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October 30, 2024

VIA ECF

The Honorable Michael E. Farbiarz
United States District Judge
Lautenberg U.S. Post Office & Courthouse
Two Federal Square
Newark, New Jersey 07102

United States v. *Coburn and Schwartz*,
Criminal No. 19-120 (MEF)

Dear Judge Farbiarz:

Please accept this letter, on behalf of both Defendants, in response to the government's October 23, 2024 letter requesting that the Court endorse the government's proposed pretrial procedure for addressing any privilege objections that non-party Cognizant may try to raise at trial. ECF No. 777. The Defendants respectfully object to the government's proposal. Under the guise of "greater efficiency," *id.* at 1, the proposal invites relitigation of definitively settled issues, is unworkable in practice, and imposes asymmetrical and inappropriate burdens on the defense.

First, the procedure the government proposes is unnecessary. The status of Cognizant's privilege, including the scope of its waiver, is well settled. In January 2022, Judge McNulty issued the first of several rulings regarding the waiver that resulted from Cognizant's voluntary self-disclosure to (and cooperation with) the government in the investigation and prosecution of this case. In that decision, the Court, finding that Cognizant had effected "a significant waiver" of privilege, described its scope, holding that: (1) "to the extent that summaries of interviews were conveyed to the government, whether orally or in writing, the privilege is waived as to all memoranda, notes, summaries, or other records of the interviews themselves"; (2) "to the extent the summaries directly conveyed the contents of documents or communications, those underlying documents or communications themselves are within the scope of the waiver"; and (3) "the waiver extends to documents and communications that were reviewed and formed any part of the basis of any presentation, oral or written, to the DOJ in connection with this investigation." ECF No. 263 at 13–14. Judge McNulty further explained that "Cognizant's voluntary turnover of materials or revelation of the fruits of its investigation to the DOJ also entailed a waiver of the privilege as to communications that 'concern the same subject matter' and

'ought in fairness be considered together' with the actual disclosures to DOJ." *Id.* (citation omitted).

Following the January 2022 ruling, Judge McNulty rejected Cognizant's repeated attempts to relitigate (and narrow) the Court's decision. *See* ECF No. 339 at 1, 5 ("[Cognizant] moves for 'clarification' of my prior opinion . . . . In that opinion, which seems clear enough, I held that Cognizant had waived attorney-client privilege and work product protections over a substantial set of documents and communications concerning its investigation of Defendants because it had provided detailed summaries of that investigation to the government . . . . Cognizant's exhaustively-briefed objections to disclosure I have already considered; they now serve only to delay this case. In that spirit, I reject this motion for 'clarification' . . . ."); ECF No. 319 at 9–11 (denying Cognizant's motion for reconsideration of the Court's order to produce materials over which Cognizant claimed privilege). The Defendants and Cognizant also litigated privilege issues before Magistrate Judge Hammer, who found a further privilege waiver. ECF Nos. 505 at 2–3, 511 at 71–79, 519 (granting Defendants' motion in part and denying Cognizant's motion in part, including based on the Court's determination that Cognizant waived privilege over documents demonstrating that the Defendants supported the internal investigation).

Notwithstanding this history, the government's proposal contemplates that Cognizant and the Defendants effectively brief Cognizant's privilege waiver and other privilege claims for at least the *fifth* time. Although phrased in terms of Cognizant's submitting a "summary" of the Court's prior rulings, the proposed procedure—which would include dueling submissions and the Court's "adjudicat[ion]" of resulting disputes—is clearly an invitation to rebrief (and reargue) issues already decided by the Court. ECF No. 777 at 4. But there is nothing left to litigate regarding Cognizant's remaining privilege, and there is certainly no need for further "clarification" of the Court's prior rulings. *Id.* at 5. Nor is there any reason to believe that the Defendants will inappropriately intrude on Cognizant's remaining privilege at trial. The parties are represented by experienced counsel who already know (or, in the government's case, can easily learn) the Court's prior rulings regarding privilege and waiver.

