investigation team

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[8] The crime-fraud exception applies if (1) the client was involved in or was planning criminal conduct when he sought advice of counsel, or that he committed a crime after he received the benefit of legal counsel; and (2) "the attorney's assistance was obtained in furtherance of the criminal . . . activity or was closely related to it." *In re Grand Jury Investigation*, 842 F.2d at 1226.

with any privileged materials. For three reasons, we conclude that this Protocol suffices under the law.

First, though we have not previously issued any published opinions on point, some of our sister circuits have approved of the use of a walled-off government filter team to review documents for privilege. In *United States v. Jarman*, 847 F.3d 259 (5th Cir. 2017), for instance, the Fifth Circuit upheld the filter team's screening for privileged materials. *Id.* at 266. There, the court stated that the filter team process was "designed to protect [the] privileged information." *Id.* The Second, Third, Fourth, Seventh, Eighth, Ninth and Tenth Circuits, in at least some cases, have also either approved of or recognized and declined to criticize the use of government filter teams to screen materials for privilege before items are released to the investigators in the case. *See*, *e.g.*, *S.E.C. v. Rajaratnam*, 622 F.3d 159, 183 & n.24 (2d Cir. 2010); *Search of Elec. Commc'ns in the Acct. of chakafattah gmail.com at Internet Serv. Provider Google, Inc.*, 802 F.3d at 530; *United States v. Myers*, 593 F.3d 338, 341 n.5 (4th Cir. 2010); *United States v. Proano*, 912 F.3d 431, 437 (7th Cir. 2019); *United States v. Howard*, 540 F.3d 905, 906 (8th Cir. 2008); *United States v. Christensen*, 828 F.3d 763, 799 (9th Cir. 2015); *United States v. Ary*, 518 F.3d 775, 780 (10th Cir. 2008).

Second, the Intervenors cite no cases for the broad remedy they seek: a holding that government agents "should never . . . review documents that are designated by their possessors as attorney-client or work product privileged" until after a court has ruled on the privilege assertion." Nor has our research unearthed any.

Third, to the extent that courts have disapproved of particular filter-team protocols, the Modified Filter-Team Protocol suffers from none of the defects those courts found disqualifying. The Intervenors rely primarily on *In re Grand Jury Subpoenas 04-124-03 and 04-124-05* ("*Winget*"), 454 F.3d 511 (6th Cir. 2006), and *In re: Search Warrant Issued June 13, 2019* ("*Baltimore Law Firm*"), 942 F.3d 159 (4th Cir. 2019), to support their contention that the Modified Filter-Team Protocol violated their rights. But both cases are materially different.

Winget arose when the plaintiffs there learned that a third party had received a grand-jury subpoena for documents, some of which allegedly were subject to the plaintiffs' claims of privilege. 454 F.3d at 512. There, the district court permitted a government-filter-team protocol under which the government's filter team—not the purported privilege possessors or the court—determined which documents were privileged. *See id.* at 515. Only if the team found a document definitely or possibly privileged did it submit it to the court for a privilege review. *See id.* at 515, 518 n.5.

The Sixth Circuit held that this protocol failed to sufficiently protect the plaintiffs' claims of privilege. First, the court questioned the use of a government filter team in non-search-warrant situations like the one at issue there. *Id.* at 522–23. But after a search warrant is executed, the court recognized, the government has physical control of potentially privileged documents. *Id.* at 522. So, the court reasoned, "the use of the [filter] team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege." *Id.* at 522–23. And second, the court expressed

concern that a government filter team that takes the first pass at the materials for privilege can miss privileged items and mistakenly pass them along to the investigative team. *Id.* at 523. In other words, a protocol of that sort imposes no check on any of the filter team's determinations that an item is not privileged. *Id.*

But neither of these problems exists here. In fact, the records here are already in the government's possession as the result of the execution of a search warrant, so under *Winget*, the use of a filter team to review them is "respectful of, rather than injurious to, the protection of privilege." *Id.* at 522–23. And unlike in *Winget*, under the Modified Filter-Team Protocol, the Intervenors identify all allegedly privileged materials in the first instance. So there is no possibility here that privileged documents will mistakenly be provided to the investigative team.

Baltimore Law Firm is also different from the Intervenors' case in important ways. There, the government seized documents in accordance with a search warrant. *Baltimore Law Firm*, 942 F.3d at 164. The search warrant was for a lawyer's records as they concerned one specific client. *Id.* at 166. In seizing that lawyer's materials, the government took all the lawyer's email correspondence, including his correspondence with clients other than the one whose materials were authorized to be seized. *Id.* at 166–67. In fact, of the 37,000 emails seized from the lawyer's inbox, only 62 were from the designated client or contained that client's surname. *Id.* at 167. Similarly, only 54 of the 15,000 emails seized from the lawyer's "sent items" folder had been sent to the designated client or contained that client's surname. *Id.* The vast majority of the rest of the correspondence was from

other attorneys and concerned other attorneys' clients who had no connection at all with the investigation that led to the search warrant. *Id.* But notably, some of those other clients were being investigated by or prosecuted by the same United States Attorney's Office for unrelated crimes. *Id.*

At the time the magistrate judge issued the search warrant, the magistrate judge also authorized a government filter-team protocol. *Id.* at 165. Like under the *Winget* protocol, the *Baltimore Law Firm* protocol allowed the government filter team to determine initially whether items were potentially privileged or not. *Id.* at 166. And when the filter team found materials not to be privileged, it could forward them directly to the investigative team. *Id.* As for items the filter team deemed privileged or potentially privileged, the filter team could provide those materials to the investigative team only if the parties agreed or the court concluded after review that the items could be turned over. *Id.* at 166.

The Fourth Circuit held that the filter-team protocol that the magistrate judge approved was legally flawed.[9] *Id.* at 176. As relevant here, it objected first to the protocol's assignment of judicial

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[9] The district court modified the protocol to require the filter team to forward any materials it deemed nonprivileged to the plaintiff or the court for approval before providing them to the investigative team. *Baltimore Law Firm*, 942 F.3d at 170. A concurring opinion in *Baltimore Law Firm* suggests that the majority decision did not address or otherwise call into question the modified filter protocol, which was more similar to the protocol at issue here. *See id.* at 169–70, 183–84. And the concurring opinion noted that the majority opinion did not suggest the modified protocol "impermissibly usurp[ed] a judicial function." *Id.* at 184 (Rushing, J., concurring).

functions to the executive branch. *Id.* In particular, the court noted that the resolution of a privilege dispute is a judicial function. *Id.* So the protocol should not have authorized the government filter team to determine in the first instance whether materials were privileged. *Id.* at 176–77. The court also concluded that the magistrate judge should not have authorized the filter-team protocol *ex parte* and before the magistrate judge knew what had been seized. *Id.* at 178. Noting that the great majority of emails seized appeared not to be relevant to the client who was the subject of the government's investigation, the court opined that that information should have affected the protocol that was put into place. *Id.* Not only that, the court explained, but the magistrate judge should have waited to determine the protocol in an adversarial proceeding where the privilege holder could be heard. *Id.* at 178–79.

