IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BRIANNA BOE, et al., **Plaintiffs,** **and** **UNITED STATES OF AMERICA,** **Plaintiff-Intervenor,** **v.** **STEVE MARSHALL, in his official capacity as Attorney General of the State of Alabama, et al.,** **Defendants.**	)	**Case No.: 2:22-cv-00184-LCB**

RESPONDENTS' BRIEF REGARDING THEIR ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS AND THE INAPPLICABILITY OF THE CRIME-FRAUD EXCEPTION

In response to the Court's show cause order regarding the Q&A Document, Dkt. 527, and pursuant to the Court's directive at the May 20, 2024 status hearing, Dkt. 535,[1] and the Court's May 23, 2024 text order, Dkt. 548, Respondents James D. Esseks, Carl Charles, LaTisha Faulks, Milo Inglehart,[2] and Kathleen Hartnett

[1] The transcript for the May 20, 2024 Zoom hearing is attached as Exhibit A.

[2] The Panel dismissed Milo Inglehart from these proceedings, *see Vague*, Dkt. 59, but he is a Respondent for purposes of the Q&A Document show cause order.

(herein, "Respondents") respectfully submit this brief regarding their attorney-client privileged communications with their counsel in this investigation (including the "Q&A Document") and the inapplicability of the crime-fraud exception.

Respondents first describe the relevant factual background, which shows—among other things—that the Q&A Document is a privileged communication between Respondents and their counsel; was not under a continuing order of production by the Panel; was not generated in furtherance of any crime or fraud; and, to the contrary, was entirely appropriate preparation by Respondents and their counsel for the May 20, 2022 hearing. Respondents next explain the applicable legal framework, under which there is nothing approaching a prima facie case to trigger the crime-fraud exception. Respondents also explain why, even if *in camera* review were proper, any *in camera* review should be performed by a special master and not by this Court, given that this is a quasi-criminal proceeding in which the Court is acting both in a prosecutorial and decision-making capacity. *See In re Ruffalo*, 390 U.S. 544, 551 (1968) (attorney-disciplinary proceedings are "adversary proceedings of a quasi-criminal nature"); *see also*, *e.g.*, *Erdmann v. Stevens*, 458 F.2d 1205, 1209 (2d Cir. 1972) ("[A] court's disciplinary proceeding … is comparable to a criminal rather than to a civil proceeding."). The question of whether a special master should be appointed need not be reached, however, because the Court should dismiss the order to produce the Q&A Document.

BACKGROUND

I. Relevant Proceedings Before The Three-Judge Panel.

A. The Three-Judge Panel Institutes This Inquiry And Holds A May 20, 2022 Hearing.

On May 10, 2022, a three-judge panel (the "Panel") was constituted by the Chief Judges of the Alabama Districts to inquire into the conduct of the *Walker* and *Ladinsky* counsel, including Respondents. Order, *In re Amie Adelia Vague* et al., No. 2:22-mc-03977-WKW (M.D. Ala.), Dkt. 1. Referencing this Court's April 18, 2022 order in *Walker*, the Panel invoked the courts' "inherent authority to address lawyer conduct that abuses the judicial process," and ordered the nearly 40 attorneys representing the *Walker*, *Ladinsky*, and *Eknes-Tucker* plaintiffs to appear in person 10 days later at a May 20, 2022 hearing "to allow the panel to inquire about the issues raised by counsel's actions." *Id.* at 5. The Panel's Order did not state that testimony would be taken from any counsel on May 20. *See generally id.* It did, however, assure that "this proceeding will not be adversarial in nature." *Id.* at 6. *But see In re Ruffalo*, 390 U.S. at 551 (1968) (attorney-disciplinary proceedings are "adversary proceedings of a quasi-criminal nature").[3]

[3] For the proposition that its inquiry was not "adversarial," the Panel has cited *United States v. Shaygan*, 652 F.3d 1297, 1308 (11th Cir. 2011). *Vague,* Dkt. 70 at 3. This Court has adopted that proposition. *See* Dkt. 527 at 15 ("As the Respondents have been continually reminded, this is not an adversarial proceeding, and the Court is a 'neutral decisionmaker.'" (citing *Vague*, Dkt. 41)). Respectfully, this proposition is contrary to *In re Ruffalo*, and it also overlooks the actual import of this observation

In light of the May 10 order, the twenty-one members of the *Walker* team promptly retained Barry Ragsdale as their investigation counsel. Dkt. 528 at 3-4; *see Vague*, Dkt. 34, 34-1, and 42-1 (protective order motion and declaration filed by *Walker* counsel laying out these facts, and sworn declaration of Mr. Ragsdale attesting to privileged nature of documents at issue). Russell Capone, an attorney at Cooley, also served as investigation counsel for the Cooley Respondents, as reflected by the transcript of the May 20, 2022 hearing. At Mr. Ragsdale's direction, the *Walker* Respondents helped prepare Mr. Ragsdale for the hearing, including by developing materials such as an attorney-client privileged "Q&A Document," to assist Mr. Ragsdale with understanding the facts and history of *Walker* and to prepare him for questioning at the May 20 hearing. *See id.* Because Mr. Ragsdale had been retained just days before the May 20 hearing, *see Vague*, Dkt. 2 (notice of appearance on May 12), he had limited time to learn all the relevant information and ensure that his representations to the Court were informed and accurate; the Q&A Document was part of that preparation. *See* Dkt. 528 at 3-4.

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in *Shaygan*: that the district court's disciplinary proceedings in that case violated the respondents' due process rights because "[t]he district court conducted an inquiry, not an adversarial hearing, and both prosecutors were denied a meaningful opportunity to be heard in that proceeding." *Shaygan*, 652 F.3d at 1318. In other words, in order for a proceeding to be properly constituted to allow for the imposition of discipline, it must be recognized as adversarial and quasi-criminal in nature and respondents in the proceeding must be afforded full due process rights.

Notably, Respondents and their counsel reasonably believed that the May 20 hearing would involve only a presentation by Mr. Ragsdale, and perhaps comments by certain senior lawyers from the *Walker* and *Ladinsky* teams—not testimony from the dozens of lawyers across the *Walker* and *Ladinsky* counsel teams. *See id.* at 4. For example, as counsel for the Cooley Respondents stated on the record at the May 20 hearing, "Your Honor, I'll just say, we didn't expect that all of the junior lawyers would be put under oath and individually questioned today." *Vague*, Dkt. 75 at 76:23-25. Mr. Capone explained further the ***lack*** of Respondents' preparation for testimony: "they might have prepared more to be here, sought counsel if they thought they needed counsel. I don't think they do [need individual counsel], but we didn't consider any of that because we weren't necessarily expecting this process today. In fact, I had been told nobody would be put under oath." *Id.* at 77:1-5.

In short, in the run-up to May 20, *Walker* Counsel were ***not preparing to provide sworn testimony to the Panel*****;** they were preparing their lawyer to represent them—truthfully and accurately—at a hearing. *Walker* Counsel had the impression that, at most, perhaps team leaders Hartnett and Esseks might present, *not testify*.

Not only was the Q&A Document and Respondents' other preparation efforts with Mr. Ragsdale for the May 20 hearing entirely appropriate, but Respondents' counsel was forthright with the Panel about this preparation. To begin, after the Panel indicated at the May 20 hearing that the junior Respondents unexpectedly

would be questioned one at a time by Justice Harwood without their counsel present, the Panel claimed that "Justice Harwood has no intention of asking about any communications anyone has had with your lawyer or your firm or organization's lawyer." *Vague*, Dkt. 75 at 80:3-4. Respondents strenuously objected to this denial of counsel. *See*, *e.g.*, *id.*, at 81:22-24 (Mr. Segall: "I don't believe I've ever been in a court proceeding where my client gets questioned and I'm not present at the time my client is questioned."). And in response to the prospect of junior lawyers being questioned without counsel, Mr. Ragsdale transparently explained that there had been attorney-client preparations with all Respondents: "And just so the record is clear, I also talked to my clients about what we anticipated in terms of questions that would be asked and what those facts were. And we did that both in an effort to make sure that we had all the facts and that there were not some discrepancy that we didn't know about." *Id.* at 80:5-10. Mr. Ragsdale further explained that this preparation "was done collaboratively." *Id.* at 80:12-13. The Panel responded with the following assurance: "All three of us practiced law before we did this. ***We understand what your responsibilities and activities would have been, and we're not trying to get into the middle of those***." *Id.* at 80:16-17 (emphasis added).

Prior to taking any testimony, the Panel said, "We're going to invoke a modified version of the rule, which means that if you're in the -- we're only going to have people in the courtrooms who will be answering questions, and you are not to

reveal the questions you're asked or the answers you give to anyone else, period." May 20, 2022 Hrg. Trans. at 74:5–9. The Panel had not previously instructed the Respondents on sequestration.

Following this discussion, Justice Harwood then questioned all of the junior lawyers who were present on May 20 one-by-one, without their counsel present. May 20, 2022 Hrg. Trans. (Harwood). In each case, Justice Harwood asked questions of Respondents that called for attorney-client privileged information about their preparation with their counsel for the May 20 hearing—with no counsel there to object. *See id.* Notwithstanding that the junior Respondents were all asked these questions while denied counsel, and without the expectation of or preparation for testifying, ***all junior Walker lawyers questioned by Justice Harwood testified that no one had coached their testimony or otherwise did anything improper with respect to preparation for the hearing***:

Andrew Barr, *id.* at 3:8–16.	JUSTICE HARWOOD: Okay. And I guess the first question I would ask: Were you given any instructions or coaching by anyone about what you should or shouldn't say at this hearing? ANDREW BARR: There were prep sessions, but it was fact-gathering regarding what did or didn't happen and people's memory of that we'll call it a ten-day period or whatever it might have been. The only thing that we were told, which is exactly what we tell every witness, is to tell the truth.
Zoe Helstrom, *id.* at 34:5–14.	JUSTICE HARWOOD: Well, as you heard, there are a couple of questions the Court has assigned me to ask and then pursue as I see fit. The first is have you been coached or instructed by

	anybody about what you should or shouldn't say by way of, quote, "testimony" at this hearing? ZOE HELSTROM: Sure. I think beyond what our attorney mentioned -- you know, we had conversations about, like, potential questions that, if we were to be asked questions, we might encounter and what the facts were in terms of, you know, each question, but that's – that's been it.
Milo Inglehart, *id.* at 54:22-55:24.	JUSTICE HARWOOD: Okay. You heard me earlier on say that one of the questions the judges had wanted me to ask, has anyone coached you or suggested to you any testimony you should give? That is, if you were asked a certain question, here's what you should say? MILO INGLEHART: I don't think so. Not quite like that. We met with our counsel, Barry, a few times who sort of explained to us what he thought might generally – JUSTICE HARWOOD: Barry Ragsdale? MILO INGLEHART: Barry Ragsdale, yeah. Sorry, sir. We didn't get specific things to say. There was a sort of Q and A document that was circulated, I think, last night for us or maybe a draft was circulated earlier in the week, but the final version was circulated last night that kind of walked through, like, things they think might come up or like -- yeah, just to sort of prep folks. And beyond that, Lynly and Dale and I were going to have a meeting on Thursday night -- no. Sorry -- on Wednesday night, but it ended up getting canceled. So I just ended up going to the group calls and looking over the document. JUSTICE HARWOOD: Okay. When you say "Q and A," "A" would be the answers. Was there a suggestion, all right. If you're asked this question, here's the answer to use? MILO INGLEHART: Usually it was sort of like -- I'm trying to remember. I just looked over it last night -- like, outlining, like -- like, general -- it wasn't like a word-for-word thing, but like things that might be useful to touch on or like -- yeah.

Katelyn Kang, *id.* at 27:6–20.	JUSTICE HARWOOD: All right. As you know, I've been charged to pursue a couple of limited areas of inquiry. The first thing I would ask, has anyone instructed you or coached you about what you should or shouldn't say in these proceedings? KATELYN KANG: I consulted generally with Mr. Ragsdale, our counsel, but other than that, we didn't have any communications amongst ourselves about what to say or not to say. JUSTICE HARWOOD: Well, did any counsel instruct you "Here's what you have to say" or "Here's the testimony you need to give"? KATELYN KANG: No, Your Honor. He told us to, you know, talk about what we -- what our personal roles were and to speak honestly.
Adam Katz, *id.* at 13:20–14:10.	JUSTICE HARWOOD: Okay. And then the question I told you I'd be asking: Any coaching or instructions to what you were or were not to say by way of any discussions and as it now turns I guess we'd call it testimony since it's under oath? ADAM KATZ: No, sir. So we did have, I think, one maybe two group meetings, like, with our entire Walker team and our counsel where they talked about what they expected this process might look like, and they shared with us that the draft written submission that we made so everyone could sort of remember the -- the timeline because, again, this all happened in basically 48 hours but – JUSTICE HARWOOD: Tell me about it. THE WITNESS: Yeah. But, yeah, I -- yeah, it was sort of a mad dash to try to get things done and -- yeah. But -- but no one said, "You should say this, and you should not say this."
Dale Melchert, *id.* at 47:9–15.	JUSTICE HARWOOD: Okay. The two questions that I've previewed for everybody, first, has anyone coached you or tried to instruct you about what you should or should not testify about here today? That is, if they ask you this question, here's what you say?

