IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-mc-00225-RBJ

JENNIFER WEDDLE,

Movant,

vs.

LULA WILLIAMS;
GLORIA TURNAGE;
GEORGE HENGLE;
DOWIN COFFY; and
MARCELLA P. SINGH,

Respondents.

RESPONDENTS' OPPOSITION TO MOTION TO QUASH

For all the reasons set forth in Respondents'[1] motion to transfer [docket #11], this subpoena-related motion should be transferred to the District Court for the Eastern District of Virginia (the "Virginia Court"), which is the court that issued the subpoena. The underlying litigation (the "Virginia Action") has been pending in the Virginia Court for eighteen months; United States District Judge Payne has actively managed discovery, has ruled on multiple

[1] Respondents are the Plaintiffs in the underlying litigation and are referred to in this memorandum as either "Respondents" or "Plaintiffs."

dispositive motions, and is familiar with the voluminous factual record and nuanced legal issues involved in the case. Furthermore, the Virginia Court currently has before it several discovery issues that substantially overlap with the issues involved in this motion. Transfer avoids conflicting rulings and promotes judicial efficiency by allowing similar issues to be decided by one judge.

If the Court is disinclined to order the motion transferred, Plaintiffs respectfully request that the motion be denied. Plaintiffs served the subpoena on Greenberg Traurig attorney Jennifer Weddle because Matt Martorello, who is a defendant in the Virginia Action disclosed her as a witness with discoverable information on which he may rely at trial. Mr. Martorello subsequently served Ms. Weddle with his own subpoena and then served interrogatory responses indicating that he intended to rely on Ms. Weddle and other lawyer's testimony to support a "good faith" defense. In other words, Mr. Martorello intends to argue at trial that he is not liable because he reasonably relied on the advice of counsel, including Ms. Weddle's. Contrary to Ms. Weddle's assertions in her motion, Plaintiffs' subpoena reasonably seeks relevant documents relating to this defense and Mr. Martorello has waived any attorney-client privilege.

Ms. Weddle objects that the subpoena is unduly burdensome, but this objection should be rejected as well. Ms. Weddle filed her motion to quash without conferring with Plaintiffs' counsel. Had she done so, she would have learned that Plaintiffs agreed to limit their subpoena to communications and information relating to the individuals and entities involved in the tribal payday lending scheme at issue in the Virginia Action. More importantly, after the motion to quash was filed, Ms. Weddle's counsel informed Plaintiffs' counsel that, at the direction of Defendants in the Virginia Action, Ms. Weddle and her law firm Greenberg Traurig destroyed

their entire client file relating to Mr. Martorello's company, Bellicose Capital LLC. Plaintiffs' counsel understand that it is not possible to compel documents that do not exist and thus told Ms. Weddle's counsel that they would withdraw or substantially narrow the subpoena if Ms. Weddle agreed to sign a declaration stating that (1) she represented Bellicose and not Mr. Martorello and (2) she destroyed the client file at the request of Defendants. Ms. Weddle initially agreed to sign such a declaration, but later withdrew her agreement without explanation. Ms. Weddle should not be permitted to avoid her obligations under the subpoena due to alleged "burden" when she could have avoided any burden by signing a declaration stating that her client file does not exist. Ms. Weddle's motion should be denied.

STATEMENT OF FACTS

A. The underlying litigation and the subpoena.

Ms. Weddle's motion to quash stems from a case currently pending in the Virginia Court in which Plaintiffs allege that Defendants, in an attempt to insulate themselves from any legal liability, established what is commonly referred to as a "rent-a-tribe" business model, where a payday lending scheme associates with a Native American tribe in an attempt to cloak itself in the privileges and immunities enjoyed by the tribe—or at least create the illusion that it enjoys tribal immunity. To facilitate blatant violations of state usury laws, Defendant Matt Martorello approached the Lac Vieux Desert Band of Lake Superior Chippewa Indians (the "Tribe" or "LVD") for the purpose of establishing a rent-a-tribe model. Defendants then made high interest loans through Red Rock Tribal Lending, LLC, which claims to be owned and operated by the Tribe. In reality, Martorello's company Bellicose Capital, LLC ("Bellicose Capital") funded the loans, controlled the underwriting, and handled the day-to-day operations of the business. In

return for the use of its name, the Tribe received 2% of the revenue, but otherwise the Tribe had no control over the income or expenses of Red Rock's loans.

