UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE #1 AND JANE DOE #2,

Petitioners,

vs.

UNITED STATES,

Respondent.
_____/

RESPONDENT'S OPPOSITION TO PETITIONERS' RENEWED MOTION FOR AN ORDER DIRECTING THE U.S. ATTORNEY'S OFFICE NOT TO WITHHOLD RELEVANT EVIDENCE

Respondent, by and through its undersigned counsel, files its Opposition to Petitioners' Renewed Motion for an Order Directing the U.S. Attorney's Office Not to Withhold Relevant Evidence, and states:

I. INTRODUCTION

In its Omnibus Order of June 18, 2013, this Court directed that petitioners should have thirty days after service of the government's privilege log to file a motion to compel contesting any asserted privilege claim. D.E. 190 at 2. Any such motion to compel was limited to seven pages. Id. Within fifteen days, the government was permitted to file its response, which was also limited to seven pages. D.E. 190 at 3.

Petitioners' response to the government's filing of its privilege log has been the filing of the following: (1) the government's privilege log with its objections annotated (D.E. 224-1); (2) a motion to compel production of documents that are not privileged, numbering eight pages D.E. 225; (3) a twenty-four page, single-spaced affidavit of petitioners' counsel, addressing the

various privileges asserted by the government, D.E. 225-1; and (4) a renewed motion for an order directing the U.S. Attorney's Office not to withhold relevant evidence, numbering seventeen pages, D.E. 226. The renewed motion also challenges the government's assertions of privilege.

I. THE GOVERNMENT HAS PROPERLY INVOKED APPLICABLE PRIVILEGES

Petitioners argue that this Court should summarily dismiss the privileges invoked by the government because of the "gross inadequacies" in the privilege assertions. D.E. 226 at 6-7. Their argument is baseless because the privilege log does clearly indicate what documents for which a privilege is being claimed. Further, the Court also has the actual document for in camera review to determine if the privilege is valid.

Petitioners go so far as to complain that the government has not identified in the privilege log which documents respond to which requests. Id. at 7. They do not explain how the validity of a privilege is contingent upon which request for production the document is responsive to. In request for production no. 18, petitioners requested documents "regarding potential conflicts of interest that the Justice Department discussed or determined existed for the USAO SDFL … ." The government's privilege log clearly references e-mails between Assistant General Counsel Richard Sudder, Executive Office for United States Attorneys, and First Assistant U.S. Attorney Benjamin Greenberg, "regarding Formal Notice of Office-wide Recusal of Southern District of Florida, dated August 24 and August 29, 2011." D.E. 212-1 at 22. Further, the privilege log detailed emails between Peter Mason, Executive Office for United States Attorneys, and Assistant U.S. Attorney Dexter Lee, "seeking advice regarding office-wide recusal, dated December 16 and 17, 2010, with attached letter from Paul Cassell to Wifredo A. Ferrer, dated December 10, 2010." D.E. 212-1 at 23.

The subjects of the e-mails, office-wide recusal and "seeking advice regarding office-wide recusal," were stated in the privilege log. The attorney-client privilege was invoked for these documents, along with the deliberative process and work product privileges for a subset of these documents. Since petitioners requested these documents, they should be able to discern what document request they pertain to. Moreover, the purpose of the e-mails, seeking advice regarding office-wide recusal, was stated in the privilege log. This is sufficient factual detail to permit petitioners and the Court to determine whether the attorney-client privilege applies.

Petitioners' claim that the government has failed to produce relevant documents is based on fallacious assumptions. They use as an example of a failure to produce documents the request for documents regarding former Assistant U.S. Attorney Bruce Reinhart. D.E. 226 at 8-9. "The victims know that the Government has information responsive to this request, because in answering the victims' First Request for Admissions, the Government admitted that it possessed information reflecting contacts between Reinhart and persons working at the Justice Department that related to the Epstein investigation." Id. Continuing, petitioners state, "It further admitted that OPR collected information about Reinhart's possibly improper behavior." They then argue that "there is no way to tell which documents (among the more than 13,000 pages of documents) are responsive to RFP 15 because the Government has not indicated which of its documents apply to which RFP."[1] Id. at 9.