The government nevertheless puts forth "three examples of potential trial issues involving Cognizant's privilege [that] have arisen during pretrial proceedings and are likely to arise again at trial." *Id.* at 2. None of these examples justifies implementation of the procedure that the government has proposed.

The government's first example relates to objections made by Cognizant at the April 2023 *Garrity* hearing. *Id.* While the government states that "some" of Cognizant's objections were sustained, a more precise account is that the overwhelming majority (19 of 22) of the objections interposed by Cognizant at the hearing were overruled—some forcefully, and for good reason.[1] Of the three remaining objections, two were sustained on relevance grounds and

[1] *See* ECF No. 473, April 18, 2023 Hr'g Tr. at 238:6–23, 244:3–245:7, 259:24–260:20, 263:9–24; ECF No. 476, April 19, 2023 Hr'g Tr. at 279:5–23, 282:1–11, 302:9–25, 307:10–308:2, 309:11–24, 310:21–311:12, 318:7–24, 339:16–340:3, 342:10–343:2, 343:9–344:8, 347:3–14, 350:24–351:12, 354:6–24, 368:15–369:4, 378:20–379:11, 386:14–387:9, 388:20–389:3, 405:14–25. Cognizant, among other things, objected ostensibly to protect the interests of Pfizer (a non-participant that counsel was not representing at the hearing) and interrupted defense questioning to ask whether a question was "based on a document," to which the Court responded: "That's not an

one was sustained in part and overruled in part.[2] Issues like these—especially as to relevance—can easily be resolved at trial. Moreover, the entire focus of the *Garrity* hearing was Cognizant's internal investigation and the coordination of its investigation with the government, a topic about which privilege objections were more likely. Privilege will not be a central issue at trial in the same way it was at the hearing, and evidence introduced or arguments made by the Defendants at trial regarding Cognizant's internal investigation will be constrained by the bounds of relevance, the Court's resolution of the parties' motions *in limine*, and the Court's prior ruling on the *Garrity* motion. *See* ECF No. 495. Put another way, the likelihood that issues regarding privilege arise in a way that requires a bespoke procedure is remote and does not justify the complex procedure proposed by the government.

The government's second example of why a special procedure is needed is that at trial the defense "could seek to offer [Mr. Schwartz's] supposed support for Cognizant's internal investigation as evidence that he did not participate in the charged bribery scheme." ECF No. 777 at 2–3. But the Court has already ruled that Cognizant waived privilege over "documents and communications wherein Defendant[s] Schwartz and Coburn supported the internal investigation, and encouraged others to do so."[3] ECF Nos. 511 at 71–79, 519. This issue is squarely within the Court's prior rulings and does not need further "clarification" before trial.[4]

The government's third example is testimony "regarding 'the frequency with which Mr. Coburn consulted with Mr. Schwartz on challenging issues or issues involving ethics or compliance' and 'Mr. Schwartz's reputation within Cognizant, as understood by Mr. Coburn.'" ECF No. 777 at 3 (quoting ECF No. 708 at 4). The government argues that it is "conceivable" that questioning related to the frequency of Mr. Coburn's consultations with Mr. Schwartz or Mr. Schwartz's reputation within the Company "could" prompt objections "given the intersection of ethics and compliance issues with legal advice." *Id.* Setting aside whether objections that are merely "conceivable"—as opposed to certain or even likely—justify the relief sought, again the Court very clearly ruled that the Defendants are permitted to ask questions at trial regarding these

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objection. 'Is that based on a document?' Come on. . . . 'Is that based on a document?' is not an objection. Sit down. . . . Sit down, please." ECF No. 473, April 18, 2023 Hr'g Tr. at 244:5–9; ECF No. 476, April 19, 2023 Hr'g Tr. at 368:20–369:3.

