IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES *ex rel.* FLOYD LANDIS,	)	
Plaintiff,	)	No. 10-cv-00976 (CRC)
v.	)	**REDACTED**
TAILWIND SPORTS CORPORATION, *et al.*,	)	
Defendants.	)	

RELATOR'S REPLY TO OPPOSITION OF LANCE ARMSTRONG AND RESPONSE OF WILLIAMS & CONNOLLY TO RELATOR'S MOTION TO COMPEL NON-PARTY WILLIAMS & CONNOLLY, LLP TO COMPLY WITH SUBPOENA

I. INTRODUCTION

Armstrong starts his argument in opposition to relator's motion to compel by attempting to invoke the public policies underlying the attorney-client privilege,[1] but what he fails to acknowledge is that those principles simply do not apply when the attorney-client relationship is abused. *Clark v. United States*, 289 U.S. 1, 53 S.Ct. 465, 469-70 (1933) ("The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told."). The crime-fraud exception, along with certain others, exists to "make sure that privileges do not serve ends for which they were not intended." *In Re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982).

II. ARGUMENT

A. Relator has shown probable cause that fraud occurred.

Armstrong next moves to the rather remarkable claim that it is "unclear how relator's allegations could constitute fraudulent conduct." Armstrong Opp. at 4.[2] This argument would perhaps be more compelling if Armstrong had not already made the tactical decision to tell all on Oprah then admit in his answer before this Court that he had lied and deceived the world for well over a decade. Nonetheless, relator will re-state -- in the step-by-step manner Armstrong requests, *see* Armstrong Opp. at 4 (listing elements of fraud) -- his *prima facie* evidence that Armstrong engaged in a massive ongoing fraud

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[1] *See* ECF No. 354, Armstrong's Opposition to Relator's Motion to Compel Non-Party Williams & Connolly LLP to Comply with Subpoena ("Armstrong Opp.") at 1, 3. Relator will refer to his opening brief, ECF No. 348(sealed)/349(redacted), as "Opening Br.," and the accompanying declaration of Paul D. Scott, ECF No. 348-1(sealed)/349-1(redacted) as "Scott Decl."

[2] Armstrong also asserts that he "is not accused of fraud" in this case, Armstrong Opp. at 1, but that claim is flatly wrong, for the United States' complaint includes just such a count. *See* ECF No. 44, United States Complaint ("U.S. Compl."), Count V, Common Law Fraud. In any event, the question at issue is whether W&C's representation assisted Armstrong in his fraudulent scheme, and not whether such a count is included in the complaint.

on sponsors and others:[3] 1) Armstrong made innumerable false representations as to his doping;[4] 2) the fact that he was doping was material to sponsors;[5] 3) the representations were made with knowledge of their falsity;[6] 4) the false statements were made with the intent to deceive;[7] and 5) action was taken in reliance on the misrepresentations.[8]

In one already-proven example of the fraudulent scheme, Armstrong defrauded SCA Insurance out of $7.5 million, as well as committing a fraud on the arbitration panel in order to accomplish this result. *See* Scott Decl., Exh. 14, SCA Final Arbitration Award at 17 ("Ample evidence was adduced at the hearing through documents and witnesses that Claimants commenced this proceeding knowing and intending to lie; committed perjury before the Panel with respect to every issue in the case; intimidated and pressured

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[3] The party alleging misconduct "need not prove the existence of a crime or fraud beyond a reasonable doubt." *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985). Rather, the moving party need only make a *prima facie* or "probable cause" showing, *i.e.,* "that a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration," of a crime, fraud, or other misconduct. *Id.* at 399 & n.3.

[4] *See, e.g.,* Scott Decl., Exh. 4, Armstrong Acceptance Interrogatory Responses at ¶ 1, 13; ECF No. 42, Relator's Second Amended Complaint ("SAC") at ¶¶ 121-130; ECF No. 299, Armstrong Amended Answer to SAC at ¶¶ 121-130.

[5] Scott Decl., Exh. 13, Armstrong SCA I Dep. at 117:19-118:17 (admitting knowledge that sponsors "would all go away" if they knew about doping); *id.*, Exh. 15, Cycling News article ("Lance Armstrong has told Oprah Winfrey that the loss of his personal sponsors in the wake of the USADA report cost him $75 million in future income.").

[6] Presumably Mr. Armstrong will not contest he was aware he was doping.