The fallacy in petitioners' reasoning is the assumption that the basis for the government's response to the request for admission was a document, rather than personal observation. If it was based on the latter, there would be no document to produce. Petitioners make the same fallacious assumption in the case of former Assistant U.S. Attorney Matt Menchel. D.E. 226 at 9-10. The admission in Request for Admission No. 20 need not have been based upon a

[1] The RFP which seeks documents pertaining to Reinhart is actually number 16, rather than 15.

document.

Petitioners admit that the government has included documents from the Office of Professional Responsibility (OPR) in its privilege logs. D.E. 226 at 10 n.6. The government has properly invoked the attorney-client, work product, and deliberative process privileges for many of the OPR documents. D.E. 216-1 at 12-14. In Sandra T.E. v. South Berwyn School District 100, 600 F.3d 612 (7th Cir. 2010), the Seventh Circuit reversed a district court's finding that the attorney-client and work product privileges did not apply to notes of witness interviews, and memoranda prepared from those interviews, by a law firm retained by a school district. A teacher in the school district was charged with sexually molesting numerous students over several years. Id. at 615. A civil lawsuit was filed against the school district and the principal. The school district hired Sidley Austin LLP to conduct an internal investigation and provide legal advice to the school board. Sidley Austin was not the school district's litigation counsel in the civil lawsuit. Attorneys from Sidley Austin interviewed current and former school district employees, as well as third-party witnesses. The attorneys took handwritten notes and later drafted memos summarizing the interviews. Id.

During discovery in the civil litigation, the plaintiffs sought documents in Sidley Austin's possession regarding its investigation. The law firm invoked the attorney-client and work product privileges as to its notes and internal memoranda relating to the employee witness interviews, as well as other legal memoranda. The district court rejected the privilege claims, finding that Sidley Austin had been hired to provide investigative services, not legal services. Id.

The appellate court found, based on the engagement letter between Sidley Austin and the school district, that the law firm had been hired to "investigate the response of the school administration to allegations of sexual abuse of students," and "provide legal services in

connection with the specific representation." Id. at 619. The Seventh Circuit found this letter brought the case squarely within Upjohn Co. v. United States, 449 U.S. 383 (1981), "which explained that factual investigations performed by attorneys *as attorneys* fall comfortably within the protection of the attorney-client privilege." 600 F.3d at 619(emphasis in original). Despite the fact that Sidley Austin was not the school district's litigation counsel, the appellate court found that Sidley's investigation of the factual circumstances surrounding the abuse was an integral part of the package of legal services for which it was hired and a necessary prerequisite to the provision of legal advice about how the school district should respond. Id. at 620. The Court also found the witness interview notes and memoranda were entitled to protection under the work product privilege because they were prepared "with an eye toward" the pending litigation. Id. at 622

In this case, OPR is charged with the responsibility of investigating allegations of misconduct committed by DOJ attorneys. 28 C.F.R. § 0.39a(a)(1). The counsel heading OPR reports to the Attorney General. 28 C.F.R. § 0.39a. One of OPR's functions is to "[r]eceive, review, investigate and refer for appropriate action." § 0.39a(a)(2). In discharging this function, OPR attorneys interviewed DOJ attorneys regarding the allegations of misconduct lodged by petitioners' counsel, took notes, and prepared memoranda, just like the law firm retained by the South Berwyn School District. The documents generated by these investigative actions are covered by the work product privilege because notes and memoranda prepared by OPR attorneys are created with an eye toward potential litigation. Under § 0.39a(a)(3), OPR Counsel shall, "[r]eport to the responsible Department official the results of inquiries and investigations arising under paragraphs (a)(1) and (2) of this section, and, when appropriate, make recommendations for disciplinary and other corrective action."

In their fourth example, petitioners claim they "know that the USAO-SDFL was in fact conflicted out of some decisions, so presumably the USAO-MDFL evaluated something as a result." D.E. 226 at 10-11. They contend that, other than a few preliminary emails within the DOJ regarding whether the recusal should occur, "nothing in the privilege log indicates that the Government has produced even a single document in response to the request for information about what happened as a result of the recusal."

