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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

AO ALFA-BANK, Plaintiff, v. JOHN DOE, *et al.*, Defendants.	Civil Action No. 2021 CA 000683 2 Judge Heidi Pasichow (*Case is pending in the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Case No. 50-2020-CA-006304-XXXX-MB)*

AO ALFA-BANK'S MOTION TO COMPEL THE DEPOSITION TESTIMONY OF LAURA SEAGO IMPROPERLY WITHHELD AS PRIVILEGED

Plaintiff AO Alfa-Bank ("Alfa Bank"), by and through undersigned counsel, moves this Court to compel the deposition testimony of Laura Seago improperly withheld as privileged. This Court entered an October 1, 2021 order compelling Seago to appear for a deposition within fourteen days. On October 8, 2021, Seago sat for a deposition but defied this Court's order by obstructing Alfa Bank's efforts to obtain relevant information. While Seago went through the mechanics of sitting for her deposition, her counsel deliberately impeded Alfa Bank's discovery efforts by interposing meritless privilege objections at every turn to thwart the examination. Seago's counsel all but conceded that the privilege objections were improper and overbroad, remarking at one point that he did not know the basis for specific assertions of privilege but nevertheless plowing forward and instructing Seago not to answer ***over sixty*** questions. The end result is that Seago refused to answer the overwhelming majority of substantive questions, violating this Court's order by failing to provide information highly relevant to identifying the unknown John Doe defendants in Alfa Bank's underlying suit.

Alfa Bank respectfully asks this Court to compel Seago to provide the deposition testimony that she improperly withheld on the basis of privilege during her October 8, 2021 deposition and

to order Seago to sit for the continuation of her deposition within seven days. Alfa Bank also respectfully asks this Court to impose sanctions against Seago and her counsel for their continued obstruction of Alfa Bank's discovery efforts in defiance of this Court's rulings.

In support of this Motion and the relief sought herein, Alfa Bank respectfully refers this Court to the attached memorandum of points and authorities. A proposed order is also attached.[1]

Dated: October 28, 2021

Respectfully submitted,

/s/ Margaret E. Krawiec

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[1] Alfa Bank opposes Seago's recently filed motion to stay discovery pending appeal and intends to file a brief establishing that Seago's request is groundless. For present purposes, Alfa Bank notes that the Court's October 1, 2021 order has not been stayed and that a "trial court may [] act to enforce an unstayed order, although the order has been appealed." *Stebbins v. Stebbins*, 673 A.2d 184, 190 (D.C. 1996). In any event, this Court retains jurisdiction to grant the present motion to enforce its October 1, 2021 order because this dispute does not affect the issues on appeal. After all, Seago's assertions of privilege ***during*** the deposition have nothing to do with the appeal, which was initiated ***before*** her deposition and concerns the distinct issue whether Seago must appear for her deposition in the first instance. *See id.* ("The rule against trial court action affecting matters on appeal is grounded not in metaphysical notions regarding transfer of power, but on practical considerations concerning efficient judicial administration. It is clear for example that a party may seek disposition in the trial court of *other* matters which do not result in revocation or alteration of the judgment on appeal.").

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF AO ALFA-BANK'S MOTION TO COMPEL THE DEPOSITION TESTIMONY OF LAURA SEAGO IMPROPERLY WITHHELD AS PRIVILEGED

Openly defying this Court's rulings, Laura Seago continues her campaign to obstruct Alfa Bank's lawful discovery efforts through a fundamental distortion of basic civil discovery practice. Over seven months ago, Seago improperly walked out of her first deposition after only two preliminary questions and over the strenuous objections of Alfa Bank. She subsequently invented a justification for cutting the examination short, citing purported jurisdictional defects first identified four days ***after*** her deposition. This Court rejected those *post hoc* jurisdictional arguments, along with Seago's varying alternative objections to sitting for a deposition; held that Seago improperly terminated her first deposition; and ordered Seago to provide deposition testimony within fourteen days of the Court's October 1, 2021 order.

Seago responded to the Court's ruling by doubling down on her refusal to provide substantive deposition testimony and, in the process, violating the October 1 order. Rather than disclosing information related to Alfa Bank's underlying lawsuit, as this Court directed, Seago blocked virtually all substantive examination through frivolous privilege assertion after frivolous privilege assertion. Indeed, Seago refused to answer a staggering ***sixty-eight*** questions on the basis

that her testimony would reveal privileged information. Seago's counsel all but conceded that Seago's aim was to waylay Alfa Bank's discovery efforts by all possible means, admitting that he could not identify a basis for many of the privilege objections but nevertheless instructing Seago not to respond to substantive questioning. Counsel's reticence to provide the detail necessary for Alfa Bank and this Court to assess Seago's privilege assertions is unsurprising—because, quite simply, no evidence supports Seago's categorical objection to disclosing relevant information. What the record makes plain, instead, is that Seago's conduct is a transparent ploy to delay providing Alfa Bank with information critical to its efforts to identify and name the unknown defendants in its underlying litigation. Presumably the relevant information that Seago possesses is so damaging to the professional reputations of her and her former employer, Fusion GPS ("Fusion"), that Seago has made the calculated choice to violate a court order to shield that evidence from Alfa Bank.

