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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

JOSE ROE, and others,

 Plaintiffs,

 v.

THOMAS F. WHITE, and others,

 Defendants.

Case No. 03-cv-04035 CRB (NC)

**ORDER GRANTING REQUEST FOR
IN CAMERA REVIEW**

Re: Dkt. No. 1208

Defendant Thomas White moves to compel disclosure of several documents that plaintiffs withheld on the basis of attorney-client and work product privilege. The only issue is whether the crime-fraud exception to these privileges applies here. The Court finds that White has made a showing sufficient to allow the Court to review the withheld documents in camera to determine whether the crime-fraud exception applies and whether the documents are relevant to the narrow realm of discovery ordered by Judge Breyer.

BACKGROUND

The Court addresses only the background relevant to the pending motion in this case, which was initiated by a complaint filed more than ten years ago. Judge Breyer approved an agreement settling plaintiffs’ claims and dismissing the action with prejudice on August 30, 2005. Dkt. No. 255. Since that time, defendant White has moved several times to

1 vacate approval of the settlement agreement and judgment, but the Court has denied all of
2 those requests.

3 On September 2, 2011, White moved for post-judgment discovery seeking evidence
4 that would support his efforts to vacate the settlement agreement and judgment. Dkt. No.
5 1026. With that motion, White provided evidence that plaintiffs' former attorney, David
6 Replogle, hacked the computers of White's attorneys and obtained their privileged and
7 confidential documents. *Id.* Judge Breyer granted the motion for post-judgment discovery
8 and allowed White to obtain documents from the hard drives of David Replogle. Dkt. No.
9 1034. Judge Breyer's order allowed for limited discovery "targeted to identify documents
10 that Replogle received directly or indirectly that were (1) prepared by or for Defendant
11 Thomas White, Defendant's counsel and/or investigator(s), (2) belonging to Defendant
12 White, Defendant's counsel and/or investigator(s), and (3) documents and emails reflecting
13 communications by Defendant, Defendant's counsel and/or investigator(s)." *Id.*

14 Plaintiffs reviewed and produced documents from Replogle's hard drives, but
15 withheld forty-nine documents based on privilege. Dkt. No. 1205. White challenges only
16 the validity of the attorney-client and work product privileges.¹ Dkt. No. 1209. In support
17 of his argument that the crime-fraud exception applies, White submitted the declaration of
18 Alberto Moran, an investigator who has worked on White's criminal and civil defense for
19 several years. Dkt. No. 1210-2. In his declaration, Moran attests that in August 2013, he
20 interviewed Victor Emanuel Ortega Rodriguez, also known as Chimpilla, a plaintiff in this
21 action. *Id.* Moran states that Chimpilla admitted that a Mexican judge and two American
22 men offered him money and his release from prison in exchange for Chimpilla accusing
23 White of sexual abuse, a bargain that Chimpilla accepted. *Id.* Moran attests that Chimpilla
24 stated he also drove around town looking for other boys to entice to falsely accuse White of
25 sexual crimes. *Id.*

26
27 ¹ Thomas White died on September 10, 2013. Dkt. No. 1192. The estate of Thomas White was
28 substituted as the defendant on November 21, 2013. Dkt. No. 1200. For ease and continuity, the
Court will refer to the estate as White.

LEGAL STANDARD

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2 In general, “[p]arties may obtain discovery regarding any nonprivileged matter that is
3 relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). Information is relevant
4 for discovery purposes if it “appears reasonably calculated to lead to the discovery of
5 admissible evidence.” *Id.*

6 Privileged attorney-client communication or attorney work product are not normally
7 discoverable. *Id.* However, communications made between a client and attorney in
8 furtherance of a crime or fraud are not protected by the attorney-client privilege. To make
9 a showing of the crime-fraud exception, “[f]irst, the party must show that the client was
10 engaged in or planning a criminal or fraudulent scheme when it sought the advice of
11 counsel to further the scheme. Second, it must demonstrate that the attorney-client
12 communications for which production is sought are sufficiently related to and were made in
13 furtherance of [the] intended, or present, continuing illegality.” *In re Napster, Inc.*
14 *Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007), *abrogated on other grounds by*
15 *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009) (citations omitted).

DISCUSSION

16
17 White does not dispute that the documents are attorney-client communications or
18 attorney work product that would normally be privileged. Instead he argues that the
19 documents fall within the crime-fraud exception to these privileges.

A. Crime-Fraud Exception

20
21 A party seeking disclosure of attorney-client communications or attorney work
22 product under the crime-fraud exception must show by a “preponderance of the evidence”
23 that “the client was engaged in or planning a criminal or fraudulent scheme when it sought
24 the advice of counsel” and that “the attorney-client communications for which production is
25 sought are sufficiently related to” the crime or fraud. *In re Napster*, 479 F.3d at 1090; *see*
26 *also United States v. Edison*, No. 07-cr-00074 WHA, 2008 WL 170660, at *5 (N.D. Cal.
27 Jan. 17, 2008) (noting that the crime-fraud exception, most commonly applied to attorney-
28 client communications, “applies with equal force in the work-product setting”).

