

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ERIC BLATTMAN, individually as an assignee)
of certain former members of E2.0, LLC, and)
DAVID STAUDINGER)

Plaintiffs,)

v.)

THOMAS M. SIEBEL, DAVID SCHMAIER,)
JOHN DOE I AND JANE DOE 2,)

Defendants.)

C.A. No. 15-530-GMS

ORDER

WHEREAS, presently before the court is Plaintiffs’ request that the court order production of certain documents under the crime-fraud exception (D.I. 291);

WHEREAS, the court has considered the parties’ written submissions as well as the applicable law;

IT IS HEREBY ORDERED THAT:

1. The Plaintiffs’ production request is DENIED;¹

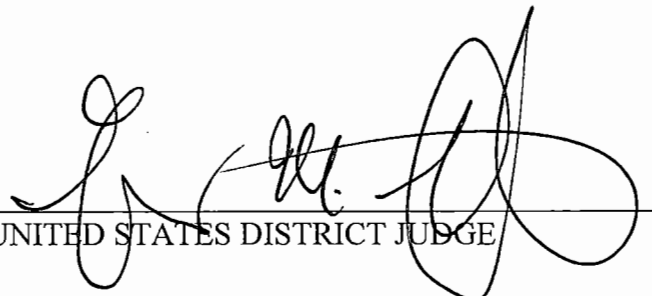
¹ Plaintiffs invoke the crime-fraud exception in an effort to secure a ruling from the court that an inadvertently produced email (TSDS0090162-68) is not, along with various other related documents identified by Defendants on their privilege log, subject to the attorney-client privilege. (D.I. 291.) In an email, inadvertently produced during discovery, Defendant, Thomas Siebel, instructed attorney John Dwyer to offer to buy Thomas Scaramellino’s shares of an entity known as C3 for \$700,000.00 and to offer to release Scaramellino from a claim for \$400,000.00. Plaintiffs contend that in exchange, Scaramellino provided an affidavit wherein Scaramellino contradicted previous statements he made in connection with the lawsuit that underlies this discovery dispute. (D.I. 291.)

The Court of Appeals for the Third Circuit has explained that “the crime-fraud exception to the attorney-client privilege applies ‘[w]here there is a reasonable basis to suspect [1] that the privilege holder was committing or intending to commit a crime or fraud and [2] that the attorney-client communications or attorney work product were used in furtherance of the alleged crime or fraud...’” *In re Grand Jury Subpeona*, 745 F.3d 681 (2014); *In re Grand*

2. The Plaintiffs must return all of the Defendants' privileged documents; and
3. The Defendants' request for fees in defending against Plaintiffs' assertions (D.I. 294 at 5) is DENIED as premature.

Dated: December 1, 2017

UNITED STATES DISTRICT JUDGE



Jury Matter #3, 847 F.3d 157, 165 (2017). For the crime-fraud exception to apply, the client must be “committing or intending to commit a crime or fraud” at the time he consults an attorney. *Id.* Additionally, the required evidentiary showing must be “sufficient to support a finding that the elements of the crime-fraud exception were met.” *United States v. Doe*, 429 F.3d 450, 454 (3d Cir. 2005).

To invoke the crime-fraud exception based on alleged bribery and witness tampering, Plaintiffs bear the burden of showing that when Thomas Siebel sent an inadvertently disclosed email to outside counsel, John Dwyer, he (1) intended to commit or did commit a crime; (2) corruptly gave something of value to Scaramellino or used intimidation or threats to obtain his testimony; and (3) intended to influence the testimony he gave. 18 U.S.C. § 201(b)(3); 18 U.S.C. § 1512(b). Plaintiffs have not met this burden.

First Plaintiffs argue that, while Mr. Siebel was willing to offer other E2.0 Unitholders the same price per share of \$0.44, he offered Mr. Scaramellino additional consideration of “a full release from the \$400,000 that [Scaramellino] appears to have stolen” in exchange for his affidavit. (D.I. 291.) Plaintiffs argue that because Mr. Scaramellino provided nothing else of value in exchange for the \$400,000 release, the only reason for Mr. Siebel’s offer was to obtain Mr. Scaramellino’s affidavit. Mr. Scaramellino, however, confirmed that he provided his declaration “of [his] free volition.” (D.I. 294, Ex. B at 15:4-16:12.) Upon consideration of the parties’ arguments and examination of the sixty-five documents from Defendants’ privilege log, *in camera*, the court finds that there is insufficient evidence to invoke the crime-fraud exception.

Second, the Defendants’ mere designation of Mr. Dwyer to testify regarding the *non-privileged* communications does not constitute a waiver of *privileged* communications. (D.I. 294 at 5); *Upjohn Co. v. U.S.*, 449 U.S. 383, 395–96 (1981) (explaining that “[c]ommunications, not facts, are privileged.”). An attorney may testify as a percipient witness about *non-privileged* facts without any waiver occurring. *In re MIG, Inc.*, 2009 WL 8662897 at *2 (Bankr. D. Del. Dec. 18, 2009); *Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 273 F.R.D., 367, 371 (S.D.N.Y. 2010).