IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502013CA015257 "AI"
Consolidated for discovery purposes only with
CASE NO. 502015CA001012 "AI"

HAROLD PEERENBOOM,
Plaintiff,

v.

ISAAC ("IKE") PERLMUTTER,
LAURA PERLMUTTER, and
JOHN/JANE DOES 1 to 10,
Defendants.
_____/

ORDER GRANTING DEFENDANTS ISAAC AND LAURA PERLMUTTERS' MOTION TO COMPEL DEPOSITION TESTIMONY OF WILLIAM DOUBERLEY, ESQ.

THIS CAUSE came before the Court for an evidentiary hearing on Defendants Isaac and Laura Perlmutters' ("Perlmutters") Motion to Compel Deposition Testimony of William Douberley ("Motion"), filed on September 29, 2015. The Court has carefully considered the Perlmutters' Motion and post-hearing memorandum, Plaintiff Harold Peerenboom's ("Peerenboom") Memorandum in Opposition and post-hearing submissions, the testimony and evidence presented at the hearing, the case file, and is otherwise fully advised in the premises.

I. INTRODUCTION

This case arises out of an action by Peerenboom against the Perlmutters for defamation and defamation per se, intentional infliction of emotional distress, tortious interference with advantageous business relationships, and civil conspiracy, stemming from an alleged "hate mail" campaign purportedly orchestrated by the Perlmutters and others. William Douberley ("Douberley") is an attorney who previously represented Peerenboom in an action filed in the

Fifteenth Judicial Circuit in and for Palm Beach County, Florida, in the matter of *Kaye-Dee Sportswear, Inc. and Karen Donnelly v. Monique Matheson, et. al.,* case number 50-2011CA006192 ("*Kay-Dee Sportswear* litigation"). The *Kay-Dee Sportswear* litigation involved a dispute separate and apart from this litigation but also involved claims for malice and defamation. The Perlmutters were deposed by Douberley in the *Kay-Dee Sportswear, Inc.* litigation on February 27, 2013 as non-party witnesses. In the instant litigation, the Perlmutters are seeking to determine whether Douberley deposed them in the *Kaye-Dee Sportswear* litigation for the purpose of assisting Peerenboom in secretly collecting their DNA. The Perlmutters allege that Douberley assisted in collecting samples of their DNA by having them touch documents during their depositions in the *Kaye-Dee Sportswear* litigation.

II. FACTUAL AND PROCEDURAL BACKGROUND

Peerenboom filed the instant action against the Perlmutters in October 2013, approximately eight months after the Perlmutters' depositions were taken in the *Kay-Dee Sportswear* litigation. In June 2014, Peerenboom sent the Perlmutters a Notice Pertaining to DNA (Fla. Stat. § 760.40) ("Notice"). In the Notice, Peerenboom informed the Perlmutters that their DNA samples were tested by a DNA lab and that the results were in the care, custody, and control of Peerenboom and the Palm Beach Police Department ("PBPD").

In August 2015, the Perlmutters deposed Douberley in this case. During his deposition, Douberley was instructed not to answer, and did not answer, sixteen questions on the ground of attorney-client privilege. While Douberley did raise the attorney-client privilege objection during his deposition, the Perlmutters were able to ascertain through Douberley's deposition testimony that the collection of their DNA would not have been possible without Douberley's direct participation in that scheme.

The Perlmutters filed the instant Motion on September 29, 2015 seeking to compel Douberley to answer those specific questions for which he asserted attorney-client privilege. The Perlmutters allege that the crime-fraud exception to the attorney-client privilege, Florida Statute section 760.40 (2015), pierces this privilege. The Perlmutters argue that the crime-fraud exception applies because Douberley's participation in the collection of DNA was essential. Specifically, Douberly (1) issued the subpoenas to compel the Perlmutters to attend the deposition; (2) permitted a forensic technician to attend the deposition to collect the samples; (3) worked with the technician to facilitate the collection at the deposition; (4) requested that the Perlmutters handle certain documents that later produced the tested DNA samples; and (5) ensured that the forensic technician could collect the documents for testing.

On April 8, 13, 22, and 25, 2015, this Court conducted an evidentiary hearing on the Perlmutters' Motion. At the hearing, Peerenboom, Peerenboom's private investigator Steve Reesor ("Reesor"), and Detective Menniti of the PBPD testified, with various exhibits being entered into evidence. Relevant portions of the testimonies are set forth below.

1. Peerenboom's Testimonial and Documentary Evidence.

a. Peerenboom's Testimonial Evidence.

