UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:19-cr-00605-WFJ-CPT**

MICHAEL J. DACORTA /

CORRECTED MOTION IN LIMINE TO EXCLUDE EVIDENCE AND TESTIMONY OF JOSEPH ANILE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE

COMES NOW Defendant, Michael J. DaCorta, by and through undersigned counsel, and moves this Court pursuant to Federal Rule of Evidence 501 to preclude evidence and any testimony of Joseph Anile that is protected by attorney-client privilege. As grounds for support, Mr. DaCorta states the following.

I. Relevant Factual Background

The Government has indicted Mr. Michael DaCorta for Conspiracy to Commit Wire and Mail Fraud, Illegal Monetary Transaction, and False and Fraudulent Statement on Income Tax Return (Doc. 39). According to the Indictment and provided discovery documents, these allegations are based on facts and events occurring from 2011 until 2019.

Mr. Michael DaCorta is a businessman. He began his career as a day trader and quickly developed a niche in the foreign exchange market. As a result of his business acumen, he opened several businesses over the course of his professional

life. It was when he was opening a beverage company named "Empire State Brewing,"[1] that John Caliendo introduced him to attorney Joseph Anile. Mr. Anile was reputed to be a very experienced corporate attorney whose business dealings involved high level financial corporations like Lehman Brothers. Although Mr. DaCorta did not officially retain Mr. Anile at that time, he consulted Mr. Anile for his legal opinion on paperwork for Empire State Brewing. Following their conversations about Empire State Brewing, Mr. Anile and Mr. DaCorta remained in touch.

In 2001, Mr. DaCorta contacted Mr. Anile again. Mr. DaCorta asked Mr. Anile to assist and advise about transitioning from an equities trader to a currency trader. Mr. DaCorta then hired Mr. Anile to form his currency trading firm, International Currency Traders, Ltd. (ICT) and The DaCorta Group, Inc. Mr. DaCorta paid Mr. Anile $5,000 in exchange for his legal advice, consultation, and formation of the companies. Evidence of their attorney-client relationship is documented through a variety of invoices, memorandums from meetings, and articles of incorporation and drafting of bylaws. (*See* Composite Exhibit A)[2]. The relationship began at least in January 2001 and continued until at least 2006

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[1] The Motion to Exclude filed August 30, 2021 mistakenly identified this company as "Imperial Brewing."

[2] Exhibit A is being filed *ex parte* and under seal as the exhibit contains privileged information.

regarding ICT. (*See* Exhibit B, Florida Department of State, Division of Corporations, International Currency Traders, Ltd., Inc. foreign corporation filing dated March 21, 2006).

After the 2008 financial market crisis, Mr. DaCorta again consulted with Mr. Anile. Mr. DaCorta advised Mr. Anile that ICT would need to close, and Mr. DaCorta would have to file bankruptcy. Mr. Anile noted that he had also suffered as a result of the crisis as much of his business dealings originated through Lehman Brothers. Though Mr. Anile did not actually file the bankruptcy documents, the two continued to stay in contact about the financial crisis and the effects of this crisis.

Documentation demonstrates, though, that even though Mr. DaCorta did not retain Mr. Anile to file the bankruptcy documents, Mr. DaCorta did consult with Mr. Anile about it. This occurred in at least 2010. Specifically, there was a civil case associated with the larger bankruptcy, *Giudice v. DaCorta, et al*, 1:10-cv-03028-VM, Southern District of New York (Foley Square), and Mr. DaCorta retained Mr. Anile to assist with this case. (*See* Exhibit C, Retainer Agreement). This demonstrates that there was an attorney-client relationship between Mr. DaCorta and Mr. Anile regarding the bankruptcy and ICT.