As with *Winget*, none of the concerns the Fourth Circuit identified in *Baltimore Law Firm* apply here. Though the magistrate judge originally approved the Original Filter-Team Protocol *ex parte*, before the investigative team could review any documents, the court held an adversarial hearing and, after considering the Intervenors' concerns, put the Modified Filter-Team Protocol into place. Also unlike in *Baltimore Law Firm*, this case involves no claims that the majority of seized materials were both privileged and irrelevant to the subject of the investigation. And finally, the Modified Filter-Team Protocol did not assign judicial functions to the executive branch. Rather, and as we have noted, under the Modified Filter-Team Protocol, the Intervenors have the first opportunity to identify potentially privileged materials. And before any of

those items may be provided to the investigative team, either the Intervenors or the court must approve. Put simply, the Modified Filter-Team Protocol complies with the recommendations both the Sixth and Fourth Circuits have made concerning the use of filter teams.[10]

So once again, we return to the observation that the Modified Filter-Team Protocol appears to us to comply with even the most exacting requirements other courts that have considered such protocols have deemed appropriate. In short, the Intervenors have not clearly established a substantial likelihood of success on the merits.

III.

For the reasons we have explained, we affirm the district court's order.

AFFIRMED.

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[10] We do not prejudge other filter protocols that are not before us. Rather, we evaluate only the Modified Filter-Team Protocol and simply conclude that, under the circumstances here, that Protocol suffices, even under frameworks of analysis that other Circuits have used to invalidate other protocols.

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

Case Number: 20-03278-MJ-O'SULLIVAN

IN RE: SEALED SEARCH
WARRANT AND
APPLICATION FOR A
WARRANT BY TELEPHONE
OR OTHER RELIABLE
ELECTRONIC MEANS /

ORDER AFFIRMING MAGISTRATE JUDGE'S ORDER

THIS CAUSE came before the Court upon Movants' Appeal from and Objections to Order of Magistrate Judge Authorizing a Federal Prosecutor to Conduct a "Filter Team" Review (the "Appeal") (ECF No. 24)[1]. This Court held a hearing on the matter on October 23, 2020. Upon careful consideration of the Appeal, the Government's Response (ECF No. 30), and the parties' arguments, and being otherwise fully advised in the premises, the Court finds that Movants' Objections are **OVERRULED** and Magistrate Judge O'Sullivan's Order (ECF No. 20) is **AFFIRMED**.

I. BACKGROUND

On July 31, 2020, Magistrate Judge O'Sullivan issued a search warrant to be executed at the Miami

[1] The Movants include all companies listed in Attachment B.3 to the Search Warrant (Search Warrant, at 9–10, ECF No. 4-1), with the exception of Optima Specialty Steel, Kentucky Electric Steel, Corey Steel Company, Michigan Seamless Tube, LLC, Georgian Manganese, LLC, Vartisikhe 2005, LLC, Optima Harvard Facility LLC, and Optima Stemmons, LLC.

offices of some of the entities which comprise the Optima Family Companies. (Search Warrant, ECF No. 4-1). The search warrant contained a review protocol that allowed for a "filter team of government attorneys and agents to review . . . all seized communications and segregate communications to/from attorneys, which may or may not be subject to attorney-client privilege." (Search Warrant, at 8, ECF No. 4-1). On August 4, 2020, the Government executed the search warrant. (Order, at 2, ECF No. 20). It was discovered that Movants' in-house counsel, Daniela Rost, and a team of paralegals maintain an office at this location, and that materials from other in- house attorneys who have worked out of this office are also stored in this space. (Order, at 2, ECF No. 20). During the execution of the search warrant, the government seized 7,688 pages out of over 125,000 pages that are potentially privileged. (U.S. Resp. Appeal, at 2, ECF No. 30).

On August 1, 2020, Movants filed a Motion to Prohibit Law Enforcement Review of Seized Materials (ECF No. 4). After conducting a telephonic hearing on the matter on September 18, 2020 (ECF No. 18), Judge O'Sullivan issued the subject Order on September 23, 2020 (the "Order") (ECF No. 20). In the Order, Judge O'Sullivan recognized that the initial review protocol did not provide sufficient protection and set forth a modified review protocol (the "Modified Review Protocol"). (Order, at 19, ECF No. 20). The Modified Review Protocol permits Movants to conduct an "initial privilege review of *all* seized items [and] provide a privilege log to the government's filter team[.]" (Order, at 20, ECF No. 20) (emphasis added). Thereafter, the filter team is "permitted to review any item on the privilege log" and the

investigative/prosecution team is prohibited from receiving any items listed on Movants' privilege log "unless agreed to by the parties or the Court/special master has overruled the privilege." (Order, at 20, ECF No. 20). Movants object to this Order and the instant appeal ensued.

II. LEGAL STANDARD

Pursuant to Local Rule 4(a)(1), "[a]ny party may appeal from a Magistrate Judge's order determining a [non-dispositive] motion or matter[.]" "The District Judge shall consider the appeal and set aside any portion of the Magistrate Judge's order found to be clearly erroneous or contrary to law." S.D. Fla. Local Rule 4(a)(1); *see also* Fed. R. Civ. P. 72(a); *Matter of Application of O'Keeffe*, 184 F. Supp. 3d 1362, 1366 (S.D. Fla. 2016). "Clear error is a highly deferential standard of review." *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005) (citation omitted). An order is clearly erroneous if "the reviewing court, after assessing the evidence in its entirety, is left with a definite and firm conviction that a mistake has been committed." *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1523 (11th Cir. 1997). "In the absence of a legal error, a district court may reverse only if there was an 'abuse of discretion' by the magistrate judge." *S.E.C. v. Merkin*, 283 F.R.D. 699, 700 (S.D. Fla. 2012) (citing *Cooter & Gell v. Hartmax Corp.*, 49 U.S. 384, 401 (1990)).

III. DISCUSSION

Movants' contend that Judge O'Sullivan erred by, (1) permitting the use of a filter team to review the documents seized pursuant to the search warrant; and (2) even if a filter team was appropriate, that he erred by allowing current federal prosecutors to form part of

the filter team. For the reasons stated herein, the Court disagrees with Movants.