Alfa Bank respectfully asks this Court to compel Seago to provide testimony improperly withheld as privileged and to sit for the continuation of her deposition within seven days. Alfa Bank also respectfully requests that the Court sanction Seago and her counsel for their deliberate and persistent obstruction of Alfa Bank's discovery efforts and their violation of this Court's October 1 order. Seago now has disregarded her obligations to comply with Alfa Bank's subpoena for deposition testimony on two separate occasions. The record amply warrants the imposition of sanctions, which would have the additional benefit of deterring Seago and her counsel from continuing their misconduct and defiance of this Court's rulings.[1]

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[1] Alfa Bank also requests that it be afforded an additional two hours to conduct the deposition of Seago, for a total of nine hours of examination time. Seago's counsel interposed speaking objections and privilege assertions at every turn, derailing the legitimate questioning of Alfa Bank's counsel and forcing pointless colloquies about the bases for the objections. The Court should not reward Seago for her gamesmanship and instead should add two *(cont'd)*

BACKGROUND[2]

A. Fusion and Seago Peddle the False Server Allegations to the Media.

As this Court is aware, Alfa Bank's underlying Florida litigation involves claims against the unknown defendants who perpetrated a series of highly sophisticated cyberattacks against Alfa Bank. The defendants intended to create the illusion of a covert communications channel between Alfa Bank and the Trump Organization in the months leading up to and following the 2016 U.S. Presidential election ("server allegations"). Seago's employer, Fusion GPS ("Fusion"), reviewed and peddled the server allegations as part of its opposition research work for *The Washington Free Beacon* and, later, Perkins Coie, LLP, who represented the Democratic National Committee ("DNC") and the Hillary for America Campaign Committee ("HFACC").[3]

Significantly, Fusion and its clients have confirmed that Fusion's work on the server allegations constituted political opposition research unrelated to legal advice. Fusion principal Glenn Simpson and representatives of HFACC, including campaign chair John Podesta, testified under oath that Fusion's engagements with the *Washington Free Beacon* and Perkins Coie involved conducting political "opposition research" on Donald Trump.[4] Fusion's principals in fact

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hours of examination time to the two-and-a-half hours that remained when Alfa Bank concluded its questioning for the day and left the deposition open.

[2] Alfa Bank incorporates the more fulsome discussion of the background of this dispute from its Motion to Compel the Re-Opening of Deponent Laura Seago's Deposition and it supporting memorandum of law, filed April 1, 2021, and its Memorandum of Points and Authorities in Opposition to Laura Seago's Motion to Quash Second Subpoena for Pre-Service Deposition Based on Lack of Subject Matter Jurisdiction and Other Grounds and/or for a Protective Order, filed August 27, 2021. Unless indicated, internal citations and quotation marks are omitted and any emphasis is added.

[3] *See* Ex. 1, Glenn Simpson & Peter Fritsch, *Crime in Progress*, 18, 54, 56-57 (2019) (excerpts).

[4] *See* Ex. 2, Interview of Glenn Simpson by the House of Representatives Permanent Select Committee on Intelligence, at 6-7 (Nov. 14, 2017) (stating Fusion was hired to do political opposition research by the *Washington Free Beacon*); *see also id.* at 13 (stating Fusion was hired by Perkins Coie to perform opposition research) (excerpts); Ex. 3, Interview of John Podesta by the House Permanent Select Committee on Intelligence, at 17 (Dec. 4, 2017) (excerpt).

(cont'd)

have disavowed any legal nexus to their engagement, emphasizing that it encompassed "political work."[5] Fusion's involvement with the server allegations thus was consistent with its stated mission when assisting political campaigns—namely, "to expose an opponent's vulnerabilities, provide source material for the media, and feed attack ads."[6] Fusion carried out its work without direction from Perkins Coie; Fusion itself was "the architect[] of the research" and "made most of the decisions about what to look for and where to look."[7]

Fusion's primary role was to shop the knowingly false server allegations to the media to advance the interests of Fusion's political clients.[8] After Seago located and retrieved the data and analysis posted by "Tea Leaves,"[9] a computer researcher working with Rodney Joffe and others,[10] Seago's supervisor Peter Fritsch forwarded that information to several reporters under subject lines such as "important" and "dude this huge."[11] Fritsch emailed Mark Hosenball, a journalist at *Reuters*, on October 18, 2016 and wrote "do the fucking alfa bank secret comms story. it is hugely

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5 Ex. 1 at 57 (stating that "[p]olitical work like [the opposition research for Perkins Coie] can be perilous"); *see also id.* at 70 (discussing the "political context" of the engagement with Perkins Coie); Ex. 2 at 6 (Simpson testified: "And so the conventional term [opposition research] is usually people who work on campaigns who are looking for information that will be useful in debates or other election related activities is my general historical understanding of the term.").