Peerenboom was called as a witness by both the Plaintiff and the Defendants during the evidentiary hearing. As detailed below, this Court does not find Peerenboom's testimony to be credible. Instead, a critical portion of his testimony was inconsistent with that of other witnesses and documentary evidence. Most significantly, upon cross-examination, Peerenboom admitted to his involvement in the scheme to collect the Perlmutter's DNA under false pretenses and further admitted that he had continued to knowingly violate the DNA statute after April 2013.

Peerenboom initially explained that a hate-mail campaign started against him in

December of 2012. Letters were sent to various residents of Peerenboom's condominium association, at both their Toronto, Canada and Florida addresses, which stated that Peerenboom was a pedophile and that he was involved in a homicide in Hallandale Beach, Florida. Peerenboom notified the PBPD and, in response, a criminal investigation was initiated by the PBPD in December of 2012.

When the hate-mail campaign began, Peerenboom was a defendant in the *Kaye-Dee Sportswear* litigation. While the Perlmutters were non-parties to that litigation, Peerenboom testified that the Perlmutters provided funding to the *Kaye-Dee Sportswear* plaintiff. On cross examination, Peerenboom admitted that the subpoena power of the Court in the *Kaye-Dee Sportswear* litigation was used to further his private investigation into the hate-mail campaign, and he further confirmed that the subpoenas were issued in order to compel the Perlmutters' appearances at depositions to create opportunities to collect their DNA samples through the use of discarded items. (Defs.' Ex., DX 16.) Peerenboom repeatedly asserted during his testimony, however, that it was actually Douberley's idea to collect both water bottles and discarded items at Perlmutters' depositions in order to collect their DNA. Peerenboom testified that he also wanted the Perlmutters to answer specific questions pertaining to the *Kaye-Dee Sportswear* litigation at their depositions.[1] Peerenboom also testified that this deposition was not the first time he attempted to collect DNA samples from individuals suspected of being involved with the hate-mail campaign.[2]

[1]Specifically, Peerenboom indicated that he wanted to know if Defendant Isaac Perlmutter published an anonymous letter to others; the letter being the subject of the defamation claim in *Kaye-Dee Sportswear, Inc.* He also indicated that the deposition was used to address the malice issue regarding the defamation claim.

[2] Peerenboom repeatedly testified that he went through the trash and recycling of his neighbors at his home in Palm Beach. Additionally, Peerenboom testified that he attempted to collect DNA

Peerenboom testified during the evidentiary hearing that he, Douberley, and Michael Sinke ("Sinke"), an employee of Speckin Laboratories (a private DNA testing facility), were present at the depositions of the Perlmutters taken in the *Kaye-Dee Sportswear* litigation on February 27, 2013. Peerenboom, through his private investigator Reesor, hired Speckin Laboratories to conduct private testing of collected DNA samples. Peerenboom testified that Sinke was sent to the Perlmutters' depositions to assist with the collection of discarded items from the depositions for possible DNA testing.

During his testimony, the Perlmutters offered into evidence the video deposition of Sinke, which was taken as part of the discovery in the instant matter. The video deposition was offered to the Court for the purpose of establishing Douberley's knowledge of Sinke's role at the depositions in the *Kaye-Dee Sportswear* litigation. Sinke testified at his deposition that he did not know whether Douberley was aware of the plan to collect the Perlmutters' DNA prior to the depositions. Sinke's testimony further revealed that he informed Douberley prior to the Perlmutters' depositions that "special paper" would be brought to the deposition for the specific purpose of collecting the Perlmutters' DNA.

During the evidentiary hearing, on cross examination, defense counsel asked Peerenboom about Sinke's video deposition testimony, specifically about whether Peerenboom had been informed prior to the depositions of the "special paper". Peerenboom responded that someone told him that Sinke had some "special paper" for the Perlmutters to handle during their

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from an individual named Steven Rafael. Peerenboom arranged to have Steven Rafael attend a restaurant owned by a friend. Peerenboom intended to test items handled by Steven Rafael from the restaurant in order to obtain a DNA sample from him.

depositions.[3] Peerenboom asserted that while at the Perlmutters' depositions he was instructed not to touch the documents. Peerenboom also testified that while at the Perlmutters' depositions in the *Kaye-Dee Sportswear* litigation, Sinke informed him that the laboratory wanted as few people handling the "special paper" as possible.

