

No. 21-A

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

MARGARET COLE; DEBRA PARRIS; DORAH MIREMBE,
Defendants

and

EUROPEAN ADOPTION CONSULTANTS, INC.
Interested Party-Appellant

**INTERESTED PARTY-APPELLANT EUROPEAN ADOPTION CONSULTANTS,
INC.'S EMERGENCY APPLICATION FOR A STAY OF EXECUTION OF JUDGMENT
PENDING APPEAL**

To the Honorable Brett M. Kavanaugh
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Sixth Circuit

On Appeal to the Sixth Circuit Court of Appeals (Case No. 21-4053) from the United States
District Court for the Northern District of Ohio (Case No. 1:20-cr-00424)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Interested Party-Appellant European Adoption Consultants, Inc. states that there is no parent or publicly held company that owns 10% or more of the corporation's stock.

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**TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE OF THE
SUPREME COURT AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:**

INTRODUCTION

This matter arises because the Government seized thousands of privileged attorney-client communications of a corporation without prior judicial authorization, identified and sequestered the privileged materials with a separate team of agents called a filter team but did not then return them, and now seeks to void the privilege years later because it eventually debarred the corporation. This and too many other cases raise the question whether the attorney-client privilege still protects the confidentiality of attorney client communications against government intrusion. Specifically, it raises several questions of immense importance: whether the Government may simply retain privileged material indefinitely which it seized without judicial authorization, and whether the Privilege survives the alleged death of a corporation as it does a natural person. The review of these questions can only be accomplished with a stay of the Government's review and use of the indisputably privileged documents.

Accordingly, pursuant to Rules 22 and 23 of the Rules of this Court, European Adoption Consultants, Inc. ("EAC") applies for a stay of the judgment of the Northern District of Ohio ordering the disclosure of its privileged communications to the Government's prosecution team, pending the consideration and disposition of its appeal from that judgment to the United States Court of Appeals for the Sixth Circuit and, if the court of appeals affirms the judgment, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

FACTUAL AND PROCEDURAL BACKGROUND

EAC is an Ohio non-profit corporation that functioned as an adoption agency for over twenty years until December 2016 when the State Department debarred it from performing

international adoptions for three years, effectively shutting the company down. In February 2017, the Government executed search warrants at properties owned by EAC and its president, Margaret Cole, and executed search warrants on e-mail service providers, seizing voluminous records and communications containing EAC's attorney-client privileged communications. Thereafter, the Government requested and EAC provided a list of attorneys whose confidential communications may be contained in the seized materials, and the Government sequestered approximately 250,000 seized documents based on the list of attorneys provided.

In July 2019, EAC and Cole, without admitting fault, agreed to a consent judgment in a civil matter brought by the Ohio Attorney General where it was alleged, *inter alia*, that EAC's clients were not provided contracted for adoption services. The judgment resolved only those claims specified brought in that matter and did not affect claims any consumers may have against EAC. It also permitted EAC to continue to exist for the purpose of prosecuting and defending against legal proceedings and required EAC to begin the dissolution process within 30 days after the final resolution of all legal proceedings.

In August 2020, Cole, Deborah Parris (a former EAC employee) and Dorah Mirembe (a former attorney of EAC) were indicted. Cole and Parris are charged with conspiring to defraud the United States, and other offenses relative to an adoption of a child from Poland. Parris and Mirembe are charged, *inter alia*, with multiple counts of conspiring to bribe foreign officials, commit visa, mail, and wire fraud, and commit money laundering, related to EAC adoptions from Uganda. EAC was not criminally charged. Rather, the Government stated that it closed its investigation of EAC with the caveat that it retained its right to reopen the investigation if the circumstances merit. Parris has since pleaded guilty and Mirembe has not been arraigned or apprehended. Cole's trial is set to begin February 7, 2022.

In December 2020, the Government sought an order in this underlying criminal proceeding that all information in the possession of its filter team withheld under EAC's claim of privilege be disclosed to the prosecution team. (the "Disclosure Motion") EAC intervened and opposed the Disclosure Motion. On October 29, 2021, the District Court issued an Opinion & Order granting the Disclosure Motion. (**Appendix A**) EAC appealed the judgment to the Sixth Circuit and requested that the District Court stay the execution of its judgment pending appeal, which motion was denied on November 12, 2021. (**Appendix B**) EAC then requested that the Sixth Circuit stay the execution of the judgment pending appeal, which motion was denied on December 17, 2021. (**Appendix C**) The Government advised on December 18, 2021 that it intended to immediately implement the trial court's order.

REASONS FOR GRANTING THE APPLICATION FOR A STAY

"In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice must 'try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities.'" *San Diegans For Mt. Soledad Nat. War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006), citing, *INS v. Legalization Assistance Project of Los Angeles County Federation of Labor*, 510 U.S. 1301, 1304 (1993). This challenging standard is met in this case.

A. EAC will suffer irreparable harm if the judgment is not stayed.

The Government intends to immediately implement the trial court's order and provide the sequestered privileged materials to its prosecution team. The forced disclosure of attorney-client privileged materials and work-product constitutes irreparable harm. *See In re Search Warrant Issued June 13, 2019*, 942 F. 3d 159, 175 (4th Cir. 2019). Indeed, "mandatory disclosure is the

exact harm the privilege is meant to guard against.” *In re Lott*, 424 F. 3d 446, 451-52 (6th Cir. 2005). The circumstances here are especially concerning because although the Government has closed its investigation of EAC, it retained the right reopen it. Furthermore, under Ohio law, once a corporation is dissolved, claims may be continued to be brought against it for up to five years. See, Ohio Revised Code §1701.88(B). Thus, once dissolved, EAC could find itself the party to a lawsuit in which these privileged materials may be used as evidence and be unable to assert the privilege.