First, it is Movants' position that Judge O'Sullivan should not have allowed the use of a filter team in this investigation. Yet, despite Movants' contentions to the contrary, it is well- established that filter teams—also called "taint teams"—are routinely employed to conduct privilege reviews. *See, e.g.*, *United States v. DeLuca*, 663 F. App'x 875, 877 (11th Cir. 2016); (noting the use of a filter team and finding no showing of prejudice); *United States v. Kallen-Zury*, 710 F. App'x 365, 373 (11th Cir. 2017) (noting the use of a filter team); *United States v. Jimenez*, No. 16-00153-CG-N, 2017 U.S. Dist. LEXIS 135276, at *6 (S.D. Ala. Aug. 17, 2017) (finding no error with the filter team process utilized); *United States v. Parnell*, No. 1:13-cr-12, 2014, U.S. Dist. LEXIS 86716, at *2 (M.D. Ga. June 26, 2014) (finding that the use of a taint team is proper); *In re Ingram*, 915 F. Supp. 2d 761, 764 (E.D. La. 2012) ("[S]everal U.S. District Courts . . . have approved the use of government filter teams."). In fact, filter teams are designed to protect, rather than infringe upon, the privilege protections afforded to parties. *See In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (Where "the potentially-privileged documents are already in the government's possession . . . the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege."); *see also United States v. Abbell*, 963 F. Supp. 1178, 1179 (S.D. Fla. 1997) (noting that "the assignment of a 'taint team' of Government attorneys and the segregation of the prosecution team of Assistant United States Attorneys and case agents . .

. was designed to minimize the exposure of privileged information.").

Movants assert that their Miami office is "the functional equivalent" of a "law office," merely because their in-house counsel maintained an office in its suite. (Appeal, at 3, ECF No. 24). In particular, Movants relied heavily on *In re Search Warrant Issued June 13,* 2019, where percent of the 52,000 documents seized by the government did not pertain to the target of the search. 942 F.3d 159, 172 (4th Cir. 2019). As Judge O'Sullivan aptly noted, "[m]ost of the cases cited by the movants concern the searches of criminal defense attorneys or law firms that performed some criminal defense work." (Order, at 10, ECF No. 20). Indeed, those cases involved different concerns than those posed by the case at hand, as there was a risk that the members of the filter team would at some point be involved in the criminal investigation and/or prosecution of other clients who were not the subject of the underlying investigation. The same is not true here, where the documents seized pertain only to Movants and its in-house counsel,[2] (U.S. Resp. Appeal, at 6, ECF No. 30), and only 7,688 pages of the over 125,000 pages seized came from in-house counsel's office. (U.S. Resp. Appeal, at 2, ECF No. 30). More importantly, the Assistant U.S. Attorney appointed to the filter team is not, and will not, be a part of the investigative team on the case. (U.S. Resp. Appeal, at 3, ECF No. 30).

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[2] The Government acknowledged that a box of materials was seized from an office in Movants' suite purportedly rented to an outside law firm. This box, however, was later determined by the outside law firm to belong to Movants. [ECF No. 30, at 6 n.1].

Movants' claim that they will suffer irreparable injury likewise fails. They vaguely allude, without more, to the violation of their constitutional rights. (Appeal, at 9, ECF No. 24). To the extent they assert a violation of their Sixth Amendment rights, those assertions are misplaced. Indeed, the Sixth Amendment "does not apply because the privileged communications occurred well before the initiation of the prosecution against [Movants]." *DeLuca*, 663 Fed. Appx. at 879. Here, Movants have not yet been charged with a criminal offense and are only the subjects of an investigation. Movants also attempt to show irreparable harm by placing much emphasis on how the disclosure of privileged communications would "intrude upon work product privileges . . . in connection with the civil lawsuit in Delaware." (Appeal, at 4, ECF No. 24). Yet, the Sixth Amendment does not apply to civil cases, and here, "[t]he seized documents were not in the files of a criminal defense lawyer, and relate to civil, not criminal, litigation that predates the indictment in this case." *See Grant*, 2004 U.S. Dist. LEXIS 9462, at *6–7.

Further, Movants argue that they will suffer irreparable injury because privileged information may be improperly revealed to the prosecution team. (Appeal, at 10, ECF No. 24). This is not a concern here. Not only do Movants have the opportunity to review the documents *before* the filter team, but any documents identified by the Movants in their privilege log may not be released to the prosecution team until the parties agree to do so, or the Court or special master has ruled on the privilege objections. The Modified Review Protocol incorporates several layers of safeguards that prevent anyone other than the filter team and Movants from reviewing the

potentially privileged documents. In cases with far more compelling facts than those presented in this case, the Eleventh Circuit has held that a movant failed to show he was prejudiced. *Cf. DeLuca*, 663 Fed. Appx. at 881 (holding that the prosecution's violation of the attorney-client privilege did not amount to a showing of prejudice because the information was not used against the defendant as part of a criminal investigation).

Second, Movants argue that Judge O'Sullivan erred by allowing Government attorneys to form part of the filter team and review materials seized during the execution of the search warrant. Movants appear to imply a lack of integrity on the Government's part, citing to their "conflicting interests in both preserving privilege and pursuing the investigation[.]" (Appeal, at 11, ECF No. 24). The Court will not presume the Government's purported lack of integrity in abiding by the Court's Order and the law. *See In re Ingram*, 915 F. Supp. 2d 761, 765 (E.D. La. 2012) (basing its decision "upon the expectation and presumption that the Government's privilege team and the trial prosecutors will conduct themselves with integrity.");*United States v. Grant*, No. 04 CR 207, 2004 U.S. Dist. LEXIS 9462, at *2 (S.D.N.Y. May 2, 2004) (same). Filter teams consisting of government attorneys who are not part of the investigative or prosecution teams have been allowed on numerous occasions by this Court. *See, e.g.*, *DeLuca*, 663 Fed. Appx. at 877; *United States v. Patel*, No, 19-CR-80181, 2020 U.S. Dist. LEXIS 104238, *2 n.2 (S.D. Fla. June 8, 2020). This case is no different.

The Court is also mindful of the burden that magistrates and district court judges would face if they were to routinely review lawfully-seized documents. *See Grant*, 2004 U.S. Dist. LEXIS 9462, at *7 (citing *United States v. Zolin*, 491 U.S. 554, 571 (1989) ("We cannot ignore the burdens in camera review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.")). As such, it will not impose this onerous and time-consuming process on the Magistrate Judge when it need not do so.

The Court recognizes the importance of the attorney-client and work product privileges in our legal system. However, Judge O'Sullivan carefully crafted a review protocol that affords proper deference to any attorney-client or work-product privileges that Movants may be entitled to. Indeed, courts have set out review protocols that afford an even lower degree of protection than those imposed by Judge O'Sullivan in the Order. *See Parnell*, U.S. Dist. LEXIS 86716, at *2 (rejecting a request that "a filter team must first release the documents to the defense before providing them to the prosecutors.").