6 Ex. 1 at 31.

7 Ex. 2 at 22.

8 Ex. 4, Indictment of Michael Sussman (Sept. 16, 2021) (hereinafter "Sussmann Indictment") at ¶ 33. The indictment refers to Fusion as "U.S. Investigative Firm," Rodney Joffe as "Tech Executive-1," and Marc Elias as "Campaign Lawyer-1." *See, e.g.*, Ex. 5, Charlie Savage and Adam Goldman, "Trump Server Mystery Produces Fresh Conflict," *New York Times* (Sept. 30, 2021) (identifying Joffe, Fusion and Elias in relation to the Sussmann indictment). When counsel for Fusion was confronted with this assertion by Alfa Bank's counsel, he did not refute it. Ex. 6, Dep. of Laura Allison Seago 90:1–92:18 (Oct. 8, 2021) (hereinafter "Seago Dep."); *see also, e.g.*, *id.* 150:1–10.

9 Ex. 6, Seago Dep. 199:21–200:21.

10 *See* Ex. 4, Sussmann Indictment ¶ 16.

11 *See, e.g.*, Ex. 7, Email from P. Fritsch to M. Isikoff (Oct. 5, 2016 5:21 p.m.) at DEFS0010335 (Fritsch emailing the server allegations to Michael Isikoff at *Yahoo! News*); Ex. 8, Email from P. Fritsch to M. Mosk (Oct. 5, 2016 5:36 p.m.) at DEFS0010266 (Fritsch emailing the server allegation to Matthew Mosk at *ABC News*); Ex. 9, Email from P. Fritsch to T. Hamburger (Oct. 5, 2016 5:14 p.m.) at DEFS0010337 (Fritsch emailing the server allegations to Tom Hamburger at the *Washington Post*).

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important."[12] When Hosenball explained that his colleagues "cannot satisfy themselves about the authenticity of the key data," Fritsch expressed frustration and told Hosenball to call David Dagon, a computer researcher at Georgia Tech who has been publicly identified as one of the researchers working with Joffe on the server allegations.[13] Personnel at Fusion, including Seago, also met with Franklin Foer, a journalist at *Slate*, to discuss the server allegations prior to the publication of Foer's October 31, 2016 article about those allegations.[14] The day before publication, Fritsch told Foer it was "time to hurry," and Foer responded by sending a draft of the article.[15] Fusion personnel also exchanged a number of emails with Foer pertaining to the server allegations before and after his October 31 article was published.[16] Notably, the recent indictment of former Perkins Coie attorney Michael Sussmann describes Fusion's media campaign and its broader conspiracy with Sussmann, Joffe, and Elias.[17]

In addition to disseminating the fabricated server allegations to the media, Fusion drafted a white paper on Alfa Bank that Sussmann provided to the Federal Bureau of Investigation ("FBI") and computer researchers analyzing the server allegations.[18]

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[12] Ex. 10, Email from P. Fritsch to M. Hosenball (Oct. 18, 2016 11:01 a.m.) at DEFS0000344.

[13] *See id.*, Email from P. Fritsch to M. Hosenball (Oct. 18, 2016 4:02 p.m.); Ex. 5 (identifying David Dagon as "Researcher-2" in the Sussmann Indictment).

[14] Ex. 6, Seago Dep. 45:13–46:6.

[15] Ex. 11, Email from P. Fritsch to F. Foer (Oct. 30, 2016 6:31 p.m.) at DEF0000325; *Id.* Email from F. Foer to P. Fritsch (Oct. 30, 2016 10:37 p.m.) at DEFS0000323.

[16] *See, e.g.*, Ex. 12, Email from F. Foer to P. Fritsch (Oct. 22, 2016 3:13 p.m.) at DEFS0011819 (stating he is excited about the article and asking Fusion for help connecting him with the source); Ex. 13, Email from P. Fritsch to F. Foer (Oct. 28, 2016 4:15 p.m.) at DEFS0011818; Ex. 14, Email from P. Fritsch to F. Foer (Nov. 3, 2016 3:01 p.m.) at DEFS0011814 (subject line "tea leaves").

[17] *See generally,* Ex. 4.

[18] Ex. 4, Sussmann Indictment ¶¶ 26(b), 27(f)(iii).

B. The Court Rejects Seago's Obstruction of Alfa Bank's Discovery Efforts.

In its October 1 order, the Court roundly rejected Seago's obstruction of Alfa Bank's efforts to obtain lawful discovery. The Court first found that Seago wrongly terminated her first deposition. Order (Oct. 1, 2021) at 9–10. The Court then dismantled each of Seago's objections to sitting for a deposition, explaining that Alfa Bank had served a lawful subpoena for deposition testimony and was entitled to the responsive information possessed by Seago. *Id.* at 7–8. The Court ordered Seago to sit for a deposition within fourteen days of the order's issuance. *Id.* at 14.