No other party will be harmed by the stay. The only defendant proceeding to trial on February 7, 2022 is Margaret Cole. Additionally, when the Government’s trial counsel inquired whether Cole would assert any claim of prejudice if the Government agreed not to disclose the sequestered materials while the Motion to Stay remained pending in the Sixth Circuit, Cole’s counsel responded: “*Ms. Cole agrees not to claim prejudice for the time period the government refrains from disclosing the material at issue to the prosecution team So that this issue may receive appellate review.*” Accordingly, no harm will be incurred by any party if a stay is granted.

B. There is a reasonable probability that four Justices will consider the issues in this case sufficiently meritorious to grant certiorari and there is a fair prospect that a majority of the Court will vote to reverse the judgment below.

This case involves three significant issues: (1) whether it was proper for the District Court to consider the Government’s Disclosure Motion in a criminal case in which EAC was not a party and to apply federal privilege law in its consideration of that Motion; (2) whether under federal common law, a defunct or dissolved corporation may assert the attorney-client privilege and whether the District Court properly found EAC to be defunct and unable to assert the privilege under federal common law; and (3) whether the Government’s seizure and continued possession of the privileged materials was unlawful.

With regard to the first issue, it is well-settled that federal courts are courts of limited jurisdiction and are presumed to lack jurisdiction over a case. See, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). It was the Government's burden to overcome that presumption, which it failed to do. *Id.* EAC is not a party to this case, and the relief the Government sought in this case, namely, a declaration that EAC may no longer assert the attorney-client privilege over the sequestered materials, should have been decided in a separate civil matter in which state privilege law should have been applied. See 28 U.S.C. § 2201 and Fed. Evid. R. 501. Moreover, this issue is of significant importance where EAC, like all corporations, exists under the express laws of the state of its incorporation, and under Ohio law, EAC's maintains its attorney-client privilege. See, Ohio Revised Code § 2317.021; *Official Comm. Of Admin. Claimants v. Bricker*, No. 1:05 CV 2158, 2011 WL 1770113 (N.D. Ohio May 9, 2011); *Wallace v. Huntington Nat'l Bank*, Nos: 2:09-CV-104, 2:10-CV-469, 20:10-CV-469, 2010 WL 3603494 (S.D. Ohio Sept. 10, 2010). This important issue requires resolution by this Court and there is a fair prospect that a majority of this Court will reverse the District Court's judgment in this case as to this issue.

The second issue, regarding whether the attorney-client privilege may be invoked by a defunct or dissolved corporation under federal privilege law, also requires resolution by this Court as the lower courts are divided on this issue. See, e.g., *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, Civil Action No. 2:09-3171-MBS, 2011 U.S. Dist. LEXIS 93021 (D.S.C. Aug. 19, 2011); *Official Committee of Administrative Claimants v. Bricker*, *supra*; *Wallace v. Huntington Nat'l Bank*, *supra*; *Official Comm. Of Admin. Claimants v. Moran*, 802 F. Supp. 2d 947, 949 (N.D. Ill. 2011); *Gilliland v. Geramita*, No. 2:05-CV-01059, 2006 U.S. Dist. LEXIS 65546, 2006 WL 2642525 (W.D. Pa. Sept. 14, 2006); *Lewis v. United States*, No. 02-2958 B/AN, 2004 U.S. Dist. LEXIS 26680, 2004 WL 3203121 (W.D. Tenn. Dec. 7, 2004). Moreover, the federal common law of this

Court which states that the attorney-client privilege attaches to corporations, and that as to individual clients, survives even their death, counsels that the privilege should be maintained even if a corporation is defunct or dissolved. *See, Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Swidler & Berlin*, 524 U.S. 399, 406-411 (1998). Thus, there is also a fair prospect that a majority of this Court will reverse the trial court's judgment as to this issue.

Finally, the issue of the Government's unlawful seizure of the sequestered materials requires resolution by this Court. The Government did not seize the privileged materials with prior judicial authorization based upon a search warrant particularly describing their seizure as required by the Fourth Amendment, and the use of a filter team does not render the search lawful. "[T]aint teams are used primarily in limited, exigent circumstances in which government officials have already obtained the physical control of potentially-privileged documents through the exercise of a search warrant." *United States v. Coffman*, 574 F. App'x 541, 565 (6th Cir. 2014), citing, *In re Grand Jury Subpoenas*, 454 F.3d 511 (6th Cir. 2006). No such exigent circumstances existed in this case. Moreover, the Government may not indefinitely retain privileged information, in this case for years, that it had no lawful right to seize in the first place. *See Harbor Healthcare System, L.P. v. United States*, 5 F. 4th 593, 599 (5th Cir. 2021). Thus, there is a fair probability that a majority of this Court would reverse the trial court's judgment as to this issue as well.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should grant a stay of the execution of the District Court's judgment pending the consideration and disposition of the EAC's appeal from that judgment to the United States Court of Appeals for the Sixth Circuit and, if the court appeals affirms the judgment, pending the filing and disposition of a petition for a writ of certiorari

and any further proceedings in this Court.

Respectfully submitted,

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- **Appendix A:** October 29, 2021 Opinion & Order of the United States District Court for Northern District of Ohio granting the Government's Disclosure Motion
- **Appendix B:** November 12, 2021 Opinion & Order of the United States District Court for the Northern District of Ohio denying EAC's request for a stay of execution of judgment pending appeal
- **Appendix C:** December 17, 2021 Order of the Sixth Circuit Court of Appeals denying EAC's request for a stay of execution of judgment pending appeal

APPENDIX A

Case No. 1:20-cr-424
Gwin, J.