After the rent-a-tribe business model came under attack by private lawsuits and governmental enforcement actions, Martorello "sold" Bellicose Capital to the Tribe in an effort to further insulate the scheme from liability. Zeke Faux, *Payday Lenders are Changing the Game Ahead of a U.S. Crackdown*, Bloomberg (Feb. 4, 2016) ("Bellicose has collected tens of millions of dollars, with the tribe keeping about 2 percent of the revenue, according to documents provided by a person involved in the deal."), https://www.bloomberg.com/news/articles/2016-02-04/payday-lenders-are-changing-the-game-ahead-of-a-u-s-crackdown. After the sale, Bellicose was reformed as Ascension Technologies, LLC and Red Rock became Big Picture Loans, LLC.

After extensive jurisdictional discovery, Judge Robert Payne of the Eastern District of Virgina issued an eighty-page opinion finding that Big Picture and Ascension were not "arms-of the-tribe" entitled to assert tribal sovereign immunity. *Williams v. Big Picture Loans, LLC*, No. 3:17-cv-461, 2018 WL 3615988 (E.D. Va. July 27, 2018). Judge Payne found "the impetus behind the formation of Big Picture and Ascension was Martorello and Bellicose's desire to avoid liability, more so than the Tribe's interest in starting its own business." *Id*. at *16.

As evidenced by his decision, Judge Payne is familiar with the parties, their claims and defenses, the matter's nuanced factual and legal issues, and, most importantly, the relevance of the documents sought by Respondents' subpoena to Ms. Weddle. The Virginia Action has resulted in 287 docket filings, including multiple dispositive and discovery motions. Trial in the case commences against Defendant Martorello on March 18, 2019 and the parties are in the

process of completing expert and fact discovery. This discovery has included third party discovery and related motion work including subpoena-related actions similar to this one that have been successfully transferred to the Virginia Court. Judge Payne has been actively involved in the discovery process. Most recently, at Plaintiffs' request, he ordered all parties to attend a hearing on January 15, 2019. *Williams v. Big Picture Loans, LLC*, No. 3:17-cv-461 (E.D. Va.) (ECF No. 287). At the hearing, Judge Payne will address discovery issues that the parties have identified as outstanding.

The subpoena that is the subject of this motion seeks documents from Jennifer Weddle, an attorney at Greenberg Traurig who Mr. Martorello disclosed on November 11, 2018 in his Amended Initial Disclosures as someone "with discoverable information that Martorello may use to support his defenses." [Docket #11-2]. Mr. Martorello describes the "discoverable information" Ms. Weddle may have as: "Relationship between Martorello, Bellicose, and Sourcepoint with LVD and Red Rock; and related facts." *See id.* On December 10, 2018, Plaintiffs served Ms. Weddle with a subpoena, diligently seeking information that Mr. Martorello indicated he may use to support his case.

On December 13, 2018, Mr. Martorello informed Plaintiffs that he intended to serve his own subpoena on Ms. Weddle, emailing all parties a "Notice of Intent to Serve Subpoena." [Docket #11-3]. The document subpoena attached to the Notice of Intent to Serve identified the following categories of documents that Mr. Martorello intended to seek from Ms. Weddle including:

- Non-privileged documents pertaining to Matt Martorello, Bellicose Capital, LLC, Bellicose VI, LLC, SourcePoint VI, LLC, Ascension Technologies, Inc., Big Picture

Loans, LLC, Castle PayDay, Pepper Cash, Red Rock Tribal Lending, LLC, and Duck Creek Tribal Financial, LLC;

- Documents "pertaining to economic development by LVD;" and
- "Any and all documents pertaining to communications with any third parties, including but not limited to Scott Merritt, Craig Mansfield, Van Hoffman, Rick Gerber, Karrie Wichtman, Rob Rosette, or the Chippewa Valley Bank regarding online consumer lending by LVD or any entity owned in whole or in part by LVD, or by any entity owned in whole or in part by an entity owned in whole or in part by LVD."