C. Seago Thwarts Substantive Questioning at Her Deposition Through Improper Privilege Assertions.

Following the Court's wholesale rejection of her objections and command to testify at a deposition (for the second time) within fourteen days, Seago sat for her deposition on October 8, 2021. But Seago's conduct at the deposition violated the Court's order in letter and spirit. Seago deployed improper assertions of privilege as purported justification for refusing to answer ***over sixty*** questions, blocking Alfa Bank's ability to obtain critical information as the Court had ordered.

1. Internal Fusion Communications and Work Performed for Fusion

Throughout her deposition, Seago refused to testify about internal communications with her colleagues at Fusion or work that she performed for Fusion. Seago's position is breathtaking in scope: she refused to answer all questions related to communications with or information received by Fusion employees concerning Alfa Bank over the entire period that Fusion was engaged by Perkins Coie. [19] And Seago invoked this capacious interpretation of privilege while

[19] *See* Ex. 6, Seago Dep. 43:4–44:1 ("MR. LEVY: Inasmuch as the answer would cover a period of time under the engagement that's going to be privileged. If you recall communications with people at Fusion outside the period of the engagement about Alfa, you can answer the question."); *id.* at 29:6-12 ("MR. LEVY: If [Seago] had access to something that was through an attorney *or an attorney's contractor* like Fusion GPS under an engaged piece *(cont'd)*

conceding that the communications at issue were not in the presence of an attorney. Seago deployed this privilege as the basis for refusing to answer questions asking for basic information such as whom she "discussed Alfa-Bank with at Fusion";[20] how she found the server allegations on the internet in the fall of 2016; and whether anyone directed her to look for the posted information.[21] In this way, Seago blocked Alfa Bank from eliciting testimony touching on any work performed by Fusion related to Alfa Bank in 2016.[22]

2. Communications with Rodney Joffe

Seago also refused to testify regarding communications with Rodney Joffe, a non- attorney. Seago admitted that Joffe was not a client of Fusion and that she was not aware of any agreements regarding confidentiality or shared privileged with Joffe.[23] Seago's counsel also conceded that Joffe is not a party to the purported (and unproduced) *Kovel* letter agreement that forms the basis of Seago's assertions of privilege over communications regarding Fusion's engagement by Perkins Coie.[24] Remarkably, Seago claimed that communications with Joffe were privileged pursuant to a common-interest agreement, even though neither she nor her counsel could provide basic facts about the necessary predicates of that privilege:

> *MR. KELLY: So you're -- there's a common interest agreement between Rodney Joffe and Fusion and the other of Fusion's clients?*
> *MR. LEVY: For that meeting, yes.*
> *MR. KELLY: Is there a signed agreement that you're aware of?*
> *MR. LEVY: Not that I'm aware of.*
> *MR. KELLY: And has Perkins Coie relayed that -- this common interest agreement to you?*
> *MR. LEVY: I just told you I'm not aware of a written agreement, but there was an agreement.*
> *MR. KELLY: So what is your understanding of when this common interest agreement was entered into?*

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of work, it's going to be privileged."); *see also id.* 28:8 29:1 (broadly claiming privilege over any information Seago received through the course of her work for Fusion while it was engaged by Perkins Coie).

[20] Ex. 6, Seago Dep. 38:7–12.

[21] *See, e.g.*, Ex. 6, Seago Dep. 65:19–66:6; 76:1–77:1; 77:7–18.

[22] *See* Ex. 6, Seago Dep. 130:3–9.

[23] Ex. 6, Seago Dep. 100:2–9. Seago's counsel later instructed her not answer whether she was aware of "any privilege agreement with Rodney Joffe and Fusion GPS." *Id.* at 108:18–109:4.

[24] Ex. 6, Seago Dep. 103:14–18 (stating that Joffe was not a party to the purported *Kovel* letter).

MR. LEVY: I don't know.
MR. KELLY: And what is the purpose of the common interest?
MR. LEVY: I -- to -- I don't know.
MR. KELLY: What is the common interest?
MR. LEVY: I'm not sure except to – except to discuss confidential material that was of interest to both clients, here was the server communications.

Ex. 6, Seago Dep. 100:18–101:17.

Seago invoked this contrived privilege to withhold testimony regarding, among other things, meetings with Joffe, emails with Joffe, data acquired by Joffe, and discussions regarding Joffe's company.[25]

3. Communications with "Tea Leaves" and Other Third Parties

Seago stretched her privilege assertions even further by claiming privilege over communications with other third parties with no discernible relationship to her or Fusion, including communications with individuals she claims not to know and people whose names Seago would not even provide.

Seago withheld information as to communications with "Tea Leaves." In addition to shielding the substance of communications with the "Tea Leaves" encrypted email account[26] (which themselves would not be privileged), Seago withheld testimony as to whether she even communicated with "Tea Leaves" at all.[27] Seago refused to provide this testimony notwithstanding that "Tea Leaves" was not a client of Perkins Coie or member of the purported *Kovel* letter, and that Seago supposedly did not even know "Tea Leaves'" identity.[28]

Seago likewise refused to provide testimony as to whether she spoke to any computer scientists, asserting a blanket privilege over any "communications with computer scientists under

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[25] *See, e.g.*, Ex. 6, Seago Dep. 103:20–104:2; 108:6-10; 170:17–171:11; 174:7-21; 105:11–17.