First, should federal or state privilege law apply? The federal courts majority rule denies attorney-client privilege to defunct corporations, while Ohio law does not. Second, can a defunct corporation claim attorney-client privilege? Finally, is European Adoption Consultants a defunct corporation?

For the reasons presented below, the Court GRANTS the government's motion for disclosure.

I. Background

a. Debarment

European Adoption Consultants formerly operated as an Ohio-based international adoption business.⁶ An administrative proceeding involving the company laid the groundwork for this criminal case. In 2016, the State Department reviewed a series of complaints about European Adoption Consultants.⁷ The Department issued a notice of temporary debarment, effective December 16, 2016, that required European Adoption Consultants "to immediately cease engaging in intercountry adoptions."⁸

The State Department conducted a hearing the following year. After reviewing written submissions by the adoption company and the Department, the Hearing Officer issued findings.⁹ According to her findings, the State Department proved that European Adoption Consultants committed fourteen separate violations of 42 U.S.C. § 14944 and 22 C.F.R. § 96, Subpart F.¹⁰

⁶ *Eur. Adoption Consultants, Inc. v. Pompeo*, 18-CV-1676, 2020 WL 515959, at *1 (D.D.C. Jan. 31, 2020), appeal dismissed, 20-5053, 2020 WL 3406482 (D.C. Cir. May 28, 2020).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at *2.

¹⁰ *Id.*

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The District Court for the District of Columbia upheld the State Department findings.¹¹ European Adoption Consultants dropped its appeal of that decision.¹²

b. Consent Decree

The Ohio Attorney General sued European Adoption Consultants after the business's debarment.¹³ The Ohio Attorney General alleged that the company made false representations to adoptive families, board members, and intercountry adoption licensing agencies.¹⁴ The Attorney General also alleged that, after the debarment, European Adoption Consultants failed to comply with federal regulations to refund client fees and transfer client records.¹⁵

The Ohio Attorney General and European Adoption Consultants entered into a consent decree to resolve the civil suit without liability admissions.¹⁶ The decree declared that from that date forward, the business "shall exist only for the purposes of prosecuting claims of any kind it may have against others, defending itself against any claims, and litigating matters in connection with proceedings related to its debarment."¹⁷ Within 30 days after the final resolution of all legal claims, the corporation was required to begin the dissolution process.¹⁸

c. Criminal Case

After a State Department referral, the FBI began investigating European Adoption Consultants and its employees. That investigation led to the current criminal case involving

¹¹ *Id.* at *1.

¹² [Eur. Adoption Consultants, Inc. v. Pompeo](#), No. 20-5053, 2020 WL 3406482 (D.C. Cir. May 28, 2020).

¹³ Doc. 38-2.

¹⁴ *Id.* at ¶¶ 8-19.

¹⁵ *Id.* at ¶¶ 20-34.

¹⁶ *Id.* at 13, ¶ 1.

¹⁷ *Id.* at 14-15, ¶ 5.

¹⁸ *Id.* at 15, ¶¶ 6-7.

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three individual defendants. European Adoption Consultants' executive director, former employee, and former service provider were indicted for conspiracy and other related charges.¹⁹ The charges stem from alleged schemes to defraud U.S. and foreign government agencies in connection with international adoptions.

The government also investigated European Adoption Consultants for possible criminal charges but closed that inquiry nearly a year ago.²⁰

II. Legal Standard

Federal Rule of Evidence 501 governs privilege claims. Under this rule, in federal criminal cases, "common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege" unless the federal Constitution, a federal statute, or rules prescribed by the Supreme Court provide an exception.²¹ In other words, federal court decisions determine the parameters of evidentiary privilege in federal criminal cases.

"The purpose of attorney-client privilege is to ensure free and open communications between a client and his attorney."²² When considering the scope of this privilege, "courts must ensure that the 'application of the privilege does not exceed that which is necessary to effect the policy considerations underlying the privilege.'"²³ The privilege is "narrowly construed" because it "operates to reduce the amount of information discoverable during the course of a lawsuit."²⁴

¹⁹ Doc. 1.

²⁰ Doc. 38-6.

²¹ Fed. R. Evid. 501.

²² *In re Grand Jury Subpoenas*, 454 F.3d 511, 519 (6th Cir. 2006).

²³ *Id.* (quoting *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir.1983)).

²⁴ *In re Grand Jury Proc. Oct. 12, 1995*, 78 F.3d 251, 254 (6th Cir. 1996).

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Corporations can invoke attorney-client privilege as clients.²⁵ “[F]or solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors.”²⁶

III. Discussion

a. Federal Privilege Law Applies

The dispute over the government’s motion for disclosure turns mainly on whether federal or state privilege law applies. Under Federal Rule of Evidence 501, federal cases govern privilege in criminal cases, while state law controls in civil cases where state law provides the rule of decision.²⁷

European Adoption Consultants argues that Ohio law should apply because the corporation is not a defendant in this criminal case, making the government’s motion the equivalent of a civil action.²⁸ This argument is unavailing. The Court applies the evidentiary rule for criminal cases because this is a criminal case.

Federal law governs the privilege issues in this case.

b. A Defunct Corporation Cannot Exercise Attorney-Client Privilege

In federal courts, the “weight of authority . . . holds that a dissolved or defunct corporation retains no privilege.”²⁹ The Court finds that this majority rule is well-supported by the principles underlying attorney-client privilege.

²⁵ Reed v. Baxter, 134 F.3d 351, 356 (6th Cir. 1998) (citing Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981)).

²⁶ Commodity Futures Trading Comm’n v. Weintraub, 471 U.S. 343, 348 (1985).