	DALE MELCHERT: No. We were told to be truthful and to be candid with the Court.
Malita Picasso, *id.* at 61:3-12.	JUSTICE HARWOOD: Okay. Well, as you know from my preamble earlier, there are two things the Court has asked me to pursue by way of further questioning is, have you been told or instructed as to how you should answer any particular questions or -- MALITA PICASSO: I have not been directed to answer any questions in any particular manner. As Barry alluded to earlier, we did have discussions about general facts as we all understood them, but at no point has anybody directed me to answer any questions in a particular way.
Elizabeth Reinhardt, *id.* at 20:11–18.	JUSTICE HARWOOD: . . . And so my first question would be: Did you receive any coaching or instruction about what you were or were not to say at these proceedings? ELIZABETH REINHARDT: No.
Robby Saldana, *id.* at 5:5–9.	JUSTICE HARWOOD: Okay. Well, I'll start out by asking have you been given any particular instructions or coaching about what you were to say or not to say at whatever proceeding this was to turn out to be today? ROBBY L.R. SALDANA: No.
Sruti Swaminathan, *id.* at 42:7–12	JUSTICE HARWOOD: Okay. Well, as you know, my two main thrusts of questioning as requested by the Court to pursue are, first, has anyone instructed you or coached you as to what you should say by way of, quote, testimony that might be taken here today? SRUTI J. SWAMINATHAN: No. JUSTICE HARWOOD: Okay. SRUTI J. SWAMINATHAN: Actually, we weren't even told that we would be giving testimony, so we were definitely not prepared to.

B. The Panel Compels Further Declarations And Testimony From Respondents, But Ultimately Does Not Order The Production of Attorney-Client Communications, Including The Q&A Document.

On July 8, 2022, the Panel ordered that "the preliminary proceeding in this matter will continue at **10:00 a.m. Central Daylight Time on August 3–4, 2022,**" *Vague*, Dkt. 22 at 1. The Panel ordered 21 attorneys from the *Walker* and *Ladinsky* teams to provide declarations on eight topics before providing live testimony in August, *see id.* at 1-3. The seventh declaration topic was: "Any knowledge you have that relates to (1) preparation for the hearing in this matter (including circulation of any Q&A document), and (2) the questions expected to be asked or that were actually asked by the court at the May 20, 2022 hearing." *Id.* at 3. In addition, Respondent Inglehart from the *Walker* team was ordered to "attach a copy of the Q&A sheet referenced at the May 20 proceeding." *Id.* at 2 n.1. The July 8 order also noted that upon the Panel's receipt of the requested testimony, the same Panel would decide whether to "initiate formal charges." *Id.* at 5.

Because the July 8, 2022 order called for Respondents' production of their attorney-client communications with their investigation counsel, Respondents filed motions for a protective order to protect their attorney-client communications and attorney work product, including the Q&A document. *See Vague*, Dkt. 27 (*Ladinsky* counsel motion); *Vague*, Dkt. 34 (*Walker* counsel motion). Both motions expressed similar concerns with respect to the Panel's request for attorney-client

communications and work product regarding the May 20 hearing. *Ladinsky* counsel summarized the concerns as follows:

> [U]pon receiving the May 10 Order and notice of the May 20 hearing, *Ladinsky* Counsel sought legal advice in preparation for the hearing—as is typical for anyone accused of potential wrongdoing. Because these communications were confidential and legal advice was sought, they fall squarely within the cloak of the attorney-client privilege. Yet, Topic Seven of the Panel's July 8, 2022 Order seeks these very communications. . . . *Ladinsky* Counsel object to disclosing any such communications to anyone, especially to the very Panel which says it may "initiate formal charges."

Vague, Dkt. 27 at 7. *Walker* counsel expressed similar concerns, including specifically with respect to the Q&A document, explaining (*inter alia*):

> Accordingly, because the July 8 Order requests information that is protected by the attorney-client privilege and the attorney work product doctrine, including the Q&A document, Walker Counsel seek a protective order to prevent such disclosure. . . . The Q&A document is plainly protected by the attorney-client privilege. *Walker* Counsel intended the Q&A document to be a confidential communication with their counsel made for the purpose of obtaining legal advice and facilitating counsel's representation of *Walker* Counsel at the May 20 hearing. . . . Here, there is no basis to believe that the attorney-client privilege or the work product doctrine do not apply. The only pertinent evidence in the record—that the Q&A document was prepared for counsel and by counsel through direct communications with clients—does not in any way meet the threshold for in camera review.

Vague, Dkt. 34 at 4, 5, 7.

The Panel issued an order on July 25, 2022 resolving the protective order motions. *Vague*, Dkt. 41. The Panel denied the motions, *see id.* at 1, but—critically—"CLARIFIE[D]" that "***the Panel is not seeking the disclosure of***

privileged communications. To the extent the materials that must be disclosed to the Panel are work product, all disclosures are to be made *in camera*." *Id.* at 3-4 (emphasis added). Indeed, according to the Panel's July 25 order, its July 8 order already had "ma[de] clear" that privileged material was not called for. *See id.* The July 25 order also reiterated the Panel's view that it was conducting a non-adversarial proceeding, *id.* at 3, and confirmed that there was no allegation of the crime-fraud exception in play: "[t]here is no opposing party to raise potential exceptions to privilege or protection: for example, waiver or the crime-fraud exception." *Id.*

In sum, the Panel's July 25, 2022 order clarified and confirmed that ***Respondents were not under any order to provide attorney-client privileged communications***. Such privileged communications include the Q&A Document, which the *Walker* counsel's protective order motion specifically identified for the Panel (explaining that it was privileged and that no exception to privilege applied), *Vague*, Dkt. 34, at 4, 5, 7—a point undisputed by the Panel's July 25, 2022 order.

In light of the July 25 order, Respondent Inglehart understood that he was no longer required to disclose the privileged Q&A Document and so advised the Panel in a submission by *Walker* counsel on July 27, 2022. *Vague*, Dkt. 42 at 2 ("On the advice of counsel (*see* Ragsdale Decl. ¶ 2), Declarant Milo Inglehart is not disclosing the 'Q&A document' initially requested by the July 8 Order (Doc. 22 at 2 n.1) because it qualifies as a 'privileged communication' exempt from disclosure

pursuant to the July 25 Order."). Mr. Inglehart filed his declaration on July 29, but did not include the privileged Q&A Document. *See Vague*, Dkt. 80-15. On August 2, 2022, after Mr. Inglehart filed his declaration and a Notice stating he was not producing the Q&A document, the Panel *sua sponte* excused Mr. Inglehart—the only individual ordered to produce the Q&A Document—from appearing at the August hearing. *Vague*, Dkt. 47.

The other remaining *Walker* and *Ladinsky* Counsel also filed declarations prior to the August 2022 hearings. Each *Walker* Counsel addressed Topic 7 by explaining their preparations for the May 2022 hearing at a level sufficient to preserve attorney-client privilege over their communications with counsel, with all making clear that their preparations with Mr. Ragsdale (including the Q&A Document) were appropriate attorney-client communications and attorney work product. *See* Exhibit B (excerpts from *Walker* Counsel declarations concerning Topic 7). All Walker Counsel also confirmed in their declarations their compliance with the Panel's sequestration orders. *See id.*

At the remaining hearings before the Panel, which took place in August and November 2022, no testimony or other evidence called into question the testimony of the junior lawyers before Justice Harwood or the declarations submitted by *Walker* counsel regarding the propriety of the Q&A Document or their preparation for the May 20, 2022 hearing.

And, although the Court's July 25, 2022 Order had already confirmed that Respondents were under no continuing order to produce attorney-client communications, including the Q&A Document, the Panel confirmed this point thrice more. *First*, at a hearing on August 4, 2022, counsel for the *Ladinsky* team began the hearing by "remind[ing] the panel of the fact that we have asserted privileges." *Vague*, Aug. 4, 2022 Tr. at 3:20-21. In response, the Panel confirmed that it "underst[oo]d" that Respondents had "drawn the line on saying we're not going to testify about matters that are attorney-client privileged, both of our clients in those cases or counsel representing the subject lawyers in this matter." *Id.* at 4:16-20. Judge Proctor went on to confirm that "in the declarations the lawyers have observed what I understood the line," *i.e.*, they "disclosed communications about what decisions were made and why they were made as it relates to the subject inquiry, but they have drawn the line and said, we are not going to disclose" privileged communications. *Id.* at 5:12-17. Judge Proctor further confirmed that the Panel was "just going to recognize the objection" to producing privileged communications and, "[i]f that changes at some point, we'll certainly let you know and have a discussion about the best way to proceed." *Id.* at 5:19-23.

Second, on September 23, 2022, the Panel entered an Order that said:

> After careful consideration of the oral and written testimony in this matter, the Panel **TERMINATES** this inquiry as to the following attorneys and **RELEASES** them from any obligation under the May 10, 2022 and July 8, 2022 Orders:

. . .
-Milo Rohr Inglehart

Vague, Dkt. 59. The July 8, 2022 Order required Inglehart to produce the Q&A document, and in its September 23, 2022 Order, the Panel "**RELEASE[D** Inglehart] from any obligation under the . . . July 8, 2022 Order." *Id.* And, to be clear, the July 8 Order required Inglehart, but no one else, to produce the Q&A Document. Until this Court's May 17, 2024 Order, none of Ms. Hartnett, Ms. Faulks, Mr. Esseks, or Mr. Charles were ever under an Order to produce the Q&A Document.

Finally, at the November 3, 2022 hearing, the Panel expressly stated that it had "not made" Respondents provide the "Q and A sheet":

> MR. SEGALL: …. I would also, Your Honor, like for today's purposes to have a continuing objection on the basis of all the privileges that have been mentioned, work product, attorney-client, common interest, joint client, et cetera.
>
> JUDGE PROCTOR: …. ***[W]e certainly understand we've not made you provide us documents, the Q and A sheet, the talking points that Doss was going to use either here or before Judge Burke at the hearing.*** So we're all right with y'all asserting anything we're not actually saying is work product we're reserving our work product objection. But I thought that there had been a decision to be somewhat candid with the Court about why these decisions were made. Am I missing the boat on my recollection here?
>
> MR. SEGALL: Well, you're correct that I didn't say anything during May 20 at all about that. But if I understand the Court's ruling –and, of course, we gave declarations. And in those declarations, we've, in my judgment, violated one or more privileges.

> JUDGE PROCTOR: Well, you – I wouldn't say you violated it. ***I would say there was a limited waiver of the work product privilege, not the attorney-client privilege but the work product privilege….***

Vague, Dkt. 79 at 4:17-5:22 (attached hereto as Exhibit C).

The Q&A Document received no further mention before the Panel or before this Court from November 3, 2022 until Friday, May 17, 2024. Nor was there any assertion of the applicability of the crime-fraud exception to pierce Respondents' attorney-client privilege with their investigation counsel before the Panel or this Court until this Court's May 17 Order.[4]

II. The May 17, 2024 Show Cause Order And Ensuing Proceedings.

On Friday, May 17, 2024, the Court issued an order to Respondents "to produce the Q & A document by May 20, 2024 at 5:00 p.m. or show cause why they should not be sanctioned for violating a court order." Dkt. 527 at 1. As the basis for this order, the Court stated that it had "come to the Court's attention that early in these proceedings, when the matter was pending before a three-judge panel, an

[4] In the Court's order unsealing these proceedings, *see* Dkt. 459, the Court determined—without any briefing of the issue—that any of Respondents' work product or common interest material in the Panel's Final Report was unprotected because "the crime-fraud exception would remove any work product protections that they might otherwise enjoy." *Id.* at 12-13. According to the unsealing order, "[t]he Panel's findings make a prima facie case of misconduct—namely, judge shopping—and the 'mental impressions and strategy' decisions for which the Respondents claim protection were produced in furtherance of that misconduct." *Id.* at 13. Although Respondent respectfully submits that this analysis was erroneous, it presents a separate question than that currently before the Court regarding the Q&A Document.

attorney named Milo Inglehart was ordered to produce a document he described as a 'Q & A,' which had been circulated to Respondents James Esseks, LaTisha Faulks, Carl Charles, Kathleen Hartnett and the rest of *Walker v. Marshall*'s litigation team. At the advice of his attorney, Barry Ragsdale, Mr. Inglehart refused to produce the document." *Id.* The May 17 Order further stated that "**[a]ny Respondent or non-Respondent who fails to comply must appear at the U.S. Courthouse in Montgomery, Alabama on May 23, 2024 at 9:30 a.m.** to show cause why the Court should not impose monetary sanctions for non-compliance and remand him or her to the custody of the U.S. Marshals Service until he or she complies." *Id.* at 17.

The May 17 order also asserted that the crime-fraud exception to the attorney-client privilege potentially applied to the Q&A document because there was a "prima facie showing that the *Walker* Respondents were engaged in or planning to engage in fraudulent conduct." *Id.* at 13. As support for claim of a prima facie case, the May 17 order cited two "findings": (1) a footnote in the Final Report and (2) an allegation in the Court's own show-cause orders. *Id.*

On Saturday, May 18, 2024, Respondent Hartnett filed a response and emergency motion for a status conference and stay in response to the May 17 Order, Dkt. 528, in which the other Respondents joined, explaining, among other things, that Respondents did not believe there was a continuing order to produce the Q&A document or any basis for invocation of the crime-fraud exception. On Sunday, May

19, 2024, Respondent Hartnett notified the Court of her intent to seek relief from the Eleventh Circuit absent relief from the production deadline of 5:00 p.m. Monday, May 20. Dkt. 532. At 10:10 a.m. on Monday, May 20, 2024, the Court set a status conference for 1:30 p.m. that day. Dkt. 533. Because the Court had not yet relieved Respondents from the production deadline, Respondents filed a Petition for Writ of Mandamus and Emergency Motion for Stay with the Eleventh Circuit ("Petition") shortly after 1:00 p.m. that day, and served the Petition on the Court and other parties to this proceeding. *See In re Esseks*, No. 24-11618 (11th Cir.).