[7] U.S. Compl. at ¶ 65 (Armstrong "made the foregoing false representations with knowledge of their falsity and with the intent that the United States and other sponsors would rely on the supposed accuracy of the representation."); Scott Decl., Exh. 13, Armstrong SCA I Dep. at 117:19-118:17 (admitting knowledge that sponsors "would all go away" if they knew about doping); s*ee also* FRCP 9(b) ("In alleging fraud or mistake, . . . intent, knowledge, and other conditions of a person's mind may be alleged generally."); *United States v. Wheeler*, 889 F. Supp.2d 64, 68 (D.D.C. 2012) ("in most cases . . . proof of intent must be inferred" and even in a criminal case inference of intent to defraud may be drawn from matters such as "efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits").

[8] [REDACTED] ; *id.,* Exh. 15, Cycling News article (sponsors had agreed to pay Armstrong $75 million based on lies); U.S. Compl. at ¶¶ 4-5 (U.S. paid more than $40 million for sponsorship).

other witnesses to lie; or influenced others to help them lie and to hide the truth; used a false personal and emotional appeal to perpetuate their lies to the Panel; used perjury and other wrongful conduct to secure millions of dollars of benefits from Respondents; used lies and fraud to falsely claim that the Panel exonerated them, thereby further allowing them to profit further from additional endorsements and sponsorships; expressed no remorse to the Panel for their wrongful conduct; and continued to lie to the Panel throughout the final hearing even while admitting to prior falsehoods and other wrongful conduct. Claimants admitted in substantial part the substance of all (but the last) of the foregoing conduct.").[9]

B. Relator has established a clear connection between the communications at issue and Armstrong's fraud.

With regard to the second element of the crime-fraud exception,[10] Armstrong asserts that Landis "fails to present any evidence supporting 'a reasonable inference' that W&C's services helped carry out a crime or fraud." Armstrong Opp. at 5. But just because Armstrong says it is so plainly does not make it true. One would be hard pressed to come up with better examples for application of the crime-fraud exception than legal services being used to a) collect money in a lawsuit based on fraudulent premises, b) evade a governing body's testing and sanctions regime, and c) exert improper influence to derail a purportedly independent investigation into the defendant's wrongdoing.

SCA Case: As described in relator's opening brief, Armstrong used W&C's work in the SCA I matter not just to help him perpetrate a fraud on SCA, but to help him perpetrate a fraud on an arbitration tribunal. Moreover, the arbitration panel specifically

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[9] *See also* Scott Decl., Exh. 14, SCA Final Arbitration Award at 1 ("The case yet again before this Tribunal presents an unparalleled pageant of international perjury, fraud and conspiracy. It is almost certainly the most devious sustained deception ever perpetrated in world sporting history.").

[10] The second element of the crime-fraud exception requires the moving party to "establish some connection between the communication at issue and the *prima facie* violation" by providing evidence that "supports a reasonable inference that [the attorneys'] representation and advice . . . assisted [defendant] in carrying out its . . . fraudulent scheme." *In re Sealed Case*, 754 F.2d at 402.

found that Armstrong used his "victory" in SCA I, obtained with W&C's help, to further his ongoing fraud on his sponsors and others. Scott Decl., Exh. 14 at 17 (Armstrong and Tailwind "used lies and fraud to falsely claim that the Panel exonerated them, thereby further allowing them to profit further from additional endorsements and sponsorships").

Evidently keen to avoid discussion of these troublesome facts, Armstrong resorts to accusing relator's counsel of "attempt[ing] to conceal … from the Court … that Levinstein was not Armstrong's counsel in the SCA arbitration." Armstrong Opp. at 7. Once again, however, Armstrong's claims are simply fiction. Relator stated that Levinstein "helped litigate" the SCA case, Opening Br. at 5, and that he did. A brief review of the transcripts from the 2006 arbitration reveals that Mr. Levinstein's cross-examination of SCA's doping expert took up large portions of three out of the thirteen volumes of testimony. Scott Decl., Exh. 20. One would think that safely qualifies as helping to litigate. In any event, the crime-fraud exception requires only that the client seek the services of the attorney in furtherance of his scheme; there is no requirement that the attorney be counsel of record in litigation. Even non-litigation legal assistance may trigger the exception. *See, e.g., United States v. Singhal,* 842 F. Supp.2d 1, 7 (D.D.C. 2011) (attorney's drafts of loan documents used in fraudulent financial scheme fell within exception).