²⁷ Fed. R. Evid. 501.

²⁸ Doc. 38 at 9.

²⁹ S.E.C. v. Carrillo Huettel LLP, No. 13 CIV. 1735, 2015 WL 1610282, at *2 (S.D.N.Y. Apr. 8, 2015) (collecting cases); see also Off. Comm. of Admin. Claimants ex rel. LTV Steel Co. v. Moran, 802 F. Supp. 2d 947, 948-49 (N.D. Ill. 2011) (collecting cases) (“Attorney-client privilege survives the death of a client if the client is a natural person, but the weight of authority suggests otherwise if the client is a corporation.”).

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Attorney-client privilege goes only as far as the policy interests supporting the rule require. Once a corporation becomes defunct, the policy interests supporting shielded communications fall away. “[T]he need to promote full and frank exchanges between an attorney and agents of his corporate clients disappears when the corporation employing those clients has departed.”³⁰ “No real purpose would be served by continuing the privilege after operations cease, as the corporation would no longer have any goodwill or reputation to maintain.”³¹

c. European Adoption Consultants Is a Defunct Corporation

European Adoption Consultants is defunct because of its consent decree with the Ohio Attorney General. The consent decree allowed the business to exist solely for the purpose of settling legal claims.³² After concluding those claims, the corporation was required to dissolve. European Adoption Consultants has an uncollected money judgment award, granted in 2016 prior to the debarment, that the corporation has not enforced.³³ The business’s claims against the State Department were resolved in favor of the State Department, and that decision is now final.³⁴

In 2017 and 2018 reports to the Ohio Attorney General, European Adoption Consultants reported no revenue, expenses, or assets.³⁵

³⁰ *Trading Techs. Int'l, Inc. v. GL Consultants, Inc.*, Nos. 05-4120, 05-5164, 2012 WL 874322, at *4 (N.D. Ill. Mar. 14, 2012).

³¹ *TAS Distrib. Co. v. Cummins Inc.*, No. 07-1141, 2009 WL 3255297, at *2 (C.D. Ill. Oct. 7, 2009) (quoting *City of Rialto v. U.S. Dep't of Def.*, 492 F. Supp. 2d 1193, 1200 (C.D. Cal. 2007)).

³² Doc. 38-2 at 14-15, ¶¶ 5-7.

³³ Doc. 38-1 at 20. Counsel declared an intent to file a foreclosure action, Doc. 38-1 at 2, but the judgment docket reflects no activity since the 2016 award. *Ashtabula County Ohio Courts System*, <http://courts.co.ashtabula.oh.us> (last visited October 29, 2021). Counsel also does not explain why the judgment has not been enforced for over five years.

³⁴ *Eur. Adoption Consultants, Inc. v. Pompeo*, 18-CV-1676, 2020 WL 515959, at *1 (D.D.C. Jan. 31, 2020), *appeal dismissed*, 20-5053, 2020 WL 3406482 (D.C. Cir. May 28, 2020).

³⁵ Doc. 34-3.

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Assessing whether a corporation is defunct for purposes of attorney-client privilege “should be based primarily on the practical realities of the business rather than technical legal status.”³⁶ Like corporations found defunct in other cases, European Adoption Consultants has no assets, liabilities, or employees.³⁷

European Adoption Consultants is defunct and as a result, the corporation can no longer claim attorney-client privilege.

d. Motion to File a Sur-Reply

European Adoption Consultants moved to file a sur-reply to the government’s reply brief. The Court denies the motion. The government did not raise new issues in the reply brief that create good cause for filing a sur-reply.³⁸

IV. Conclusion

For the stated reasons, the Court **GRANTS** the government’s motion for disclosure. The filter team should disclose materials that have been sequestered solely because of European Adoption Consultants’ attorney-client privilege claim. This order does not apply to any material sequestered because of privilege claims by any Defendants.

The Court **DENIES** European Adoption Consultants’ motion to file a sur-reply.

IT IS SO ORDERED

Dated: October 29, 2021

s/ James S. Gwin

JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

³⁶ *Gilliland v. Geramita*, No. 2:05-CV-01059, 2006 WL 2642525, at *2 (W.D. Pa. Sept. 14, 2006).

³⁷ *Lewis v. United States*, No. 02-2958, 2004 WL 3203121, at *4 (W.D. Tenn. Dec. 7, 2004), *aff’d*, No. 02-2958B, 2005 WL 1926655 (W.D. Tenn. June 20, 2005). European Adoption Consultants reported that after the debarment, it “shut down all operations and terminate[d] its employees.” Doc. 34-2 at ¶ 16.

³⁸ *Eldridge v. Cardif Life Ins. Co.*, 266 F.R.D. 173, 175 (N.D. Ohio 2010).

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,	:	
	:	Case No. 1:20-cr-424
Plaintiff,	:	
	:	
vs.	:	OPINION & ORDER
	:	[Resolving Doc. 86]
MARGARET COLE, et al.,	:	
	:	
Defendant.	:	

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On October 29, this Court granted the government’s motion to disclose documents held by the government’s filter team in this criminal case involving intercountry adoptions.¹ The government seized the documents while executing two search warrants.² European Adoption Consultants—an adoption business that is no longer operating—claimed attorney-client privilege over more than 200,000 documents.³ Following the rule that a majority of federal courts have adopted, this Court held that European Adoption Consultants was defunct and could no longer claim the privilege.

Now, the defunct corporation, European Adoption Consultants, moves to stay the Disclosure Order pending appeal.⁴ With this decision, this Court determines whether European Adoption Consultants meets its burden to justify a stay. The Court considers whether: (1) the corporation is likely to prevail on the merits on appeal, (2) whether the corporation will suffer irreparable harm without a stay; (3) whether a stay would harm other interested parties; and (4) whether public interest favors a stay.

