

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

ADVICE INTERACTIVE GROUP, LLC,

Plaintiff,

vs.

Case No. 3:17-cv-00801-BJD-MCR

WEB.COM GROUP, INC.,

Defendant.

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**PLAINTIFF'S REPLY IN SUPPORT OF ITS SECOND MOTION TO COMPEL
DEFENDANT TO RETURN INADVERTENTLY PRODUCED PRIVILEGED
DOCUMENTS**

REDACTED

In accordance with this Court's Order (Doc. 182), Advice Interactive Group, LLC ("AIG") hereby files this Reply in Support of Plaintiff's Second Motion to Compel Defendant to Return Inadvertently Produced Privileged Documents ("Motion"). Doc. 150.

I. INTRODUCTION

Web attempts to use its 18-page opposition to a three-page motion to reargue and supplement its arguments that AIG's privileged communications are subject to the crime-fraud exception.¹ *See* Doc. 173, (Defendant's Notice of Filing Under Seal) ("Opposition"). But in this Opposition, Web takes its claims of fraud a step further, casting aspersions on AIG's witnesses and in-house counsel with utterly no support for the claims and insinuations it makes.

Web copied AIG's Visibility Report. That is clear from a simple comparison of AIG's report and the report Web continued to use after it unilaterally terminated its contract with AIG. *See* Doc. S-175-A, (Expert Report of Philip Greenspun) at Section 8.3. In the face of this "smoking gun" evidence of copying, Web uses its Opposition as a mechanism to lead the Court down a rabbit hole of its over the top and baseless fraud allegations—presenting AIG as the wrong-doer. The problem is that the evidence—when properly characterized and fully considered in light of the record in its entirety—simply does not support a finding of fraud.

As discussed below, and in the Declaration of Michael Archuleta, II,² attached hereto as Exhibit A, the document at issue in AIG's Motion is privileged and thus it is Web's burden

¹ *See* Defendant's Motion to Compel (Doc. 128); Defendant's Motion for *In Camera* Review (Doc. 131); Defendant's Motion for Referral to the Register of Copyrights (Doc. 132); Defendant's Response in Opposition to Plaintiff's Motion to Compel (Doc. 163, Notice of Filing Under Seal).

² AIG submits this declaration along with this Reply because at the time AIG filed its Motion, AIG understood that Web was opposing its clawback of AIG01237650 purely on the basis of Web's claim that the crime-fraud and "delay" privilege exceptions/waiver apply with respect to this document. *See* Motion, Ex. A (Doc. 150-1). Web now argues that this document is not privileged and that AIG has failed to meet its burden. AIG was unaware of this basis for Web's refusal to return this document at the time it filed its Motion.

to demonstrate that the crime-fraud exception applies. However, much of Web’s Opposition is dedicated to arguing that AIG01237650-51—the single document at issue in AIG’s Motion—contains misrepresentations that somehow prove Web’s allegations of fraud. In so arguing, Web attempts to circumvent its burden of proving the applicability of the crime-fraud exception, by raising this argument as a justification for withholding AIG’s privileged document. As discussed at length in AIG’s Reply in Support of its First Motion to Compel (“First Reply”) (Doc. S-197), Web cannot rely on AIG’s inadvertently produced privileged document as the sole basis for its claim that the document should be produced because the crime-fraud exception applies. And regardless—[REDACTED] does not evidence fraud.

As such, where the document at issue is clearly privileged and Web’s Opposition (1) mischaracterizes the evidence and contains untruths, and (2) inappropriately alleges fraud and malfeasance unsupported by any evidence, *including* the document that is the subject of AIG’s Motion, the Court should grant AIG’s Motion and require Web to return this document.

II. ARGUMENT

A. *The Document AIG Seeks To Clawback Is Privileged*

As stated in AIG’s Motion, the document at issue is clearly privileged. Motion at 3.

[REDACTED]

[REDACTED] See

Ex. A, Archuleta Decl., ¶¶ 9, 13. [REDACTED]

[REDACTED] *Id.* at ¶¶ 10-

12. [REDACTED] *Id.* at ¶ 12. [REDACTED]

[REDACTED]

██████████ *Id.* at ¶ 14. ██████████

██████████ *Id.* at ¶ 13. Further buttressing AIG's claim that ██████████

is privileged, is Web's own Opposition. All of the arguments Web raises to support its allegations of purported fraud are premised on a finding that the document is in fact privileged.

██████████ *See* Opposition at 16.³

B. *Web Improperly Relies On The Document At Issue to Argue Crime-Fraud*

Web attempts to use ██████████ at issue in AIG's Motion and the plethora of misrepresentations noted below to argue that the crime-fraud exception applies to ██████████ ██████████ However, Web's crime-fraud exception argument is improper and ungrounded in the law. Web does not cite to any case law for the proposition that the crime-fraud exception is appropriately raised in an opposition to a motion to compel inadvertently produced privileged documents. Web is attempting to circumvent its burden of proving the applicability of the crime-fraud exception, by raising its argument as a justification for withholding AIG's privileged document before the Court has made a finding on the applicability of the crime-fraud exception. *See Gutter v. E.I. Dupont De Nemours*, 124 F. Supp. 2d 1291, 1307 (S.D. Fla. 2000) (stating the party opposing privilege based on the crime-fraud exception has the initial burden of proof). Web should not be allowed to unilaterally retain and use ██████████ ██████████ *before* it meets its burden of proof with respect to the crime-fraud exception.

³ Web's argument that it has a substantial need for these documents because it needs to prove its claim for fraud on the Copyright Office is nonsensical and improper—this document does not prove fraud at all. And Web's reliance on this *privileged* document for its fraud on the Copyright Office claim is improper. *See* Section II.B.

Web cannot rely on AIG's inadvertently produced privileged document as its basis for its claim that the crime-fraud exception applies here. *See Bailey v. Oakwood Healthcare, Inc.*, No. 15-11799, 2017 WL 427714, at *4 (E.D. Mich. Feb. 1, 2017) (“Without some plausible indication of fraud outside of the [document], Plaintiff's argument [that the crime-fraud exception is applicable] is conjecture.”). In its Opposition, Web improperly relies on AIG's privileged document in order to assert that the crime-fraud exception applies to this very same document—only accompanied by a page of narrative containing pure conjecture [REDACTED] [REDACTED] Opposition at 15. Web's unsupported claims are improper—and Web's reliance on the document itself in creating this narrative is an improper attempt to bootstrap its claim that the crime-fraud exception applies. Thus, the Court should not consider any of Web's fraud allegations in ruling on AIG's Motion.

C. *The Crime-Fraud Exception Does Not Apply Here*

To the extent the Court does consider Web's crime-fraud arguments, the exception does not apply here, and the document in question does not evidence fraud.⁴ As an initial matter, Web's fraud claim rests on disputed facts and legal conclusions that have not been proven, and are hotly contested—specifically Web's purported authorship and the completion date of the report. Web's arguments essentially amount to an assertion that Web is right, therefore AIG must have committed fraud. But one does not follow from the other—and indeed the former does not demonstrate any evidence of intent. Because of this failing, [REDACTED] [REDACTED]

⁴ AIG incorporates its arguments regarding the applicability of the crime-fraud exception in its Opposition to Web's Motion to Compel. Doc. 157.

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