Id. Mr. Martorello also served Plaintiffs with Notices of Intent to Serve subpoenas on other individuals identified in his interrogatory responses as having information relating to his good faith defense, including attorneys Wichtman, Rosette, Gravel, and Galloway. Plaintiffs' motion to strike objections and compel responses to their subpoena to Rosette has been transferred to the Virginia Court. Plaintiffs recently learned that Jennifer Galloway intends to file a motion to quash the subpoena issued to her.

On December 28, 2018, Mr. Martorello served responses to Plaintiff Hengle's Second Set of Interrogatories. In those response, Martorello stated that he intends

> to assert good faith as a defense in this matter based, in part, on non-privileged information provided by attorneys Jennifer Weddle, Karrie Wichtman, Blake Sims, John Williams, Jennifer Galloway, Dan Gravel, Saba Bazzazich and Robert Rosette, as well as others at their respective law firms, as well as from additional non-attorney public sources, about the legality of the tribal business model and LVD's lending operations.

[Docket #11-4] at Rog 13. During the parties' meet and confer discussions on this issue, Mr. Martorello claimed that he would be able to support his defense using only "non-privileged" materials and communications with the listed attorneys and would not be relying on privileged materials. [Docket #11-5]. Plaintiffs disagree that Mr. Martorello can assert a defense based on advice of counsel without waiving the attorney-client privilege with respect to documents showing the nature of that advice.

B. The motion to quash and the parties' efforts to confer.

Ms. Weddle filed her motion to quash on December 13, 2018 without conferring with Plaintiffs' counsel as the local rules require. After Ms. Weddle filed her motion to quash, Ms. Weddle's counsel reached out to Plaintiffs' counsel apologizing for failing to confer before filing the motion to quash and asking Plaintiffs to limit the scope of the subpoena.

Counsel conferred by telephone on December 17, 2018. During the call, Plaintiffs' counsel explained they served the subpoena because Mr. Martorello had disclosed Ms. Weddle as a witness in his amended initial disclosures and noted that Mr. Martorello had sent his own subpoena to Ms. Weddle seeking documents to support his defense. Ms. Weddle's counsel was unaware of Mr. Martorello's subpoena, which apparently had not been served. Accordingly, Plaintiffs' counsel forwarded him a copy of the Notice of Intent to Serve and attached subpoena.

On December 28, 2018, Ms. Weddle's counsel informed Plaintiffs' counsel by email that Mr. Martorello still had not served the subpoenas on Ms. Weddle but that he was authorized to provide his client's position. In his email he said that "As a result of the 2015 merger and consistent with the contemporaneous direction of the parties to that merger, the Tribe owns any privilege and records of the company and has directed Greenberg Traurig to maintain its

confidences." [Docket #11-6]. He further said that "Greenberg Traurig deleted its client files in 2015, consistent with the Tribe's direction and Mr. Martorello's confirmation. Also, any post-2015 files related to Bellicose in the firm's custody related to ongoing representations for which privilege has not been waived, e.g., the *Cumming* class action defense in California." *Id.*

Plaintiffs' counsel advised Ms. Weddle's counsel that Plaintiffs would consider withdrawing the subpoena or to significant narrowing if Ms. Weddle provided a declaration that she destroyed all pre-merger documents at the direction of Ascension Technologies and with the consent of Mr. Martorello. *Id.* Ms. Weddle's counsel responded that Ms. Weddle would be willing to sign a declaration stating that she represented Bellicose—not Mr. Martorello—as well as the following:

1. Around the time the parties thereto entered into the Agreement and Plan of Merger dated September 14, 2015, Bellicose Capital, LLC, the Seller, informed Greenberg Traurig of the merger and indicated that all company files were required to be transferred to the Tribe or destroyed per Paragraph 2(d). Greenberg Traurig did not represent the Seller or any other entity in connection with the merger. Seller contacted Greenberg Traurig in connection with its obligations under paragraph 2(d) of the Plan of Merger.
2. Upon receipt of the notice of merger from Seller, I contacted counsel for the Acquirer and requested the Acquirer's instructions as to their client files in Greenberg Traurig's custody. Acquirer advised it would not be engaging Greenberg Traurig going forward and directed that we delete/destroy the files in our possession. We promptly complied with that client direction and all

> timekeepers who had worked on Bellicose Capital, LLC matters deleted electronic files and disposed of hard copy files by secure methods.