For the foregoing reasons, the Court finds that Movants have failed to demonstrate that the Order is "clearly erroneous or contrary to law."

IV. CONCLUSION

Accordingly, it is ORDERED and ADJUDGED that:

1. Movants' objections to the Order (ECF No. 24) are **OVERRULED**.

2. Magistrate Judge O'Sullivan's Order (ECF No. 20) is **AFFIRMED**.

DONE and ORDERED in Chambers at Miami, Florida this 1st day of November, 2020.

/s/ Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 20-MJ-03278-O'SULLIVAN

In Re: Sealed Search Warrant
and Application for a Warrant /

ORDER

THIS MATTER is before the Court on the Time-Sensitive Motion of Optima Family Companies, Mordechai Korf, Uriel Laber, and Chaim Shochet to Prohibit Law Enforcement Review of Seized Materials until an Appropriate Procedure for Review of Privileged Items is Established (DE# 4, 8/17/20) (hereinafter "Motion"). The Court allowed Mordechai Korf, Uriel Laber, Chaim Shochet and the Optima Family Companies[1] (collectively, "movants") to intervene in the instant proceedings on August 19, 2020. See Order (DE# 10, 8/19/20).

BACKGROUND

On July 31, 2020, the undersigned issued a search warrant to be executed at the Miami offices of some of

[1] The movants define the "Optima Family Companies" as those entities "listed in Attachment B.3 to the search warrant" excluding "Optima Specialty Steel, Kentucky Electric Steel, Corey Steel Company, Michigan Seamless Tube, LLC, Georgian Manganese, LLC, Vartisikhe 2005, LLC, Optima Harvard Facility LLC and Optima Stemmons, LLC." Mordechai Korf, Uriel Laber, Chaim Shochet and the Optima Family Companies' Motion to Intervene (DE# 3 at 1 n.1, 8/17/20).

the entities which comprise the Optima Family Companies. See Search Warrant (DE# 4-1, 8/17/20).[2]

Attachment B.2 of the search warrant contained the following review protocol:

> 3. **Filter for Privileged Materials**: If the government identifies seized communications to/from an attorney, the investigative team will discontinue review until a filter team of government attorneys and agents is established. The filter team will have no previous or future involvement in the investigation of this matter. The filter team will review all seized communications and segregate communications to/from attorneys, which may or may not be subject to attorney-client privilege. At no time will the filter team advise the investigative team of the substance of any of the communications to/from attorneys. The filter team then will provide all communications that do not involve an attorney to the investigative team and the investigative team may resume its review. If the filter team decides that any of the communications to/from attorneys are not actually privileged (e.g., the communication includes third party or the crime-fraud exception applies), the filter team must

[2] The government obtained a separate search warrant for the Cleveland offices of some of the movants. Response at 3. This Order pertains only to the Miami search warrant. The Court does not have jurisdiction over the Ohio search warrant and any review of documents seized pursuant to the Cleveland search warrant will not be done in the Southern District of Florida.

> obtain a court order before providing these attorney communications to the investigative team.

Search Warrant (DE# 4-1 at 8, 8/17/20).[3]

On August 4, 2020, the government executed the search warrant at the Miami offices of some of the movants. Motion at 4; Declaration of Daniela Rost (DE# 4-6 at ¶3, 8/17/20). In-house counsel, Daniela Rost, maintains an office at this location and "[t]he office . . . has a team of paralegals." Declaration of Daniela Rost (DE# 4-6 at ¶¶ 3, 8, 8/17/20). The materials from other in-house attorneys who have worked out of this office in the past [are] also stored at this location. Id. at ¶¶ 5-8.

The law firm of Roche Cyrulnik Freedman LLP (hereinafter "RCF" or "outside counsel"), subleases office space at this location and "serves as outside counsel to some of the entities listed in the search warrant." Declaration of Devin "Velvel" Freedman (DE# 12-3 at ¶¶ 4-5, 9/2/20).

"RCF is actively representing the Movants in a civil action [brought by PrivatBank] in Delaware . . . which alleges, among other things, violations of the Racketeer Influenced and Corrupt Organizations Act" (hereinafter "Delaware litigation"). Reply at 3.

On August 6, 2020, the government initiated two civil forfeiture actions in the Southern District of Florida which relate to "assets that facilitated, were involved in, and are traceable to an international

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[3] The search warrant itself remains under seal as part of an ongoing criminal investigation. In this Order, the Court cites to only those portions of the search warrant which were disclosed in the parties' public filings.

conspiracy to launder money embezzled and fraudulently obtained from PrivatBank." See Verified Complaint for Forfeiture in Rem (DE# 1 at ¶1 in Case Nos. 20-cv-23278-MGC and 20-cv-23279-RNS, 8/6/20). According to the movants, "[t]he transactions, occurrences, and allegations at issue in the Delaware litigation are the same transactions and allegations the Government made in [the] two . . . civil forfeiture actions" Reply at 3.

During the execution of the search warrant on August 4, 2020, the government seized numerous items from the Miami offices including documents, binders, notepads, shipping invoices, hard drives, flash drives, computers, laptops and disks. See Inventory of Miami Search (DE# 11-1, 8/28/20).[4] The parties do not dispute that some of the items seized during the search are at least potentially privileged. Id.; Response at 2 (acknowledging that "some documents seized likely will be privileged," but maintaining that "the vast majority will not.").

[4] The government states that of the 85 categories of items seized, three boxes of materials came from in-house counsel's office and one box of materials came from the space subleased by RCF. Reply at 2, 4-5. At the September 18, 2020 hearing, the government advised the Court that it provided the materials in these three boxes, without the filter team reviewing or copying them, to the movants and the movants are conducting a privilege review of those materials. The box of materials that came from the space subleased by RCF has been returned to RCF. RCF has reviewed the materials and has determined that the materials in the box belonged to the Optima companies. The government has issued a subpoena to the Optima companies and in response to that subpoena, RCF will be returning the box to the government. See Order (DE# 19, 9/18/20).

On August 17, 2020, the movants moved to intervene in this proceeding[5] and filed the instant Motion "object[ing] to any review by law enforcement of privileged materials." Motion at 2.

On August 19, 2020, the Court held a status hearing wherein it allowed the movants to intervene in the instant proceeding and set a briefing schedule. See Order (DE# 10, 8/19/20).

Pursuant to the Court's briefing schedule, the government filed its response in opposition to the instant Motion on August 28, 2020. See United States' Response to Motion of Optima Family of Companies, Mordechai Korf, Uriel Laber, and Chaim Shochet to Prohibit Review of Seized Materials (DE# 11, 8/28/20) (hereinafter "Response"). The movants filed their reply on September 2, 2020. See Movants' Reply in Support of Motion to Prohibit Review of Seized Materials Until an Appropriate Procedure for Review of Privileged Items is Established (DE# 12, 9/2/20) (hereinafter "Reply").

