UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ex rel. LANDIS, Plaintiffs, v. **TAILWIND SPORTS CORP., et al.**, Defendants.	Case No. 1:10-cv-00976 (CRC)

ORDER

Relator Floyd Landis filed this *qui tam* action in June 2010 against Lance Armstrong, his former teammate on the United States Postal Service ("USPS") cycling team, and associated defendants Capital Sports and Entertainment Holdings, Inc. ("CSE"), William Stapleton and Barton Knaggs ("CSE Defendants"). The Government intervened in 2013, and the case is now in discovery. The law firm Williams & Connolly LLP ("W&C") represented Armstrong in a variety of other matters between 2003 and 2013 but does not represent Armstrong in this case. In May 2015, Landis served W&C and one of its partners, Mark S. Levinstein, with a subpoena *duces tecum* for 12 categories of documents. W&C and Levinstein have asserted attorney-client privilege with respect to six of the categories, which cover communications between W&C, Armstrong, and the CSE Defendants. Landis now moves to compel W&C to comply with the subpoena, arguing that the attorney-client privilege does not apply. Alternatively, Landis asks the Court to review the documents sought *in camera* to determine whether the privilege applies. Given the central importance of the attorney-client privilege to the proper functioning of the judicial system, and because Landis has failed to provide sufficient facts to meet his burden to overcome it, the Court will deny his motion.

I. Standard of Review

"The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The purpose of the privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. Courts typically construe the privilege narrowly, and the burden of proof is on the party claiming it to show that the communications "rest on confidential information obtained from the client." In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984). The burden then "shifts . . . to the [party] seeking to pierce or overcome the privilege." United States v. Naegele, 468 F. Supp. 2d 165, 174 (D.D.C. 2007). "Communications otherwise protected by the attorney-client privilege are not protected if the communications are made in furtherance of a crime, fraud or other misconduct." In re Sealed Case, 754 F.2d 395, 398 (D.C. Cir. 1985). Under the crime-fraud exception, a party can overcome a claim of privilege by (1) making "a prima facie showing of a [crime or fraud] sufficiently serious to defeat the privilege" and (2) providing enough evidence to establish a "reasonable inference" that the attorney's "representation and advice" helped further the crime or fraud. Id. at 402. In some instances, it may be "impossible to know" whether the crime-fraud exception applies "without reviewing the documents *in camera*." Tri-State Hosp. Supply Corp. v. United States, 226 F.R.D. 118, 134 (D.D.C. 2005). The party seeking *in camera* review must set forth a "'factual basis adequate to support a good faith belief by a reasonable person' that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." United States v. Zolin, 491 U.S. 554, 572 (1989) (quoting Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982)). The decision whether to pursue *in camera* review "rests in the sound discretion of the district court." Zolin, 491 U.S. at 572.

II. Analysis

Landis advances three grounds to overcome W&C and Levinstein's assertion of attorney-client privilege. First, he contends that the crime-fraud exception precludes invoking the privilege here. Second, he argues that the communications between W&C and Armstrong's agents are not covered by the privilege. And third, he maintains that the privilege does not protect any of the communications sought that do not constitute legal advice. Landis also requests *in camera* review of the relevant documents. Landis has not met his burden on any of these grounds.

A. Crime–Fraud Exception

To successfully invoke the crime–fraud exception, a party first must make a prima facie showing of crime or fraud. See In re Sealed Case, 754 F.2d at 398. The elements of fraud are (1) a false representation, (2) made in reference to a material fact, (3) with knowledge of its falsity, (4) with the intent to deceive, and (5) an action that is taken in reliance upon the representation. Daskalea v. Wash. Humane Soc'y, 480 F. Supp. 2d 16, 37 (D.D.C. 2007). As evidence of Armstrong's fraud, Landis cites his history of doping, his doping denials, his attacks "on anyone who got in his way," and his ultimate admission of doping. Relator's Mot. to Compel at 3–4. Armstrong certainly has admitted to falsely denying his doping activity. But he has not been criminally prosecuted and whether his false statements and noncompliance with international cycling standards were material remains a sharply disputed question in this False Claims Act case. Finding that such allegations—without more concrete evidence of materiality or criminal conduct—comprise a prima facie showing of crime or fraud would dramatically circumscribe the attorney-client privilege as it is now understood. The Court thus finds that Landis has not met his burden.

Regardless, Landis also falters on the second prong of the crime-fraud exception—establishing a "reasonable inference" that W&C's "representation and advice" helped further the crime or fraud—because none of W&C's alleged conduct is sufficient to meet this standard. In re