[Docket #11-6].

However, on December 31, 2018, Ms. Weddle's counsel informed Plaintiffs' counsel that Ms. Weddle was "no longer inclined to sign a declaration." [Docket #11-7]. The parties agreed that Plaintiffs could have a one-week extension to respond to the motion to quash and on Monday January 7, 2019 conferred regarding Plaintiffs' proposed motion to transfer the matter to the Virginia Court. On January 8, 2019, Ms. Weddle's counsel informed Plaintiffs' counsel that his client would not agree to the transfer.

AUTHORITY

A. Martorello has waived attorney-client privilege by asserting a good faith defense.

Ms. Weddle asserts that Plaintiffs' subpoena "invade[s] both the attorney-client privilege and Ms. Weddle's duty of confidentiality to her clients," including Mr. Martorello and his companies. [Docket #1 at 7]. Ms. Weddle maintains that the privilege protects communications with both her clients and non-clients and documents relating to tribal lending because such documents are related to her representation of Mr. Martorello. But as Ms. Weddle's own authority holds "the privilege is held by the client." *People v. Trujillo*, 144 P.3d 539, 542 (Colo. 2006). As such, it may be "waived … by the client." *Id.* Here, Mr. Martorello has waived the privilege.

It is well settled that where a party raises a defense about his good faith belief that he was following the law, he cannot invoke attorney-client privilege regarding any attorney advice leading to that belief. *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (upholding trial

court's ruling that if defendant testified about his good faith belief he was following the law, he could not also invoke the privilege regarding what his attorneys told him because "[defendant's] testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue."). In discussing a similar privilege, McCormick on Evidence explained that it has "become established that if a party interjects the 'advice of counsel' as an essential element of a claim or defense, then that party waives the privilege as to all advice received concerning the same subject matter." Waiver, 1 McCormick on Evid. § 93 (7th ed.). "[S]pecific reliance upon the advice either in pleading … will generally be same as waiving the privilege." *Id.*

Mr. Martorello has identified Ms. Weddle as a witness with knowledge that he intends to use to support his "good faith" defense in the underlying litigation. [Docket ## 11-2, 11-4]. In other words, Mr. Martorello intends to defend his actions by saying that he believed, based on advice of counsel, that his lending enterprise was legal. Although Mr. Martorello asserts that he intends to rely on "non-privileged materials and communications" with Ms. Weddle and others to support this defense, this cherry-picking methodology is not permitted. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (argument that defendants cannot use attorney client privilege as both a "sword" and a "shield" has merit); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Selective disclosure for tactical purposes waives the attorney-client privilege."). This is only fair—if Martorello wants to rely on the advice he received regarding the legality of the tribal business model, he must disclose ***all*** the advice he received. For example, after the Second Circuit admonished the Tribe's lending business in *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin Servs.*, 769 F.3d 105, 114 (2d Cir. 2014) (finding, inter

alia, that the LVD and Red Rock had "no legitimate interest in selling an opportunity to evade state law"), Ms. Weddle may have advised Mr. Martorello that his enterprise was illegal. This advice must be disclosed as well as any advice to the contrary. Because Mr. Martorello has waived the attorney-client privilege by stating he will rely on advice of counsel, Ms. Weddle's assertions of privilege should be rejected.

B. The documents that Plaintiffs seek are not within Mr. Martorello's control because he destroyed them.

Ms. Weddle asserts Plaintiffs' motion should be quashed because the requested documents may be obtained from the client himself. But had she conferred with Plaintiffs before filing her motion, she would have learned that Plaintiffs ***have*** sought the information from Mr. Martorello as well as the other Defendants. Plaintiffs were unable to obtain many crucial documents because they were destroyed. [Docket #11-5]. Plaintiffs have dedicated substantial effort to obtaining these documents from other sources, including Ms. Weddle. However, when they conferred with Ms. Weddle's counsel after the motion to quash was filed, they learned that Ms. Weddle and her law firm, Greenberg Traurig, deleted their entire client file relating to Mr. Martorello and his company Bellicose "consistent with the Tribe's direction and Mr. Martorello's confirmation. [Docket #11-6]. Plaintiffs intend to file a spoliation motion in the Virginia Court, seeking sanctions under Fed. R. Civ. P. 37(e), which governs when a party fails to preserve electronically stored information and "it cannot be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e).