The Court conducted the status conference on Monday, May 20, and decided to allow Respondents until May 24 to brief the applicability of the crime-fraud exception. Dkt. 548. As a result, Respondents voluntarily dismissed their Petition in the Eleventh Circuit. On May 23, the Court set the issue for oral argument on May 28 and stayed "the deadline for Respondents Esseks, Faulks, Charles, and Hartnett, and Non-Respondent Inglehart to produce the Q & A Document until the Court has had time to consider their arguments at the May 28 hearing and any additional briefing they may file." Dkt. 548.

ARGUMENT

I. RESPONDENTS WERE NOT UNDER A CONTINUING ORDER BY THE PANEL TO PRODUCE THE Q&A DOCUMENT AND HAVE NOT MISPREPRESENTED THE RECORD.

Undersigned counsel understands that the Court is seeking the Q&A Document regardless of whether Respondents were under a continuing order from the Panel to provide that document. Yet undersigned counsel takes extremely seriously this Court's statements at the May 20 conference that Respondents "misrepresented" the record to the Eleventh Circuit regarding whether they were under a continuing order to produce the Q&A Document by the Panel and whether the Panel viewed that document as subject to an assertion of privilege. Ex. A at 4-5, 10. Respectfully, there has been no misrepresentation. Nor were Respondents under a continuing order from the Panel to produce the Q&A Document.

As Respondents have explained in prior filings, *e.g.*, Dkts. 528, 529; *Vague*, Dkt. 42, and explained in even more detail above, *see supra* pp. 19–22, although the Panel's July 8, 2022 order initially ordered production of the Q&A document (by Mr. Inglehart), *see Vague*, Dkt. 22 at 2 n.1, the Panel later clarified in its July 25, 2022 Order that it was "not seeking the disclosure of privileged communications," *Vague*, Dkt. 41at 4. Importantly, *Walker* counsel had made clear to the Panel in *Walker* counsel's protective order motion filed prior to the July 25 order that *Walker* counsel considered the Q&A Document, in particular, to be an attorney-client privileged communication. *See Vague*, Dkt. 34 at 4, 5, 7. And, after the July 25 order issued, Respondents openly and specifically informed the Panel that Respondent Inglehart would not be producing the Q&A Document in light of the

Panel's confirmation that it was not seeking attorney-client communications. *See Vague*, Dkt. 42 at 2 (stating that "Inglehart is not disclosing the 'Q&A document' initially requested by the July 8 Order (Doc. 22 at 2 n.1) because it qualifies as a 'privileged communication' exempt from disclosure pursuant to the July 25 Order"). Inglehart was thereafter excused from the August hearings, *Vague*, Dkt. 47, and the Panel never again requested the Q&A document. Instead, the Panel confirmed at an August 4, 2022 hearing that it was respecting that Respondents had "drawn the line on saying" they would not disclose "attorney-client privileged" communications with their "counsel . . . in this matter," and that the Panel would "let [Respondents] know and have a discussion" if "that changes at some point." *Vague*, Aug. 4, 2022 Tr. at 4-5.

Between the August and November hearings, the Panel then expressly released Mr. Inglehart from "any obligation under the . . . July 8, 2022 Order[]." *Vague*, Dkt. 59. The Panel did not make any exception for the Q&A Document, even though Mr. Inglehart had openly stated that he had not produced the document and his reasons why.

The Panel then reaffirmed this position specifically with respect to the Q&A Document at a November 3, 2022 hearing, stating that "we certainly understand we've not made you provide us documents, the Q and A sheet, the talking points that Doss was going to use either here or before Judge Burke at the hearing," and that the

Panel had not ordered the production of "attorney client privilege" material. Ex. D at 4:17-5:22.

Thus, Respondents respectfully submit that the record is clear that (1) Respondents (in particular, Respondent Inglehart, the only one who had ever been subject to an order concerning the production of the Q&A Document) were not under a continuing order to produce the Q&A Document after the clarification provided by the July 25 Panel order; (2) the Panel thereafter confirmed that it respected Respondents' objection to producing privileged information and that Respondents need not produce the Q&A Document; (3) the Panel expressly released Mr. Inglehart from any obligation under the July 8 Order, and (4) Respondents have made no misrepresentations of the record to the Eleventh Circuit or otherwise. Notably, the Panel's Final Report cites its original order seeking production of the Q&A Document and notes its receipt of Respondents' declarations that described the Q&A Document, but makes no suggestion or finding that Respondents failed to comply with any order regarding the production of produce the Q&A Document. *Vague*, Dkt. 70 at 14-15.

II. THE ATTORNEY-CLIENT PRIVILEGE PROTECTS THE Q&A DOCUMENT FROM DISCLOSURE ABSENT THE EXISTENCE OF AN EXCEPTION TO THE PRIVILEGE.

Where, as here, a court investigates attorneys for claimed misconduct, those parties are entitled to engage counsel and consult with counsel in confidence, subject

to the attorney-client privilege. *See* Fed. R. Evid. 1101(c) (providing that "[t]he rules on privilege apply to *all* stages of a case or proceeding" (emphasis added)); Fed. R. Evid. 1101(d) (confirming that the evidentiary rules regarding privilege apply to miscellaneous proceedings); Northern District of Alabama Local Rule 83.1(h)(1)(C) (recognizing that privileges may be asserted in an attorney disciplinary proceeding); Middle District of Alabama Local Rule 83.1(j)(3) (same).[5]

Communications between Respondents and the attorneys representing them in this investigation are at the very core of what the attorney-client privilege protects: "disclosures made by a client to his attorney, in confidence, for the purpose of securing legal advice or assistance." *Knox v. Roper Pump Co.*, 957 F.3d 1237, 1248 (11th Cir. 2020). The privilege likewise protects communications by attorneys to their clients. *See Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). And in a case, like this one, that involves joint representation, the privilege protects communications between co-clients and their common attorneys. *See, e.g.*, *Teleglobe Commc'ns Corp. v. BCE, Inc.*, 493 F.3d 345, 363 (3d Cir. 2007). The very point of the privilege is "to encourage full and frank communication between attorneys and their clients," recognizing "that sound legal advice or advocacy serves

[5] The attorney work product doctrine also applies in these proceedings and protects the Q&A document. *See Vague*, Dkt. 34. Because the Q&A Document is an attorney-client communication, this brief focuses on the attorney-client privilege.

public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn*, 449 U.S. at 389; *see also United States v. Noriega*, 917 F.2d 1543, 1550 (11th Cir. 1990) (similar).

The Q&A Document is classic attorney-client privileged material. Mr. Ragsdale, representing Respondents in the Panel's investigation, directed his clients to prepare a list of potential questions the Panel might ask at the May 20, 2022 hearing, as well as proposed answers to those questions, so that he could be prepared for the hearing. *Vague*, Dkt. 34 at 2-8; *Vague*, Dkt. 34-1 at ¶¶ 6–15. Senior *Walker* Counsel did so, and discussed the document with Mr. Ragsdale for the purpose of obtaining his legal advice in preparation for that hearing. *See id.* These "disclosures made by . . . client[s] to [their] attorney, in confidence, for the purpose of securing legal advice or assistance," are at the very heart of what the attorney-client privilege protects. *Knox*, 957 F.3d at 1248.

Respondents do not read the Court's show cause order regarding the Q&A Document, Dkt. 527, to dispute that it is covered by the attorney-client privilege. Rather, the Court's order assumes that it is privileged and argues that the crime-fraud exception applies. *See id.* at 8, 11-12.

III. THERE IS NO PRIMA FACIE SHOWING OF THE CRIME-FRAUD EXCEPTION TO PERMIT REVIEW OF THE Q&A DOCUMENT.

A. The Rare and Extraordinary Crime-Fraud Exception.

"The crime-fraud exception allows a party—***in rare circumstances***—to obtain discovery that otherwise would be protected by the attorney-client privilege or the attorney work product doctrine." *Drummond Co., Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1335 (11th Cir. 2018) (emphasis added); *see also*, *e.g.*, *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir. 1994) ("The crime-fraud exception presents one of the *rare and extraordinary* circumstances in which opinion work product is discoverable." (emphasis added)); *United States v. Hogan*, 240 F. App'x 324, 328 (11th Cir. 2007) (referring to the "crime-fraud exception as an extraordinary example of when the work-product privilege may be pierced"). The exception applies only when otherwise protected materials "***are made in furtherance of an ongoing or future crime or fraud***." *Drummond*, 885 F.3d at 1335. (emphasis added).[6]

A two-part test applies to determine if the crime-fraud exception exists: "[f]irst, 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," and "[s]econd, there

[6] Notably, the Panel suggested that the crime-fraud exception may not be available in these proceedings at all. *See Vague*, Dkt. 41 at 3 ("Again, this is not an adversarial proceeding. There is no opposing party to raise potential exceptions to privilege or protection: for example, waiver or the crime-fraud exception.").

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." *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987); *accord, e.g.*, *Drummond*, 885 F.3d at 1335.

Where, as here, the alleged basis for the exception's applicability is a claimed "fraud on the court,"[7] there must be deception, directed at the court, based on "egregious misconduct" that actually affects the integrity of the proceedings. *Herring v. United States*, 424 F.3d 384, 386-87, 390 (3d Cir. 2005). As the Eleventh Circuit has made clear "'[f]raud upon the court' … embrace[s] only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985) (even perjury does not rise to the level of fraud on the court). Thus, "[o]nly the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court." *Russell v. Redstone Fed. Credit Union*, 710 F. App'x 830, 832–33 (11th Cir.

[7] Respondents understand this to be the nature of the present allegation of fraud in the May 17 order. *See* Dkt. 527 at 13.

2017) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)); *see also Apotex v. Merck & Co.*, 507 F.3d 1357, 1360-61 (Fed. Cir. 2007); *Zurich N. Am. v. Matrix Serv.*, 426 F.3d 1281, 1291 (10th Cir. 2005).

A federal court may not conduct an *in camera* review of a document to determine whether an exception to attorney-client privilege unless there has been a threshold showing of "a factual basis adequate to support a good faith belief by a reasonable person" that an exception to the attorney-client privilege applies. *United States v. Zolin*, 491 U.S. 554, 572-73 (1989). A "prima facie" case requires evidence that, "if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed." *In re Grand Jury Investigation*, 842 F.2d at 1226. That showing must "have some foundation in fact, for mere allegations of criminality are insufficient to warrant application of the exception." *Id.* In a Fifth Circuit decision cited approvingly by the Eleventh Circuit in *In re Grand Jury Investigation*, the Fifth Circuit "approved of the definition of a prima face case contained in Black's Law Dictionary." *In re International Systems and Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982). That Dictionary, in turn, defined "prima facie case" as "evidence such as will suffice until contradicted and overcome by other evidence." *Id.* (citing Black's Law Dictionary 4th ed. 1968); *see also* Black's Law Dictionary (11th ed. 2019) (defining "prima facie case" to mean sufficient evidence to allow the trier of fact to "rule in the party's favor.").

B. No Prima Facie Case Of Crime-Fraud Exists Here, Nor is There Evidence that the Q&A Document Furthered Any Crime or Fraud.

The Court's show cause order cites two "findings" to support the claimed applicability of the crime-fraud exception here, Dkt. 527 at 13—neither of which comes close to establishing a crime or a fraud. First, the Court cites its own underlying show cause orders as a claimed basis for the existence of a fraud. *See id.* at 13 ("each of them has been issued a show-cause order"). But an accusation—here the Court's show-cause orders against Respondents—is not evidence of a crime or a fraud. That an "allegation" cannot make out a prima facie case is settled in this Circuit and others. *See*, *e.g.*, *In re Grand Jury Investigation*, 842 F.2d at 1228 ("mere allegations" are "insufficient to warrant application of the exception"); *In re International Systems & Controls Corp. Sec. Litig.*, 693 F.2d at 1242 (rejecting application of the exception where proponent of the exception relied on "allegations"); *In re Grand Jury Investigation*, 599 F.2d 1224, 1232 (3d Cir. 1979) ("naked assertion" of a corporate cover-up insufficient to overcome the privilege).

