

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.

REPLY IN SUPPORT OF MOTION TO TRANSFER

I. INTRODUCTION

Exceptional circumstances warrant transferring Weddle's motion to quash to the Eastern District of Virginia. *First*, the central issue that Weddle's motion to quash raises — whether the attorney-client privilege protects the requested documents or has been waived — is currently being briefed in the underlying litigation and is certain to be decided by Judge Payne, who presides over that litigation. Plaintiffs informed Judge Payne about various motions to quash

pending across the country, including this one, and Judge Payne stated that he believes transfer would be fair. To avoid conflicting rulings, Weddle's motion should be transferred.

Second, transfer is appropriate due to Judge Payne's familiarity with the specific issues that Weddle's motion raises. For example, Plaintiffs have sought from Defendants in the underlying litigation many of the same documents they seek from Weddle, including Defendant Martorello's emails relating to the lending enterprise. These emails apparently were destroyed when Martorello's company, Bellicose, was sold to the Tribe and Weddle apparently destroyed them as well. Plaintiffs are in the process of determining whether these emails can be restored. Judge Payne is very familiar with this issue and thus is in a better position to rule on whether Greenberg Traurig's backup systems should be searched to recover the missing emails.

Weddle asserts that transfer is not appropriate because Judge Payne has not yet ruled on the privilege issue and the issue is unlikely to arise in other jurisdictions. But Rule 45 is not so restrictive. Judge Payne specifically requested briefing on the issue and is certain to rule on it. He should rule on this motion as well. Weddle also maintains that she did not represent Martorello individually and thus any privilege issues do not overlap. Martorello contends exactly the opposite (*see* docket #19). Martorello and Weddle's attorney client relationship, or lack thereof, is pending before Judge Payne, creating a risk of inconsistent rulings on a critical issue in the case. If Judge Payne rules Weddle and Martorello had an attorney client relationship and this Court finds otherwise (or vice versa), there would be confusion as to how to move forward. Further, the successor-in-interest companies, Big Picture and Ascension, have counsel in the

Eastern District of Virginia and thus it would be easier for them to assert any privilege in that court. Judicial economy and efficiency plainly favor transfer.

Weddle has failed to identify any burden that would preclude transfer. Weddle's concern that her attorney would have to travel to Virginia to argue the motion to quash provides no reason to deny transfer. Weddle's local counsel either can appear for the hearing telephonically, or Weddle can enlist one of Greenberg Traurig's able lawyers to argue the motion. For all these reasons, Plaintiffs' motion should be granted.

II. REPLY

A. **Exceptional circumstances justify transfer because Judge Payne is certain to rule on the privilege-waiver issue.**

Ms. Weddle asserts that transfer is not proper because the issuing court has not yet ruled on the specific arguments presented in her motion to quash and these specific issues are not likely to arise in other districts. Resp. Br. at 6-7. This is not the law. When considering if exceptional circumstances warrant transferring a subpoena-related motion to the issuing a court, the compliance court "must account for the complexity, procedural posture, duration of pendency, and the nature of the issues *pending before*, or already resolved by, the issuing court in the underlying litigation." *Google, Inc. v. Digital Citizens Alliance*, No. 15-00707 JEB/DAR, 2015 WL 4930979, at *2 (D.C.C. July 31, 2015) (citing cases); *see also E4 Strategic Solutions, Inc. v. Pebble Ltd. P'ship*, SA MC 15-00022-DOC (DFMx), 2015 WL 12746706, at *3 (C.D. Cal. Oct. 23, 2015) (holding transfer appropriate where a ruling was "certain to occur" (emphasis in original)); *In re Cassell*, No. 2:16-mc-00602-DB-EJF, 2016 WL 3645166, at *2 (D. Utah June 30, 2016) (finding issuing court was in "a superior position to address the nuanced privilege

issues raised by th[e] Motion to Quash” where the parties had “already started addressing” the privilege issue with the issuing court).

Plaintiffs have filed in the underlying litigation a motion to compel Defendant Matt Martorello to produce documents withheld as privileged. *Williams v. Big Picture Loans, LLC*, No. 3:17-cv-00461 (E.D. Va.) (“*Williams*”), at ECF Nos. 340, 341. That motion focuses on whether Martorello has waived attorney-client privilege by asserting a “good faith” defense. Plaintiffs’ primary argument is that Martorello’s “good faith” defense is based on the advice of counsel, including Weddle, as to whether the lending enterprise he operates is legal. Judge Payne recently set a deadline of February 19, 2019 for the parties to complete briefing on that motion. *See Williams* at ECF 358. Transfer is appropriate to avoid inconsistent rulings on this key issue. *See E4 Strategic Solutions, Inc.*, 2015 WL 12746706 at *3 (citing cases).