[26] Ex. 6, Seago Dep. 201:4–19.

[27] Ex. 6, Seago Dep. 116:9-14; 118:10–15.

[28] Ex. 6, Seago Depo. 116:9–118:15.

(cont'd)

the engagement" related to the server allegations.[29] Seago's counsel went so far as to instruct her not to answer whether she shared information from computer scientists with journalists whom counsel did not claim were parties to any privileged arrangement.[30] Seago's basis for withholding information was merely that her employer, Fusion, was engaged by Perkins Coie.[31]

4. Non-Privileged Information Regarding the Privilege Claims

Seago also withheld basic information that would allow Alfa Bank (and this Court) to assess her claims of privilege. While Seago time and again raised claims of work-product protection, her counsel repeatedly refused to provide any information related to the anticipated litigation that purportedly served as the basis for the claims. When Seago's counsel finally agreed to offer some semblance of an explanation, he still would not identify the specific litigation. Instead, he read from a brief submitted to a federal court in an unrelated case to which neither Seago nor Alfa Bank is a party and suggested that Perkins Coie retained Fusion because Perkins Coie anticipated amorphous defamation-related claims stemming from unspecified statements that might be made at an unknowable point in time.[32] Seago's counsel also repeatedly referenced the *Kovel* letter between Fusion and Perkins Coie, but Seago has not produced that letter and she and her counsel have not provided any description of the terms of the supposed arrangement.[33] Notably, Seago herself testified that she did not recall having been informed that her relevant work was done in anticipation of litigation. [34] Nor could she recall having been issued a litigation

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[29] Ex. 6, Seago Dep. 49:10–50:15.

[30] Ex. 6, Seago Dep. 51:3–52:8.

[31] *See, e.g.*, Ex. 6, Seago Dep. 50:8–15.

[32] *See* Ex. 6, Seago Dep. 83:15–84:12.

[33] Ex. 6, Seago Dep. 102:21–103:4.

[34] Ex. 6, Seago Dep. 84:14–21; 30:6–8.

(cont'd)

preservation notice in 2016, as she doubtless would have been had litigation actually been anticipated.[35]

Seago similarly refused to provide the details necessary to assert (and assess) her claims of attorney-client privilege. For example, she refused to answer whether she ever communicated with an attorney about the server allegations or who instructed her that she was performing work on behalf of a law firm.[36] Seago also refused to disclose the identities of Fusion personnel with whom she spoke about the server allegations, the identities of third parties with whom she communicated, whether she discussed certain information with third parties, and whether certain communications even happened.[37]

ARGUMENT

A party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." D.C. Super. Ct. R. Civ. P. 26(b)(1). If a deponent "fails to answer a question asked under Rule 30 or 31," the party seeking discovery may move for an order compelling an answer. D.C. Super. Ct. R. Civ. P. 37(a)(3)(B). A deponent who withholds information on the basis of privilege "bears the burden of demonstrating the applicability of any asserted privilege" and "must establish the claimed privilege with reasonable certainty." *Center for Pub. Integrity v. U.S. Dept. of Defense*, 486 F. Supp. 3d 317, 330 (D.D.C. 2020).[38] To carry her burden, the deponent must "adduce competent evidence in support of each of the essential elements necessary to sustain a claim of privilege" and "offer more than just conclusory

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[35] Ex. 6, Seago Dep. 84:14–21; 30:6–8.

[36] *See* Ex. 6, Seago Dep. 33:7–34:11; 41:14–21.

[37] *See, e.g.*, Ex. 6, Seago Dep. 43:4–44:1; 123:16–21; *see also id.* at 136:16–137:18 (withholding testimony as to discussions with third parties regarding the identification of the data underling the server allegations).

[38] D.C. Superior Court Rule 37 "is patterned on Rule 37 of the Federal Rules of Civil Procedure" and D.C. courts "construe our local rule 'consistently' with the federal rule even though it differs from that rule in certain respects." *Edwards v. Climate Conditioning Corp.*, 942 A.2d 1148, n.6 (D.C. 2008).

statements, generalized assertions, and unsworn averments of its counsel." *Id.* at 331.

Seago relied on the attorney-client privilege and work-product doctrine when refusing to answer ***over sixty*** questions at her deposition. She cannot satisfy her burden to establish that either privilege applies to any testimony that she withheld.

I. Seago Cannot Establish that the Attorney-Client Privilege Protects the Withheld Testimony.

Seago cannot establish that the attorney-client privilege protects the testimony that she withheld, for at least two fundamental reasons. First, the testimony does not qualify for protection because it does not relate to the provision of legal advice. Second, even assuming that the information at one point was privileged (and it was not), Seago, Fusion, and Perkins Coie have waived that privilege through disclosure to third parties.