Vrijman Report: Armstrong miscasts relator's argument with regard to the Vrijman Report, saying that relator "appears to take issue with the conduct of Dutch lawyer Emile Vrijman." Armstrong Opp. at 5. In fact, relator's arguments were squarely focused on the fact that Armstrong used W&C's Levinstein to divert Vrijman's investigation from examining whether Armstrong had actually used EPO, which was in fact the case, and instead focus on alleged procedural improprieties by the French lab. Opening Br. at 6-7. Indeed, this is precisely what the Cycling Independent Reform Commission ("CIRC") concluded had occurred.[11]

[11] *See, e.g.,* Scott Decl., ¶ 25 & Exh. 24, CIRC Report at 188 ("UCI, together with the Armstrong team, became directly and heavily involved in the drafting of the Vrijman report, the purpose of which was only partly to expedite the publication of the report. The main goal was to ensure that the report reflected UCI's and Lance Armstrong's

Moreover, Armstrong's protestations that "Levinstein's contributions to Vrijman's report amounted to proper representation of Armstrong's interests," *see* Armstrong Opp. at 6, even if true, would not preclude application of the exception. Rather, it is sufficient for relator to show that the W&C attorneys "were instrumentalities in the ongoing coverup whether they realized it or not, and the fact that their primary role was . . . legitimate . . . cannot whitewash [defendant's] ancillary use of the attorneys to assist in its fraudulent scheme." *In re Sealed Case,* 754 F.2d at 402. As with the SCA case, W&C's assistance with the Vrijman Report helped Armstrong to avoid detection of his doping, falsely claim that the report "confirms my innocence,"[12] and thus continue his ongoing scheme to defraud sponsors and others.

Missed drug tests: With respect to his missed drug tests, Armstrong argues that "Landis fails to argue that missing a drug test is a crime or a fraud and we all know it is not." Armstrong Opp. at 6-7. But relator need not establish that missing a drug test itself is a crime or fraud. Again, the standard is whether W&C's representation regarding missed tests assisted Armstrong in his ongoing fraud on sponsors and others like USADA. *See supra* note 10. Clearly, it assisted Armstrong in this regard, when Armstrong's attorneys from the prestigious law firm Williams & Connolly, in the course of their representation regarding missed tests, repeatedly made the (presumably

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personal conclusions. The significant participation of UCI and Armstrong's team was never publicly acknowledged, and was consistently denied by Hein Verbruggen.").

Curiously, Armstrong continues to cite the Vrijman Report's conclusions with reverence, despite the fact that, as he knows, and as the CIRC Report made clear, the supposedly "independent" report was thoroughly undermined by the influence of Armstrong's legal team. *See, e.g., id.* ("Emile Vrijman failed to exert his independence and demonstrated a serious lack of impartiality: firstly, by allowing UCI and Armstrong's team to define the scope of the mandate [*i.e.,* to ensure that "the allegation that Lance Armstrong used EPO during the 1999 Tour would not be considered"] and letting them add to, and redact large parts of his 'independent' report, secondly, by not giving all parties the same opportunities to contribute to the investigation or to comment on the report and, thirdly, by not disclosing the true facts to the public.").

[12] *See* Scott Decl., Exh. 27, USDC ND Tx Action at ¶ 123. Armstrong also used W&C, along with other counsel, to file his action in federal court in October 2012, where he repeatedly argued that he was being unfairly accused by USADA and that the supposedly "independent" Vrijman report had vindicated him. *See generally id.*

unknowing) false statement to USADA that "[Recent] tests confirmed what every test has confirmed – that Mr. Armstrong has not taken any prohibited substances." Scott Decl., Exhs. 16-19. Moreover, under the applicable rules, athletes are subject to sanctions for missing more than three tests in an 18-month period. Scott Decl., Exh. 19 at CSE 3302 (USADA letter). Thus, to the extent W&C was successful in helping Armstrong to avoid a "missed test" determination, even in the unlikely event that he actually missed the test for an innocent reason, such success would provide him with an additional "free pass" to evade a test on a day he knew he would test positive.

C. Armstrong has failed to meet his burden of establishing that either Stapleton or Knaggs was acting as his agent or intermediary.

Relator's opening papers set forth several arguments as to why W&C's communications with Stapleton or Knaggs cannot be protected by any claim of attorney-client privilege by Armstrong. Armstrong does not address these arguments head-on. Instead, he attempts to focus the Court's attention on irrelevant details like Armstrong's high school education and lack of formal legal training. These arguments are entirely specious as Armstrong is plainly a highly sophisticated individual.

Armstrong fails to address relator's argument that if Stapleton or Knaggs knew of his doping, then any assertions of privilege would fail under the crime-fraud exception for the same reasons that apply to Armstrong. He also fails to respond in any meaningful way to relator's arguments that, if Stapleton/Knaggs did not know of his doping then they could not properly be considered his "agents" for purposes of communications relating to doping, and, furthermore, both men were acting as agents of Tailwind during the relevant time period. *See* Opening Br. at 9-10. Armstrong merely asserts in a footnote that "neither this motion nor this action relates to duties Armstrong owed to Stapleton, Knaggs or CSE." Armstrong Opp. at n.15. In fact, however, Armstrong has put such duties at issue by attempting to rely on the existence of an agency relationship to maintain the attorney-client privilege.