[2] *See* ECF No. 476, April 19, 2023 Hr'g Tr. at 302:9–25 (sustaining objection because the "internal deliberations about why" DLA Piper made the decision not to allow Mr. Schwartz to bring two lawyers to his interview "are not relevant"), 307:10–308:2 (sustaining objection as to a question regarding DLA Piper attorney "thought processes," but permitting inquiry into whether a question asked in Mr. Schwartz's interview was at the government's behest), 347:3–14 (sustaining objection as to whether a DLA Piper attorney thought certain material was exculpatory because "it's not relevant").

[3] The defense's ability to introduce evidence of Defendants' support for the internal investigation remains the subject of a pending motion *in limine*. *See* ECF No. 699.

[4] The government's reliance on the Court's ruling, at the *Garrity* hearing, "sustaining Cognizant's objection to Defendant Schwartz's counsel asking a DLA Piper witness whether Schwartz's purported reporting up of information during the investigation was regarded as exculpatory" is unpersuasive. *See* ECF No. 777 at 3. First, the Court sustained that objection on relevance, not privilege, grounds. ECF No. 476, April 19, 2023 Hr'g Tr. at 347:13–14 ("[M]aybe it's privileged, but it's not relevant."). Second, the dispute as to Cognizant's waiver over Defendants' support for the internal investigation "chiefly arose at the *Garrity*/*Brady* hearing" and the Court did not determine Cognizant had effected that particular waiver until about four months later. ECF No. 511 at 73:22–74:6.

specific subjects, ECF No. 708 at 4–5 ("Defendants shall be permitted to elicit testimony, through witnesses who are already testifying, regarding two aspects of how in-house/internal lawyers functioned at Cognizant: (1) the frequency with which Mr. Coburn consulted with Mr. Schwartz on challenging issues or issues involving ethics or compliance and (2) Mr. Schwartz's reputation within Cognizant, as understood by Mr. Coburn."). There is no reason to think that counsel cannot comfortably navigate these waters within the bounds of the Court's privilege rulings or that the Court cannot address these issues as they arise at trial, as it no doubt can do.

The procedure sought by the government is not just unnecessary; it is also unprecedented, and the two cases the government cites in support of its proposal are entirely distinguishable.

The pretrial privilege dispute in *United States* v. *Bilzerian*, 926 F.2d 1285, 1291–94 (2d Cir. 1991), concerned a testifying defendant's own attorney-client privilege and whether his testimony on the stand as to his good faith and lack of intent would waive privilege over communications with his attorney that formed the basis of his knowledge and understanding of the law. In this context, the court denied the defendant's request for "an advisory ruling in advance" of trial that his "attorney-client privilege would not be waived regardless of what developed in his direct testimony." *Id.* at 1292–93. That court did not impose any pretrial privilege briefing requirements of the sort the government requests here. Moreover, the issue at bar in *Bilzerian* simply has no bearing on this case, where there is no concern about the Defendants' waiving attorney-client privilege with their own counsel and the Court has already found that Cognizant, a third party, has effected a well-defined waiver of privilege.

United States v. *Lopez et al.*, No. 15-cr-252 (PKC) (E.D.N.Y. 2023), ECF No. 1879, the only other case cited by the government, likewise does not support its proposal. In that case, the court did not require the defendants to provide, prior to trial, the particulars of "any potential arguments or evidence" they might use "that arguably implicate the scope of" their former employer's privilege. Instead, the court held a pretrial conference in which it [among other things] instructed the defendants to be careful not to argue to the jury that the fact that they were not fired following their former company's internal investigation meant they had not committed the alleged crimes, noting that this argument would open the door as to the quality and particulars of the company's internal investigation (topics the company retained privilege over). *Id.* at 37–40. The defendants agreed to heed the court's concerns, but stressed that they did not yet know what arguments they would make "without knowing what [the government is] going to say" or hearing the inferences the government is "going to suggest to the jury." *Id.* at 13:7–21, 17:14–18:3, 36:21–22, 43:3–9. The court acknowledged that the issues had not "obviously ripened yet, because I think neither side knows what they are going to argue precisely," and did not make pretrial rulings as to permissible or impermissible evidence on this issue, instead noting that "I am fully apprised of the issue, and I guess I will be on the look-out for any arguments." *Id.* at 25:6–8, 40:14–17. As in *Lopez*, the Court here certainly can, as it should, address the government's concerns in the normal course of trial. *See id.* at 40:8–13.