At the Court's direction, the parties have conferred regarding the issues raised in the instant Motion. Response at 6. Despite multiple discussions, the parties have not been able to agree on a privilege review protocol. See Response at 5-6, 18-20; Reply at 10-11.

On September 17, 2020, the movants filed a status report concerning the documents they have received thus far from the government (52,034 pages in the first batch and 157,850 pages in the second batch)

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[5] See Mordechai Korf, Uriel Laber, Chaim Shochet and the Optima Family Companies' Motion to Intervene (DE# 3, 8/17/20).

which they are in the process of reviewing for privilege. See Movants' Status Report (DE# 17, 9/17/20).

On the same day, RCF filed a motion to intervene and for other relief based on the government's search of RCF's work area during the execution of the search warrant. See Roche Cyrulnik Freedman LLP's Motion to Intervene for Limited Relief and

an Evidentiary Hearing (DE# 14, 9/17/20) (hereinafter "RCF's Motion").[6] The movants have joined in RCF's Motion. See Movants' Joinder in [ECF# 14] Roche Cyrulnik

Freedman LLP's Motion to Intervene for Limited Relief and an Evidentiary Hearing (DE# 16, 9/17/20) (hereinafter "Movants' Motion for Joinder"); Order (DE# 19, 9/18/20).

On September 18, 2020, the Court held a hearing on the instant Motion. At the hearing, counsel for the movants represented to the Court that the movants anticipate a large volume of emails regarding the Delaware litigation will be designated privileged. It was also established that the government has returned the seized items belonging to in- house counsel and RCF. Thus, as it pertains to the instant Motion, the issue before this Court is what the protocol should be for the privilege review of the items seized from the remaining (non-attorney) areas of the Miami offices.

This matter is ripe for consideration.

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[6] The Court has set a briefing schedule on RCF's Motion, see Order (DE# 19, 9/18/20), and will rule on RCF's motion once the issues have been briefed.

STANDARD OF REVIEW

The movants "seek an injunction to prohibit law enforcement from reviewing the seized materials until a protocol more protective of the privileges is ordered." Motion at 7.

A preliminary injunction may be granted only if the moving party establishes four factors: (1) a substantial likelihood of success on the merits; (2) an immediate and irreparable injury absent injunctive relief; (3) a threatened harm to the movant that outweighs any injury the injunction would cause to the non-movant and (4) the injunction will not disserve the public interest. Carillon Imps. v. Frank Pesce Int'l Grp. Ltd., 112 F.3d 1125, 1126 (11th Cir. 1997) (citation omitted).

A preliminary injunction is "an extraordinary and drastic remedy not to be granted unless the movant clearly establishe[s] the 'burden of persuasion' as to the four requisites." McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998) (citing All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc., 887 F.2d 1535, 1537 (11th Cir. 1989)).

ANALYSIS

A. Injunctive Relief

1. Likelihood of Success on the Merits

The movants argue that they have established a likelihood of success on the merits. The movants raise numerous concerns with the filter team protocol set forth in the search warrant. The movants note that under the filter team protocol, the filter team improperly engages in the judicial function of adjudicating legal privileges. Motion at 14 (noting that "the function of the judiciary to adjudicate legal

privileges cannot be properly (or securely) delegated to a prosecuting agency of the executive branch, especially where such delegation will result in prosecutors reviewing all privileged communications between in-house counsel and prosecutorial targets.").

The movants further argue that because the Court authorized the filter team protocol prior to the search, the Court did not know the nature of the items which would ultimately be seized. Motion at 15 (positing that "[t]he Court may well have rejected the Filter Team and its Protocol if it had known that in-house lawyers working at the offices of the relevant Optima Family Companies would have all their documents and communications seized, and that the government intended to review through all such legal documents and communications on its own") (internal quotation marks omitted).[7] Relatedly, the movants take issue with the fact that the movants did not have the opportunity to raise their concerns prior to the Court's authorization of the filter team protocol. Id.

The movants also argue that the filter team protocol is flawed because it fails to account for "'important legal principles that protect attorney-client relationships'" by "permit[ting] 'government agents and prosecutors' to engage in 'an extensive review of client communications and lawyer discussions,' which is 'in disregard of the attorney client privilege, the work-product doctrine, and the Sixth Amendment.'" Id. at 15-16 (quoting In re Search Warrant, 942 F.3d at 179).

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[7] As noted above, the government has since returned the materials taken from the work areas used by in-house counsel and outside counsel.

The government maintains that the movants cannot show a substantial likelihood of success on the merits because the filter team protocol set forth in the search warrant is standard procedure. See Response at 1 (stating that the filter team protocol outlined in the search warrant is "standard, considered practice—approved by the Department of Justice and by numerous courts—for the efficient and careful exclusion of privileged materials from the fruits of a search and seizure warrant executed at business offices."); id. at 9 (stating that "filter teams are a time-tested solution to the complex problem of reviewing voluminous records without investigators uncovering privileged materials or imposing massive costs on the court or the government."). The government argues that the risks identified by the movants, such as the potential for inadvertent disclosure of privileged materials is "unfounded" and that "courts begin with the 'expectation and presumption that the Government's privilege team and the trial prosecutors will conduct themselves with integrity.'" Id. at 8-9 (quoting In re Ingram, 915 F. Supp. 2d 761, 765 (E.D. La. 2012)).

The government further argues that the use of a filter team does not "usurp judicial authority" because filter teams "operate under the court's direction, and they are guided by instructions of the court (in this case, via the warrant, and any subsequent orders)." Response at 10. The government also argues that the movants' complaint about the ex parte manner in which the filter team protocol was authorized is moot because the movants have now presented their objections to the filter team protocol to the Court. Response at 11.

At the outset, the Court rejects the movant's argument that the use of government filter teams to conduct privilege reviews is per se legally flawed. Filter teams have been employed to conduct privilege reviews in numerous cases. See, e.g., In re Ingram, 915 F. Supp. 2d 761, 764 (E.D. La. 2012) (noting that "several U.S. District Courts . . . have approved the use of government filter teams."); In re Search of 5444 Westheimer Rd. Suite 1570, Houston, Texas, on May 4, 2006, No. H-06-238, 2006 WL 1881370, at *3 (S.D. Tex. July 6, 2006) (noting that "[o]ther courts have upheld the use of taint team procedures.").