Even if the Court's citation to its own "show-cause order," were construed to incorporate the show-cause order's citations—*i.e.*, Dkt. 478 at 13 (Faulks), Dkt. 479 at 13-14 (Hartnett), Dkt. 481 at 14 (Charles), and Dkt. 486 at 13 (Esseks)—and those citations were in turn construed to incorporate the portions of the Final Report that they reference—*i.e.*, all cite to (1) unspecified misrepresentations and omissions, (2) unspecified "discrepancies" and "credibility" findings in Section IV of the Final

Report, and (3) the "finding in Section V that it was misconduct … to claim that the dismissal was because Judge Axon did not explain the reassignment of *Ladinsky* and the Court set *Walker* for a status conference in Huntsville on April 18," *e.g.*, Dkt. 478 at 13-14 (cleaned up)—the prima facie case would still fail. None of those three nested sources make a prima facie case for a crime or fraud. The first—unspecified misrepresentations and omissions, *e.g.*, Dkt. 479 at 13—does not actually point to any misrepresentation or omission, or cite to the Final Report. It is, in short, a "mere allegation." *Supra* p. 28. The second—unspecified discrepancies and credibility findings in Section IV—cites to the entire 34-page fact section of the Final Report, without further guidance as to any specific findings. Even still, an adverse credibility finding is not enough to make out a prima face case that these Respondents were planning an ongoing fraud on the court in the lead-up to the May 20 hearing, as explained *infra* p. 31. As to "discrepancies," the Final Report itself concedes that "[m]any lawyers provided the same account of the same events," Dkt. 339 at 16. This Court's show-cause order does not specify a "discrepancy" or "misrepresentation" it has in mind.[8] The third—the reference to dismissing because

[8] The Final Report does not use the words "discrepancy" or "fraud." The only time the Final Report refers to a "misrepresentation," it is the Panel's mistaken view that Charles—who did not believe he was going to be called to testify and had not attempted to refresh his recollection of the events—forgetting that he called Judge Thompson's chambers was in fact a "misrepresentation[]." *Vague*, Dkt. 70 at 22. But even if that were so, there is no suggestion in this Court's order that the Q&A Document—which the Court claims was drafted in order to coordinate identical

the reassignment of *Ladinsky* struck counsel as unusual and this Court set a status conference in Huntsville immediately after Easter and Passover weekend—is not fraudulent in the first place. The Panel believed that Respondents' "suspicions" about the reassignment were "unwarranted," but did not expressly deny that they were genuinely felt. Dkt. 339 at 31. And the Final Report points to nothing to undermine the consistent testimony that Respondents were concerned about the need to quickly combine two large legal teams in time for a presentation in Huntsville after a holiday weekend.

Second, the Court cites a footnote in the Final Report which states that "Walker counsel's candor on the whole is concerning." *Id.* (quoting *Vague*, Doc. No. 70 at 18 n.3). However, that footnote does not support such an assertion: it cites to one answer by one Respondent in response to one hypothetical question—out of hundreds of pages of testimony. *See Vague*, Doc. No. 339 at 18 n.3. Although the Panel may not have found the answer to the hypothetical convincing,[9] it does not

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testimony—was or could have been in furtherance of Charles not immediately remembering his call to chambers.

[9] Since the Panel issued its Report, Mr. Esseks has explained in greater detail why his testimony to the Panel was truthful and why the Panel's skepticism may have been based on a misunderstanding of Esseks's testimony—an issue Respondents had no opportunity to brief before the Final Report issued. Esseks Suppl. Decl. dated May 8, 2024 at ¶¶ 51-55. In determining whether there is a prima facie case that Respondents were engaged in a fraud on the Court through their testimony before the Panel, the Court should consider all of the evidence that Respondents have provided in the course of learning what the Panel's concerns were.

support a blanket conclusion that all *Walker* Respondents failed to testify truthfully or defrauded the Court.[10] Testimony that speculates as to what the testifier might have done in a counterfactual by definition lacks the "foundation in fact" that a prima face case requires. *In re Grand Jury Investigation*, 842 F.2d at 1226. To this end, the Panel stated only that the response "strains credulity," Dkt. 339 at 18 n.3—not that it was or could have been factually false.[11] Moreover, if an adverse credibility finding is enough to raise a prima facie case of the crime-fraud exception—it is not—then at least one party would lose privilege in virtually every case. That is not the law and would fatally undermine the attorney-client privilege.[12]

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[10] Neither the Final Report nor this Court have connected this specific piece of testimony to the Q&A Document. *Supra* p. 25 (explaining that the privileged material must be "in furtherance" of a crime or fraud). Nor could this connection be made. Respondents gave varied answers to this and similar hypotheticals, so it would be illogical to blame an answering the Panel found unsatisfying on a document that this Court has suggested was designed to "coordinate[] … testimony." Dkt. 527 at 8.

[11] While the Panel may have thought Mr. Esseks speculated wrongly, he did not testify falsely about a verifiable fact. As a general matter, "[s]peculation, subjective opinions and unfulfilled hopes do not support a claim for fraud." *Next Century Commc'ns Corp. v. Ellis*, 171 F. Supp. 2d 1374, 1380 (N.D. Ga. 2001).

[12] In other situations when the Panel asked a Respondent to weigh in on a hypothetical, it appreciated the possibility for unfairness when asking a fact witness to speculate on facts that did not actually happen. *See*, *e.g.*, *Vague*, Dkt. 77, at 55:19-20 (Judge Proctor: "this is a hypothetical, and it may be an unfair hypothetical"). Typically, asking a fact witness to speculate on a hypothetical is not considered evidence at all. *See*, *e.g.*, *Brim v. Midland Credit Mgmt., Inc.*, 795 F. Supp. 2d 1255, 1268 (N.D. Ala. 2011) ("Speculative testimony is generally not admissible because it is not based on the witness's perception.").

Even if an adverse impression of a party's candor were enough to eliminate privilege (it is not), the Panel's footnote ignores that the Panel elsewhere expressly praised *Walker* Counsel's candor. For example, the Panel repeatedly praised Petitioner Hartnett's testimony, making statements such as: "One of the things I was impressed with your declaration is its clarity, its organization, and its candor. So I want to give you that compliment as we stand here." Dkt. No. 521 at 3 (quoting Aug. 3, 2022 Hearing); *see also*, *e.g.*, *Vague*, Dkt. 77 (Judge Proctor: "I really appreciate the way you're tackling this, and I just want to affirm that as we're going along."). A lone reference to an answer to a question about a hypothetical scenario cannot support a prima facie case where, as here, the remainder of the voluminous record includes repeated compliments of counsel's candor.

Further still, even if there were a prima facie case of fraudulent conduct by Respondents (there is not), there would still not be any indication that the Q&A Document was made in "furtherance of" an ongoing or future fraud. *In re Grand Jury Investigation*, 842 F.2d at 1226; *see also*, *e.g.*, *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997) (the proponent of the exception must show the legal advice was sought "with the intent to further … illegal conduct"). Indeed, the uncontradicted record in this matter —including the sworn testimony of all *Walker* counsel and their lawyer—is that the only activity that the Q&A Document was created in "furtherance" of was preparation for the May 20, 2022 hearing. *See supra* p. 25.

Were a prima facie case made out on these facts, it would mean that in every case where an individual accused of some form of misconduct hires a lawyer to prepare a defense and advocate on his or her behalf, there would be a risk that the accused's privileged communications with counsel could be breached based on the factfinder merely characterizing that advocacy as being in "furtherance" of the underlying accusations of misconduct.[13] *Cf. In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) (explaining that were the "in furtherance" requirement is not adhered to, it would mean "the privilege would be virtually worthless because a client could not freely give, or an attorney request, evidence that might support a finding of culpability"). What's more, the Q&A Document could not have been in "furtherance" of fraudulent testimony given the uncontradicted evidence that Respondents did not believe they would be testifying at the May 20, 2022 hearing *at all*. *Supra* p. 4-7.

[13] Finally, to the extent the Court's May 17 Order *sub silentio* invokes the Panel's generalized findings of misconduct in the Final Report, that too is insufficient to trigger the crime-fraud exception. That is so for multiple reasons: the Panel did not find a fraud on the Court, the Panel did not make individualized findings but rather "collective" findings, and—as noted—the Panel's process was suffered from multiple, severe due process violations such that *all* of the Panel's findings are wholly unreliable. Indeed, and notably, the Panel's original (and ultimately withdrawn) request for the Q&A Document was spurred by Justice Harwood asking questions the Panel promised he would not ask, to a junior lawyer testifying without counsel present, in a scenario where that lawyer was not expecting to testify or prepared to testify or aware of any rule violated. *See supra* p. 8.

Put simply, neither the Final Report nor anything else in the record before the District Court supports the notion that Respondents and their counsel in the investigation have been engaged in a fraud on the Court.

While the Court's May 17 Order states, "it is improper for any witness to testify to facts he or she doesn't personally remember, coordinate omissions with other witnesses, or agree to stick to a particular story that is not the truth, the whole truth, and nothing but the truth," it provides no specific examples—i.e., a prima facie case—of this occurring.[14] Rather, it merely says that the Q&A Document was based on the "collective knowledge" of counsel. Prior to the Court's sequestration order on May 20, the *Walker* Respondents were not under any prohibition that prevented them from discussing their recollections of past events. Merely discussing "collective knowledge" about past events alone is not improper in the absence of a sequestration order, particularly as here where the undisputed purpose was to educate counsel for an upcoming hearing. Typically, Rule 615 requires a party to make a request or "invoke the rule" before sequestration applies. *See United States v. Joseph*, 806 F. App'x 910, 914 (11th Cir. 2020) ("Once a party invokes the rule of sequestration, the district court must exclude witnesses from court proceedings . . .."); Fed. R. Civ. P.

[14] The absence of specific examples of fraud is in stark contrast to the prima facie case made in *Drummond Co., Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324 (11th Cir. 2018). *See infra* p. 35.

615 ("At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony."). No sequestration order had been entered before May 20, 2022.

The Court's May 17 Order relies heavily on *Drummond Co., Inc. v. Conrad & Scherer, LLP*, 885 F.3d 1324 (11th Cir. 2018), but *Drummond* only underscores the impropriety of applying the crime-fraud exception here. In *Drummond*, the party seeking to invoke the crime-fraud exception "set forth over 50 specific misrepresentations" made by its adversary, and the adversary "did not dispute the vast majority of those misrepresentations." *Drummond, Inc. v. Collingsworth*, 2:11-cv-3695, Dkt. 417 (Dec. 7, 2015), at 8. From there, the district court set forth *ten pages* of bullet-pointed examples of specific misrepresentations. *Id.* at 8-17. Moreover, the materials at issue in *Drummond* were plainly in furtherance of the alleged misconduct—*i.e.*, communications to an attorney who served as an intermediary to make illegal bribe payments, in furtherance of "witness bribery." *Drummond*, 885 F.3d at 1333. In short, *Drummond* represents the rare and exceptional case where the crime-fraud exception applies, and provides no support for invoking that exception based on the non-evidence of fraud here.

IV. THE COURT SHOULD NOT CONDUCT ANY IN CAMERA REVIEW.

Because there is not a sufficient basis to invoke the crime fraud exception, the Court need not decide whether it should appoint a special master. However, even if

this Court were to decide that in camera review is appropriate here, the interests of justice strongly favor the appointment of a special master outside the Alabama district courts.

When a presiding judge reviews privileged materials, there is a possibility that the judge could be "prejudiced." Douglas R. Richmond, *Understanding the Crime-Fraud Exception to the Attorney Client Privilege and Work Product Immunity*, 70 S.C.L.R. 1, 30 (2018) ("Richmond"). For that reason, "[i]deally, any *in camera* review should be conducted by a judge other than the one presiding over the case involving the communications" or the court should "appoint a special master to conduct the review." *Id.*; *see*, *e.g.*, Thomas E. Spahn, *A Practitioner's Summary Guide to the Attorney-Client Privilege & the Work Product Doctrine* 297–98 (2013) (noting the "common-sense concept," that "the judge hearing a case (especially in a non-jury setting) should arrange for another judge to review arguably protected communications or documents," to help prevent "adverse effects of the trial judge reviewing what should never have been disclosed"); *see id.* at 298 (noting that "[m]any courts delegate" this review "to special masters"). Courts in this Circuit have appointed special masters to assess the relevance of the crime-fraud exception. *See*, *e.g.*, *Drummond*, 885 F.3d at 1327 (noting that the district court "ordered a special master to perform an *in camera* review to determine whether the crime-fraud exception … appl[ied]").

This proceeding presents an exceedingly strong case for a special master. *First*, the typical factors that favor a special master clearly obtain here: there is a general risk that a judge presiding over a case will be prejudiced by reviewing privileged material and there is no jury so the ultimate findings and penalties here will be made by the same person that would be reviewing the privileged material. *Second*, the underlying charge is that Respondents perpetrated a fraud on the court and, for obvious reasons, the "potential for prejudice would seem to be especially great where the alleged fraud is fraud on the court." Richmond at 30. *Third*, the unconventional structure of these proceedings makes the risk of prejudice especially acute. In the typical case where a court acts as trier of fact (which itself triggers a risk of prejudice), the court is still acting as a neutral arbiter between two adversaries. That is manifestly not this case. Here, the Court is acting as investigator, prosecutor, judge, and jury all at once, and doing so in a quasi-*criminal* proceeding. *See In re Ruffalo*, 390 U.S. 544, 551. In these circumstances, it would be fundamentally unfair to allow the Court unfettered access to privileged communications. It is no "personal criticism" of the Court to observe that a judge in that scenario could not "reasonably be expected to erase the earlier impressions from his mind" gleaned from "privileged communications." *United States v. Nicholson*, 611 F.3d 191, 217–18 (4th Cir. 2010).

Compounding the foregoing problems is another: the allegations in this case are unavoidably personal. In essence, the Panel's Final Report concludes that

because Respondents thought they could not obtain a favorable result from Judge Burke, they did not want to appear before Judge Burke. And while Respondents vigorously contest the charge that they tried to subvert the random-case assignment system or otherwise acted improperly, there is no dispute that Respondents at times had concerns about Judge Burke. *See*, *e.g.*, Dkt. 339 at 31 ("McCoy and others testified to an additional, and more troubling, concern: they suspected that Judge Burke reached out to obtain the *Ladinsky* case"); *id.* at 32 (concerns expressed based on Judge Burke's "prior political affiliations"); *Vague*, Dkt. 77 at 227 (testimony that because "Judge Burke had a portrait of Jefferson Davis in his chambers," that "did not seem to be a good fact" for a "civil rights lawyer"). Again, it is not a criticism to suggest that there is a risk of prejudice when a judge is asked to consider sanctions in a case predicated on charges that the lawyers attempted to avoid that judge. That risk of prejudice makes it all the more important not to poison the well by allowing the ultimate decisionmaker to review privileged communications. The Supreme Court teaches that courts deciding whether and how to engage in "*in camera* review" should look to the "facts and circumstances of the particular case," *Zolin*, 491 U.S. at 572, and the circumstances here—a case in which the alleged misconduct is inextricably bound up with allegations about the attorneys' concerns with a judge—strongly disfavor this Court conducting *in camera* review.

