

1. A ruling from the U.S. District Court for the Western District of Missouri denying a motion to compel the production of documents off of privilege logs based on the crime-fraud exception to the attorney-client and work product privileges.

In *Consultus, LLC v. CPC Commodities*, 2022 WL 345653 (W.D. Mo. Feb. 4, 2022), U.S. Magistrate Judge Lajuana M. Counts denied a motion to compel Defendants to produce documents from their privilege logs based on the crime-fraud exception to the attorney-client and work product privileges.

In this case involving claims of computer tampering, misappropriation of trade secrets, copyright infringement, and a number of tort and breach of contract claims, Plaintiffs alleged that they owned and developed a software platform for which Defendant provided supporting IT services. Plaintiffs alleged that Defendant accessed their servers without authorization and downloaded proprietary files and databases they owned without their authorization or knowledge. *Id.* at *1.

Magistrate Judge Counts began her discussion with the crime-fraud exception, which Plaintiffs claimed compelled disclosure of the withheld material. *Id.* at *2. She stated that the crime-fraud exception applies to the work product doctrine and assured that the “seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.” *Id.* (internal citations omitted). Parties seeking disclosure under the crime-fraud exception must make a threshold showing of a factual basis adequate to support a good-faith belief by a reasonable person that the party asserting the privilege was engaged in intentional fraud and communicated with counsel in furtherance of the fraud at the time the party was engaged in or planning the criminal or fraudulent scheme. *Id.* at *3. Upon a successful showing, the court has the discretion to engage in an *in camera* review with the available evidence to determine whether the crime-fraud exception applies.

Plaintiffs argued that deposition testimony showed that Defendant’s agent accessed Plaintiffs’ servers and downloaded software code and other material and were directed to do this by Defendant. Magistrate Judge Counts cast doubt on Plaintiffs’ interpretation of this testimony and noted that Defendant cited to various evidence showing that Defendant “had authorization and/or reasonable grounds to believe it had authorization to access the Software because it either owns it or has an implied non-exclusive license to the Software.”

Magistrate Judge Counts found that Plaintiffs’ assertions did not provide an adequate factual basis for the threshold showing under the crime-fraud exception as they “amount[ed] to mere conjecture.” She added that there was no other evidence that the communications were made in furtherance of a crime or fraud, and Plaintiffs merely offered their general theory that a fraud occurred and asserted that any communications made aided that fraud. This did not satisfy the requirements for the crime-fraud exception or justify *in camera* review.

Magistrate Judge Counts used as an example an email Plaintiffs argued confirmed that Defendants communicated with counsel in furtherance of maintaining software they knew was stolen. *Id.* at *4. She stated that the email, which was only three sentences long, was “clearly part of an ongoing discussion” and did “not provide any information as to the specific subject.” Magistrate Judge Counts noted that the email was dated a month after the emails Plaintiffs were requesting, causing

her to reject the suggestion that Defendants waived the attorney-client privilege for other communications by disclosing it to a third party.

Magistrate Judge Counts continued that there were also open fact issues as to whether Defendant owned the software at issue. She stated that Missouri's Computer Tampering Act provided the elements needed to show that a crime or fraud was being undertaken, and per the statute, the "computer tampering must be done 'without authorization or without reasonable grounds to believe that he has such authorization.'" *Id.* (quoting Mo.Rev. Stat. § 569.095 (2017)). Magistrate Judge Counts added that common law fraud also required a specific intent to provide a false representation. *Id.* at *4. Magistrate Judge Counts concluded that Defendant's belief that it owned the software in question negated the crime-fraud exception, and denied this part of Plaintiffs' motion to compel. *Id.* at *5.