The videotaped deposition of Douberley, taken in the instant matter in August 2014, was offered as evidence during Peerenboom's testimony. Douberley's videotaped testimony indicated that he was neither made aware of the plan to obtain the Perlmutters' DNA through the use of specifically manufactured paper, nor did any discussion pertaining to DNA collection take place. Douberley also indicated that he handed the Perlmutters the special paper to touch at the request of Peerenboom. This statement was later partially confirmed, through Peerenboom's testimony, when Peerenboom indicated neither he nor Douberley were made aware of the plan to collect the Perlmutters' DNA through the use of special paper.

Peerenboom testified that his collection of the Perlmutters' DNA was proper because law enforcement authorized the collection, and because he was working as an undercover agent for the PBPD. During the hearing, however, Peerenboom repeatedly confirmed that the Perlmutters' DNA was taken without their knowledge and under false pretenses.[4] Peerenboom also confirmed that, at the time he sought the subpoena duces tecum in *Kay-Dee Sportswear* litigation, he never informed the trial court that he intended to take DNA samples from the Perlmutters at their depositions. When asked by defense counsel whether the special paper was a

[3] Peerenboom confirmed that he met with Erich Speckin of Speckin Laboratories two days prior to the deposition of the Perlmutters. He stated that he and Speckin did not discuss anything regarding the special paper to be used at the deposition to collect the Perlmutters' DNA samples.

[4] Peerenboom qualified these assertions by articulating, "I was led to believe by the police and the lawyer, if they discarded items, we were allowed to pick them up, I was going with what I was aware."

fake document presented to the Perlmutters at the depositions, Peerenboom responded, "I do not recall that, sir. I'm not saying it didn't happen."

Peerenboom, in his defense, explained that at the time of the Perlmutters' depositions, he was unaware of Florida Statute section 760.40, which prohibits the testing and publication of DNA samples without the informed consent of the person to be tested. Peerenboom testified that he became aware of section 760.40 at a meeting with his legal counsel on April 5, 2013. Peerenboom further asserted that a reasonable interpretation of section 760.40 might preclude his conduct had he done so privately but, because Peerenboom was working "in cooperation of a police investigation to prosecute [the Perlmutters]," Peerenboom felt his conduct was permissible. He also stated that if his conduct was illegal, he should have been stopped by law enforcement investigating his case and counsel[5] representing him in the current matter. Peerenboom testified that he understood the statute to pertain mainly to employment issues: "This was a statute as I read it for employment. You can't bring someone into your office, give them a glass of water or coffee and do the DNA to see if they have health problems."

Peerenboom confirmed that the parties in the *Kay-Dee Sportswear* litigation entered into an agreed order which required that the parties "maintain the confidentiality of the [Perlmutters'] testimony" and which prohibited the parties from "disseminating any information revealed" during the deposition. Despite the agreed order, evidence was submitted which showed that on April 20, 2013, Peerenboom emailed individuals who were involved in examining the hate-mail, indicating that the DNA testing was taking place and that the results of those tests would arrive thereafter. Peerenboom also testified that he disclosed the results of the DNA testing conducted

[5] Peerenboom later indicated to the Court that he did not seek a legal opinion prior to the collection and testing of the Perlmutters' DNA.

from the deposition to an individual[6] at the Canadian Broadcasting Company.

b. E-Mail Evidence Submitted During Peerenboom's Testimony.

E-mail discussions between Peerenboom, Douberley, and other parties involved in examining the hate-mail campaign were submitted into evidence during Peerenboom's direct and cross examinations. An e-mail sent on January 16, 2013, from Douberley to Peerenboom, which was approximately one month before the Perlmutters' depositions, included "We could have an investigator pick up a used glass or water bottle." [7] (Defs.' Ex., Control Two.) Peerenboom's responsive e-mail on that same day stated, "I think that's a great idea." (*Id.*) Additionally, in an e-mail dated February 14, 2013, Douberley wrote to Peerenboom:

> I don't think I want your hired guns at the upcoming depositions. I need to be delicate in approaching this topic, since, on its face, it is far afield from the tennis girl's case [*Kay-Dee Sportswear, Inc.*]. I don't want to be quite so bold as to bring in the attorneys who have been hired to deal with that case exclusively and give the judge excuse to preclude exploration, even on the fringes.

(Defs.' Ex., Control Three.)

Peerenboom forwarded the February 14, 2013 email to Mark Dunbar ("Dunbar"), an attorney advising Peerenboom with regard to possible criminal activity associated with the hate-mail campaign. Dunbar replied that the civil suit and PBPD investigation "are parallel paths . . . and mixing them incorrectly will create problems." (*Id.*) Douberley was not part of this e-mail conversation between Peerenboom and Dunbar. Peerenboom, however, later forwarded the February 14, 2013 email to Douberley and included a notation that "they" – meaning Dunbar and

[6] The individual was identified by defense counsel as "a man named Fife."