A. Seago's Withheld Testimony Does Not Relate to the Provision of Legal Advice.

As a threshold matter, the testimony withheld by Seago is not covered by the attorney-client privilege for the simple reason that neither Seago nor Fusion was assisting in the provision of ***legal*** advice. Because she and the other relevant Fusion personnel are not practicing lawyers, Seago can sustain her assertions of the attorney-client privilege only to the extent that the privilege extends to third parties. And in those limited circumstances, the "critical factor" is whether the communication at issue was made "*in confidence* for the purpose of obtaining *legal* advice *from the lawyer.*" *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1514 (D.C. Cir. 1993) (emphasis in original). As Simpson and members of HFACC testified, Fusion was retained to perform political opposition research, not to assist in providing legal advice. *See supra* pp. 3–5. And an attorney's "advice on political, strategic, or policy issues, valuable as it may [be]," is "not [] shielded from disclosure by the attorney-client privilege." *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998); *see also Blumenthal v. Drudge*, 186 F.R.D. 236,

243 (D.D.C. 1999) (denying claim of privilege over communication with purported "litigation consultant" who provided "media, journalistic and political consulting experience" to defendant's attorney). Because Fusion was retained to provide opposition research and not legal advice, the attorney-client privilege does not apply to Seago's communications.

And, indeed, that Fusion's (and Seago's) work related to the server allegations performed on behalf of *The Washington Free Beacon* (a nonlegal entity) was materially identical to that done on behalf of Perkins Coie and the DNC underscores that the attorney-client privilege does not shield testimony related to that work. *See Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (rejecting privilege claims of public relations firm retained by a law firm on behalf of a client when the public relations firm "d[id] not appear to have been performing functions materially different from those that an ordinary public relations firm would have performed if they had been hired directly by [the law firm's client], instead of by [the law firm]").[39]

B. Any Putative Privilege Has Been Waived Through Disclosure to Third Parties.

Even if Seago could establish that her withheld testimony satisfies the standard for asserting the attorney-client privilege (and she cannot), that privilege has been waived through Fusion's and Perkins Coie's widespread dissemination of putatively privileged material to non-lawyers, including the media. *See supra* pp. 4–5. Communications shared with third parties, of course, are not privileged. *See, e.g., Mead Data Cent., Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977) ("If the information has been or is later shared with third parties, the privilege does not apply."); *Logan v. Oliver*, 96 A.2d 516, 517 (D.C. 1953) ("[C]ommunications made in the presence of a third party or made to an attorney for the purpose of being conveyed by

[39] Simpson admitted under oath that Fusion's work for HFACC was a continuation of the work performed for *The Washington Free Beacon*. *See, e.g.*, Ex. 15, Interview of Glenn Simpson by the Senate Judiciary Committee, 74 (Aug. 22, 2017) (stating that Fusion "continue[d] doing opposition work on Candidate Trump" when it switched clients to Perkins Coie) (excerpt); Ex. 2 at 12–13.

him to a third party are not confidential and therefore not privileged."). And when a person waives privilege through the disclosure of putatively privileged material to third parties, that waiver applies not just to a document or communication but to the entire subject matter of the communication. *See Banneker Ventures LLC v. Graham*, 253 F. Supp. 3d 64, 74 (D.D.C. 2017) ("[W]aiver of the attorney-client privilege for a document is not confined to that document alone, but extends to all other documents involving the same subject matter as well."); *see also SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997) (stating that courts adhere to a "strict rule on waiver of privileges," "[i]f the holder wishes to preserve its privilege, it must treat the confidentiality ... like jewels–if not crown jewels," and "the holder must zealously protect the privileged materials, taking all reasonable steps to prevent their disclosure."). In light of Perkins Coie's and Fusion's intentional and widespread disclosure of information related to the false server allegations and the resulting subject-matter waiver, Seago cannot broadly claim privilege over testimony regarding the server allegations and her work at Fusion.

Contrary to the scattershot musings of Seago's counsel, the supposed *Kovel* letter engagement between Fusion and Perkins Coie does not extend the attorney-client privilege to cover internal communications at Fusion and communications with third parties. First, Seago has provided no evidence of a contemporaneous *Kovel* letter, dooming her argument at the outset. Nor has Seago offered support for the claim that any privilege conferred by a *Kovel* letter (if it exists) extends to the political opposition research work that Fusion was conducting. Second, even assuming that such a letter exists, it (like all *Kovel* agreements) must be construed narrowly. *Kovel* agreements do not, as Seago appears to suggest, automatically cover all communications between a lawyer and an expert, or that expert and third parties. Instead they are narrowly cabined to allow a client or attorney only to share a ***client's*** information with a non-attorney expert, such as an