Petitioners appear to believe that, because the USAO-SDFL was recused from the Epstein case, the USAO-MDFL "evaluated something as a result." In U.S. v. Weyhrauch, 544 F.3d 969 (9th Cir. 2008), the Ninth Circuit noted that, "the General Counsel's Office of the EOUSA coordinates office-wide recusals, obtains necessary approvals and helps arrange the transfer of responsibility to another office … ." Id. at 973-74. Office-wide recusals are frequently based upon a finding that a reasonable person could question the impartiality of a particular U.S. Attorney's Office, such as when the Office is prosecuting a crime where the victim is an employee in that U.S. Attorney's Office, or a defendant is a close family member of a U.S. Attorney's Office employee. Petitioners seem to believe that the recusal of the USAO-SDFL was based on a finding that misconduct had occurred in the Epstein case, which is incorrect. Further, the transfer of responsibility to the USAO-MDFL was not a charter for it to investigate the USAO-SDFL. Instead, the USAO-MDFL assumed responsibility for the Epstein case, and exercises its own independent judgment and discretion in deciding what action to take, if any.

II. THE FIDUCIARY EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY IN THIS CASE

Petitioners argue that government should be ordered to produce the requested documents because there is a fiduciary exception to all privilege. This wholesale attempt to overcome the

government's claims of privilege should be rejected because it lacks any legal basis.

The premise of petitioners' argument is that the CVRA provides that government prosecutors are to "make their best efforts to see that crime victims are accorded their rights." 18 U.S.C. § 3771(c)(1). They provide no legal authority for the contention that the CVRA creates a fiduciary obligation between the government and crime victims. Instead, petitioners attempt to engraft such a duty from other cases, involving duties owed by a corporation to its shareholders, Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), and the relationship between the federal government and Indian tribes. None of those cases are apposite.

In United States v. Jicarilla Apache Nation, 131 S.Ct. 2313 (2011), the Supreme Court reversed the Court of Federal Claims' finding that the government was required to produce documents in litigation involving the Jicarilla Apache Nation. The Tribe had instituted a breach of trust action against the United States, claiming the government had mismanaged funds held in trust for the Tribe. The Tribe sought various documents in discovery, which included materials for which the government claimed were protected by the attorney-client privilege. The Court of Federal Claims applied the fiduciary exception to the attorney-client privilege, applied in the context of common law trust, and found the documents were not privileged. 131 S.Ct. at 2319.

The Supreme Court reversed, finding the government is not a private trustee, and the trust defined between the government and the Tribe was governed by statutes, rather than the common law. Id. at 2323. Further, the United States did not obtain legal advice as a "mere representative" of the Tribe, nor was the Tribe the "real client" for whom that advice was intended. Id. at 2326. Assuming any fiduciary relationship exists between the government and a crime victim, such relationship would be based on the CVRA, not the common law. Further, the government would be managing any trust relationship as a sovereign function, pursuant to

the plenary authority of Congress, not as a private trustee.

In Jicarilla, the Supreme Court distinguished Garner:

> The United States has a sovereign interest in the administration of Indian trusts distinct from the private interests of those who may benefit from its administration. Courts apply the fiduciary exception on the ground that "management does not manage for itself." *Garner*, 430 F.2d at 1101; *Wachtel*, 482 F.3d at 232 ("[O]f cental importance in both *Garner* and *Riggs* was the fiduciary's lack of a legitimate personal interest in the legal advice obtained"). But the Government is never in that position. While one purpose of the Indian trust relationship is to benefit the tribes, the Government has its own independent interest in the implementation of federal Indian policy. For that reason, when the Government seeks legal advice related to the administration of tribal trusts, it established an attorney-client relationship related to its sovereign interest in the execution of federal law. In other words, the Government seeks legal advice in a "personal" rather than a fiduciary capacity. See *Riggs*, 355 A.2d at 711.

131 S.Ct. at 2327-28. In this case, the government had its own independent interest in the exercise and implementation of its sovereign authority to prosecute an individual for violating federal law. Therefore, the fiduciary exception does not apply.[2]

III. PETITIONERS HAVE NO DUE PROCESS RIGHTS UNDER THE CVRA

Petitioners argue that they have a due process right to documents in the government's possession. D.E. 226 at 14-17. The basis for a due process right, according to petitioners, is the CVRA's provision that crime victims have a right "to be treated with fairness." 18 U.S.C. § 3771(a)(8).