Weddle wrongly relies on two out-of-circuit district court cases that are easily distinguishable. In *Garden City Employees’ Ret. Sys. v. Psychiatric Solutions, Inc.*, No. 13-238, 2014 WL 272088, at *3 & *6 n. 3 (E.D. Pa. Jan. 24, 2014) the court held that the party seeking transfer had failed to show that the issues presented by the motion to quash were likely to recur in the issuing court. *See also* docket #20 (Martorello’s Notice of Joinder in Mtn to Transfer) at 2. And in *Woods ex rel. U.S. v. Southerncare, Inc.*, 303 F.R.D. 405, 408 (N.D. Ala. 2014) the court found that overlapping issues “standing alone” did not warrant transfer of the motion. Here, by contrast, Plaintiffs have shown not only that the issues presented by Weddle’s motion are likely to recur and, indeed, have recurred in the underlying litigation, but also that Judge Payne is far

better situated to resolve these issues due to his understanding of the nuances of the myriad of discovery issues before him in the underlying litigation.

Weddle maintains that her motion to quash “bears no relation to any privilege that Mr. Martorello may claim” because she allegedly “did not represent him individually.” Resp. at 12. As evidenced by his motion to intervene, Martorello asserts otherwise. Indeed, Martorello seeks to intervene in this action to assert privilege, including privilege over documents generated during the course of Weddle’s representation of entities “with respect to which Martorello is or was a principal, including Bellicose, SourcePoint, and Eventide” *See* Docket #19 at 4. And tellingly, Martorello has joined Plaintiffs’ motion to transfer. Docket #20.

B. Judge Payne’s familiarity with the specific issues raised by the motion to quash, including spoliation, constitutes an exceptional circumstance warranting transfer.

Ms. Weddle’s contention that the issuing court’s familiarity with the underlying litigation does not constitute an “exceptional circumstance” also misses the mark. District courts in this Circuit consider the procedural posture of the litigation when considering a request to transfer. *See, e.g., In re Cassell*, 2016 WL 3645166, at *1 (transferring subpoena-related motion where the parties “have heavily litigated the case, as evidenced by the 253 docket entries” and noting that such a case “differs from cases where the court in the underlying case may not have a great deal of familiarity with the issues in the case because a Motion to Quash from an out of district non-party is the first or one of a few motions in dispute”).

The underlying litigation now has over 350 docket entries. Judge Payne is consciously and deliberately managing all discovery and has specifically requested that subpoena-related motions be transferred to his court so that he can resolve the motions consistently and fairly.

Plaintiffs alerted Ms. Weddle and this Court to the issuing court's request in their Second Notice of Supplemental Authority (docket #15). Ms. Weddle ignores this authority in her response brief.

Plaintiffs are not simply arguing that the case should be transferred due to Judge Payne's general familiarity with the underlying litigation. Instead, Judge Payne is familiar with the *specific* issues that Weddle's motion raises. For example, Weddle argues in her motion to quash that Plaintiffs should have sought the documents directly from the defendants in the underlying litigation. But Plaintiffs seek documents from Weddle rather than the defendants in large part because Martorello's emails were apparently destroyed in connection with the sale of Bellicose to the Tribe. Weddle asserts in her declaration that her firm also destroyed the documents. Judge Payne is currently addressing this very issue in the underlying litigation, including a spoliation protocol to determine if the documents may be retrieved. Thus, he is in the best position to determine whether Weddle should be required to search system backups to recover emails responsive to the subpoena.

C. Exceptional circumstances warranting transfer outweigh any burden on Weddle.

Weddle asserts that she would be unduly burdened by transfer because her lawyers would have to travel to Virginia for a hearing on the motion to quash. Weddle maintains that attending a hearing by teleconference is not an option because "appearances by phone are in no way as effective as in-person advocacy." Resp. at 14. Her own authority rejects this position. *See Google, Inc.*, 2015 WL 4930979, at *4 (observing "the encouragement of utilizing telecommunications as an alternative to travel is adequate to avoid undue burden on the nonparties in this context"). And, as Martorello points out in his joinder to Plaintiffs' request for transfer, though it may be Weddle's preference that her counsel travel to Virginia rather than

appear telephonically, “[t]hat [an] attorney’s preference to be ‘old-fashioned’ precludes” her from utilizing a telephonic alternative “does not constitute an undue burden” that would preclude transfer of a motion. *See* docket 20 at 3 (quoting *id.*).

III. CONCLUSION

For all the above reasons, Weddle’s motion to quash should be transferred to the Virginia Court. If the Court is inclined to deny a transfer, Plaintiffs respectfully request that the Court deny Weddle’s motion on the merits.

RESPECTFULLY SUBMITTED AND DATED this 14th day of February, 2019.

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CERTIFICATE OF SERVICE

1. I, Jennifer Rust Murray, hereby certify that on February 14, 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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