Rather than being disruptive, some courts have viewed the use of filter teams as being protective of privileges: where "the potentially-privileged documents are already in the government's possession . . . the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege." In re Grand Jury Subpoenas, 454 F.3d 511, 523 (6th Cir. 2006); see also United States v. Grant, No. 04 CR 207BSJ, 2004 WL 1171258, at *2 (S.D.N.Y. May 25, 2004) ("not[ing] that a review of the documents by a privilege team of Assistant United States Attorneys would not waive Defendant's attorney-client privilege. A waiver is defined as the intentional relinquishment of a known right."); United States v. Triumph Capital Grp., Inc., 211 F.R.D. 31, 43 (D. Conn. 2002) (stating that "[t]he use of a taint team is a proper, fair and acceptable method of protecting privileged communications when a search involves property of an attorney"); In re Ingram, 915 F. Supp. 2d at 765 (noting that the government's proposed filter team protocol "show[ed] proper deference to any attorney-client or work

product privileges while allowing the government's investigation to proceed.").

In In re Search of 5444 Westheimer Rd. Suite 1570, for instance, the court determined that a filter team protocol which provided for the use of a filter team to review all seized materials for potentially privileged items and provided the privilege holder with an opportunity to challenge the filter team's privilege determinations would "sufficiently protect any potentially privileged documents." 2006 WL 1881370, at *3, *3 n. 5. By contrast, in Heebe v. United States, the court found that a procedure where "the initial determination that a document was potentially privileged involved the examination of the document by **individuals not on the 'taint team**,' . . . threaten[ed] any privilege contained in those documents." No. CIV.A. 10-3452, 2011 WL 2610946, at *5 (E.D. La. July 1, 2011) (emphasis added). Thus, the use of a filter team to review privileged materials is not, in and of itself, injurious to any privileged held by the movants.

The movant relies heavily on In re Search Warrant Issued June 13, 2019, 942 F.3d 159 (4th Cir. 2019), as amended (Oct. 31, 2019). That case is materially distinguishable from the instant case because:

> 99.8 percent of the 52,000 emails seized by the government were not from Client A, were not sent to Client A, and did not mention Client A's surname; and (2) . . . many of those emails contained privileged information relating to other clients of the Firm, including clients who are potential subjects or targets of government investigations.

Id. at 172. Here, the government has returned (without review) the materials seized from the work areas of in-house counsel and RCF and the movants have not identified any other clients whose privileged communications were seized.

Most of the cases cited by the movants concern the searches of criminal defense attorneys or law firms that performed some criminal defense work. See, e.g., In re Search Warrant Issued June 13, 2019, 942 F.3d at 168 (search of a law firm which had both a civil and criminal practice); United States v. Stewart, 2002 WL 1300059, at *1 (S.D.N.Y. Jan.11, 2002) (search of offices shared by multiple criminal defense attorneys); United States v. Gallego, No. CR1801537001TUCRMBPV, 2018 WL 4257967, at *2 (D. Ariz. Sept. 6, 2018) (search of law office belonging to criminal defense attorney). The concern in those cases–that members of the filter team might have been involved in or could later become involved in the criminal investigation and or prosecution of other clients–is simply not present here. The movants have failed to establish a likelihood of success on their request that a government filter team not be permitted to review potentially privileged documents.

Nonetheless, the Court has reservations about the initial filter team protocol set forth in the search warrant as applied to the instant case. The filter team protocol requires the filter team to segregate only those communications which are "to/from attorneys" and authorizes the filter team to "provide all communications that do not involve an attorney to the investigative team " Search Warrant (DE# 4-1 at 8, 8/17/20). Under the filter team protocol set forth in the search warrant, at least some items which are protected by the attorney-client privilege or the work

product doctrine may be inadvertently disclosed to the investigative team. This is because the segregation process only requires the filter team to review for possible privilege those items which are "to/from attorneys." Id. As the movants note, the filter team protocol "(1) does not account for the existence of documents subject to the work product doctrine, including compilations of documents prepared by attorneys in anticipation of litigation; and (2) does not account for the existence of communications between non-lawyers reasonably necessary for the transmission of attorney-client communication." Motion at 3.[8] Moreover, the initial filter team protocol as set forth in the search warrant does not in all instances provide the movants with a mechanism for challenging the filter team's privilege determinations.[9] See, e.g., United States v. Grant, 2004 WL 1171258, at *1 (approving filter team protocol where the privilege holder would have the opportunity to object to privilege determinations made by the filter team).

The instant case is different from the ordinary search of a business where items protected by the

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[8] The movants also argue that the filter team may not know the names of all the attorneys. Motion at 4. However, that concern is easily remedied by permitting the movants to provide the government with a list of attorneys.

[9] For instance, the initial filter team protocol as set forth in the search warrant requires the filter team to obtain a court order if "the filter team decides that any of the communications to/from attorneys are not actually privileged." Search Warrant (DE# 4-1 at 8, 8/17/20). However, the filter team is permitted to release to the investigative/prosecution team "all communications that do not involve an attorney" without providing the movants with an opportunity to assert a privilege. Id.

attorney-client or work product doctrine may sometimes be found. The Court notes that the movants anticipate asserting attorney-client privilege or the work product doctrine over a large volume of communications concerning the Delaware litigation. Although the Delaware litigation is a civil action, the underlying transactions are related to the two civil forfeiture actions which the government has brought in this District. If privileged documents are inadvertently disclosed to the investigative /prosecution team, the government may become privy to privileged materials concerning the Delaware litigation. Such a disclosure could prejudice the movants and may result in future efforts by the movants to disqualify the investigative/prosecution team. It is therefore important to ensure that any privileged documents not be seen by the investigative /prosecution team. Allowing the movants to conduct the initial privilege review will protect both the movants and the government from the inadvertent disclosure of privileged materials to the government's investigative/prosecution team.

In sum, the movants have shown a likelihood of success on the merits with respect to the initial filter team protocol as applied to the seized items in the instant case. The movants have failed to establish a likelihood of success on their request that a government filter team not be permitted to review potentially privileged documents.

2. Irreparable Harm

The movants argue that they have suffered irreparable harm because the deprivation of a constitutional right – the Sixth Amendment's guarantee of effective assistance of counsel –

constitutes an irreparable injury. Motion at 8 (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)). The movants note that "'the attorney-client privilege and the work-product doctrine jointly support the Sixth Amendment's guarantee of effective assistance of counsel.'" Id. (quoting In re Search Warrant, 942 F.3d at 174).

The movants also argue that they may suffer irreparable harm if privileged information is improperly disclosed. Id. at 10 (stating that "[s]eparate and apart from the deprivation of constitutional rights, irreparable injury may also occur when privileged information is improperly revealed because 'courts cannot always "unring the bell" once the information has been released.'") (quoting Maness v. Meyers, 419 U.S. 449, 460 (1975)).