¹ Doc. [84](#).

² Doc. [82](#) at 3-4.

³ Doc. [90-1](#).

⁴ Doc. [86](#).

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For the reasons presented below, the Court DENIES European Adoption Consultants' motion for a stay pending appeal.

I. Background

a. Debarment

European Adoption Consultants formerly operated as an Ohio-based international adoption business.⁵ An administrative proceeding involving the corporation preceded this criminal case. In 2016, the State Department reviewed a series of complaints about European Adoption Consultants.⁶ The Department issued a notice of temporary debarment, effective December 16, 2016, that required European Adoption Consultants "to immediately cease engaging in intercountry adoptions."⁷

The State Department conducted a hearing the following year. After reviewing written submissions by the adoption corporation and the Department, the Hearing Officer issued findings.⁸ According to her findings, the State Department proved that European Adoption Consultants committed fourteen separate violations of 42 U.S.C. § 14944 and 22 C.F.R. § 96, Subpart F.⁹

The District Court for the District of Columbia upheld the State Department findings.¹⁰ European Adoption Consultants abandoned its appeal of that decision.¹¹

b. Consent Decree

The Ohio Attorney General sued European Adoption Consultants after the

⁵ *Eur. Adoption Consultants, Inc. v. Pompeo*, 18-CV-1676, 2020 WL 515959, at *1 (D.D.C. Jan. 31, 2020), appeal dismissed, 20-5053, 2020 WL 3406482 (D.C. Cir. May 28, 2020).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at *2.

⁹ *Id.*

¹⁰ *Id.* at *1.

¹¹ *Eur. Adoption Consultants, Inc. v. Pompeo*, No. 20-5053, 2020 WL 3406482 (D.C. Cir. May 28, 2020).

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corporation's debarment.¹² The Ohio Attorney General alleged that the corporation made false representations to adoptive families, board members, and intercountry adoption licensing agencies.¹³ The Attorney General also alleged that, after the debarment, European Adoption Consultants failed to comply with federal regulations to refund client fees and transfer client records.¹⁴

The Ohio Attorney General and European Adoption Consultants entered into a consent decree to resolve the civil suit without liability admissions.¹⁵ The decree declared that from that date forward, the corporation "shall exist only for the purposes of prosecuting claims of any kind it may have against others, defending itself against any claims, and litigating matters in connection with proceedings related to its debarment."¹⁶ Within 30 days after the final resolution of all legal claims, the corporation was required to begin the dissolution process.¹⁷

c. Criminal Case

After a State Department referral, the FBI investigated European Adoption Consultants and its employees. That investigation led to the current criminal case against three individual defendants. European Adoption Consultants' former executive director, former employee, and former service provider were indicted for conspiracy and other related charges.¹⁸ The charges stem from alleged schemes to defraud U.S. and foreign government agencies in connection with international adoptions.

¹² Doc. [38-2](#).

¹³ *Id.* at ¶¶ 8-19.

¹⁴ *Id.* at ¶¶ 20-34.

¹⁵ *Id.* at 13, ¶ 1.

¹⁶ *Id.* at 14-15, ¶ 5.

¹⁷ *Id.* at 15, ¶¶ 6-7.

¹⁸ Doc. [1](#).

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The government also investigated European Adoption Consultants for possible criminal charges but closed that inquiry nearly a year ago.¹⁹

d. This Court's Order

European Adoption Consultants claimed attorney-client privilege over thousands of documents the government seized in its criminal investigation.²⁰ The government's filter team then sequestered those documents, preventing disclosure to the prosecution team. In December 2020, several years after European Adoption Consultants shut down operations,²¹ the government moved to disclose the documents.²² The government argued that European Adoption Consultants was defunct, eliminating its privilege claim.

European Adoption Consultants, acting as an interested party, opposed the government's motion.²³ European Adoption Consultants argued that it was not yet defunct because the corporation had an uncollected money judgment and planned to file another suit against the State Department.²⁴

This Court granted the government's motion for disclosure.²⁵ In the Disclosure Order, the Court adopted the federal court majority rule: defunct corporations cannot exercise attorney-client privilege.²⁶ The Court found that European Adoption Consultants was defunct under its consent decree with the Ohio Attorney General. The Court supported this finding

¹⁹ Doc. [38-6](#).

²⁰ Doc. [34](#) at 4.

²¹ The corporation reported no revenue, assets, or expenses in 2017 and 2018. Doc. [34-4](#). In a 2018 federal court filing, European Adoption Consultants reported that after the debarment, it "shut down all operations and terminate[d] its employees." Doc. [34-2](#) at ¶ 16.

²² Doc. [34](#).

²³ Doc. [38](#).

²⁴ *Id.* at 3.

²⁵ Doc. [84](#) (Disclosure Order).

²⁶ *Id.* at 5 (citing [S.E.C. v. Carrillo Huettel LLP](#), No. 13 CIV. 1735, 2015 WL 1610282, at *2 (S.D.N.Y. Apr. 8, 2015) (collecting cases); *Off. Comm. of Admin. Claimants ex rel. LTV Steel Co. v. Moran*, 802 F. Supp. 2d 947, 948-49 (N.D. Ill. 2011) (collecting cases)).

