

#### **4. An opinion from the U.S. Court of Appeals for the Fifth Circuit affirming an order requiring the Appellants to bolster their deficient privilege logs that asserted over 30,000 claims of privilege after a filter team with the DOJ reviewed and identified documents for disclosure.**

In *United States v. Fluitt*, 99 F.4th 753 (5th Cir. Apr. 24, 2024), a panel of the U.S. Court of Appeals for the Fifth Circuit, in an opinion authored by U.S. Circuit Judge James L. Dennis, addressed an appeal from a district court order granting a motion to compel, based on the determination that a nonparty's privilege logs failed to adequately substantiate its assertions of attorney work product protection and common interest privilege.

In this action regarding allegations of fraud and kickbacks related to genetic testing services provided to Medicare beneficiaries, the government executed search warrants at laboratories allegedly operated by nonparty Appellants as part of a nationwide investigation into Defendant's company. *Id.* at 758. The government copied several terabytes of data from the nonparty Appellants, some of which the government determined were material to Defendant's defense.

The government established a "filter team" to review the materials seized in its investigation and identify any that might be privileged. The filter team's review was governed by a protocol order, which established a multistep process for notifying a nonparty that it might have a claim of privilege and then adjudicating that claim. According to the protocol order, the filter team was "required to segregate any material potentially subject to a claim of privilege." If the potential privilege claim belonged to someone other than Defendant, the filter team was mandated to notify the nonparty claimant and seek court authorization before disclosing the potentially privileged material to either Defendant or the prosecution team. *Id.* at 758-59.

The filter team notified Appellants that it planned to disclose certain materials seized from them to Defendant. In response, Appellants provided privilege logs to the filter team, asserting over 30,000 claims of privilege in total. *Id.* at 759. Defendant and the filter team both agreed that the privilege logs were facially deficient as "they made only threadbare assertions of privilege, e.g., 'attorney-client communication' or 'attorney work product,' without any accompanying explanation."

Defendant subsequently filed a motion to compel against the Appellants, arguing that they had failed to carry their burden of establishing privilege and that their deficient logs should be interpreted as a waiver. The government provided notice to the district court that Appellants' privilege logs were deficient, but that it would not seek court authorization to disclose the potentially privileged materials.

U.S. Magistrate Judge Kayla Dye McClusky entered an order directing the government to disclose the potentially privileged material to Defendant. She held that the Appellants lacked standing as nonparties to challenge Defendant's motion to compel as part of a criminal proceeding, and even if Appellants had standing, their assertions of privilege would fail because their privilege logs were deficient under federal common law. *Id.* at 760.

On appeal, the Fifth Circuit first found that the Appellants had standing to appeal the determination of the district court as part of an equitable exception for certain nonparty appeals. *Id.* at 761-762. However, in addressing the merits of Appellants' joint appeal of the district court order, Judge Dennis agreed with the district court's finding that Appellants' privilege logs did "not provide a proper description for the documents to explain why each should be protected from disclosure." *Id.* at 763.

Judge Dennis noted that the privilege logs listed only the names of the parties to the documents, the date, the file name, and an assertion of privilege, but did not disclose the roles of the parties to the communications or describe the nature of the communications over which attorney-client privilege was asserted. *Id.* at 764. Additionally, as to the nonparty Appellants' assertions of attorney work product privilege and common interest privilege, the privilege logs were silent as to whether the materials were prepared in anticipation of litigation or whether the communications were between co-defendants and their counsel. Thus, the Fifth Circuit panel affirmed Magistrate Judge McClusky's ruling that Appellants failed to establish their claims of privilege. *Id.* at 765.

In a dubitante opinion, Circuit Judge Andrew S. Oldham scrutinized the foundation of the DOJ's filter team protocols, stating that they had "no obvious foundation in the Federal Rules." He emphasized that the filter team "arrogated to itself the power to review the seized documents for privilege," and as a result, Appellants were forced to assert privilege after their documents had been seized and subjected to various protocol orders without notice to Appellants or an opportunity to object. Judge Oldham had serious concerns about the majority's suggestion that this case should be evaluated under the same rules that govern traditional discovery disputes and traditional privilege assertions, noting that "[t]here is nothing traditional about filter teams." *Id.* at 766.