The government argues that the movants cannot show an irreparable injury because "the Government will not use privileged information, and [privileged information] will not be viewed by anyone investigating Movants." Response at 11. The government also argues that the movants' Sixth Amendment right to effective counsel has not yet materialized and is not implicated in the filter team's review of potentially privileged items because the movants are not under indictment and have only identified materials related to civil legal proceedings. Response at 13 (noting that "'[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused.'") (quoting Rothgery v. Gillespie Cty., Tex., 554 U.S. 191, 203 (2008)). The government therefore argues that there can be no showing of irreparable harm based on the deprivation of a constitutional right. Id. at 13 (noting that "the attorney-client privilege is not itself a constitutional

right"). The government also argues that "[e]ven assuming that there is a 'right' triggered here," the movants cannot show irreparable harm because "the review of privileged documents by disinterested, non-investigative government employees is no different than the review of documents by a special master or the court." Id. at 14.

In their reply, the movants maintain that the Sixth Amendment is implicated here because the government has commenced two civil forfeiture proceedings. Reply at 6 (stating that "[a]lthough '[t]he Government argues that there [are] no adversary proceedings against the [Movants] because forfeiture actions are in rem, rather than in personam [that] argument exalts form over substance.'") (quoting United States v. Bowman, 277 F. Supp. 2d 1239, 1243 (N.D. Ala. 2003)). The movants also cite to several cases supporting the proposition that it is the review of privileged materials that harms the privilege holder. Id. at 6-8. The movants assert that it is "[t]he review of the most sensitive and sacred communications by adversarial prosecutors [that] causes fundamental harm to privilege holders." Id. at 8.

"A showing of irreparable injury is the sine qua non of injunctive relief." Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir. 2000) (citations omitted); Sampson v. Murray, 415 U.S. 61, 88 (1974) (stating that "the basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies"). To show irreparable harm, "the [movants are] obliged to demonstrate that [they are] likely to suffer such harm in the absence of injunctive relief." In re Search Warrant, 942 F.3d at 171. The movants must make a "clear showing" of "substantial," "actual

and imminent" irreparable harm, not "a merely conjectural or hypothetical—threat of future injury." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008).

The Court is satisfied that the movants have shown irreparable harm with respect to the initial privilege review of the seized documents. The filter team protocol as set forth in the search warrant requires the filter team to segregate only those communications which are "to/from attorneys." Search Warrant (DE# 4-1 at 8, 8/17/20). Under the filter team protocol, the filter team "will provide all communications that do not involve an attorney to the investigative team and the investigative team may resume its review." Id. Under the filter team protocol set forth in the search warrant, at least some items which are protected by the attorney-client privilege or the work product doctrine may be disclosed to the investigative team.

The movants suspect that the government's investigation largely mirrors the Delaware litigation. See Motion at 5 (asserting that "[t]he transactions and occurrences at issue in the Delaware case overlap entirely with and are substantively identical to the factual predicate for the grand jury investigation pursuant to which the search warrant issued"). At the September 18, 2020 hearing, counsel for the movants represented to the Court that the movants anticipate a large volume of emails regarding the Delaware litigation will be designated privileged.

The Court finds that the movants have shown irreparable harm with respect to the initial privilege review of the seized documents. Here, the movants are involved in the Delaware litigation. If the government

is permitted to review the materials seized from the Miami offices under the filter team protocol set forth in the search warrant (which, as noted above, requires the filter team to review for privilege only those communications which are "to/from attorneys"), at least some items which are protected by the attorney-client privilege or the work product doctrine may be inadvertently disclosed to the investigative team. Moreover, given that the movant anticipates that a large volume of the materials for which it will assert a privilege concern the Delaware litigation, it is likely that the inadvertent disclosure will involve matters which directly relate to the government's proceedings. Although the government has not publicly disclosed the nature of its investigation, it has two pending civil forfeiture actions in this District which relate to the Delaware litigation filed by PrivatBank. See Verified Complaint for Forfeiture in Rem (DE# 1 at ¶1 in Case Nos. 20-cv-23278-MGC and 20- cv-23279-RNS, 8/6/20) (alleging that "assets that facilitated, were involved in, and are traceable to an international conspiracy to launder money embezzled and fraudulently obtained from PrivatBank."). This case is therefore distinguishable from the ordinary search of a business where items protected by the attorney-client privileged or work product doctrine may sometimes be found. In this case, any inadvertently disclosed privileged materials would likely be related to the proceedings initiated by the government.

The movants have shown irreparable harm with respect to the initial privilege review of the seized documents. For the reasons stated in the prior section addressing likelihood of success on the merits, the movants have not shown irreparable harm as to the

use of a government filter team to review of any documents for which the movants assert a privilege.

3. Balancing of Harms

The movants assert that the balancing of harms favors the issuance of an injunction. The movants argue that "the irreparable injury to the attorney-client relationships caused by the improper 'filter team' procedure" outweighs any concerns the government may have about any potential delay to the investigation. Motion at 16.

The government asserts that the balancing of harms weighs against the issuance of an injunction. The government argues that allowing the movants to review the seized materials first "will necessarily delay the ongoing investigation" and, if the Court appoints a special master, "it could take months for that process to commence" and "will be incredibly expensive." Response at 15-16.[10]

The movants counter that "[a] private sector special master can review data faster than a single AUSA who has other work." Reply at 12.

The Court finds that the balancing of harms favors the issuance of an injunction. The filter team protocol as set forth in the search warrant which permits the filter team to "provide all communications that do not involve an attorney to the investigative team,"[11] may result in the disclosure of items protected by the attorney-client privilege or work product doctrine, particularly communications related to the Delaware

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[10] As discussed below, the review process will only take up to 45 days after the documents are provided to the movants.

[11] Search Warrant (DE# 4-1 at 8, 8/17/20).

litigation. The government's concerns regarding delay would be exacerbated if privileged materials are disclosed to the investigative/prosecution team and the movants later seek to disqualify the investigative/prosecution team. Even if the movants are ultimately unsuccessful, it would result in a delay in the proceedings.

The movants have shown that the balancing of harms favors the issuance of an injunction regarding the initial privilege review.

4. Public Interest

The movants must also show that "an injunction is in the public interest." In re Search Warrant, 942 F.3d at 182 (citation omitted). The movants argue that "the filter team and its protocol contravene[ ] the public interest" because they "creat[e] appearances of unfairness as to the intrusion into privileged documents and communications of in-house counsel." Motion at 16.

The government asserts that "[t]he public in general likely has little knowledge of or expectation regarding privilege review." Response at 17. It points to the countervailing "public interest in minimizing the delay of criminal investigations and the efficient administration of justice" and notes that if filter teams are not used, the "courts would bear a heavy cost of increased litigation and potential review of voluminous records." Id. at 17-18. In United States v. Grant, for instance, the court noted that "[p]ermitting the Government's privilege team to conduct an initial review of the documents [would] narrow the disputes to be adjudicated and eliminate the time required to review the rulings of the special master or magistrate judge, thus reducing the possibility of delay in the

criminal proceedings." No. 04 CR 207BSJ, 2004 WL 1171258, at *3 (S.D.N.Y. May 25, 2004).