accountant, so that the information can be translated or interpreted in a manner to allow the attorney to provide legal services to a client. *See United States v. Ackert*, 169 F. 3d 136, 139-40 (2d Cir. 1999); *see also Calvin Klein Trademark Trust*, 198 F.R.D. at 54 ("[T]he possibility that communications between [a retained public relations firm] and [a law firm] may help the latter to formulate legal advice is not in itself sufficient to implicate privilege: the privilege protects communications between a client and an attorney, not communications that prove important to an attorney's legal advice to a client."). A *Kovel* arrangement could not cover Seago's work because Fusion did not receive any information from the client but instead was researching new information that the client did not possess. *See id.; see also Ackert*, 169 F.3d at 139-40 (rejecting *Kovel* arguments when client's counsel sought information from the accountant that the client did not possess). Third, any *Kovel* agreement would apply to communications between HFACC, Perkins Coie, and Fusion. Contrary to Seago's apparent position, a *Kovel* arrangement cannot be co-opted to permit Fusion indiscriminately to extend the privilege to cover internal communications not discussing client information and to communications with third parties. *See Guo Wengui v. Clark Hill, PLC*, 338 F.R.D. 7, 13 (D.D.C. 2021) ("[T]he *Kovel* doctrine must be applied narrowly lest the privilege be construed to engulf 'all manner of services' that should not be summarily excluded from the adversary process.") (quoting *Linde Thomson*, 5 F.3d at 1514–15)).

Nor can Seago rely on a purported common-interest agreement to shield testimony related to communications with Joffe. The disclosure of information to Joffe waived any purported attorney-client privilege that otherwise protected that material. First, Seago's failure to establish that any information exchanged with Joffe was privileged in the first instance precludes the assertion of a common-interest privilege, which "presupposes the existence of an otherwise valid

privilege." *Minebea Co. v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005). Second, Seago has not established that the information shared with Joffe was "disclosed pursuant to a common legal interest *and* pursuant to an agreement to pursue a joint defense strategy." *Id.* Seago's counsel's admission that Joffe did not enter into a written common-interest agreement, Ex. 6, Seago Dep. 100:18–101:17, seriously undermines Seago's reliance on the common-interest privilege. *Minebea*, 228 F.R.D. at 16 ("Without a written agreement, the party's burden of proving that a statement was made in the common interest will undoubtedly be more difficult."). And her counsel's failure to provide any meaningful facts to substantiate the purported agreement—including the date, purpose, or common interest—dooms her ability to meet the governing standard. *See* Ex. 6, Seago Dep. 100:18–101:17. Finally, because Seago and her counsel have not identified any common *legal* interest, Seago necessarily has failed to establish that "specific communications at issue were designed to facilitate a common legal interest." *Minebea*, 228 F.R.D. at 16.[40]

II. Seago Cannot Establish that the Work-Product Doctrine Protects the Withheld Testimony.

The work-product doctrine protects certain materials that were "prepared in anticipation of litigation or for trial." D.C. Super. Ct. R. Civ. P. 26(b)(3)(A). Seago has failed to establish that the work-product doctrine protects her withheld testimony, for three fundamental reasons.

First, Seago has not established that there was cognizable "anticipation of litigation." Her inchoate and vague allusions to hypothetical future defamation suits arising out of unspecified statements are not sufficient, as "[g]eneralized steps to avoid non-specific litigation are not

[40] Even if some of the testimony withheld by Seago is covered by the attorney-client privilege (and it is not), she still "has no right to decline to identify the privileged communications" and "at least must describe the parties to the communications, the dates on which communications occurred and their general subject matter." *Blumenthal*, 186 F.R.D. at 242–43. Her refusal to provide this information is unjustifiable.

accorded work product protection." *Chen-Oster v. Goldman, Sachs & Co.*, 293 F.R.D. 547, 553 (S.D.N.Y. 2013). Further, "[w]hile legal risks may ripen into litigation, not all risk management qualifies as anticipation of litigation." *Id.* (collecting cases). The record in fact undercuts Seago's *post hoc* claim of work-product protection. For one thing, Fusion's use of its work product "for a range of non-litigation purposes," including widespread dissemination to the media, "reinforces the notion that it cannot be fairly described as prepared in anticipation of litigation." *Guo Wengui*, 338 F.R.D. at 12; *see also Calvin Klein Trademark Trust*, 198 F.R.D. at 55 (rejecting work product assertions "because the purpose of the [work product] rule is to provide a zone of privacy for strategizing about the conduct of litigation itself"). For another, Seago conceded that she could not recall having been informed that her work was performed in anticipation of litigation or instructed to preserve documents during the relevant time period, indicating either that there was no anticipated litigation or that Fusion and Seago deliberately violated their preservation obligations. *See supra* pp. 9–10; *see also Kurtiev v. Shell*, No. 15-cv-1839 (EGS), 2020 WL 2838523, at * 15 (D.D.C. June 1, 2020) (stating that the "duty to preserve arises when litigation is reasonably foreseeable" and that a party has "an obligation to preserve and also to not alter documents it knew or reasonably should have known were relevant to the . . . litigation").