Sealed Case, 754 F.2d at 402. Landis first contends that Armstrong used W&C to make false statements, citing a W&C letter to the U.S. Anti-Doping Agency ("USADA") arguing that Armstrong should not be sanctioned for missing a single drug test in 2004 because his many other USADA drug tests that year had revealed no "prohibited substances." Relator's Reply at 6. But Landis provides no evidence that the statement was false. See In re Sealed Case, 107 F.3d 46, 50 (D.C. Cir. 1997) (noting the requirement of a showing of an actual offense and intent to further it in order to invoke the crime-fraud exception). Landis next alleges that Levinstein's role in Armstrong's litigation against SCA Promotions, Inc. ("SCA") in 2004 helped Armstrong win a $7.5 million arbitration award against SCA, which had refused to pay a Tour de France victory bonus because of the doping allegations. W&C and Armstrong respond that Levinstein was not Armstrong's counsel during the SCA litigation and that his participation extended no further than cross-examining an anti-doping expert. Without more, the Court cannot draw a "reasonable inference" that this limited legal assistance helped further a crime or fraud. Lastly, Landis cites Levinstein's alleged contributions to the "Vrijman report"—the summary of an independent investigation by Dutch lawyer Emile Vrijman into alleged doping—as evidence of W&C's furtherance of a crime or fraud. Landis contends that "Armstrong used W&C's Levinstein to divert Vrijman's investigation from examining whether Armstrong had actually used EPO [a performance-enhancing drug], which was in fact the case, and instead focus on alleged procedural improprieties by the French lab." Relator's Reply at 4. Landis points to Levinstein's communications with Vrijman about Armstrong's objections to the research and methods underlying the allegations to illustrate Levinstein's improper role. Decl. of Paul D. Scott, Ex. 24. But, again, vigorously advocating on behalf of a client under investigation—even if that client later admits wrongdoing—is a core attorney function; much more is needed to constitute evidence that an attorney's actions constituted or furthered a crime or fraud. See In re Sealed Case, 223 F.3d 775,

779 (D.C. Cir. 2000) (finding crime-fraud exception did not apply because conduct in question was not criminal); United States v. Barnes, 662 F.2d 777, 781 (D.C. Cir. 1980) (quoting United States v. Hurt, 543 F.2d 162, 167-68 (D.C. Cir. 1976) ("Effective assistance of counsel requires that one's attorney be 'able and willing to advocate fearlessly and effectively.'").

In sum, Relator's subpoena does not overcome W&C's assertion of attorney-client privilege because Relator has neither made a prima facie showing of crime or fraud nor provided sufficient evidence to allow a reasonable inference that W&C's "representation and advice" helped further a crime or fraud.

B. Intermediary Doctrine

Landis also asserts that W&C's communications with the CSE Defendants are not covered by attorney-client privilege because they were not themselves W&C clients. Armstrong counters that the communications are nonetheless protected because CSE and its principals, William Stapleton and Barton Knaggs, were communicating with W&C as Armstrong's agents. Under the intermediary doctrine, "attorney-client privilege . . . covers communications between an attorney and a client made through an agent" when the agent acts "merely as an intermediary." In re Lindsey, 158 F.3d 1263, 1279 (D.C. Cir. 1998). To determine whether an agent acts as an intermediary, courts focus on whether the communications were made "'in confidence for the purpose of obtaining legal advice from the lawyer.'" Id. at 1280 (quoting Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp., 5 F.3d 1508, 1514 (D.C. Cir. 1993)) (emphasis omitted); Blumenthal v. Drudge, 186 F.R.D. 236 (D.D.C. 1999). Stapleton and Knaggs represent that they have served as Armstrong's business agents since 1995 and 2001, respectively. CSE Defendants' Motion for Summ. J., Decl. of William J. Stapleton at ¶ 3; Decl. of Barton B. Knaggs at ¶ 3. Armstrong maintains that he "relied on Stapleton to communicate with [his] lawyers and convey to [him] necessary information relating to his legal interests" and that

"Knaggs and CSE have frequently assisted [his] attorneys by providing information relevant to Armstrong's legal representation." Armstrong's Opp'n at 9–10. Landis primarily responds that Stapleton and Knaggs acted as agents of Tailwind, the owner of the USPS cycling team, during the relevant time period. Relator's Mot. to Compel at 9. But even if that is so, Stapleton and Knaggs could have served as agents of both Tailwind and Armstrong. The representations of Armstrong, Stapleton, and Knaggs facially satisfy the intermediary doctrine. And because Landis offers no evidence that would contradict them, he has not overcome W&C's assertion of privilege with respect to its communications with the CSE Defendants.

C. Legal Advice

Landis also asserts that all communications that do not involve legal advice are not subject to attorney-client privilege. But "the privilege cloaks a communication from attorney to client 'based, *in part at least*, upon a confidential communication'" from attorney to client. In re Sealed Case, 737 F.2d at 98 (quoting Brinton v. Department of State, 636 F.2d 600, 604 (D.C. Cir. 1980)). Communications may still be protected even if they are not themselves legal advice but are nonetheless closely "intertwined with litigation and legal strategies." FTC v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002). W&C's communications with Armstrong and his agents regarding allegations and denials of doping logically fall into this category, given their relevance to the variety of legal proceedings to which he was a party at the time. Accordingly, Relator may not compel production of the communications sought on the ground that they did not involve legal advice.

D. *In Camera* Review

Finally, Landis requests that the Court review *in camera* any documents sought by the subpoena that Armstrong seeks to withhold. He must show that *in camera* review would reveal evidence sufficient to "establish the claim that the crime-fraud exception applies." United States v.

Zolin, 491 U.S. at 572. Even then, the decision to undertake *in camera* review "rests in the sound discretion of the district court." Id. Because Landis has failed to identify how Armstrong satisfied the elements of fraud or how W&C attorneys furthered the alleged fraudulent scheme, he has not met his burden of setting forth a factual basis that could support the application of the crime-fraud exception. The Court will therefore deny Relator's request for *in camera* review.

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Relator's Motion to Compel Williams & Connolly LLP to Comply with the Subpoena [ECF No. 349] is **DENIED**.

Christopher R. Cooper

CHRISTOPHER R. COOPER
United States District Judge

Date: July 13, 2015