In sum, there is no basis for the crime-fraud exception and, if there were any colorable basis, a special master is the only just option.

Respectfully submitted, May 24, 2024

/s/ Brannon J. Buck
Brannon J. Buck (ASB-5848-K56B)
bbuck@badhambuck.com
Christopher B. Driver (ASB-9178-G39B)
cdriver@badhambuck.com
BADHAM & BUCK, LLC
2001 Park Place North, Ste. 500
Birmingham, Alabama 35203
(205) 521-0036 (Phone)
(205) 521-0037 (Facsimile)

Counsel for Kathleen Hartnett

/s/ Barry A. Ragsdale
Barry A. Ragsdale
Robert S. Vance
Dominick Feld Hyde, PC
1130 22nd Street South, Suite 4000
Birmingham, AL 35205
Tel.: (205) 536-8888
bragsdale@dfhlaw.com
rvance@dfhlaw.com

/s/ *W. Neil Eggleston*
W. Neil Eggleston
Byron Pacheco
Kirkland & Ellis LLP
1301 Pennsylvania Ave, N.W.
Washington, D.C. 20004
Tel.: (202) 389-5016
neil.eggleston@kirkland.com
byron.pacheco@kirland.com
Counsel for Respondents Esseks, Charles, and Faulks and non-party Milo Inglehart.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on all parties of record via the CM/ECF electronic filing system, electronic mail, and/or U.S. Mail on this the 24th day of May, 2024.

/s/ Brannon J. Buck
OF COUNSEL

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

BRIANNA BOE, et al.,	*	
	*	
Plaintiffs,	*	2:22-cv-00184-LCB
	*	May 20, 2024
vs.	*	Montgomery, Alabama
	*	10:00 a.m.
STEVE MARSHALL, et al.,	*	
	*	
Defendants.	*	

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TRANSCRIPT OF STATUS CONFERENCE
VIA VIDEOCONFERENCE
BEFORE THE HONORABLE LILES C. BURKE
UNITED STATES DISTRICT JUDGE

Proceedings recorded by OFFICIAL COURT REPORTER, Qualified pursuant to 28 U.S.C. 753(a) & Guide to Judiciary Policies and Procedures Vol. VI, Chapter III, D.2. Transcript produced by computerized stenotype.

CHRISTINA K. DECKER, RMR, CRR
Federal Official Court Reporter
256-506-0085/ChristinaDecker.rmr.crr@aol.com

APPEARANCES

FOR THE PLAINTIFFS:
Kaitlin N Toyama, Esq.
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530
202-353-5311
Email: Kaitlin.toyama@usdoj.gov

RESPONDENTS:
Brannon Buck, Esq.
Christopher Driver, Esq.
BADHAM & BUCK, LLC
2001 Park Place North, Suite 500
Birmingham, AL 35203

Samuel H. Franklin, Esq.
Harlan I. Prater, IV, Esq.
LIGHTFOOT, FRANKLIN & WHITE, LLC
The Clark Building
400 20th Street North
Birmingham, Alabama 35203

Robert D. Segall, Esq.
Shannon Holliday, Esq.
COPELAND FRANCO
444 South Perry Street
P.O.Box 347
Montgomery, Alabama 36101

April A. Otterberg, Esq.
JENNER & BLOCK
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222 9350

Barry Alan Ragsdale, Esq.
Robert S. Vance, III, Esq.
Dominick Feld Hyde, P.C.
Litigation
1130 22nd St S - Ste 4000
Birmingham, AL 35205
205-536-8888
BRagsdale@dfhlaw.com

W. Neil Eggleston, Esq.
KIRKLAND & ELLIS, LLP
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Bruce F. Rogers, Esq.
BAINBRIDGE, MIMS, ROGERS & SMITH LLP
The Luckie Building, Suite 415
600 Luckie Drive
Birmingham, Alabama 35223
Phone: 205-879-1100

John M. Ugai, Esq.
FARELLA BRAUN AND MARTEL
One Bush Street
Suite 900
San Francisco, CA 94104
415.954.4400

FOR THE DEFENDANT:
James W. Davis, Esq.
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
(334) 242-7300

COURTROOM DEPUTY: Deena Harris

COURT REPORTER: Christina K. Decker, RMR, CRR
Federal Official Court Reporter
101 Holmes Avenue, NE
Huntsville, Alabama 35801
(256) 506-0085

P R O C E E D I N G S

THE COURT: All right. Good afternoon. Can everybody hear me?

All right. Several things, obviously, to cover today.

I will start with the first question here, which is, is anybody going to turn this document over today?

MR. BUCK: Your Honor, this is Brannon Buck on behalf of Kathleen Hartnett.

As our filings over the weekend indicated, we are in the process of, if not already, have filed -- I haven't gotten confirmation yet -- a request in the Eleventh Circuit seeking emergency relief.

As the notice of intent indicated that we filed last night, it is our hope to have a discussion today that can maybe lead to an alternative course here in this Court. But I do want to be up front with Your Honor and let you know that's, you know, that's where we are, as far as the respondents are concerned.

THE COURT: I understand.

I do want to say I feel like the record has been misrepresented. I have read it with care, and read it with care before I entered my order.

The three-judge panel never excused anybody from producing this. In fact, Judge Proctor actually says that. He says, I know we haven't made you, but I have to say that it's very

clear that that order still stands.

But on top of that -- and I would love to have your thoughts on that -- if you read my order, my order references that you were ordered to produce it and that you did not produce it. But it also says, hey, independently and for all these reasons, I'm now ordering you to produce it myself.

So I'm not here to enforce the panel's order. I'm enforcing my own order, where I ordered this document to be produced.

Now, why did I go ahead and set a show cause date for this? I went ahead and set it because it didn't get produced the last time, and the one person who was required to produce it said he wasn't going to produce it.

So, you know, with that said, tell me what your alternative method is, Mr. Buck.

MR. BUCK: Yes.

So, Your Honor, I mean, let me start by saying we respect the Court's authority here. And I hope that nothing that we have filed portrays anything different. And we appreciate Your Honor accommodating our request to have this conference.

In our view, and in our read of the transcript, and our understanding of that November 3rd comment on the record by Judge Proctor was that the respondents were, in fact, excused. That was our view of it, our reading of it.

And it appeared to us from your order that perhaps the

Court, you know, was not aware that that statement had been made, or that the respondents had relied upon that statement in not filing the document up to this point.

I don't think -- you know, it -- it was our impression that the panel recognized that the Q&A document is privileged. And from reviewing your order, I don't necessarily think Your Honor disputes that. I think the question we have is whether or not the crime-fraud exception applies, at least that's our read of the situation at this point.

And the reason we wanted to have this conference was, number one, to talk about the fact that the respondents have never had an opportunity to brief the application of the crime-fraud exception, specifically the prima facie issue that Your Honor speaks about in the order from Friday afternoon.

And we would like the opportunity to brief that, Your Honor, before a decision, a final decision -- although we certainly understand the finding in your order. But we would like the opportunity to brief that, and have Your Honor consider that briefing on the prima facie case relating to that document before a decision is made about an in camera inspection since that's -- you know, step one of the process, as you know, Your Honor, from the Drummond case and the Zolin case, is a determination as to whether there is a showing that the client was engaged in criminal or fraudulent conduct when he or she sought the advice of counsel, that he or she was

planning on such conduct when the advice was sought, or that he or she committed a crime or fraud subsequent to receiving the benefit of counsel's advice.

And so, Your Honor, we haven't briefed that issue before, but we would like the opportunity to brief that issue.

We don't think the record -- and we obviously understand that Your Honor disagrees -- but we don't think the record supports that or that the panel's report supports a prima facie showing of that initial step in the analysis for a prima facie case.

And so that would be the first part of our ask, that if the Court wants to continue to pursue this -- and it sounds like Your Honor does -- that we be given the opportunity to brief that. And we would also like to discuss, because Your Honor is the ultimate finder of fact in this case, that we would propose the invocation of a special master here, which I noted --

THE COURT: I noticed that. My first question would just be I've been at this for 30 years and a judge for more than half of that, and every single case I have ever read says that when a judge sits as a finder of fact, you know, if I review this in camera, and I find that it should not be considered, then I don't consider it, and I say I have not considered this. And the appellate court assumes that I have not considered it.

Do you have one case that suggests that I should do this? Because that would literally change the way federal and state judges handle everything in the world. All the time judges in divorces, civil litigation, et cetera, et cetera, et cetera, they look at something to determine whether it's admissible or not. And if they determine it's not admissible, you don't have to get a special master to make evidentiary ruling.

So tell me, is there a case that says this?

MR. BUCK: Well, Your Honor, I noted in the Drummond case Judge Proctor appointed a special master to conduct the analysis there. And so we picked up on that from that case, that that was the procedure followed in the Drummond case.

THE COURT: But my question to you is, is there a case that requires it? Or did Judge Proctor just do that because he's a good-natured guy and a good judge?

MR. BUCK: Your Honor, I candidly don't have an answer to that question. I don't know. And I can't tell you I have researched the issue of whether or not it's required in the context of the situation where a judge is serving as the ultimate, you know, fact finder.

Our thought is more of a practical one, which, you know, it's hard to unsee something that you have seen. We understand, you know, the notion that the Court won't consider it, but it's a little bit like trying to put the toothpaste back in the bottle.

THE COURT: Well, is there something so bad in here it's going to shock my conscious, Mr. Buck?

MR. BUCK: No, Your Honor.

I mean, this is -- this is really about the attorney-client privilege and the sanctity of that privilege, Your Honor.

I think the document has been described at some length in the filings, in the declarations that have been filed. I mean, it is admittedly a Q&A document. I think the title or the description of the document accurately describes it.

It was prepared during that ten-day period leading up to that first hearing, as you know, from reading our filings. And it was -- the purpose of it was to prepare primarily Mr. Ragsdale to be ready to answer questions from the panel at that very first hearing at a time when he was, you know, having to learn a whole lot of background information and a lot of facts and history in getting ready for that hearing at the very outset, you know, with less than ten days' notice.

THE COURT: Okay. So next question: So in my review of the record, obviously, when this issue arose in front of the panel, there was a request for a protective order, there was heavy briefing on behalf of the Walker respondents.

You know, certainly crime-fraud could have been briefed at that time had it been desired. But is there somebody who's not had a full opportunity to raise any of these issues at the time

the panel considered all this?

MR. BUCK: Well, Your Honor, I think at that point in time -- and I can certainly let Mr. Ragsdale speak to this -- but I believe at that point in time, based on the statement in the order from the panel that it was not requiring the production of attorney-client privileged communications, that counsel and the respondents thought that that ended the inquiry at that point. And we just haven't revisited it since then.

And the issue of whether or not the crime-fraud exception applies has never been raised again until, or I think for the first time in your -- I know there's been mention of it, but it's really been raised for the first time in Your Honor's order from Friday afternoon.

THE COURT: Well, you know, I understand your position. But, again, I have read the record.

You know, the panel never said the Q&A was privileged. They just generally said we're not seeking privileged communication, you know.

And Judge Proctor remarked from the stand that, you know, this was a reversal, and that he did not understand why all of a sudden there was a lack of candor on this issue.

So, you know, and I'll tell you I have skimmed your writ of mandamus. And, again, I would just say I believe it's a misrepresentation of what the panel's words were. So I just put that out there.

If I were to give you time to brief this issue, exactly what are you seeking?

MR. BUCK: Well, Your Honor, we recognize that we've got the final show cause hearings set in just over a month. And so we would ask for seven to ten days -- I haven't conferred with other counsel -- for an opportunity to brief the prima facie question.

And, then, you know, beyond that, if -- you know, once that issue is briefed and decided finally after briefing, then I think we move to the second step. And, you know, then the question becomes can we fit all of that in within the 30 or so days that we have.

Does Your Honor feel compelled to finally adjudicate this issue before those hearings in June, or if -- you know, can that go beyond those hearing dates?

But we're certainly willing to work with the Court on timing, as far as briefing and hearing on that.

THE COURT: Well, you know, another way that we could consider this issue is everybody could just go ahead and comply with my order. I will do an in camera review. You know, hey, I may look at this and say no, this is not coming in. I don't need to consider this. And then it doesn't even matter.

On the other hand, if I did look at it and decide, hey, I do need to consider this, why could I not just allow you to brief it at that point?

MR. BUCK: Well, Your Honor, again, at that point, the privilege has been breached, you know --

THE COURT: Has the privilege been breached by an in camera review if I determine that it's, you know, not procedurally in front of me, that I don't need consider it?

MR. BUCK: Well, Your Honor, I understand your point about that the Court will decide whether to consider it or not.

But, at that point, the ultimate fact finder has seen the communications at that point. And so, you know, we consider that to be -- at that point, the attorney-client privilege has been breached, because the ultimate fact finder has, therefore, been privy to and been provided with those communications.

And that's truly our concern about that.