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with evidence showing that, since 2017, the corporation had reported no revenue, expenses, assets, or employees.²⁷

II. Legal Standard

Granting a stay pending appeal is “an exercise of judicial discretion,” not a “matter of right.”²⁸ “The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.”²⁹

Courts look to four factors to guide their discretion in granting a stay: (1) “the movant’s likelihood of success on appeal”; (2) “whether irreparable injury to the movant will result in the absence of a stay”; (3) “prospective harm to others if a stay is granted”; and (4) “the public’s interest in granting a stay.”³⁰ The first two factors “are the most critical.”³¹

“The strength of the likelihood of success on the merits that needs to be demonstrated is inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue.”³² At a minimum, to justify a stay, the movant must demonstrate “serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted.”³³

III. Discussion

a. Likelihood of Success on the Merits

European Adoption Consultants fails to show a strong likelihood of success on the

²⁷ *Id.* at 6-7 (citing Doc. 38-2; Doc. 34-3; Doc. 34-2); see also Doc. 34-4.

²⁸ *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926)).

²⁹ *Id.* at 434.

³⁰ *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 220 (6th Cir. 2016)

³¹ *d.* at 221 (quoting *Nken*, 556 U.S. at 434).

³² *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002).

³³ *Id.*; see also *A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 919 (6th Cir. 2018) (explaining the relationship between the stay factors).

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merits. The corporation also fails to show serious questions going to the merits, falling short of this lower standard applicable to movants showing clear irreparable harm.

European Adoption Consultants addresses the merits of the Court's order in a short paragraph citing no legal authority.³⁴ The corporation argues that "this matter should have been decided in a civil proceeding," but cites no authority supporting this claim.³⁵ European Adoption Consultants also provides no support for its claim that "federal law dictates that the privilege should be retained."³⁶

In the Disclosure Order, the Court held that the federal court majority rule denies attorney-client privilege to defunct corporations.³⁷ European Adoption Consultants does not engage with that conclusion or cite any authority suggesting that this Court's decision will be overturned on appeal.

The Court also found that European Adoption Consultants is defunct. In its motion, the corporation did not challenge that finding.

European Adoption Consultants does not show a strong likelihood of success on the merits or serious questions going to the merits. The corporation cites no legal authority and does not discuss the Court's holding, that defunct corporations cannot exercise attorney-client privilege. European Adoption Consultants does not challenge (or even mention) the Court's factual finding that it is a defunct corporation. The corporation fails to show a likelihood of success on appeal.

b. Irreparable Harm

³⁴ Doc. [86](#) at 2-3.

³⁵ *Id.* at 3.

³⁶ *Id.*

³⁷ Doc. [84](#) at 5-6.

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European Adoption Consultants does not show that it will suffer irreparable harm absent a stay.

Like other federal courts adopting the majority rule on defunct corporations' privilege, the Court based its Disclosure Order reasoning on the public policy concerns underlying attorney-client privilege.³⁸ Once a corporation is defunct, the "need to promote full and frank exchanges" disappears,³⁹ and the corporation "no longer [has] any goodwill or reputation to maintain."⁴⁰

European Adoption Consultants does not explain how a corporation that shut down operations can be irreparably harmed by document disclosure. And European Adoption consultants does not give a clue how attorney-client privilege would apply to the more than 200,000 documents it seeks to stop disclosure of.

Attorney-client privilege may be invoked for: "(1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of obtaining or providing legal assistance for the client."⁴¹ To qualify for the privilege, the communication must occur with a lawyer acting as a "professional legal adviser," giving legal advice.⁴²

European Adoption Consultants argues that the communications at issue here are privileged because they involve communications with 18 foreign attorneys who helped to facilitate intercountry adoptions.⁴³ Yet it appears that many or most of the communications

³⁸ Doc. 84 at 5-6.

³⁹ *Trading Techs. Int'l, Inc. v. GL Consultants, Inc.*, Nos. 05-4120, 05-5164, 2012 WL 874322, at *4 (N.D. Ill. Mar. 14, 2012).

⁴⁰ *TAS Distrib. Co. v. Cummins Inc.*, No. 07-1141, 2009 WL 3255297, at *2 (C.D. Ill. Oct. 7, 2009) (quoting *City of Rialto v. U.S. Dep't of Def.*, 492 F. Supp. 2d 1193, 1200 (C.D. Cal. 2007)).

⁴¹ Restatement (Third) of the Law Governing Lawyers § 68 (2000).

⁴² *Reed v. Baxter*, 134 F.3d 351, 355 (6th Cir. 1998).

⁴³ Doc. 38 at 5.

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involved administrative or business tasks, rather than legal advice.⁴⁴ For example, many email subject lines on the log reference administrative tasks such as translations and invoice payments. The government also argues that at least one of the attorneys involved in the communications was not licensed in the country where she worked, requiring European Adoption Consultants to engage separate legal counsel for court appearances.⁴⁵

The communications may not meet the elements for attorney-client privilege, further reducing the likelihood of irreparable harm. Even those documents that do meet the elements could be subject to the crime-fraud exception.⁴⁶ Co-Defendant Dorah Mirembe is an attorney, and her communications are among the sequestered documents.

The corporation argues that it could be irreparably harmed because the government could reopen its criminal investigation into the corporation.⁴⁷ Yet the government closed its investigation almost a year ago.⁴⁸ The executive director is already criminally charged, one former employee is also charged, and one former employee already pled guilty to criminal charges.⁴⁹ It is very unlikely that the United States would reopen a criminal investigation of a non-operating corporation without assets or employees that is required to dissolve as soon as it concludes legal proceedings. While it is possible for the government to reopen the criminal investigation long after closing it, the possibility appears remote given European Adoption Consultants' defunct status.

Beyond the possibility of a reopened criminal investigation, European Adoption

⁴⁴ The Court reviewed a privilege log from the filter team that was distributed to counsel and the Court. The log was not publicly filed because unindicted individuals were listed on the communications.

⁴⁵ Doc. [34](#) at 5-6.

⁴⁶ *Id.* at 4 n.1.