In their reply, the movants maintain that while "[a] special master may impose financial costs, . . . the intrusion into privileged documents and communications imposes far greater harm to the public interest in functional attorney-client relationships, which these privileges uphold and protect." Reply at 10.

The parties have identified important and competing public interests. The Court finds that, in the instant case, the public interest is furthered by applying a modified filter team protocol to the seized items. Under the modified filter team protocol discussed below, the government will, on an ongoing basis, provide the movants with items to review for privilege.[12] The movants will have forty-five (45) days from receipt of the items to assert their privileges. Allowing the movants to conduct a privilege review of the seized materials within a fixed time frame and on an ongoing basis will ensure that the attorney-client privilege and work product doctrine are timely asserted by the privilege holders while at the same time alleviating some of the government's concerns with the delay and expense of using a special master to perform the privilege review at the outset.

The movants have shown that the public interest favors the issuance of an injunction as to the initial privilege review of the seized items.

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[12] At the September 18, 2020 hearing, the movants advised the Court that they have provided the government with passwords which will reduce the time it would ordinarily take for the government to copy and process electronic media.

B. Modified Filter Team Protocol

The Court is concerned that the filter team protocol set forth in the search warrant only requires the filter team to review for possible privilege those items which are "to/from attorneys" and does not include other forms of privilege such as the work product doctrine. Additionally, the movants are presently litigating the Delaware litigation which directly relates to the two civil forfeiture actions brought by the government in this District. The movants anticipate that they will be asserting a privilege over a large volume of communications concerning the Delaware litigation. For these reasons, special care should be employed here to protect against the disclosure of privileged items.

The modified protocol will permit the movants to conduct the initial privilege review of all seized items. The movants will provide a privilege log to the government's filter team[13] and the government's filter team will have the opportunity to challenge any privilege designation on the movants' privilege log. The government's filter team will be permitted to review any item on the privilege log in order to formulate a challenge.

Although the movants vehemently object to the filter team's review of seized items, the Court finds that it is necessary to allow the government's filter

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[13] The government's filter team shall be comprised of attorneys and staff from outside the United States Attorney's Office for the Northern District of Ohio's Cleveland branch office. The filter team shall not share a first level supervisor with anyone on the investigative/prosecution team. Any supervisor involved in the filter team review shall be walled off from the underlying investigation.

team to review any item listed on the privilege log in order for the government's filter team to make an informed challenge to the movants' privilege designations. For instance, the government's filter team may not be able to effectively raise the crime-fraud exception without reviewing the underlying item. The investigative/prosecution team will be prohibited from receiving any items listed on the privilege log unless agreed to by the parties or the Court/special master has overruled the privilege.

CONCLUSION

Having reviewed the applicable filings and the law and having held a hearing on September 18, 2020, it is

ORDERED AND ADJUDGED that the movants' Time-Sensitive Motion of Optima Family Companies, Mordechai Korf, Uriel Laber, and Chaim Shochet to Prohibit Law Enforcement Review of Seized Materials until an Appropriate Procedure for Review of Privileged Items is Established (DE# 4, 8/17/20) is **GRANTED in part and DENIED in part** as follows:

1. The parties shall adhere to the following modified filter team protocol:

    a. The government shall process the items and provide them to the movants, on a rolling basis, so that the movants may perform the initial privilege review. Within **forty-five (45) days of receipt** of these items, the movants shall release all non-privileged items to the government's investigative/prosecution team and provide a privilege log to the government's filter team for all items for which they assert a privilege.

b. The government's filter team shall be comprised of attorneys and staff from outside the United States Attorney's Office for the Northern District of Ohio's Cleveland branch office. The filter team shall not share a first level supervisor with anyone on the investigative/prosecution team. Any supervisor involved in the filter team review shall be walled off from the underlying investigation.

c. The government's filter team is permitted to review any items listed on the movants' privilege log and may challenge any of the movants' privilege designations.

d. The government's filter team and the movants' counsel shall confer and attempt to reach a resolution as to those items challenged by the government's filter team.

e. If the parties are unable to reach a resolution, the parties shall file a joint notice with the Court. Either the Court or a special master shall rule on the parties' privilege disputes.

f. The filter team will provide to the investigative team only those items for which the parties agree or for which the privilege has been overruled.

2. The portion of this Order that allows for the government filter team review of potentially privileged documents is stayed until **Thursday, October 15, 2020** to provide the

movants with an opportunity to appeal this ruling.[14]

DONE AND ORDERED in Chambers at Miami, Florida this **23rd** day of September, 2020.

/s/ *John J. O'Sullivan*
Chief United States Magistrate Judge

[14] The stay is only as to the use of a filter team or special master to conduct the initial privilege review. At the September 18, 2020 hearing, after the Court had announced its ruling, the movants requested a stay to provide them with an opportunity to appeal that ruling.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-14223-AA

Filed
01/19/2022

In re:

Sealed Search Warrant and Application for a Warrant by Telephone or Other Reliable Electronic Means.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MORDECHAI KORF,
URIEL LABER,
CHAIM SHOCHET,
OPTIMA INTERNATINAL, LLC,
OPTIMA VENTURES, LLC,
OPTIMA MANAGEMENT GROUP, LLC,
OPTIMA ACQUISITIONS, LLC,
NIAGARA LASALLE CORPORATION,
OPTIMA GROUP,
GEORGIAN AMERICAN ALLOYS, INC.,
CC METALS AND ALLOYS, LLC,
FELMAN PRODUCTIONS, LLC,
FELMAN TRADING, INC.,
FELMAN TRADING AMERICAS, INC.,
GEORGIAN AMERICAN ALLOYS SARL,
GEORGIAN AMERICAN ALLOYS
MANAGEMENT, LLC,
OPTIMA FIXED INCOME, LLC,

OPTIMA HOSPITALITY, LLC,
OPTIMA 777, LLC,
OPTIMA 925, LLC,
OPTIMA 925 II, LLC,
OPTIMA 1300, LLC,
OPTIMA 1375, LLC,
OPTIMA 1375 II, LLC,
OPTIMA 55 PUBLIC SQUARE, LLC,
OPTIMA 7171, LLC,
OPTIMA 500, LLC,
OPTIMA CBD INVESTMENTS, LLC,
CBD 500, LLC,

Movants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: ROSENBAUM and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

*This order is being entered by a quorum pursuant to 28 U.S.C. § 46(d) due to Judge Martin's Retirement on September 30, 2021.