But the government's proposal is not just unnecessary and unprecedented; it is also unworkable and unfair. As an initial matter, it requires the defense to "explain why" particular "*potential* arguments or evidence" "are admissible," notwithstanding that the government's

proposal is ostensibly designed to address issues of privilege, not admissibility. ECF No. 777 at 5 (emphasis added). Even more problematically, it contemplates requiring the Defendants to preview, on pain of preclusion, particulars of their defense and trial strategy—and in doing so, to make a determination whether these particulars "arguably implicate" the Court's privilege rulings, an unworkably vague standard—all nearly two months before jury selection and a month before the government's updated witness and exhibit lists are due to the Defendants on February 10, 2025. This process is both unrealistic from a trial preparation perspective and, more importantly, places an asymmetrical and unfair burden on the defense. Requiring rulings before trial on these issues also deprives the Court of the benefit of context and understanding how defense evidence may rebut arguments not yet made. The Defendants represent in good faith that they do not intend to make arguments or introduce evidence at trial that are beyond the scope of the waiver the Court has already found or otherwise implicate Cognizant's remaining privilege. Under the government's proposal, however, if they turn out to be mistaken and any of the Defendants' "potential arguments or evidence" are later deemed to "arguably implicate" Cognizant's remaining privilege, they would be forever precluded from offering them. *See id.*[5]

The government's proposal is all the more curious in light of the fact that Cognizant has not asked the government to address any particular privilege concerns. As the government has acknowledged, the multiple prior rounds of privilege briefing were "largely between Defendants and Cognizant without the Government's involvement." *Id.* at 1. Only now, however, long after the privilege litigation has been resolved, has the government decided that it would like the opportunity to "investigate such matters" and "weigh in on these important issues in advance of trial." *Id.* at 4–5. The defense's objection to the government's procedure notwithstanding, the defense has, in an effort to address any concerns that the government may have about privilege disputes disrupting the trial, proposed that the government, the Defendants, and Cognizant enter into a Rule 502 agreement (which they would then ask the Court to enter as a Rule 502 order) providing that any information revealed by any Cognizant or DLA Piper witnesses during the pretrial hearing or trial in this matter would not constitute a further waiver of Cognizant's privilege. This proposal would at a minimum protect Cognizant's interest in preventing claims of further waiver. We understand that the government conveyed this proposal to Cognizant, which rejected it.[6] This Court should decline to adopt the government's procedure, which is, in theory, designed to address potential privilege objections by Cognizant, but which Cognizant has not requested, and which would unfairly prejudice Defendants.

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[5] The Defendants asked the government if it would be willing to provide the defense with the portions of its direct examinations that it believes might lead the Defendants to potentially ask questions on cross-examination that could "arguably implicate" the scope of Cognizant's privilege. The government declined to do so. Its refusal to provide this information—which the Defendants would need to meaningfully engage in the second stage of the government's contemplated briefing—underscores the abstract and fundamentally unfair nature of the government's proposal. It is also difficult to square with the government's statement that it itself "anticipates calling several witnesses at trial whose testimony could touch upon issues of Cognizant's privilege." *Id.* at 3.

[6] There have been two prior Rule 502 orders in connection with this matter. The government and Cognizant entered into a Rule 502 agreement and order (signed by Judge Salas) during the grand jury stage of the matter. ECF No. 150-43. Years later, after the case was indicted, the Defendants and Cognizant entered into a Rule 502 agreement and order (signed by Judge McNulty) in connection with a particular document production by Cognizant. ECF No. 461.

For all of these reasons, the government's unnecessary, unprecedented, unworkable, and unfair proposal should be rejected. Any issues of privilege can, and should, be addressed by the Court concretely and in context during trial, if and when they arise.

Respectfully submitted,

/s/ Justin D. Lerer

Justin D. Lerer

cc: All counsel of record (via ECF)