In 2010, Mr. DaCorta met Ray Montie and joined Ambit Energy, a company that Mr. Montie worked at as a top-level marketer. As their professional relationship developed, Mr. Montie expressed his interest in the financial currency markets. As

a result, Mr. DaCorta and Mr. Montie began Oasis Management LLC as a small investment "club." Each investor was a limited "partner" in the club. Once Oasis Management LLC was created, Mr. DaCorta contacted Mr. Anile about the entity. Mr. DaCorta sought Mr. Anile's advice about transitioning Oasis Management LLC from an investment "club" into a new business entity. In the MOI from his proffer, Mr. Anile estimates this to be around late 2012. (*See* Exhibit D, Anile Memorandum of Interview, p. 2, ¶ 6). Mr. Anile and Mr. DaCorta met in person to discuss the legal issues. During that conversation, Mr. Anile agreed to join as a partner and be lead counsel for the business—focusing on legal, compliance, and administrative functions. Mr. Anile agreed to a sum of $10,000 for legal work. (*See* Exhibit D, Anile Memorandum of Interview, p. 2, ¶ 6). Some of his duties included devising the format and structure of Oasis, advising Oasis on acquisition of assets, (*See* Composite Exhibit E – memorandums regarding acquisitions located on Anile's desktop)[3], and ensuring legal compliance. At all relevant time periods, Mr. Anile was a licensed and barred attorney in the State of New York. He was admitted to the New York State Bar in 1991. Mr. Anile states that he did not know about the fraud until 2017 or 2018. (*See* Exhibit D, Anile Memorandum of Interview)

[3] Exhibit E is being filed *ex parte* and under seal as the exhibit contains privileged information.

II. The Attorney Client Privilege Applies to All Communications Between Mr. DaCorta and Mr. Anile

The Federal Rules of Evidence incorporate and protect common-law privileges. *See* Fed. R. Evid. 501. The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law," and it "protects the disclosures that a client makes to his attorney, in confidence, for the purpose of securing legal advice or assistance." *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994), *modified on other grounds by* 30 F.3d 1347 (quoting *United States v. Zolin*, 491 U.S. 554, 562 (1989)). The purpose of the attorney-client privilege is to encourage "full and frank communication between clients and attorneys." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

The attorney-privilege does not cover all conversations between attorneys and clients. Instead, the privilege "attaches only to communications made in confidence to an attorney by that attorney's client for the purposes of securing legal advice or assistance." *In re Grand Jury Investigation*, 842 F.2 1223, 1224 (11th Cir. 1987). As the party invoking the attorney-client privilege, Mr. DaCorta must show (1) the existence of an attorney-client relationship and (2) that the communications were confidential and made to his attorney "in his professional capacity, for the purpose of securing legal advice or assistance." *United States v. Schaltenbrand*, 930 F.3d 1554, 1562 (11th Cir. 1990) (internal quotation marks omitted). As to the second requirement, the "key question" is whether Mr. DaCorta "reasonably understood the

conference to be confidential." *Id.* (internal quotation marks and citation omitted). Mr. DaCorta can satisfy both requirements.

Mr. DaCorta asserts his privilege and seeks to exclude evidence and testimony of two categories of protected communications with Mr. Anile: (1) those while Mr. Anile represented Mr. DaCorta in past business ventures (including, but not limited to, Empire State Brewing and ICT), and (2) those while Mr. Anile represented Oasis and its affiliates.

A. Mr. Anile and Mr. DaCorta had an attorney-client relationship prior to Oasis and Mr. DaCorta asserts the attorney client privilege to protect these communications.

As explained *infra*, Mr. Anile was Mr. DaCorta's lawyer for various business ventures from at least 2001 until 2012. During the existence of the attorney-client relationship, Mr. DaCorta engaged in confidential communications with Mr. Anile for purposes of securing legal advice or assistance, and Mr. DaCorta reasonably believed those communications to be confidential. *See Schaltenbrand*, 930 F.3d at 1562. Accordingly, this Court should exclude any evidence, including testimony of Mr. Anile, that reveals those privileged conversations. Mr. DaCorta holds this privilege and asserts the privilege for all communications between himself and Mr. Anile pre-Oasis.

B. Mr. DaCorta asserts the privilege as it pertains to any communications between Oasis and Mr. Anile, its corporate counsel.