[7] This e-mail appears to originate from a different conversation that was then forwarded to Douberley. The e-mail's subject line: "Re: FW: From Harold Peerenboom – Criminal Postal Abuse Issue Timeline Letter and Documents." (Defs.' Ex., Control Two.)

his other counsel – would not attend the deposition.[8] On February 15, 2013, Douberley sent a follow up email to Peerenboom stating, "Let me know if you want to try and get a DNA sample." (*Id.*) Later that same day, Peerenboom replied, "For sure absolutely. [F]rom both of them." (*Id.*)

2. Testimony of Detective Menniti.

Detective Menniti is a detective with the PBPD. This Court finds Detective Menniti's testimony to be credible. In December of 2012, Detective Menniti was assigned as the lead investigator to the PBPD's investigation of the hate-mail campaign. Detective Menniti testified at the evidentiary hearing that as of April 8, 2016, the hate-mail investigation was still ongoing.

Detective Menniti testified that when his investigation began, he told Peerenboom that any potential DNA testing of letters from the hate-mail campaign could not be conducted through the PBPD because of protocol and expense.[9] In response, Peerenboom expressed his interest in hiring a private DNA lab to conduct DNA testing. Detective Menniti testified he attempted to dissuade Peerenboom from doing so, because of concerns relating to chain of custody and admissibility of evidence in court. He opined during his testimony that he did not think Peerenboom was dissuaded from pursuing that course of action. Detective Menniti testified, however, that he would not bar himself from reviewing evidence produced from a

[8] Specifically, Peerenboom wrote: "Here is the email confirming they will not attend." (Defs.' Ex., Control Three.)

[9] Detective Menniti, however, did indicate that he took DNA samples from other individuals involved in the hate-mail investigation. Detective Menniti also testified about the PBPD procedure regarding DNA collection. He stated that the PBPD must obtain consent before collecting a DNA sample – such as hair, blood, urine, or finger nail scrapings – from an individual. When asked whether he tested other suspects to the hate-mail campaign, Detective Menniti stated that he did collect a buccal swab sample from one other person involved in the *Kay-Dee Sportswear* litigation. While Detective Menniti obtained the suspect's consent prior to test, he did indicate that he sent the sample to Reesor, Peerenboom's private investigator, for DNA testing and analysis.

private investigation. He also testified that he never expressly told Peerenboom it was illegal to collect discarded objects to test them for DNA.

Detective Menniti further testified that he was advised by Peerenboom that Peerenboom would not do anything without Detective Menniti's knowledge and approval, as to prevent Peerenboom from interfering with the PBPD's investigation. Detective Menniti explained that he explicitly stated that at no time was Peerenboom operating as an agent of the PBPD, nor was Peerenboom working undercover on behalf of PBPD. Detective Menniti testified that every action Peerenboom took, Peerenboom did so as a private citizen.

Detective Menniti testified that Peerenboom e-mailed him prior to the Perlmutters' depositions, asking if Detective Menniti had any questions he felt Peerenboom should ask concerning the hate-mail investigation. Peerenboom's e-mail, however, did not inform Detective Menniti that Peerenboom intended to collect the Perlmutters' DNA samples. Detective Menniti later qualified his testimony, stating that he was generally aware that Peerenboom was collecting discarded objects in his community to have tested for DNA samples to compare to samples obtained from hate-mail letters.

Detective Menniti testified that on April 5, 2013, he received the results of the Perlmutters' DNA testing in an e-mail from Reesor and Speckin Laboratories. He again reiterated his concerns to Peerenboom regarding private entities testing and analyzing DNA samples. Detective Menniti, however, did indicate during his examination by defense counsel, that he did not feel it was illegal for the Peerenboom to collect and test a discarded item.

3. Testimony of Reesor.

Reesor is a retired police officer and investigator from Toronto, Canada. The Court finds Mr. Reesor's testimony to be credible. He is currently a licensed private investigator in Canada.

A long-time friend of Peerenboom, Reesor was hired by Peerenboom in December of 2012 to investigate the hate-mail campaign. Reesor testified he received some of the hate-mail letters from Peerenboom and sent them to Maxxam Analytics, a private DNA laboratory, to extract any DNA samples from them.