1 However, the Ninth Circuit has recognized that “the party challenging the privilege
2 may lack sufficient evidence to prove crime or fraud to a liability standard, particularly
3 given the fact that the best evidence is likely to be in the hands of the party invoking the
4 privilege.” *In re Napster*, 479 F.3d at 1090. For that reason, a party seeking in camera
5 review, rather than outright disclosure of attorney-client communications, must meet a
6 threshold showing that is “considerably lower than that for fully disclosing documents.” *Id.*
7 at 1092 (internal quotation marks omitted). To meet this showing, the party challenging the
8 privilege must present “a factual basis adequate to support a good faith belief by a
9 reasonable person that in camera review of the materials may reveal evidence to establish
10 the claim that the crime-fraud exception applies.” *United States v. Zolin*, 491 U.S. 554, 572
11 (1989). In meeting this threshold showing, the party may provide “any relevant evidence,
12 lawfully obtained, that has not been adjudicated to be privileged.” *Id.* at 575 (analyzing
13 Federal Rule of Evidence 104(a)).

14 Once the challenging party makes the required showing, “the decision whether to
15 engage in in camera review rests in the sound discretion of the district court.” *Id.* at 572.
16 The court can consider “facts and circumstances of the particular case, including, among
17 other things, the volume of the materials the district court has been asked to review, the
18 relative importance to the case of the alleged privileged information, and the likelihood that
19 the evidence produced through in camera review, together with other available evidence
20 then before the court.” *Id.*

21 Here, White requests disclosure of the attorney-client communications and attorney
22 work product, or in the alternative, in camera review of the documents. Dkt. No. 1214.
23 Plaintiffs also propose in camera review instead of outright disclosure. Dkt. No. 1213. In
24 support of his argument that the crime-fraud exception applies, White points to evidence in
25 the record that the plaintiffs in this case were bribed to falsely accuse Thomas White of
26 sexual abuse. Specifically, White points to the declaration of Moran, who states that a
27 plaintiff in this case admitted to him that he accepted a bribe to falsely accuse White of
28 sexual crimes. Dkt. No. 1210-2. Plaintiffs argue that the Court should not consider this

1 declaration because it is inadmissible hearsay under the Federal Rules of Evidence. But the
2 Court need not decide whether the declaration is inadmissible hearsay, because the Court is
3 not bound by the hearsay rules in making the initial determination of whether a privilege
4 applies. Fed. R. Evid. 104(a) (“The court must decide any preliminary question about
5 whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding,
6 the court is not bound by evidence rules, except those on privilege.”); *Zolin*, 491 U.S. at
7 574 (analyzing the applicability of Rule 104(a) and finding that “the party opposing the
8 privilege may use any nonprivileged evidence in support of its request for in camera
9 review.”).

10 The Court finds that the declaration of Moran is sufficient to meet the low threshold
11 showing required to warrant in camera review. A reasonable person could have a good
12 faith belief, based on the Moran declaration regarding Chimpilla, that in camera review of
13 the withheld documents will reveal evidence that the crime-fraud exception applies. *See In*
14 *re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 830 (9th Cir. 1994) (finding that affidavit
15 based on testimony of two of defendant’s former employees was sufficient to meet the *Zolin*
16 standard). The Court also finds that in camera review is appropriate based on the
17 circumstances of this case, where the volume of withheld documents is small and the
18 documents are potentially highly relevant to White’s efforts to overturn the settlement and
19 judgment against him.

20 Therefore, the Court will conduct in camera review of the documents that plaintiffs
21 withheld based on attorney-client privilege or attorney work product privilege. Based on
22 review of the documents and the other evidence presented, the Court will then determine
23 whether “it is more likely than not that the communications were made in furtherance of a
24 fraudulent or criminal purpose.” *Laser Indus., Ltd. v. Reliant Technologies, Inc.*, 167
25 F.R.D. 417, 439 (N.D. Cal. 1996).

26 **B. Relevance**

27 White seeks privileged documents in support of his efforts to invalidate the
28 settlement and overturn the judgment entered in this case. In their briefing, plaintiffs do not

1 contest the potential relevance of the privileged documents that White seeks. The Court
2 notes, however, that Judge Breyer has re-opened discovery for a narrow purpose, and the
3 undersigned magistrate judge is limited in ordering discovery related only to that purpose.
4 Judge Breyer allowed discovery “targeted to identify documents that Replogle received
5 directly or indirectly that were (1) prepared by or for Defendant Thomas White,
6 Defendant’s counsel and/or investigator(s), (2) belonging to Defendant White, Defendant’s
7 counsel and/or investigator(s), and (3) documents and emails reflecting communications by
8 Defendant, Defendant’s counsel and/or investigator(s).” Dkt. No. 1043. Therefore, in the
9 process of reviewing privileged documents in camera, the Court will not only analyze the
10 applicability of the crime-fraud exception, but will ensure that only documents relevant to
11 this narrow issue are produced to White.

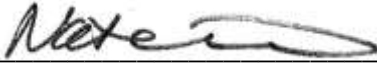
12 CONCLUSION

13 For the reasons discussed, the Court orders plaintiffs to submit to the court for in
14 camera review, within seven days of this order, those documents withheld on the basis of
15 attorney-client or attorney work product privilege, as identified in their privilege log at
16 docket entry number 1205.

17 Any party may object to this order within fourteen days. Fed. R. Civ. P. 72(a).

18 IT IS SO ORDERED.

19 Date: February 28, 2014

20 
21 Nathanael M. Cousins
22 United States Magistrate Judge