THE COURT: So are you saying that I would not be capable of not considering something even if I found that I shouldn't consider it and I said I didn't?

MR. BUCK: Your Honor, I'm not questioning your word or your judgment. I just know that, you know, once you've reviewed a document, you've reviewed a document. And that's really our point.

THE COURT: Let me see if I have any other questions to ask.

MR. BUCK: And, Your Honor, may I speak to just one other thing, one other point that you brought up a moment ago?

You know, I think there has perhaps been some confusion or

miscommunication on our part about the applicability of the privilege and the work-product doctrines through the course of this proceeding. And I think that arises from the fact that you have got really two proceedings, right?

You have got the underlying proceeding, the Walker and Ladinsky cases, where you have got, you know, attorney-client and work-product privileges between the Walker and Ladinsky counsel and their clients in those underlying proceedings.

And my understanding is that throughout this, counsel and the respondents have been very forthcoming, particularly about work product as to the underlying proceeding.

I think the -- where the confusion lies is I believe that counsel and the respondents have tried to be more restrictive, in terms of their disclosure relating to their relationship with their counsel as the clients in this, you know, Vague, and now sanctions proceeding.

And so I think perhaps there's been a situation where the waiver or disclosure of work-product information, in particular, has been more readily made as to the underlying proceeding, and then a distinction drawn between the underlying proceedings and this sanctions inquiry.

And I don't -- I don't know if that makes sense. I'm not doing a great job of explaining it. But I do think we see a distinction here, Your Honor.

THE COURT: Is there anything else we need to talk

about, or have we talked about all the issues today?

MR. RAGSDALE: Yes, sir, Your Honor. This is Barry Ragsdale.

We filed a motion asking that Milo Ingelhart be excused from this order. He is not the custodian of this document. If it gets produced, there are other people that can produce it. He doesn't have it in the native format, and, frankly, is not sure he's got it at all at this point.

But he's a nonparty. And he's not necessary for compliance with the production.

And we ask that -- it's not an attempt to duck compliance by excusing him. There, as I said, there are other lawyers on here who can do that.

But it would present a hardship for him if he is -- again, I don't know that he has to come to Montgomery, but we just ask that as a nonparty he be released from the purview of this order.

THE COURT: Right. You know, that's something I can take up at a later time.

I think what my inclination is, is to give Mr. Buck until Monday to brief this, and to stay the hearings -- not Thursday's hearing. Thursday's hearing will still go ahead as scheduled.

But I will continue -- I will give him five days to brief it. Let me see what that would be. This is Monday. I'll give

you until Friday at 5:00 p.m. to brief the crime fraud. I think that's all you wanted to brief; is that correct, Mr. Buck?

MR. BUCK: Yes, Your Honor.

We were specifically -- I was specifically referring to the first step in that analysis, that two-step analysis, which is the prima facie case.

THE COURT: All right. Well, I will stay this production deadline for seven days.

I will reset the show cause hearing on the production for -- I will have to look at my schedule -- for one of those days following that.

I will give you until 5:00 p.m. on Friday to brief whatever issues that you want to additionally brief.

Fair enough?

MR. BUCK: Yes, Your Honor. We appreciate the accommodation.

THE COURT: All right. Am I leaving anything out here?

I've got your motion to stay. I've done that.

You wanted briefing. I've done that.

Am I leaving anything out?

MR. BUCK: I don't think so, Your Honor.

We're still on for Thursday, correct?

THE COURT: Still on for Thursday, yes. Not only do

we have some things -- housekeeping with this matter, we have got to take up the issue of the stay of the whole case. But we won't get into that now.

Mr. Ragsdale, as to your request regarding Mr. Ingelhart, I would suggest that since I have stayed it, we'll just take that issue up after the briefing is done.

MR. RAGSDALE: Thank you, Your Honor.

THE COURT: We will figure out where we need to go.

Anybody else have anything that we ought to take up? Or have we covered everything that this call was supposed to be about?

All right. I will get a paper order out in the next day or two regarding the stay, but, obviously, I've done it orally and on the record. So that's where we are.

New production day of the document is a week from today at 5:00 o'clock. Briefing due by Friday. And then, obviously, that will give me the weekend to read your briefing.

And what I think we would just likely do is probably reconvene by Zoom again on Monday morning and let you orally argue it.

Does that seem to work?

MR. BUCK: Yes, Your Honor. That works for us.

THE COURT: All right. Mr. Prater looks like something is about to come out of his mouth.

You have to unmute. You're muted, Mr. Prater.

MR. PRATER: I just wanted to note, Your Honor, that Monday is Memorial Day.

THE COURT: It sure is Memorial Day. I'm glad you pointed that out.

MR. PRATER: Thank you.

THE COURT: Then let's see here. All right. We'll make it Tuesday. And I will get an order out to that effect.

Good catch, Mr. Prater. You saved me a lot of trouble and trouble with my wife when I decided to go in to work on Memorial Day.

All right. I think that covers us. And I'll get an order out, but I'll see you all again on Tuesday.

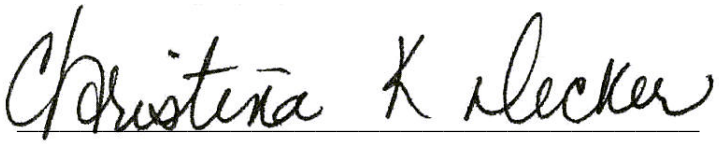
MR. BUCK: Thank you, Judge.

THE COURT: All right. Have a good one.

(Whereupon, the above proceedings were concluded at 1:59 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



Christina K. Decker, RMR, CRR

Federal Official Court Reporter

ACCR#: 255

05-21-2024

Date

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

***In re* Amie Adelia Vague, et al**	**)**	**Case No. 2:22-mc-03977-WKW**
	)	**(Middle District of Alabama)**

DECLARATION OF JAMES ESSEKS

I, James Esseks, declare as follows:

1. I am providing this *in camera* Declaration as required by the Panel's July 8, 2022 Order in the above referenced proceeding. By doing so, I am not waiving any privilege, including the attorney client privilege and the protections of the attorney work product doctrine. The matters stated herein are based upon my personal knowledge and are true and complete to the best of my recollection.

2. I understand the Panel's July 25, 2022 Order (ECF 41) requires me to disclose work product responsive to the topics in the Panel's July 8, 2022 Order. To comply with that Order, I am, on the advice of counsel, disclosing certain information protected by the work product doctrine in this declaration. To preserve

7. Any knowledge you have that relates to (1) preparation for the hearing in this matter (including circulation of any Q&A document), and (2) the questions expected to be asked or that were actually asked by the court at the May 20, 2022 hearing

45. Following the May 10, 2022 Order opening this proceeding, the *Walker* team hired Barry Ragsdale of Dominick Feld Hyde, P.C. to represent *Walker* counsel named in this matter.

46. From my recollection, Mr. Ragsdale met with the decision-makers on the *Walker* team, including me, multiple times prior to the hearing on May 20, 2022, and met with the full *Walker* counsel group three or four times prior to the hearing. I understand that the Panel's July 25, 2022 Order (ECF 41) clarified that the Panel is not seeking any attorney-client privileged communications or requiring the declarants to waive the attorney-client privilege, and so I do not describe the contents of those privileged communications.

47. At Mr. Ragsdale's request, to aid in his representation of *Walker* counsel at the May 20 hearing, I reviewed and edited a document containing potential questions the Panel might ask and factual information responsive to those questions. I also reviewed and edited drafts of the pre-hearing brief submitted by *Walker* counsel and a timeline created, at Mr. Ragsdale's direction, by Cooley and other members of the *Walker* team to help Mr. Ragsdale prepare for the May 20 hearing. To my knowledge, the Q&A document, pre-hearing brief drafts, and timeline have never been shared outside of the *Walker* team and our retained counsel.

48. I did not speak to anyone aside from counsel to prepare for the May 20, 2022 hearing. I did review some research independently prepared by an ACLU attorney concerning the right to voluntarily dismiss a case.

8. The identity of each attorney, not included in the style of the original order, whom you are aware of being involved in any input, recommendation, decision, or strategy regarding any of the subjects referenced above and the details of each such person's involvement

49. Joshua Block, a Senior Staff Attorney at the ACLU, was a member of the team preparing to litigate a healthcare ban in Alabama in 2020 and 2021. To my recollection, during those time periods he was involved in conversations concerning whether to mark the new case as related to *Corbitt*. Mr. Block was not a member of the team in 2022, and played no role in filing, litigating, or dismissing the case. After receiving the May 10, 2022 Order initiating this proceeding, Mr. Block took it upon himself to research the right to voluntarily dismiss a case. While I did not direct him to perform this research, I did review it as part of my preparation for the May 20, 2022 hearing.

50. Sharon McGowan and Camilla Taylor of Lambda Legal were involved in aspects of the *Walker* case. Ms. McGowan attended some *Walker* counsel meetings prior to the case filing, during which the team may have discussed whether

to mark the case as related to *Corbitt*, which parties to name, and where to file. Camilla Taylor attended the April 16 call with *Ladinsky* counsel.

Attestation of Sequestration Order Compliance

51. I attest that I have not discussed with any individuals named in the May 10, 2022 Order the substance of any testimony given by those individuals during the May 20, 2022 hearing, including any questions asked or answers given. I further attest that I have not discussed the contents of my declaration with anyone other than my counsel in this proceeding.

52. Following the status conference on June 17, 2022, I received notes created by my counsel that contained a description of some of the substance of Mr. Charles' May 20, 2022 testimony, which I sent to members of the client group before reading the notes, with Mr. Ragsdale's permission. Shortly thereafter, at Mr. Ragsdale's direction, I sent a second email telling the group that those notes were sent in error and asking them to delete them because they inadvertently disclosed some of the substance of testimony. I deleted the notes and have not reviewed them since I sent that second email.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

***In re* Amie Adelia Vague, et al**	)	**Case No. 2:22-mc-03977-WKW**
	)	**(Middle District of Alabama)**

DECLARATION OF LYNLY S. EGYES

I, Lynly S. Egyes, declare:

1. I am providing this *in camera* Declaration as required by the Panel's July 8, 2022 Order in the above referenced proceeding. By doing so, I am not waiving any privilege, including the attorney client privilege and the protections of the attorney work product doctrine. The matters stated herein are based upon my personal knowledge and are true and complete to the best of my recollection.

2. I understand the Panel's July 25, 2022 Order (ECF 41) requires me to disclose work product responsive to the topics in the Panel's July 8, 2022 Order. To comply with that Order, I am, on the advice of counsel, disclosing certain information protected by the work product doctrine in this declaration. To preserve

short period of time, the *Walker* case had been transferred to a new court and was being consolidated with the *Ladinsky* case, and a status conference had been ordered without adequate time to prepare in a court that was unfamiliar to our team. On April 15, the *Walker* team filed its notice of voluntary dismissal.

33. On Saturday, April 16, I attended a call among leadership of the *Walker* team organizations and the *Ladinsky* team. During the call, it became clear that it would not be possible for the two groups of organizations to work together to file one new case going forward. Working together would mean eight nonprofit legal organizations and three law firms involved in determining case strategy and decision-making, which did not seem feasible. In addition, the advocacy groups that originally filed *Walker* and *Ladinsky* have divergent beliefs about litigation strategies and the decision-making process concerning case strategy.

6. Any and all actions that relate to the decision to file *Eknes-Tucker* in the United States District Court for the Middle District of Alabama

34. I did not participate in and have no knowledge of any actions that related to the decision to file *Eknes-Tucker* in M.D. Alabama.

7. Any knowledge you have that relates to (1) preparation for the hearing in this matter (including circulation of any Q&A document), and (2) the questions expected to be asked or that were actually asked by the court at the May 20, 2022 hearing

35. Following the May 10, 2022 Order that initiated this proceeding, the *Walker* team hired Barry Ragsdale to represent *Walker* counsel in this matter.

36. Mr. Ragsdale met with me and other leaders from the *Walker* team organizations a handful of times. He also met with the full team three or four times prior to the hearing. I understand that the Panel's July 25, 2022 Order (ECF 41) clarified that the Panel is not seeking any attorney-client privileged communications or requiring the declarants to waive the attorney-client privilege, and so I do not describe the contents of those privileged communications.

37. I participated in drafting a document for Mr. Ragsdale which contained a list of potential questions the Panel may ask and information applicable to respond to those questions. The document was prepared at Mr. Ragsdale's request to help prepare him to represent us in this matter. I was not a primary drafter of the document, but I reviewed and edited it.

38. I also reviewed drafts of the pre-hearing brief submitted by *Walker* counsel and a timeline created by Cooley and other members of the *Walker* team to help Mr. Ragsdale prepare for the May 20 hearing. To my knowledge, the Q&A document, pre-hearing brief drafts, and timeline have never been shared outside of the *Walker* team and our retained counsel.

8. The identity of each attorney, not included in the style of the original order, whom you are aware of being involved in any input, recommendation, decision, or strategy regarding any of the subjects referenced above and the details of each such person's involvement

39. There are no other attorneys from TLC not included in the style of the original order who were involved in any input, recommendation, decision, or strategy regarding any of the subjects referenced above.

40. I am aware that Sharon McGowan, the Legal Director at Lambda Legal prior to the filing of *Walker*, attended some *Walker* team meetings prior to and after filing *Walker*.

41. I am further aware that Camilla Taylor, the Director of Constitutional Litigation at Lambda Legal, participated in discussions among *Walker* counsel on April 15, 2022 concerning whether to dismiss *Walker* and in a phone call among *Walker* counsel and *Ladinsky* counsel on April 16, 2022.