Conversations between corporate counsel and a company's officers or employees are privileged, *see Upjohn*, 449 U.S. at 391–95, and that privilege generally belongs to the company itself, *see In re Grand Jury Subpoenas*, 144 F.3d 653, 658 (10th Cir. 1998); *see also Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348–49 (1985). The *Weintraub* case is the seminal case on this issue.

In *Weintraub*, the United States Supreme Court ruled that the trustee of a corporation in bankruptcy ("Trustee") had the power to waive the corporation's attorney-client privilege for communications prior to the filing of the bankruptcy petition. In so holding, the Supreme Court started from the general principle that the attorney-client privilege as it pertains to a corporation is unique because an entity itself cannot waive or assert a privilege. The privilege must be held by individuals empowered to act on behalf of the corporation. *Id.* at 348. When new managers take over, the privilege (and the ability to waive it) is passed to those new managers. *Id.* at 349.

The key issue in *Weintraub*, then, was whether the privilege was held by the Trustee or the debtor's directors. Because the Bankruptcy Code gave no direct guidance on the issue, the Supreme Court had to determine who most resembled the

management of the company. *Id.*at 351. The Supreme Court determined that the Trustee had broad management powers and the directors retained virtually no management powers. *Id.* at 353. In light of that conclusion, the Supreme Court held that the Trustee controlled the privilege unless permitting it to do so would interfere with the policies underlying the Bankruptcy Code. *Id.* Because the Supreme Court identified no conflicting policies, it determined that the Trustee held the privilege and had the power to waive the privilege as to pre-bankruptcy communications. *Id.* at 353–58.

Whether Mr. DaCorta or Oasis's court-appointed receiver[4] can assert the attorney-client privilege must be determined under the rubric of *Weintraub*. First, the Court must decide if the receiver is the individual who <u>most closely</u> resembles management of Oasis at this point. Resoundingly, no. The receiver, unlike the Trustee in *Weintraub*, has an interest that runs parallel to the interest of the Department of Justice and the United States Attorney's Office. In the receivership case, the United States Attorney's Office has requested status as an intervenor and has filed a motion to stay the proceedings and periodically has filed status updates

[4] The receivership originated from a Commodity Futures Trading Commission ("CFTC") complaint. Pursuant to that complaint, a receiver was appointed and case 8:19-cv-886-VM-SPF was docketed in the Middle District of Florida. The CFTC is a regulatory body. The Commission consists of "five commissioners appointed by the President, with the advice and consent of the Senate . . . ." It must submit its budget requests to Congress for approval. *See* CFTC at https://cftc.gov.

with the Court. The receiver and the Government (DOJ and US Attorney's office) are in lockstep. The US Attorney's office is working on the criminal indictment and the receiver is working on the receivership case, but, nonetheless, their goals are the same—to recover assets for what they deem "victims." For example, during the suppression hearing the receiver testified that a criminal conviction in Mr. DaCorta's case would benefit the receivership case. While the receiver here exhibits certain managerial aspects, in total, his behavior is more akin to a government agency than a manager of a profit-driven company.

Instead, Mr. DaCorta is the person most closely resembling management. Oasis, though no longer trading, continues to be run by a board of directors. That board of directors consisted of Mr. DaCorta, Mr. Anile, and Mr. Montie, and none of those individuals have given up their positions on the Board. Thus, Mr. DaCorta as Oasis's director retains the power to exercise or waive Oasis's privilege.[5] At the very least, because the receiver is not the individual who most closely resembles the management of Oasis, the receiver does not have the power to waive attorney-client privilege over Mr. DaCorta's objection.[6]

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[5] If this Court disagrees and does not deem it appropriate for Mr. DaCorta to hold the privilege, the power to exercise the privilege should extend to Mr. Montie, who has not been federally indicted, rather than the receiver.

[6] Significantly, nothing demonstrates that the receiver has even attempted to waive the attorney client privilege.