Reesor indicated that Detective Menniti was the head of the investigation. Reesor understood, however, that he would assist with the DNA collection given PBPD's budgetary constraints. Reesor testified when the question of private DNA testing was posed, Detective Menniti did not seem reluctant to the idea of using the results of a privately retained DNA lab during the investigation. Reesor did recall Detective Menniti telling Peerenboom and Reesor there would be "some hurdles" to using privately analyzed DNA samples in court. Reesor also testified he was unaware of regulations governed by section 760.40, Florida Statutes; he later became aware upon meeting with Peerenboom's legal counsel in April of 2013.

III. LEGAL ANALYSIS

In their Motion, the Perlmutters argue that Peerenboom knowingly used the services of Douberley to both commit a fraud on the trial court in the *Kaye-Dee Sportswear* litigation and to commit a crime against the Perlmutters. The Perlmutters argue this use of Douberley's services implicates the crime-fraud exception to attorney-client privilege, thereby allowing the Court to compel Douberley's deposition.

In support, the Perlmutters first argue Peerenboom and his attorney committed a fraud on the trial court in the *Kaye-Dee Sportswear* litigation when they improperly used the court's subpoena power to compel the Perlmutters' attendance at a deposition without informing the trial court of the true motive behind the deposition. Second, the Perlmutters argue because Peerenboom was neither acting on behalf of the PBPD, nor working to further a criminal

prosecution, Peerenboom committed a crime by illegally collecting analyzing their DNA, and by publishing the results of that analysis. Third, the Perlmutters argue because Peerenboom testified to Douberley's knowledge regarding section 760.40, he put Douberley's knowledge at issue, thereby requiring Douberley to disclose his communications on the matter. In response, Peerenboom argues the crime-fraud exception to attorney-client privilege does not apply here for three reasons: (1) Peerenboom lacked knowledge that his conduct was a crime at the time of the deposition; (2) no crime or fraud occurred prior to, nor during the deposition and; (3) this Court's *in camera* review of e-mails renders the Permutters' Motion moot, as the e-mails answer the sixteen questions objected to during Douberley's deposition.

Communications between an attorney and his or her client typically are privileged from disclosure. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). This privilege exists to "encourage full and frank" communications between attorneys and clients in order to promote broader public interests related to the administration of justice. *Id.* The policy of protecting these communications, however, is not without limitation. *Am. Tobacco Co. v. State*, 697 So. 2d 1249, 1255-57 (Fla. 4th DCA 1997). This privilege ceases to protect communications when "the desired advice refers . . . to future wrongdoing." *United States v. Zolin,* 491 U.S. 554, 562-63 (1989). This exception operates to assure that the "seal of secrecy" between an attorney and his or her client does not "extend to communications made for the purpose of getting advice for the commission of a fraud or crime." *Id.* at 563 (internal quotations omitted); *see also Kneale v. Williams*, 30 So. 2d 284 (Fla. 1947). Thus, "[t]he dispositive question is whether the attorney-client communications are part of the client's effort to commit a crime or perpetrate a fraud." *First Union Nat'l Bank v. Turney,* 824 So. 2d 172, 186-87 (Fla. 1st DCA 2001) (citations omitted). It is immaterial whether the lawyer knows of the client's intent to commit a crime or

perpetrate a fraud, "so long as the client has the intention to do so sometime in the future." *Id.* If the client can show, however, that his criminal or fraudulent course of action was taken in good faith, the attorney-client privilege will remain in effect. *Id.* (citing §90.502(4)(a), Fla. Stat (1987)).

In order to compel Douberley's testimony under the crime-fraud exception to the attorney-client privilege, the Perlmutters must show, by a preponderance of the evidence, that Peerenboom either knowingly used the services of his former attorney to commit a fraud on the trial court in *Kaye-Dee Sportswear, Inc.*, or that Peerenboom committed a crime against the Perlmutters. *Am. Tobacco Co.*, 697 So. 2d at 1255-57. For the reasons set forth below, this Court finds that the attorney-client privilege between Peerenboom and Douberley is pierced under the crime-fraud exception. Peerenboom's conduct was without a reasonable good faith explanation to keep the attorney-client privilege intact. An examination of both the fraud and the crime elements of this exception are discussed below.

1. Whether Peerenboom Committed a Fraud Against the Trial Court in the *Kaye-Dee Sportswear* Litigation.

A litigant commits fraud on the court when "it can be demonstrated, clearly and convincingly," that the litigant intentionally sets forth an "unconscionable scheme calculated to interfere with the judicial system's ability impartiality to adjudicate a matter." *Trans Health Mgmt. Inc v. Nunziata,* 159 So. 3d 850, 861 (Fla. 2d DCA 2014) (citing *Ramney v. Haverty Furniture Cos.*, 993 So. 2d 1014, 1018 (Fla. 2d DCA 2008)). Improper interference can occur when a litigant "improperly influenc[es] the trier of fact or unfairly hamper[s] the presentation of the opposing party's claim or defense." *Id.*; *Ramney,* 993 So. 2d at 1018.