Attestation of Sequestration Order Compliance

42. I attest that I have not discussed with any individuals named in the May 10, 2022 Order the substance of any testimony given by those individuals during the May 20, 2022 hearing, including any questions asked or answers given. I further attest that I have not discussed the contents of my declaration with anyone other than my counsel in this proceeding.

43. Following the status conference on June 17, 2022, I received notes created by my counsel that contained a description of some of the substance of Mr. Charles' May 20, 2022 testimony. Shortly thereafter, I received a second email telling me that those notes were sent in error and asking me to delete them because they inadvertently disclosed some of the substance of testimony. I have not reviewed those notes since receiving the second email, and I deleted them.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

Dated: July 27, 2022

New York, New York

/s/ Lynly S. Egyes
Lynly S. Egyes

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

***In re* Amie Adelia Vague, et al**	)	**Case No. 2:22-mc-03977-WKW**
	)	**(Middle District of Alabama)**

DECLARATION OF TARA BORELLI

I, Tara Borelli, declare:

1. I am providing this *in camera* Declaration as required by the Panel's July 8, 2022 Order in the above referenced proceeding. By doing so, I am not waiving any privilege, including the attorney client privilege and the protections of the attorney work product doctrine. The matters stated herein are based upon my personal knowledge and are true and complete to the best of my recollection.

2. I understand the Panel's July 25, 2022 Order (ECF 41) requires me to disclose work product responsive to the topics in the Panel's July 8, 2022 Order. To comply with that Order, I am, on the advice of counsel, disclosing certain information protected by the work product doctrine in this declaration. To preserve

6. Any and all actions that relate to the decision to file *Eknes-Tucker* in the United States District Court for the Middle District of Alabama

40. I did not participate in and do not have knowledge of any actions that relate to the decision to file *Eknes-Tucker* in M.D. Alabama.

7. Any knowledge you have that relates to (1) preparation for the hearing in this matter (including circulation of any Q&A document), and (2) the questions expected to be asked or that were actually asked by the court at the May 20, 2022 hearing

41. Following the May 10, 2022 Order opening this proceeding, the *Walker* team hired Barry Ragsdale of Dominick Feld Hyde, P.C. to represent *Walker* counsel named in this matter.

42. From my recollection, Mr. Ragsdale met with the leaders from the *Walker* team organizations, including me, several times to learn about the case and to prepare for the May 20, 2022 hearing. He also met with the full *Walker* counsel team three or four times prior to the hearing. I understand that the Panel's July 25, 2022 Order (ECF 41) clarified that the Panel is not seeking any attorney-client privileged communications or requiring the declarants to waive the attorney-client privilege, and so I do not describe the contents of those privileged communications.

43. At Mr. Ragsdale's request, to aid in his representation of *Walker* counsel at the May 20 hearing, I helped draft a document containing potential questions the Panel may ask and factual information responsive to those questions. I also reviewed drafts of the pre-hearing brief submitted by *Walker* counsel and a

timeline created by Cooley and other members of the *Walker* team to help Mr. Ragsdale prepare for the May 20 hearing. To my knowledge, the Q&A document, pre-hearing brief drafts, and timeline have never been shared outside of the *Walker* team and our retained counsel.

44. I did not speak to anyone outside of my discussions with Mr. Ragsdale and *Walker* counsel to prepare for the May 20 hearing.

8. The identity of each attorney, not included in the style of the original order, whom you are aware of being involved in any input, recommendation, decision, or strategy regarding any of the subjects referenced above and the details of each such person's involvement.

45. Camilla Taylor, Lambda Legal's Deputy Legal Director for Litigation, was consulted by Lambda Legal members of the *Walker* counsel team when the *Walker* team was deciding whether to dismiss the case. I spoke with Ms. Taylor concerning the dismissal of *Walker*, and she was a part of the April 16 call with other leadership from the *Walker* and *Ladinsky* teams.

46. Sharon McGowan, Lambda Legal's then Legal Director, participated in *Walker* team meetings where some of the topics of this Order may have been discussed. Ms. McGowan also participated in communications with Mr. Ragsdale in advance of the May 20, 2022 hearing as part of the Lambda Legal client team he represents. Ms. McGowan left Lambda Legal in June 2022 to pursue other opportunities.

47. I am aware of no other attorneys involved in the filing of the *Walker* litigation in 2022 or the decision to dismiss that litigation.

Attestation of Sequestration Order Compliance

48. I attest that I have not discussed with any individuals named in the May 10, 2022 Order the substance of any testimony given by those individuals during the May 20, 2022 hearing, including any questions asked or answers given. I further attest that I have not discussed the contents of my declaration with anyone other than my counsel in this proceeding.

49. Following the status conference on June 17, 2022, I received notes created by my counsel that contained a description of some of the substance of Mr. Charles' May 20, 2022 testimony. Shortly thereafter, I received a second email telling me that those notes were sent in error and asking me to delete them because they inadvertently disclosed some of the substance of testimony. I have not reviewed those notes since receiving the second email, and I deleted them.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

Dated: July 27, 2022

Avondale Estates, Georgia

*/s/ Tara Borelli*_____
Tara Borelli

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In re* Amie Adelia Vague, *et al.	} } }	**Case No. 2:22-mc-03977-WKW**

DECLARATION OF JULIE VEROFF PURSUANT TO JULY 8, 2022 ORDER

I, Julie Veroff, declare:

1. I submit this Declaration pursuant to the Panel's July 8, 2022 Order in this matter.

2. The matters stated herein are based upon my personal knowledge and are true to the best of my knowledge, information, and belief. To the extent information provided in response to one of the Panel's questions is responsive to other questions, I have attempted to repeat that information, but the information

- On April 16, 2022, I learned that Cooley informed other *Walker* Counsel that Cooley would not be part of any further litigation regarding Alabama's transgender youth healthcare ban, including any effort to file a coordinated suit with *Ladinsky* Counsel. I understand that other *Walker* Counsel then informed *Ladinsky* Counsel of this decision by Cooley.

14. **Topic 6. With regard to the sixth topic identified in the Panel's July 8, 2022 Order**, I had no participation in and have no knowledge of "[a]ny and all actions that relate to the decision to file *Eknes-Tucker* in the United States District Court for the Middle District of Alabama."

15. **Topic 7. With regard to the seventh topic identified in the Panel's July 8, 2022 Order, my participation in or knowledge of "(1) preparation for the hearing in this matter (including circulation of any Q&A document), and (2) the questions expected to be asked or that were actually asked by the court at the May 20, 2022 hearing" is as follows:**

- On May 10, 2022, I learned of the Panel's Order in this matter instructing me and other counsel to appear before the Panel on May 20, 2022.
- On May 11, 2022, I and other *Walker* Counsel retained Barry Ragsdale to represent us in this matter. That same day, we had an introductory call with Mr. Ragsdale.

- On May 13, 2022, I understand that senior *Walker* Counsel had a call with Mr. Ragsdale regarding strategy for the May 20 hearing. I did not participate in this call.
- On May 14, 2022, I received a copy of a chronology of relevant events from another Cooley attorney. I understand the chronology was created for the purpose of preparing Mr. Ragsdale for the May 20 hearing. I responded that day with comments that I understand were incorporated into the final version of the timeline.
- On May 15, 2022, I participated in a team call with Mr. Ragsdale regarding preparation for the May 20 hearing.
- Also on May 15, 2022, I and other junior *Walker* Counsel received a copy of a Q&A document from another Cooley attorney. I understood that this document was being circulated for our input and that its purpose was to prepare Mr. Ragsdale for the May 20 hearing. I did not provide any input on the Q&A document.
- Between May 15, 2022 and May 19, 2022, I received drafts of a pre-hearing submission from another Cooley attorney. I provided some comments on this submission, which I understand were incorporated into the final version.

- On May 17, 2022, I participated in a team call with Mr. Ragsdale regarding preparation for the May 20 hearing.
- That same day, I understand that Mr. Ragsdale submitted a letter to the Panel requesting that I be excused from in-person attendance at the May 20 hearing due to my pregnancy and related medical condition. Later that day, I understand that Mr. Ragsdale received a phone call from a clerk confirming that I was excused from attending the May 20 hearing in person.
- On May 18, 2022, I participated in a team call with Mr. Ragsdale regarding preparation for the May 20 hearing.
- On May 19, 2022, I briefly dialed in to an in-person meeting with Mr. Ragsdale that was happening in Alabama. I did not actively participate in that meeting and I could not really hear what was going on. On the evening of May 19, 2022, I received a copy of the Q&A document. I did not respond to this email.
- My knowledge of "the questions . . . that were actually asked by the court at the May 20, 2022 hearing" is limited to what I have inferred about the nature of the questions asked of certain witnesses based on a report of the June 17, 2022 status conference and the Panel's July 8, 2022 Order.

Otherwise, I have been given no information about what any of the other attorneys may have been asked by the Panel on May 20, 2022.

16. **Topic 8. With regard to the eighth topic identified in the Panel's July 8, 2022 Order, I have the following knowledge of the "identity of [any] attorney, not included in the style of the original order, whom" I am "aware of being involved in any input, recommendation, decision, or strategy regarding any of the subjects referenced above":**

- I am aware that Shannon Minter from NCLR was involved as part of the *Ladinsky* team.
- I am aware that Alexa Kolbi-Molinas and Josh Block at ACLU had some involvement in the *Walker* case strategy in early 2021.
- I am aware that Sharon McGowan at Lambda had some involvement in the 2021 and 2022 *Walker* efforts. I also believe that Sharon McGowan and Camilla Taylor at Lambda were part of our efforts to prepare for the May 20, 2022 hearing.
- As described above, on April 14, 2022, I reached out to an attorney who practices in Alabama. I asked that attorney for background information on Judge Marks and Judge Axon. Additionally, the Alabama attorney offered to seek information about how Judge Thompson handles related cases, and I accepted that offer. I relayed the information I received to the *Walker*

team. I am also aware that, at various times, other *Walker* Counsel reached out to former clerks for Judge Thompson to get additional information about how Judge Thompson handles related cases.

- There are several attorneys at Cooley who have been working as my counsel in this matter as a result of the May 10, 2022 Order, including some who helped with our preparations in advance of the May 20, 2022 hearing.

17. With respect to the Panel's directive that I attest to my compliance with the July 8, 2022 Order and to affirmatively indicate any non-compliance: I have complied with the Panel's July 8, 2022 Order as modified by the Panel's July 25, 2022 Order.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

Dated: July 27, 2022
Berkeley, California

/s/ Julie Veroff
Julie Veroff

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In re* Amie Adelia Vague, *et al.	}	**Case No. 2:22-mc-03977-WKW**

DECLARATION OF KATHLEEN HARTNETT PURSUANT TO JULY 8, 2022 ORDER

I, Kathleen Hartnett, declare:

1. I submit this Declaration pursuant to the Panel's July 8, 2022 Order in this matter.

2. The matters stated herein are based upon my personal knowledge and are true to the best of my knowledge. To the extent information provided in response to one of the Panel's questions is responsive to other questions, I have attempted to repeat that information, but the information provided below should be considered as being provided in response to all questions as necessary, notwithstanding that it is provided in response to a specific question. In addition, in some instances I provide

attended that call that the different counsel groups struggled to work together, had conflicting strategies, and had a disagreement about decisional structure. I also knew that, in the hours following that call, the ACLU and Lambda had decided not to continue to litigate in Alabama, and that ACLU of Alabama was considering joining the *Ladinsky* team.

- On the evening of April 16, 2022, I informed other *Walker* Counsel that Cooley would not be part of any further litigation regarding Alabama's transgender youth healthcare ban, including any effort to file a coordinated suit with *Ladinsky* Counsel, given the difficulties of coordinating the many groups involved and the disparate strategies. Other *Walker* Counsel then informed *Ladinsky* Counsel of this decision by Cooley.

19. Topic 6. With regard to the sixth topic identified in the Panel's July 8, 2022 Order, I have no participation in or knowledge of "[a]ny and all actions that relate to the decision to file *Eknes-Tucker* in the United States District Court for the Middle District of Alabama."

20. Topic 7. With regard to the seventh topic identified in the Panel's July 8, 2022 Order, my participation in or knowledge of "(1) preparation for the hearing in this matter (including circulation of any Q&A document), and (2) the questions expected to be asked or that were actually asked by the court at the May 20, 2022 hearing" is as follows:

- On May 10, 2022, I learned of the Panel's Order in this matter instructing me and other counsel to appear before the Panel on May 20, 2022. I immediately informed Cooley leadership, including Cooley's General Counsel, about the order and began consulting with them regarding how to proceed.
- On May 11, 2022, I and other *Walker* Counsel retained Barry Ragsdale to represent us in this matter. That same day, we had an introductory call with Mr. Ragsdale.
- On May 13, 2022, I participated in a team call with Mr. Ragsdale regarding preparation for the May 20, 2022 hearing, including Mr. Ragsdale's plan to draft a written pre-hearing submission. On this call, Mr. Ragsdale directed *Walker* Counsel to prepare work product to assist him in representing us at the May 20, 2022 hearing, including a document with potential questions that may be asked at the hearing, answers to those questions, and a chronology of relevant events. I began preparing the chronology of relevant events in coordination with other *Walker* Counsel and attorneys representing *Walker* Counsel shortly after the May 13 meeting. I also began assisting with preparation of *Walker* Counsel's pre-hearing submission.