In making this due process argument, petitioners dispense with any analysis of whether the CVRA creates any protected liberty or property interest, sufficient to trigger the due process clause. "The necessary first step in evaluating any procedural due process claim is determining

[2] The two cases cited by petitioners in support of a fiduciary exception due to the government's relationship with Indian tribes, Osage Nation and/or Tribe of Indians of Oklahoma v. United States, 66 Fed. Cl. 244 (2005), and Cobell v. Norton, 212 F.R.D. 24 (D.D.C. 2002), are of dubious vitality in light of Jicarilla Apache Nation.

whether a constitutionally protected interest has been implicated." Tefel v. Reno, 180 F.3d 1286, 1299 (11th Cir. 1999), citing Economic Dev. Corp. v. Stierheim, 782 F.2d 952, 954-55 (11th Cir. 1986)("in assessing a claim based on an alleged denial of procedural due process a court must first decide whether the complaining party has been deprived of a constitutionally protected liberty or property interest. Absent such a deprivation, there can be no denial of due process.").

There is no life, liberty, or property interest implicated in the CVRA, and courts are hesitant to find that a substantive due process right has been created. See Collins v. City of Harker Heights, Texas, 503 U.S. 115, 125 (1992)("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open ended. (citation omitted). The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."). Without a protected life, liberty, or property interest, petitioners cannot invoke the due process clause as a basis for compelling the government to disclose documents to them.

Petitioners' reliance upon Brady v. Maryland, 373 U.S. 83 (1963), is similarly unavailing. Petitioners are not charged with any crime, nor are they in the position of having their liberty deprived at the hands of the government, such as the case with a defendant charged with committing a crime. Petitioners rely upon three cases, which they claim demonstrate the application of Brady outside the criminal context. D.E. 226 at 15. In Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), the Sixth Circuit observed:

> We believe Brady should be extended to cover denaturalization and extradition cases where the government seeks denaturalization or extradition based on proof of alleged criminal activities of the party proceeded against. If the government had sought to denaturalize Demjanjuk only on the basis of his misrepresentation at the time he sought admission to the United

> States and subsequently when he applied for citizenship, it would have been only a civil action.

Id. at 353. Demjanjuk has no application to this case since the government does not seek to deprive petitioners of their United States citizenship, or anything else. The Sixth Circuit found Brady should apply because of two factors. First, the government was seeking to denaturalize Demjanjuk. Second, it was seeking to do so on the ground that Demjanjuk engaged in criminal activities. The appellate court's specific focus on the government's reliance upon Demjanjuk's participation in criminal activities, demonstrates that was the legal basis for its finding that Brady applied. Their reference to the denaturalization case being "only a civil action," if the government had relied solely upon Demjanjuk's misrepresentations, suggests that seeking to denaturalize, without an allegation of criminal activity, would not be a sufficient basis for applying Brady.

Similarly, in U.S. v. Edwards, 777 F.Supp.2d 985 (E.D.N.C. 2011), the government was seeking to civilly commit Edwards for being a "sexually dangerous person" under 18 U.S.C. § 4248(a). The district court found that Edwards had a liberty interest in avoiding detention and civil commitment. Id. at 990. Consequently, the due process clause was implicated because the government was seeking to deprive Edwards of a liberty interest in avoiding detention. In this case, the government does not seek to deprive petitioners of anything.

The third case cited by petitioners is EEOC v. Los Alamos Constructors, Inc., 382 F.Supp. 1373 (D.N.M. 1974). The district court's analysis of the due process issue is contained in one sentence in the following footnote: "Brady v. Maryland (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, orders that exculpatory information must be furnished a defendant in a criminal case. A defendant in a civil case brought by the government should be afforded no less due process of law." Id. at 1383 n.5. This is no authority for petitioner's due process argument

since there is no analysis of whether a protected life, liberty, or property interest is implicated by the government's actions. Moreover, by its own terms, this district court decision is inapplicable because petitioners are not defendants in a civil case brought by the government.

CONCLUSION

Petitioners' renewed motion should be denied. The privilege log provided by the government adequately describes the documents for which privileges are being asserted. Further, there is no fiduciary exception to the attorney-client privilege invoked by the government, nor is there any due process right to documents provided in the CVRA.

DATED: September 3, 2013

Respectfully submitted,

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By: s/ Dexter A. Lee
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[redacted]

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 3, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Dexter A. Lee
DEXTER A. LEE
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SERVICE LIST

Jane Does 1 and 2 v. United States,
Case No. 08-80736-CIV-MARRA/JOHNSON
United States District Court, Southern District of Florida

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