This Court finds that Peerenboom's request, through Douberley, to use the subpoena power of the court to depose the Perlmutters in the *Kay-Dee Sportswear* litigation constitutes

fraud on the trial court. First, without a clear explanation for the purpose of the deposition, outside of Peerenboom's ancillary goal to collect the Perlmutters' DNA, this Court cannot ascertain a legitimate basis for the subpoena issued. Second, this Court finds Peerenboom's testimony regarding the purpose of the deposition – to ask the Perlmutters' questions about publication and malice in the *Kay-Dee Sportswear* litigation– not credible. Peerenboom's e-mail conversations with Douberley further confirm Peerenboom's initial testimony that the subpoena was utilized in order to obtain the Perlmutters' DNA samples without their consent.

The circumstances surrounding the issuance and use of the subpoena also corroborate this conclusion. Peerenboom first became aware of the hate-mail campaign in December of 2012. Douberley issued the subpoena duces tecum in January of 2013. During this time, Peerenboom testified that he had already begun his efforts to collect DNA samples from individuals suspected of being involved with the hate mail campaign. Peerenboom also testified that the idea to collect DNA samples at the deposition originated with Douberley, and came about after Peerenboom failed to collect DNA from another "suspect."

The conduct of both Peerenboom and his counsel during from December of 2012 to January of 2013 demonstrates, by a preponderance of the evidence, that Douberley filed the subpoena for the purpose of providing Peerenboom with an opportunity to obtain DNA samples from the Perlmutters. This Court finds that Peerenboom, through the assistance of Douberley, issued the subpoena duces tecum under false pretenses in order to further his efforts to collect DNA samples from alleged suspects. As such, Peerenboom committed a fraud on the trial court within the meaning of the crime-fraud exception to the attorney-client privilege. *See* §90.502(4)(a); *see also United States v. Zolin,* 491 U.S. 554, 562-63 (1989). Thus, on the first ground, this Court finds the attorney-client privilege is pierced.

2. Whether Peerenboom Committed a Crime Against the Perlmutters under Section 760.40, Florida Statutes, within the Meaning of the Crime-Fraud Exception to the Attorney-Client Privilege.

a. Florida Statute section 760.40.

Section 760.40, Florida Statutes, makes it a crime to conduct DNA analysis without first obtaining consent from the person to be tested. Specifically, section 760.40(2)(a) provides:

> Except for purposes of criminal prosecution, except for purposes of determining paternity as provided in s. 409.256 or s. 742.12(1), and except for purposes of acquiring specimens as provided in s. 943.325, DNA analysis may be performed only with the informed consent of the person to be tested, and the results of such DNA analysis, whether held by a public or private entity, are the exclusive property of the person tested, are confidential, and may not be disclosed without the consent of the person tested. Such information held by a public entity is exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

The language of section 760.40(2)(a) is "aimed at two types of individuals or entities: those who analyze the DNA and those who receive the records, results, or findings of the analysis." *Doe v. Suntrust Bank*, 32 So. 3d 133, 138 (Fla. 2d DCA 2010).

An individual who performs DNA analysis and/or releases the results of such testing, without the informed consent of the person to be tested, commits a misdemeanor in the first degree. § 760.40(b). In *Greenberg v. Miami Children's Hospital Research Institute, Inc.*, 264 F. Supp. 2d 1064, 1075 (S.D. Fla. Mar 29, 2003), the Southern District of Florida articulated section 760.40 "by its plain meaning, . . . only provides penalties for disclosure *or* lack of informed consent if a person is being genetically tested." (emphasis added). Additionally, under section 90.502, the attorney-client privilege ceases to exist when "the services of the lawyer were sought or obtained to enable anyone to commit or plan to commit what the client *knew* was a crime or a fraud." (emphasis added). Thus, this section imparts a knowledge requirement on the part of the plaintiff that his or her conduct was a crime or a fraud.

b. Construction of Florida Statute section 760.40.

Before examining whether Peerenboom's actions in the *Kaye-Dee Sportswear* litigation violated section 760.40, the Court first addresses the proper construction of the statute. Peerenboom contends a literal interpretation of section 760.40 would produce both an ambiguous and absurd result. Specifically, Peerenboom argues that a literal application of the statute would mean any police officer who has tested and analyzed DNA during a criminal investigation has also committed a misdemeanor. Peerenboom also asserts a logical reading of the statute would require a DNA sample be taken from the body of the person to be tested – i.e., a buccal swab instead of a sample from a physical item – in order for an individual to be found in violation of the statute. Peerenboom thus argues that by taking discarded items and items that were touched by the Perlmutters, Peerenboom is not in violation of the statute. This Court rejects both of Peerenboom's interpretations of the statute for the reasons discussed below.