- On May 14, 2022, I sent the chronology of relevant events to *Walker* Counsel for their review.
- On May 15, 2022, I participated in another team call with Mr. Ragsdale regarding preparation for the May 20 hearing. I also sent the chronology of relevant events, which we discussed on the May 15 call, to Mr. Ragsdale and senior *Walker* Counsel.
- Also on May 15, 2022, the Q&A document was circulated to counsel for *Walker* Counsel and senior *Walker* Counsel by a member of the *Walker* team. I began assisting with the preparation of that document shortly after receiving it. I also forwarded the document to more junior *Walker* Counsel for their input.
- Between May 15, 2022 and May 19, 2022, I and other senior *Walker* Counsel provided input to the Q&A document and to the pre-hearing submission.
- On May 17, 2022, I participated in a team call with Mr. Ragsdale regarding preparation for the May 20 hearing. We discussed the Q&A document at that meeting.
- On May 18, 2022, I participated in multiple team calls with Mr. Ragsdale regarding preparation for the May 20 hearing.

- On May 19, 2022, I traveled to Alabama for the May 20 hearing, and I participated in in-person meetings with Mr. Ragsdale. During those meetings, we discussed the Q&A document with Mr. Ragsdale. On the evening of May 19, 2022, the Q&A document was circulated to more junior *Walker* Counsel to verify the accuracy of the information in the document.
- My knowledge of "the questions . . . that were actually asked by the court at the May 20, 2022 hearing" is limited to the Panel's statements in open court during the May 20 hearing, including the Panel's description of the questions the Special Master planned to ask junior attorneys in their individual interviews. I also believe I may have inferred general information about certain questions asked of certain witnesses based on a report of the June 17, 2022 status conference and my review of the Panel's July 8, 2022 Order. None of the information or knowledge I have about the questions asked by the Court at the May 20, 2022 hearing came from counsel who testified at that hearing or who are the subject of this proceeding.

21. **Topic 8. With regard to the eighth topic identified in the Panel's July 8, 2022 Order, my knowledge of the "identify of [any] attorney, not included in the style of the original order, whom" I am "aware of being involved**

in any input, recommendation, decision, or strategy regarding any of the subjects referenced above," is as follows:

- I am aware that Shannon Minter from NCLR was involved as part of the *Ladinsky* team.
- I am aware that Josh Block at ACLU had some involvement in 2021 *Walker* strategy and at the beginning of our 2022 *Walker* effort.
- I am aware that Sharon McGowan at Lambda Legal had some involvement in the 2021 and 2022 *Walker* efforts. Sharon McGowan and Camilla Taylor at Lambda Legal also were part of our efforts to prepare for the May 20, 2022 hearing.
- I informed Cooley's pro bono and communications teams of our dismissal of *Walker* and our decision not to refile any case.
- There are several attorneys at Cooley who are working as my counsel in this matter since May 10, 2022, including some who helped with our preparations in advance of the May 20, 2022 hearing.

22. With respect to the Panel's directive that I attest to my compliance with the July 8, 2022 Order and to affirmatively indicate any non-compliance: I have complied with the Panel's July 8, 2022 Order as modified by the Panel's July 25, 2022 Order.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In re* Amie Adelia Vague, *et al.	}	**Case No. 2:22-mc-03977-WKW**

DECLARATION OF VALERIA M. PELET DEL TORO
PURSUANT TO JULY 8, 2022 ORDER

I, Valeria M. Pelet del Toro, declare:

1. I submit this declaration pursuant to the Panel's July 8, 2022 Order in this matter.

2. The matters stated herein are based upon my personal knowledge and are true and complete to the best of my knowledge.[1] To the extent information provided in response to one of the Panel's questions is responsive to other questions,

[1] Pursuant to and in compliance with the Panel's July 25, 2022 Order, I have not disclosed any attorney-client communications in this declaration. Moreover, by submitting this declaration, I do not intend to waive the attorney work product protection as to any materials or communications disclosed herein.

also had the impression that Judge Burke would likely be less receptive to our client's legal claims and the arguments we planned to make, and I believed that other members of the *Walker* team shared that impression.

d. Other than the foregoing, I did not participate in, and have no knowledge of, any action or decision that relates to the coordination of the *Ladinsky* and *Walker* cases.

e. At some point I learned that the *Ladinsky* case had been dismissed, but I did not participate in, and have no knowledge of, any action or decision that relates to the dismissal of the *Ladinsky* case.

13. **Topic 6. With regard to the sixth topic identified in the Panel's July 8, 2022 Order,** I have no participation in or knowledge of "[a]ny and all actions that relate to the decision to file *Eknes-Tucker* in the United States District Court for the Middle District of Alabama."

14. **Topic 7. With regard to the seventh topic identified in the Panel's July 8, 2022 Order, my participation and knowledge relating to "(1) preparation for the hearing in this matter (including circulation of any Q&A document), and (2) the questions expected to be asked or that were actually asked by the court at the May 20, 2022 hearing," are as follows:**

a. On May 10, 2022, co-counsel at Lambda Legal informed me and other attorneys on the Cooley team about the Panel's May 10, 2022 Order initiating this action.

b. On May 11, 2022, I learned that Barry Ragsdale had been retained to represent me and other members of the Cooley team in connection with this action. The following day, I learned that Russell Capone and others working at his direction would also be representing me and other members of the Cooley team in connection with this action.

c. On May 15, 2022, I participated in a phone call with Mr. Capone and a separate teleconference with Mr. Capone and other members of the Cooley team about the May 20, 2022 hearing. I recall discussing with Mr. Capone a potential application for me to be excused from participating in the May 20, 2022 hearing due to a pre-scheduled medical procedure on that day.

d. On May 18, 2022, I was notified by Mr. Capone that I would be excused from participating in the May 20, 2022 hearing in this action due to the pre-scheduled medical procedure. On the same day, I reviewed a copy of the *Walker* Counsel's pre-hearing brief that was submitted to the Panel.

e. On May 19, 2022, I participated in a teleconference with *Walker* Counsel and our attorneys, Mr. Ragsdale, and Mr. Capone. I recall that the subjects included the standard for voluntary dismissal under Rule 41 of the Federal Rules of Civil Procedure and the role of the attorney-client privilege at the May 20, 2022 hearing.

f. At some point during the May 19, 2022 teleconference, co-counsel shared electronically a "Q&A document" with all *Walker* Counsel. The document included some potential topics that we expected might be discussed at the May 20, 2022 hearing, but I do not recall the specifics of that document. I did not review the document in detail, because I had been excused from attending the hearing.

g. I have no knowledge of the questions that were actually asked by the Panel or the Special Master at the May 20, 2022 hearing.

15. **Topic 8. With regard to the eighth topic identified in the Panel's July 8, 2022 Order, my knowledge of "[t]he identity of each attorney, not included in the style of the original order . . . involved in any input, recommendation, decision, or strategy regarding any of the subjects referenced above and the details of each such person's involvement," is as follows:**

a. On April 13, 2022, I identified through web searches a former Judge Thompson clerk who, like me, had attended Yale Law School. I

contacted the former clerk through email and asked how Judge Thompson usually approaches motions to mark cases as related and the process by which such motions are handled in the Middle District of Alabama. The former clerk did not recall ever receiving such a motion while working for Judge Thompson.

b. On the same day, I separately contacted two former law school classmates and asked if they knew anyone who had clerked for Judge Thompson. One of my former classmates knew a former Judge Thompson clerk and relayed my question about how Judge Thompson usually approaches motions to mark cases as related. According to my former classmate, the former clerk did not recall receiving such a motion while working for Judge Thompson. I did not communicate directly with this former clerk.

16. With respect to the Panel's directive that I attest to my compliance with the July 8, 2022 Order and to affirmatively indicate any non-compliance: I have complied with the Panel's July 8, 2022 Order as modified by the Panel's July 25, 2022 Order.

* * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

***In re* Amie Adelia Vague, et al**	)	**Case No. 2:22-mc-03977-WKW**
	)	**(Middle District of Alabama)**

DECLARATION OF CARL S. CHARLES

I, Carl S. Charles, declare:

1. I am providing this *in camera* Declaration as required by the Panel's July 8, 2022 Order in the above referenced proceeding. By doing so, I am not waiving any privilege, including the attorney client privilege and the protections of the attorney work product doctrine. The matters stated herein are based upon my personal knowledge and are true and complete to the best of my recollection.

2. I understand the Panel's July 25, 2022 Order (ECF 41) requires me to disclose work product responsive to the topics in the Panel's July 8, 2022 Order. To comply with that Order, I am, on the advice of counsel, disclosing certain information protected by the work product doctrine in this declaration. To preserve

7. Any knowledge you have that relates to (1) preparation for the hearing in this matter (including circulation of any Q&A document), and (2) the questions expected to be asked or that were actually asked by the court at the May 20, 2022 hearing

46. I recall that shortly after receiving notice of the May 10, 2022 Order initiating *In re Vague*, *Walker* counsel hired Barry Ragsdale to represent us in this proceeding.

47. I recall attending approximately four meetings with Mr. Ragsdale, which occurred over the telephone, Zoom, or in person, prior to the May 20, 2022 hearing.

48. I reviewed drafts of the pre-hearing brief submitted by *Walker* counsel and a timeline created by Cooley and other members of the *Walker* team that I understand was created at Mr. Ragsdale's request to help him prepare for the May 20, 2022 hearing. I also received and reviewed a Q&A document the night prior to the hearing. To my knowledge, the Q&A document, pre-hearing brief drafts, and timeline have never been shared outside of the *Walker* team and our retained counsel.

49. I did not speak to anyone outside of my discussions with Mr. Ragsdale and *Walker* counsel to prepare for the May 20 hearing.

Attestation of Sequestration Order Compliance

83. I attest that I have not discussed with any individuals named in the May 10, 2022 Order the substance of any testimony given by those individuals during the May 20, 2022 hearing, including any questions asked or answers given. I further attest that I have not discussed the contents of my declaration with anyone other than my counsel in this proceeding.

84. Following the status conference on June 17, 2022, I and others on the *Walker* team received notes created by my counsel that contained a description of some of the substance of my May 20, 2022 testimony. Shortly thereafter, we received a second email telling us that those notes were sent in error and asking us to delete them because they inadvertently disclosed some of the substance of my testimony. I have not reviewed those notes since receiving the second email, and I deleted them.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

Dated: August 1, 2022

Atlanta, Georgia

/s/ Carl S. Charles
Carl S. Charles

Exhibit C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE:
AMIE ADELIA VAGUE, et al. CASE NO.: 2:22-mc-3977-WKW

SEALED DOCUMENT

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EVIDENTIARY HEARING

* * * * * * * * * * * * * * * * *

BEFORE THE HONORABLE W. KEITH WATKINS, UNITED STATES DISTRICT JUDGE, THE HONORABLE R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE, and THE HONORABLE JEFFREY U. BEAVERSTOCK, UNITED STATES DISTRICT JUDGE, at Montgomery, Alabama, on Thursday, November 3, 2022, commencing at 9:10 a.m.

* * * * * * * * * * * * * * * * *

APPEARANCES

APPEARING ON BEHALF OF CARL CHARLES, TARA BORELLI, JAMES D. ESSEKS:

Mr. Barry Alan Ragsdale
Attorney at Law
DOMINICK FELD HYDE, P.C.
1130 22nd Street South - Suite 4000
Birmingham, Alabama

travel.

MR. SEGALL: And, Your Honor, I very much appreciate the courtesy of the Court --

JUDGE PROCTOR: We are all glad to do that.

MR. SEGALL: -- in doing that. I would like to say two quick things.

JUDGE PROCTOR: Be glad to hear it.

MR. SEGALL: One is you were kind enough to permit me to read the transcript. And at the beginning of the August 3-4, the parties asked for a continuing objection on the basis of privilege. I would like -- which you granted. You denied, but you denied the objections.

JUDGE PROCTOR: We overruled the objection, but we gave you the right to assert the objection globally on these matters.

MR. SEGALL: Right. And I would like to be treated as having made a similar objection on August 3, 4. And I would also, Your Honor, like for today's purposes to have a continuing objection on the basis of all the privileges that have been mentioned, work product, attorney-client, common interest, joint client, et cetera.

JUDGE PROCTOR: And that's the interesting road we've kind of navigated, it seems, in this matter is we started off with a limited waiver where the parties came in and -- I'm not sure you said this, but other counsel said this -- that we don't have anything to hide, we're going to be cards up, we're going

to explain this decision to you. And I think even -- what I recall was even when Judge Burke convened the initial status conference in Eknes-Tucker, Mr. Doss and Ms. Eagan were prepared to explain to him all the decisions that were made about this.

On the other hand, we certainly understand we've not made you provide us documents, the Q and A sheet, the talking points that Doss was going to use either here or before Judge Burke at that hearing. So we're all right with y'all asserting anything we're not actually saying is work product we're reserving our work product objection. But I thought that there had been a decision to be somewhat candid with the Court about why these decisions were made. Am I missing the boat on my recollection here?

MR. SEGALL: Well, you're correct that I didn't say anything during May 20 at all about that. But if I understand the Court's ruling -- and, of course, we gave declarations. And in those declarations, we've, in my judgment, violated one or more privileges.

JUDGE PROCTOR: Well, you -- I wouldn't say you violated it. I would say there was a limited waiver of the work product privilege, not the attorney-client privilege but the work product privilege. Is that a fair assessment?

MR. SEGALL: Well, we actually preserved it. I mean, in our filing, we say we're doing this without waiving any of those --