D. Armstrong fails to meet his burden to show that the communications were for the purpose of seeking legal advice.

Armstrong has also failed to meet his burden to show that the requested communications sought legal advice. In fact, Armstrong does not take issue with relator's position that Request Nos. 1, 2, 8 and 12 involve activities by W&C that did not constitute "legal advice." Rather, he contends that such activities might have been "intertwined" with legal advice. Armstrong has provided no factual support for this assertion, however, and his contentions are legally wrong.[13] Armstrong has therefore failed to establish that the attorney-client privilege applies to these categories.

E. The Court should order W&C to produce non-privileged documents directly.

While W&C spends much of its brief[14] arguing that it cannot properly turn over even non-privileged documents directly to relator, applicable rules permit W&C to do so

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[13] *FTC v. Glaxosmithkline*, 294 F.3d 141, 147-48 (D.C. Cir. 2002) in no way stands for the proposition that non-legal advice is privileged if "intertwined" with legal advice. The case merely held that, where consultants were not full-time employees of Glaxo but were "members of the team assigned to deal with issues [that] . . . were completely intertwined with [GSK's] litigation and legal strategies" and "acted as part of a team with full-time employees" then the privilege was not waived by providing documents that otherwise met the requirements for privilege to such persons. *Gentile v. Nevada State Bar*, 501 U.S. 1030, 1043 (1991) is likewise entirely inapposite because, while stating that an attorney's duties may properly include defending a client's reputation, the case did not address whether such conduct was "legal advice" or whether communications relating to such matters would be privileged. *In re Grand Jury Subpoenas*, 179 F. Supp. 2d 270, 285 (S.D.N.Y. 2001) also does not help Armstrong because relator does not assert that the privilege is vitiated just because W&C attorneys sometimes engage in lobbying. In fact, the case supports relator's position that Request No. 12 does not call for privileged documents, because it only seeks documents related to lobbying, and lobbying is not legal advice. *See id.* ("[M]atters conveyed to the attorney for the purpose of having the attorney fulfill the lobbyist role do not become privileged by virtue of the fact that the lobbyist has a law degree or may under other circumstances give legal advice to the client, including advice on matters that may also be the subject of the lobbying efforts.")

[14] Notably, W&C filed a "response" to relator's motion rather than an opposition. Similarly, although Armstrong asserts the United States "has not joined this motion," Armstrong Opp. at n.4, in fact the United States' position is that it "does not oppose the motion." Opening Br. at 1.

upon court order, and that is what relator is seeking here.[15] Numerous of relator's requests concern communications with third parties, as to which Armstrong has not asserted privilege. The categories are narrowly defined and Armstrong has cited no basis to allow him to conduct an unspecified review to determine which documents are "responsive" before producing them to relator. Armstrong Opp. at 11. To the extent the issue is one of burden for W&C, relator can provide W&C a discrete list of specific email addresses (*e.g.,* representatives of UCI and Vrijman) to which responsive communications would have been sent. It would be a simple matter for W&C to generate a separate production of such emails directly from its database and produce those emails directly to relator without further delay.

F. Relator's subpoena is not improper or for purposes of harassment.

As a parting shot, Armstrong asserts that because he has already admitted doping, the documents sought by relator have little relevance and thus relator must be pursuing this subpoena for purposes of harassment. Armstrong Opp. at 12. Once again, though, Armstrong's incendiary claims are baseless. Unlike Armstrong, the CSE Defendants have not yet admitted their knowledge of Armstrong's doping and many of the documents sought may be probative on that point or other facts related to the CSE Defendants or Armstrong. Moreover, relator specifically noted in his opening brief that "Relator seeks these documents from non-party W&C in part because they are unavailable from the CSE Defendants, due to CSE"s destruction of many potentially relevant documents in January 2005." Opening Br. at 2. The subpoena was thus served in complete good faith for entirely proper purposes.

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[15] *See* D.C. Rule of Professional Conduct 1.6(e)(2)(A) ("A lawyer may use or reveal client confidences or secrets . . . when permitted by these Rules or required by . . . court order."); *see also* W&C Opp. at 4 (citing Ethics Op. 14 & 288 for proposition that, once law firm informs client of subpoena and gives him an opportunity to challenge it, law firm is "free to comply with whatever directive the trial court gives").

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Respectfully submitted,

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