To Peerenboom's first argument, section 760.40 expressly exempts law enforcement from this statute by providing that DNA collection and testing utilized for purposes of criminal prosecution is exempt from the statute. § 760.40(2)(a), Fla. Stat. Thus, contrary to Peerenboom's assertion, law enforcement would not be criminalized under this statute. Accordingly, this Court rejects Peerenboom's first interpretation of section 760.40.

Peerenboom's second argument, asserting that a tested DNA sample must be taken directly from a person's body in order to be within the scope of section 760.40, distorts the plain terms of the statute. This Court finds that the terms of the statute make no such distinction between the testing of a DNA sample collected directly from a person's body and the testing of a DNA sample collected from an object discarded by a person to be tested. Rather, the statute criminalizes the testing, analysis, and publication of a person's DNA sample without their

consent, *regardless* of how the sample was obtained. Merely collecting items the Perlmutters touched and, further, utilizing specialized tools for the Perlmutters to handle to obtain their DNA does not remove Peerenboom from the scope of this statute. Collection by intentional transference of DNA is still collection from a person. Thus, this Court rejects Peerenboom's second interpretation of section 760.40.

c. Peerenboom's Actions Implicate section 760.40.

Because this Court rejects Peerenboom's interpretation of section 760.40, this Court must also find that Peerenboom's actions implicate section 760.40. For Peerenboom's collection of the Perlmutters' DNA to trigger the crime-fraud exception to attorney-client privilege, it must first be shown Peerenboom actually violated the statute and, if so, whether he knew his actions were a crime. These issues are addressed in turn.

1) Whether Peerenboom Collected and Analyzed DNA from the Perlmutters without Their Consent, and/or Whether Peerenboom Disclosed the Results of Such DNA Testing without the Perlmutters' Consent.

Peerenboom repeatedly testified at the evidentiary hearing that his primary objective at the depositions was to collect and analyze the Perlmutters' DNA. He also repeatedly testified during the hearing that he collected and analyzed these DNA samples without the Perlmutters' consent. Additionally, e-mails sent between Peerenboom and Speckin Laboratories, which were provided to the Court during the hearing, confirm that samples were taken from the Perlmutters' deposition and were analyzed to create a genetic profile. (Pl.'s Ex., PX 8-3a.)

While Peerenboom admitted to collecting and testing DNA without the Perlmutters' informed consent, Peerenboom contends that he collected and tested these samples in furtherance of a criminal prosecution and thus, his conduct is protected by the plain language of section 760.40(2)(a). At no time, however, was a criminal prosecution initiated against any alleged

suspect in the hate-mail investigation. Further, Detective Menniti testified that Peerenboom never acted under the authority of the PBPD, and no evidence was submitted to suggest that Peerenboom was working under the authority of the State Attorney's office. Thus, Peerenboom's argument that his conduct is sanctioned by the language of section 760.40 is without merit. Instead, the evidence and admissions from Peerenboom himself overwhelmingly establish that the Perlmutters' DNA samples were collected, tested, and analyzed, without their informed consent in violation of section 760.40(2)(a).

During the evidentiary hearing, Peerenboom also attempted to draw a distinction between the collection of discarded items for DNA testing and the collection of DNA samples through the use of the special paper employed by Sinke. To that end, Peerenboom argued that the collection of DNA samples from discarded items, which Peerenboom was aware of, did not constitute a crime. In support of this argument, Peerenboom presented evidence that this is common practice of law enforcement during the course of a criminal investigation. This Court, however, declines to follow the distinction made by Peerenboom. First, Peerenboom provided little to no authority to support this proposition, aside from the testimony of Detective Menniti and Reesor. Second, section 760.40 makes no distinction between permissible and impermissible collection and testing of DNA samples. Rather, the plain language of the statute criminalizes conducting a DNA *analysis* of an individual's DNA sample without consent given prior to testing. It is for these reasons that this Court finds Peerenboom's second argument unpersuasive.