Second, Seago has failed to establish that the research that Fusion performed for the DNC and HFACC "would not have been produced in the absence of litigation." *See Guo Wengui*, 338 F.R.D. at 13. The record in fact suggests the opposite, as Fusion was performing non-privileged political opposition research of the type normally performed for electoral campaigns. Surely the entire point of obtaining this research was to prevail at the polls, not in the courthouse. *See id.* at 10 (explaining that the work-product doctrine does not apply "[w]here a document would have been created 'in substantially similar form' regardless of the litigation.'" (quoting *FTC v.*

Boehringer Ingelheim Pharms., Inc., 778 F.3d 142, 149 (D.C. Cir. 2015)).

Third, any privilege claim based on the work-product doctrine was waived through Fusion's vigorous campaign to disseminate all relevant information to the media. *See supra* pp. 4–5. While sharing work product with third parties does not always waive privilege, disclosure of otherwise privileged materials to the media "is inconsistent with the maintenance of secrecy from the disclosing party's adversary" and thus fatal to the privilege. *United States v. All Assets Held at Bank Julius Baer & Co.*, 315 F.R.D. 103, 109 (D.D.C. 2016).[41]

[41] Alfa Bank also requests that the Court compel Seago to answer questions related to Special Counsel John Durham's investigation. Improperly claiming grand jury secrecy, Seago refused to disclose whether she or anyone else at Fusion had been contacted by the Special Counsel's office or produced any documents. Ex. 6, Seago Dep. 259:2–6; 260:2–8. Of course, whether Seago or Fusion was contacted by or produced documents to the Special Counsel would not fall within the bounds of grand jury secrecy, which applies only to "what is said or takes place in the grand jury room." *In re Tucker*, 689 A.2d 1214, 1217 (D.C. 1997). In any event, the rules covering grand jury secrecy do not impose nondisclosure obligations on witnesses like Fusion and Seago.

CONCLUSION

For the foregoing reasons, Alfa Bank respectfully requests that the Court grant Alfa Bank's Motion, order Seago to provide the testimony improperly withheld as privileged, and afford Alfa Bank two additional hours of examination time. Alfa Bank also respectfully asks this Court to impose sanctions on Seago and her counsel for their persistent obstructive misconduct.

Dated: October 28, 2021

Respectfully submitted,

/s/ Margaret E. Krawiec

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RULE 5 CERTIFICATE

I, Margaret E. Krawiec, hereby certify that the following discovery has occurred as of the date of this filing:

1. Plaintiff AO Alfa-Bank ("Plaintiff" or "Alfa Bank") has issued over forty third-party subpoenas for document production to individuals and entities located in fifteen different jurisdictions in the United States. The vast majority of these subpoenas have been served and the remainder are in the process of being served. Service of a number of these subpoenas has been hampered by court interruptions or witness unavailability because of the COVID-19 pandemic.

2. Plaintiff has received documents pursuant to third-party subpoenas for document production from over twenty individuals and entities.

3. Plaintiff has issued third-party subpoenas for depositions of over twenty individuals, the majority of whom have been served.

4. As described in court filings in the underlying Florida action, Plaintiff has been diligently working to identify the John Doe defendants and serve them with process. Plaintiff has thrice presented these efforts to the Florida court in connection with motions seeking an extension of time to serve process on the John Doe defendants, noting in particular that Plaintiff has obtained and served numerous subpoenas, diligently negotiated with third parties who have been served with subpoenas, and received substantial document productions furthering its efforts to identify and locate the John Doe defendants. In this regard, Plaintiff has attempted to move this matter forward as expeditiously as possible while navigating complexities posed by the various courts and jurisdictions in which the subpoena recipients reside and working through the challenges posed by COVID-19. In light of these efforts, the Florida court has granted each of Plaintiff's motions for an extension of time to serve process on the John Doe defendants.

RULE 37 CERTIFICATE

I, Margaret E. Krawiec, hereby certify that, in accordance with Rule 37 of the D.C. Superior Court Rules of Civil Procedure, counsel for AO Alfa-Bank ("Alfa Bank") made a good-faith effort to secure the requested discovery, including through a meeting with Laura Seago's counsel. Throughout the October 8, 2021 deposition of Seago, counsel for Alfa Bank engaged in discussion with Seago's counsel regarding the deposition testimony being withheld and the basis for counsel's instruction not to provide the deposition testimony at issue. Counsel for Alfa Bank also informed Seago's counsel that Alfa Bank would file this motion and confirmed that Seago opposed the motion and would not consent to providing the withheld testimony.

With Alfa Bank's good-faith efforts rebuffed, including a face-to-face discussion, Alfa Bank submitted this motion to the Court.

/s/ Margaret E. Krawiec
Margaret E. Krawiec

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Motion to Compel the Deposition Testimony of Laura Seago Improperly Withheld as Privileged electronically using the Court's case filing system, CaseFileXpress, which will send notification of such filing to all counsel of record.

/s/ Margaret E. Krawiec
Margaret E. Krawiec