Second, even if the receiver is the one who most closely resembles management of Oasis, letting the receiver control the privilege here is inappropriate if it would interfere with any important policies. As we assert above, the receiver is working with the Government. Permitting the receiver here in a federal criminal case to hold the privilege and make a determination (unlike the Trustee in *Weintraub*, who exercised the attorney-client privilege in connection with a civil case) is like letting the fox guard the henhouse. Thus, permitting the receiver to exercise the privilege would *not* benefit the corporation of Oasis. To the contrary, it would only assist the Government further with both the criminal case and the receivership. There are individuals – namely, Mr. DaCorta and the board of directors – who are in a better position to make the assessment of whether it is in the best interest of Oasis to waive the privilege.

In sum, under the reasoning of *Weintraub*, the receiver is not the appropriate person to waive the attorney-client privilege on behalf of Oasis. Since Mr. DaCorta remains the director and individual most involved in the company's management, he controls Oasis's attorney-client privilege and asserts it as to all privileged conversations between Mr. Anile and the company's officers, directors, and employees. *See Upjohn*, 449 U.S. at 391–95.

C. The Government bears the burden of proving an exception to the attorney-client privilege, such as the crime-fraud exception, applies.

Mr. DaCorta anticipates that the Government may assert that an exception to the attorney-client privilege applies to some of the otherwise-protected communications. In particular, the Government may argue that the communications were made in furtherance of a crime, such that the privilege does not apply. *See In re Grand Jury Subpoena*, No. 21-11596, --- F.4th ---, 2021 WL 2628069, at *4 (11th Cir. June 25, 2021). The Government bears the burden of showing that the exception applies. Specifically, the Government must show two things:

> First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel/s advice. Second, there **must** be a showing that the attorney's assistance was obtained **in furtherance of** the criminal or fraudulent activity or was closely related to it.

Id. (quoting *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987)) (emphasis added).

As to the first requirement, the Government must make a "showing of evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed." *Id.* (internal quotation marks omitted). As to the second requirement, the Government must show "that the

attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it." *Id.* at *7 (internal quotation marks omitted).

The Eleventh Circuit has not clarified whether the second requirement is satisfied by a mere showing that the communication was "related" to the crime, or whether the government must show the communications were made "in furtherance" of the crime. *See id.* at *7–*8. Several other circuits, however, have "disclaimed any focus on 'relatedness' and instead focused exclusively on whether the communications at issue were made 'in furtherance' of the crime or fraud." *Id.* at *8 (citing *In re Grand Jury Invest.*, 810 F.3d 1110, 1113 (9th Cir. 2016); *In re Grand Jury Subpoena*, 745 F.3d 681, 693 (3d Cir. 2014); *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989); *In re Antitrust Grand Jury*, 805 F.2d 155, 168 (6th Cir. 1986)).

Mr. DaCorta submits that the other circuits got it right: the crime-fraud exception applies only when the communications were made "in furtherance" of the crime. But, no matter what test this Court adopts, it should the hold the Government to its burden to establish that the exception applies. This is why, in part, an evidentiary hearing on this issue is necessary. A mere assertion by the Government that the exception applies should not be sufficient to deny this Motion.

The Government will not be able to meet its burden. Based on Mr. Anile's long-standing representation of Mr. DaCorta over a period of nearly twenty years,

their confidential communications covered topics entirely unrelated to the alleged wire and tax fraud, and certainly not in furtherance of those crimes. *See infra* at 2–4 (discussing Mr. Anile's professional relationship with Mr. DaCorta). Indeed, Mr. Anile has stated he did not become aware of the alleged fraud until 2017 at the earliest, which supports the argument that Mr. DaCorta was not using that advice in furtherance of a crime. Moreover, even post-2017, there is no evidence that any advice Mr. Anile gave was related to or utilized in furtherance of the alleged fraud. These communications, then, should be excluded.

CONCLUSION

Mr. DaCorta requests this Court exclude any evidence, including testimony of Mr. Anile, that is protected by attorney-client privilege.

Dated this 31st day of August 2021.

Respectfully submitted,

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FEDERAL DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 31st day of August 2021, the foregoing was filed with the Clerk of Court using the Cm/ECF system, which will send a notice of the electronic filing to the following:

Rachelle Bedke, AUSA
David WA Chee, AUSA
Francis D Murray, AUSA
Suzanne C Nebesky, AUSA

/s/ Jessica Casciola
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