

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

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IN RE: ASHLEY MADISON CUSTOMER DATA)	MDL No. 2669
SECURITY BREACH LITIGATION)	4:15-MD-2669-JAR
)	
This Document Relates to:)	
)	
ALL CASES)	
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**PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR
LEAVE TO FILE THEIR MEMORANDUM IN OPPOSITION TO DEFENDANT
AVID DATING LIFE, INC.'S MOTION FOR A PROTECTIVE ORDER UNDER SEAL**

I. INTRODUCTION

In what could only be described as an oddity, Defendants oppose Plaintiffs' Motion for Leave to File Under Seal¹ despite the fact that their success in opposing this motion would result in the very thing Defendants seek to prevent in their Motion for a Protective Order — the filing of the documents on the public docket. Regardless, Plaintiffs do not intend, for present purposes, to submit any original documents ADL maintains have been stolen or are somehow privileged. Instead, plaintiffs intend to quote and discuss some of the media reports that themselves discuss such documents and submit those media reports as exhibits.² This is entirely appropriate, given

¹ Later today, Plaintiffs will file their Memorandum in Opposition to Defendant Avid Dating Life, Inc.'s ("ADL") Motion for a Protective Order Precluding Use of Stolen Documents by Plaintiffs or Their Counsel [Doc. No. 116] (the "Opposition to the Motion for Protective Order"). For the reasons Plaintiffs will set forth in their Memorandum in Opposition, Plaintiffs do not believe there exists any prohibition against referencing documents that have been publicly released on the Internet by individuals having nothing to do with Plaintiffs or their attorneys and widely discussed in media accounts of the data breach at issue.

² On Wednesday, March 9, 2016, Plaintiffs' counsel advised Defense counsel of the fact that Plaintiffs intended to only reference documents/emails to the extent they were reported/quoted in

that, for example, parties relying on the crime-fraud exception to the attorney-client privilege must make a threshold showing of an intent to defraud, based on any relevant evidence, lawfully obtained, that has not been itself adjudicated to be privileged. Thus, contrary to ADL's assertion in its opposition to Plaintiffs' motion for leave to file under seal ("Motion"), Plaintiffs' intend to follow the correct procedure in asking for the Court to find that the crime-fraud exception to the attorney-client privilege applies to certain communications between Defendants Leslie Weiss, Barnes & Thornburg (collectively "B&T") and ADL. In fact, Plaintiffs' Motion, while not required by *either* the Rules of Professional Conduct or caselaw, was done out of an abundance of caution, so as not to publicly disclose disputed communications prior to the Court's ruling on the issue. (See Motion for Leave to File Sealed Documents, Dkt. #125, at 2). Under these circumstances, it is hard to understand ADL's vigorous opposition. Nevertheless, Plaintiffs reply briefly as follows.

II. ARGUMENT

ADL does not maintain that all (or even most) of the documents at issue are legally privileged. With regard to those documents for which ADL asserts privilege, however, Plaintiffs maintain that one of the reasons ADL's argument fails is that the documents are subject to the crime-fraud exception. In the leading case on that exception, *United States v. Zolin*, 491 U.S. 554 (1989), the United States Supreme Court addressed how a district court should proceed when a party invokes the crime-fraud exception. There, the Court held that the district court may engage in an *in camera* review of the materials at issue to determine whether the crime-fraud exception

media outlets, and attach some of those articles as exhibits. On Thursday, March 10, 2016, Plaintiffs' counsel emailed Defense counsel copies of the exhibits that Plaintiffs will be attaching to the Memorandum in Opposition. Despite the fact that these are publicly available news articles, Defendants declined Plaintiffs' request to withdraw their opposition to the motion to file under seal.

applies. *Id.* at 574-75. As ADL correctly notes, before the district court engages in an *in camera* review of the materials, the party seeking the *in camera* review must present sufficient evidence to support a reasonable belief that the crime-fraud exception applies. *Id.* (requiring only a threshold showing “of a factual basis adequate to support a good faith belief by a reasonable person” that the crime-fraud exception applies). Yet, ADL fails to acknowledge the next sentence of the *Zolin* Court’s decision, which states “the threshold showing to obtain *in camera* review may be met by using **any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.**” *Id.* at 575.

As will be discussed in greater detail in their Memorandum in Opposition, the documents that Plaintiffs seek leave to file under seal are relevant, lawfully obtained, and have not been adjudicated as privileged. Plaintiffs’ documents are news articles discussing the data breach and Defendants’ use of fake female profiles. In the articles, the journalists reviewed the leaked documents and describe the communications between ALM and B&T regarding methods of hiding the fake female profiles from *Ashley Madison* Members. The evidence is relevant because the articles discuss how Defendants worked together to commit fraud against *Ashley Madison* Members. The articles were lawfully obtained by Plaintiffs and, in fact, remain available to anyone with access to the Internet.³ Finally, the articles Plaintiffs seek to file under seal have not been adjudicated to be privileged by this Court or any other court. Thus, Plaintiffs, in an abundance of caution, have gone above and beyond what is required by *Zolin* by requesting leave to file **publicly available news articles** under seal.

³ Pursuant to Supreme Court precedent including *Bartnicki v. Vopper*, the journalists’ access of and reporting on the original materials is protected by the First Amendment. 532 U.S. 514 (2001) (holding that the First Amendment protected a radio commentator’s broadcast of intercepted phone calls).

But even setting aside the fact that Plaintiffs are rightly within the *Zolin* rule, the type of conduct that *Zolin* intended to discourage — groundless fishing expeditions into privilege logs — is simply not present here. As the Eighth Circuit has explained, “concerned that routine in camera review would encourage opponents of the privilege to engage in groundless fishing expeditions, the [*Zolin*] Court ruled that the discretion to review in camera may not be exercised unless the party urging disclosure has made a threshold showing ‘of a factual basis adequate to support a good faith belief by a reasonable person’ that the crime-fraud exception applies.” *In re BankAmerica Corp. Sec. Litig.*, 270 F.3d 639, 641-42 (8th Cir. 2001) (citations omitted). Plaintiffs are not engaging in a fishing expedition here. Plaintiffs are using a discrete set of publicly available documents to make the threshold showing (required by *Zolin*) that the crime-fraud exception applies to documents that ADL and B&T have in their possession.

III. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs Motion for Leave to File Their Memorandum in Opposition to Defendant Avid Life, Inc.’s Motion for a Protective Order Under Seal [Doc. No. 125].

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2016, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all parties. In addition, copies were served via email upon the following attorneys of record:

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