This Court also finds that Peerenboom not only collected and analyzed the Perlmutters' DNA samples without their consent, but also disclosed those results to others without the Perlmutters' permission. This Court heard evidence regarding the disclosure of results of the Perlmutters' DNA analysis to multiple parties, including Reesor, Detective Menniti, Speckin, an

employee of Speckin Laboratories, and an official at the Canadian Broadcasting Company. (Pl.'s Ex., PX 8-3a.; Defs.' Ex., DX 33-34.) Peerenboom also acted contrary to the agreed confidentiality order in *Kay-Dee Sportswear, Inc.* by obtaining and analyzing the Perlmutters' DNA samples, and by publishing the results of such testing without the Perlmutters' informed consent. This Court finds that Peerenboom's conduct reflects both on his lack of credibility and his intent to have these DNA samples tested and disclosed.

Taking the evidence presented as a whole, this Court finds that Peerenboom both collected and analyzed the Perlmutters' DNA without their informed consent. Further, Peerenboom published the results of such testing without the Perlmutters' consent. As such, Peerenboom violated section 760.40(2), Florida Statutes.

2) Whether Peerenboom Knew His Conduct at the Perlmutters' Depositions was a Crime.

During the evidentiary hearing, Peerenboom repeatedly testified that he was not aware, at the time of the Perlmutters' depositions, that the collection and testing of their DNA samples was a crime under Florida law. He testified he later became aware of section 760.40 at a meeting with his counsel in April of 2013. This Court finds Peerenboom's testimony not credible. Even if Peerenboom was not aware of section 760.40 at the time the Perlmutters' depositions took place, the evidence submitted at the evidentiary hearing demonstrates that Peerenboom became aware of it well before this hearing took place and despite this knowledge, Peerenboom continued to collect and test DNA samples without the consent of the persons he tested. This Court finds that this conduct bears on Peerenboom's credibility and further demonstrates his disregard for Florida law.

Further, Peerenboom's assertion that he was unaware of Sinke's activity at the deposition is contrary to the evidence presented. Peerenboom testified Sinke's sole purpose at

the deposition was to collect the single water bottle left behind by Defendant Laura Perlmutter. Yet, Peerenboom also confirmed he spent a considerable amount of money to have Sinke to attend this deposition. While Peerenboom claimed the expense was for the collection of discarded water bottles in order to preserve the chain of custody, Peerenboom also testified that he independently collected water bottles and discarded items on multiple occasions. Thus, Peerenboom's contention that Sinke was there to preserve the chain of custody for later use during a criminal trial does not hold merit.

The conclusion that Peerenboom knowingly collected and analyzed the Perlmutters' DNA samples, in contravention of section 760.40, is confirmed by evidence submitted at the hearing. The Perlmutters introduced a memo from Sinke referencing Peerenboom's litigation. In the memo, dated June 18, 2014, Sinke wrote "On 2/27/13 I traveled to West Palm Beach, FL to witness depositions and collect potential evidence for forensic analysis . . . 4 – Sheets of paper with typed words handled by Mr. Ike Perlmutter and his attorney." When Speckin Laboratories provided the results of the testing to Peerenboom and Reesor, Peerenboom did not object to the use of the special paper.

Peerenboom never informed the trial court or the Perlmutters regarding the collection of DNA samples during the deposition. More telling, Peerenboom and his counsel acted fraudulently in obtaining the subpoena duces tecum to compel the Perlmutters to attend the deposition in order to collect their DNA, as discussed above. Peerenboom acted as a private citizen throughout the course of these events. In doing so, he concealed his true motive from all parties involved in the *Kay-Dee Sportswear* litigation. This Court finds that the preponderance of the evidence submitted establishes that Peerenboom acted with knowledge when he obtained the DNA samples of the Perlmutters' at the deposition in February of 2013.

Peerenboom violated section 760.40 when he analyzed the Perlmutters' DNA and published the results of such testing without their consent. Peerenboom did so with knowledge of his action's illegality. Peerenboom accomplished this action through the use of Douberley's services. Thus, this Court finds that the attorney-client privilege is pierced under the crime-fraud exception. As such, this Court need not reach the Perlmutters' third argument regarding required disclosure of Douberley's testimony. Accordingly, it is hereby

ORDERED that the Perlmutters' Motion to Compel Deposition Testimony of William Douberley is **GRANTED**. The attorney-client privilege does not shield William Douberley, Esquire, from testifying to events related to the collection, testing, and publication of the Perlmutters' DNA samples, occurring between December of 2012 and April of 2013, as the crime-fraud exception applies to the instant matter, piercing the attorney-client privilege. All exhibits submitted during the evidentiary hearing are hereby incorporated into this Order by reference.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida on this 1st day of July 2016.

ADMINISTRATIVE OFFICE OF THE COURT

MEENU SASSER, CIRCUIT JUDGE

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