C. Plaintiffs' subpoena seeks information crucial to Martorello's good-faith defense.

Ms. Weddle challenges Plaintiffs' subpoena on relevance grounds, asserting that it is "not apparent" why the requested documents "would tend to make facts establishing that Defendants

made usurious loans and operated under the guise of a tribal entity more or less probable." Mtn. at 10. Ms. Weddle misses the point. As described above, had Ms. Weddle conferred with counsel before filing her motion she would have learned that Plaintiffs served her with a subpoena because Mr. Martorello placed her advice at issue when he identified her as a witness with information pertinent to his good-faith defense. The information Plaintiffs' request is highly relevant to this defense and, due to Defendants' document destruction, potentially within Ms. Weddle's sole possession. Ms. Weddle should be compelled to either produce the documents or sign the declaration that Plaintiffs proposed she sign stating that she destroyed the documents.

D. Ms. Weddle's burden objection is meritless.

Ms. Weddle's contention that the subpoena should be quashed as unduly burdensome should be rejected for two main reasons. First, when the parties conferred regarding the scope of the subpoena, Plaintiffs' counsel told Ms. Weddle's counsel that they would agree to limit the subpoena to documents relating to Mr. Martorello and the entities listed in their subpoena. Thus, Ms. Weddle need not produce documents related to "tribal lending" that are unrelated to her representation of Mr. Martorello and the entities involved in Mr. Martorello's lending scheme. Ms. Weddle suggests that even a more limited request is unduly burdensome because it would require her to figure out what documents and communications "arguably relate" to the Martorello enterprise. But Ms. Weddle should be estopped from making this argument, considering she apparently destroyed the Martorello/Bellicose file at the Tribe's instruction and with Mr. Martorello's consent. Had she retained the file — which she had a duty to preserve due to the reasonable likelihood the Mr. Martorello and his entities would be sued following the

merger — she could have simply reviewed the documents in it and produced those responsive to the subpoena.

Second, during the meet and confer process, Plaintiffs offered to withdraw the subpoena or substantially narrow it if Ms. Weddle would sign a declaration stating that she represented Bellicose and not Mr. Martorello and that she destroyed documents at the instruction of Mr. Martorello and the Tribe. Ms. Weddle initially agreed to sign a declaration saying that she represented Bellicose and not Mr. Martorello and that she destroyed her client files at the instruction of the Tribe and with Mr. Martorello's consent. [Docket #11-6]. However, she subsequently changed her mind and the parties were forced to brief this motion. *Id.* Plaintiffs do not know if Ms. Weddle changed her mind because she realized she never destroyed the Bellicose file and thus the proposed declaration would be inaccurate or because she simply did not want to sign the declaration even if it was accurate. Either way, Ms. Weddle's assertions of burden are undermined. If the Bellicose file still exists, then Ms. Weddle can simply review and produce the responsive documents in it. If the Bellicose file was destroyed, then Ms. Weddle could avoid any burden by signing a declaration to that effect.

CONCLUSION

In short, Plaintiffs respectfully request that Ms. Weddle's motion to quash be transferred to the Virginia Court. In the alternative and for the reasons stated above, Ms. Weddle's motion to quash should be denied.

RESPECTFULLY SUBMITTED AND DATED this 10th day of January, 2019.

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CERTIFICATE OF SERVICE

1. I, Jennifer Rust Murray, hereby certify that on January 10, 2019, I caused the foregoing document to be electronically filed with the Clerk of the Court via the CM/ECF system, which will send notification of such filing to the following e-mail addresses denoted on the Court's Electronic Mail Notice List:

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2. I also certify that I caused the foregoing to be electronically transmitted to the following not denoted on the Court's Electronic Mail Notice List:

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DATED at Seattle, Washington, this 10th day of January, 2019.

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