⁴⁷ Doc. [86](#) at 3.

⁴⁸ Doc. [38-6](#).

⁴⁹ Doc. [1](#); Order Accepting Guilty Plea, *United States v. Longoria*, No. 19-cr-482 (N.D. Ohio Oct. 9, 2019), Doc. [15](#).

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Consultants does not argue any other form of irreparable harm. The corporation cites cases holding that disclosing privileged communications can cause irreparable harm.⁵⁰ But those cases involved an actively operating corporation and an individual criminal defendant.⁵¹ European Adoption Consultants does not explain how a corporation no longer in operation can suffer similar harm, nor does it cite any authority recognizing attorney-client privilege for a defunct corporation.

European Adoption Consultants does not show that it will be irreparably injured without a stay of the Disclosure Order.

c. Prospect of Stay Harming Other Interested Parties

European Adoption Consultants argues that a stay would cause only “minimal” harm to the parties in this criminal case because, to its knowledge, “no party raised any concern that this information was imminently needed” while the motion for disclosure was pending.⁵² Opposing the motion, the government argues that a stay “could delay the Government’s ability to complete discovery,” resulting in trial delays.

The Court finds that granting a stay would harm government and the Defendants by delaying trial. This factor does not weigh heavily in the analysis, but it reinforces the Court’s conclusion that European Adoption Consultants does not meet its burden to justify a stay.

d. Public Interest

European Adoption Consultants does not show that granting a stay serves the public interest. The corporation argues that the attorney-client privilege serves an important role in

⁵⁰ *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 175 (4th Cir. 2019); *In re Lott*, 424 F.3d 446, 451-52 (6th Cir. 2005).

⁵¹ *In re Search Warrant*, 942 F.3d at 164; *In re Lott*, 424 F.3d at 447.

⁵² Doc. 87 at 3-4.

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the legal system. This is true. But European Adoption Consultants does not argue and does not show that a defunct corporation retains the privilege or that the public interest would support such a rule.

All privileges reduce truth-assisting fact finding by limiting information available to the jury. In some circumstances, the trade-off makes sense. But attorney-client privilege must be "strictly construed" because it "operates to reduce the amount of information discoverable during the course of a lawsuit."⁵³ The scope of the privilege "does not exceed that which is necessary to effect the policy considerations underlying the privilege": "free and open communications between a client and his attorney."⁵⁴

For a corporation with no income, no employees, no prospect of coming back, the attorney-client privilege application cannot be justified. European Adoption Consultants shows no public interest in granting a stay.

The public does, however, have an interest in a fair trial without unnecessary delay on these serious charges related to intercountry adoptions.

European Adoption Consultants does not meet its burden to show that public interest favors a stay pending appeal.

IV. Conclusion

For the stated reasons, the Court DENIES European Adoption Consultants' motion for an emergency stay of the Court's October 29 Disclosure Order.

IT IS SO ORDERED

Dated: November 12, 2021

s/ James S. Gwin

⁵³ *In re Grand Jury Proc. Oct. 12, 1995*, 78 F.3d 251, 254 (6th Cir. 1996).

⁵⁴ *In re Grand Jury Subpoenas*, 454 F.3d 511, 519 (6th Cir. 2006) (quoting *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir.1983)).

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JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Re: Case No. 21-4053, *USA v. Margaret Cole, et al*
Originating Case No. 1:20-cr-00424-001

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Robin L Baker
Case Manager
Direct Dial No. 513-564-7014

cc: Ms. Samantha Bateman
Ms. Sandy Opacich
Ms. Chelsea S. Rice

Enclosure

No. 21-4053

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
 v.)
)
 MARGARET COLE, et al.,)
)
 Defendants,)
)
 EUROPEAN ADOPTION CONSULTANTS, INC.,)
)
 Interested Party-Appellant.)

ORDER

Before: NORRIS, WHITE, and THAPAR, Circuit Judges.

European Adoption Consultants, Inc. (“EAC”) appeals a district court order authorizing a filter team to disclose to the government materials seized from various EAC locations but sequestered based on EAC’s assertion of the attorney-client privilege. EAC moves to stay disclosure of the materials pending appeal, asserting that it has a likelihood of success on appeal because disclosure of the documents should have been resolved in a separate civil matter rather than this criminal case, it is not a defunct corporation, it retains the privilege under state law, and the government unlawfully seized the documents. The government opposes a stay, and EAC replies.

“The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [our] discretion.” *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). We balance four

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factors to determine whether a stay is appropriate: (1) whether the movant “has made a strong showing that [it] is likely to succeed on the merits”; (2) whether the movant “will be irreparably injured absent a stay”; (3) whether issuance of a stay will “substantially injure” other interested parties; and (4) “where the public interest lies.” *Id.* at 434 (citation omitted). The first two factors “are the most critical.” *Id.* More than a “mere possibility” of relief and irreparable injury is necessary to satisfy these factors, respectively. *Id.* at 434–35 (cleaned up). The first two factors are also “inversely proportional” in that “more of one excuses less of the other.” *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

Under Federal Rule of Criminal Procedure 41, an aggrieved person may move for the return of seized property. Fed. R. Crim. P. 41(g). Pursuant to that Rule, a motion for return of property in the absence of an ongoing criminal proceeding should be pursued through a civil action. *See Harbor Healthcare Sys., L.P. v. United States*, 5 F.4th 593, 596 (5th Cir. 2021) (“Because there was not yet any criminal proceeding against Harbor, the motion was filed as its own civil case.”); *United States v. Bailey*, 508 F.3d 736, 737–38 (5th Cir. 2007) (“Because Bailey’s criminal case had concluded, the court properly construed [his Rule 41(g) motion for the return of property] as a civil complaint.”). Here, however, it is the government moving for disclosure of sequestered communications held by a filter team to use in its criminal proceeding against defendants. No Federal Rule of Criminal Procedure specifically governs such a request, but this court has permitted the government to seek disclosure of sequestered communications retained by filter teams in an ongoing criminal proceeding. *See, e.g., United States v. Coffman*, 574 F. App’x 541, 564–65 (6th Cir. 2014).

Although EAC contends that state law applies to its assertion of privilege, “[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege” in a federal criminal case. Fed. R. Evid. 501; *see also In re Lott*, 424 F.3d

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446, 450 (6th Cir. 2005). Under common law, the privilege survives the death of a client who is a natural person, even in criminal cases, *Swidler & Berlin v. United States*, 524 U.S. 399, 410–11 (1998), and it can be asserted on behalf of a corporation, *Upjohn Co. v. United States*, 449 U.S. 383, 389–90 (1981). It is unsettled, however, whether a corporation may assert the privilege after it is dissolved. See *In re Grand Jury Subpoena # 06-1*, 274 F. App'x 306, 308–09 (4th Cir. 2008) (per curiam). But the majority of district courts “hold[] that a dissolved or defunct corporation retains no privilege.” *S.E.C. v. Carrillo Huettel LLP*, No. 13 Civ. 1735, 2015 WL 1610282, at *2–3 (S.D.N.Y. Apr. 8, 2015) (collecting cases and discussing the rationales supporting this holding). Those courts “hold[ing] that the privilege survives the dissolution of a corporation generally do so on the basis of state law.” *Id.* at *3.

The district court found that EAC is defunct because of a consent decree with the Ohio Attorney General that required it to dissolve. EAC argues that the district court erred because the consent decree allowed it to continue to “exist only for prosecuting claims” and “defending itself against any claims.” But EAC doesn’t explain why this alone suggests it would not still be considered defunct. And the district court did not rely exclusively on the consent decree. It also pointed to the fact that EAC has no assets, liabilities, or employees. EAC has not identified any cases suggesting similarly situated companies have been treated as not defunct for privilege purposes.

EAC also argues that state law should apply to its privilege claim. See Ohio Rev. Code § 2317.021(A) (extending the attorney-client privilege to dissolved corporation’s “last board of directors, their successors or assigns, or to the trustees, their successors or assigns.”). But here EAC asserted its privilege in a criminal proceeding. So, as explained above, Federal Rule of Evidence 501 suggests federal common law applies. EAC has pointed to no case in which a federal court has applied state privilege law in a criminal proceeding. Nor has EAC pointed to any case suggesting that, under federal common law, attorney-client privilege survives the

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dissolution of a company. In light of the authority contrary to its position and the lack of authority in its favor, EAC has not made a “strong showing” that it is “likely to succeed on the merits.” *Nken*, 556 U.S. at 434.

EAC must also demonstrate that it will suffer irreparable harm upon disclosure. It summarily represents that it will—and the government will not—given the government’s delay in seeking disclosure, the length of time the motion was pending below, and that a co-conspirator has not yet been arraigned. “The attorney-client privilege is one of the oldest recognized privileges for confidential communications.” *Swidler & Berlin*, 524 U.S. at 403. “[A]n order to disclose privileged information intrudes on the confidentiality of attorney-client communications.” *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109 (2009). Yet immediate appeals generally do not lie from orders requiring disclosure of privileged materials, in part because “a ruling [that] ‘may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . has never sufficed.’” *Id.* at 107 (quoting *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994)); *see id.* at 109; *In re United Shore Fin. Servs.*, No. 17-2290, 2018 WL 2283893, at *2 (6th Cir. Jan. 3, 2018) (order). Here, the order is immediately appealable only because of EAC’s status as a third party, which depends not on the irreparability of harm from disclosure but on the third party’s lack of incentive to comply with the order. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992). Further, a movant must show more than “some possibility of irreparable injury.” *Nken*, 556 U.S. at 434 (internal quotation marks and citation omitted). The government has not indicted EAC and represents that such a possibility is “remote.” Appellee’s Br. at 10. Although a co-conspirator who has not yet been arraigned may have an interest in retaining the attorney-client privilege over some of these documents, those concerns appear to have been addressed in the prior civil litigation and to the extent they were not, she may challenge them on

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her own behalf. Under these circumstances, therefore, EAC has not shown a possibility of irreparable harm.

The remaining “factors merge when the Government is the opposing party.” *Nken*, 556 U.S. at 435. The government did not unduly delay moving to obtain the documents by filing its motion four months after indicting Cole. The parties promptly filed and briefed the motion, rendering it ripe for a decision within a month of it being filed, but the district court did not rule on the motion until nine months later. In the interim, however, Cole moved to file a sur-reply, and to suppress documents from her home and office which included sequestered communications. Only after the district court granted Cole leave to file a sur-reply and denied her motion to suppress did it rule on the government’s motion to disclose. The district court’s denial of the motion to suppress also cuts against Cole’s contention that seizure of the documents was unlawful, and the use of taint teams to sequester privileged communications is not alone a basis for rendering the search unlawful. *See United States v. Jarman*, 847 F.3d 259, 266 (5th Cir. 2017). The government’s prosecution of Cole and Parris is ongoing, and trial is scheduled to commence in February 2022. “[W]hen the ground for asserting privilege . . . for use in criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice” and “must yield to the demonstrated, specific need for evidence in a pending criminal trial.” *United States v. Nixon*, 418 U.S. 683, 713 (1974) (addressing executive privilege). The communications among the conspirators are undoubtedly probative and relevant given the charges involved.

The motion to stay is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk