

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

LULA WILLIAMS, *et al.*,

Plaintiffs,

v.

Civil Action No. 3:17-cv-461

BIG PICTURE LOANS, LLC, *et al.*,

Defendants.

MEMORANDUM ORDER

This matter is before the Court on DEFENDANT MATT MARTORELLO'S MOTION FOR PROTECTIVE ORDER, OR IN THE ALTERNATIVE, TO STAY SUBPOENAS PENDING ARBITRATION (ECF No. 915 and 916, respectively). The Court previously granted two related motions: (1) the JOINT MOTION FOR ENTRY OF STIPULATED ORDER CONCERNING THE APPLICABILITY OF THE MOTION FOR PROTECTIVE ORDER [ECF NO. 915] TO THE SUBPOENA ISSUED TO DROPBOX, INC. ON SEPTEMBER 17, 2020, AND MEMORANDUM IN SUPPORT (ECF No. 940) ("Joint Motion to Add Dropbox, Inc."), and (2) the JOINT MOTION FOR ENTRY OF STIPULATED ORDER CONCERNING THE APPLICABILITY OF THE MOTION FOR PROTECTIVE ORDER [ECF NO. 915] TO THE SUBPOENA ISSUED GODADDY.COM, LLC ON SEPTEMBER 30, 2020, AND MEMORANDUM IN SUPPORT (ECF No. 941) ("Joint Motion to Add GoDaddy.com, LLC"). DEFENDANT MATT MARTORELLO'S MOTION TO STAY SUBPOENAS PENDING ARBITRATION (ECF No. 916) is DENIED as moot.

See ECF No. 936 at 1 n.1 (“Martorello withdraws his alternative request for a stay pending arbitration.”).

For the following reasons, DEFENDANT MATT MARTORELLO’S MOTION FOR PROTECTIVE ORDER (ECF No. 915) is DENIED.

BACKGROUND

On May 31, 2019, PLAINTIFFS’ MOTION FOR LEAVE TO SERVE REQUESTS FOR PRODUCTION AND THIRD-PARTY SUBPOENAS (ECF No. 524) was filed. There, Plaintiffs requested leave to issue: (1) requests for production to Ascension Technologies (“Ascension”) regarding what Bellicose Capital, LLC (“Bellicose”) data¹ would be in the possession of cloud-based storage companies; and (2) subpoenas to ten third parties: Rackspace, Amazon, Dropbox, Microsoft, GoDaddy, Balance Credit, Rob Rosette, Tribal Loan Management, LLC, Hudson Cook, and VP Compliance Services.

This Court granted the PLAINTIFFS’ MOTION FOR LEAVE TO SERVE REQUESTS FOR PRODUCTION AND THIRD-PARTY SUBPOENAS (ECF No. 524) on May 22, 2020, see ECF No. 740, on the grounds that:

Ascension Technologies, Inc. (“Ascension”) has represented that it is no longer in possession of any of the emails that were sent by Matt Martorello’s Bellicose email account, those emails having been

¹ Defendant Matt Martorello was the founder and CEO of Bellicose. Williams v. Big Picture Loans, LLC, 929 F.3d 170, 174 (4th Cir. 2019). For reasons outside the scope of this opinion, an entity called Ascension eventually came to own all of Bellicose’s assets. Williams v. Big Picture Loans, LLC, 329 F. Supp. 3d 248, 258, 261 (E.D. Va. 2018), rev'd on other grounds and remanded, 929 F.3d 170 (4th Cir. 2019).

deleted before the filing of this case pursuant to an agreement[,] and Ascension has stated that it does not object to the issuance of the requested subpoenas to 'Rackspace, Amazon, Dropbox, Microsoft, GoDaddy, Balance Credit, Hudson Cook, and VP Compliance Services' seeking recovery of email traffic dated before January 26, 2016 to which Matt Martorello or Justin Martorello were a party on the accounts used by Bellicose Capital. . . [T]his spoliated evidence is significant to the issues in this case and can be obtained only from the entities as to whom the subpoena is requested

ECF No. 740 at 1-2.

On July 20, 2020, Plaintiffs served notice of eight subpoenas on Amazon Web Services, Inc., Dropbox, Inc., GoDaddy.com, LLC, Microsoft Corp., Rackspace U.S., Inc., Balance Credit, LLC, Hudson Cook, LLP, and VP Compliance Services, LLC. ECF No. 925 at 1. Responses were due on August 10, 2020. ECF No. 925 at 1.

On August 17, 2020, defendant Matt Martorello requested a protective order pursuant to Federal Rule of Civil Procedure 26(c)(1) to protect attorney-client privileged communications "with respect to Plaintiffs' subpoenas to third-parties Rackspace, Amazon, Dropbox, Microsoft, GoDaddy, Balance Credit, Hudson Cook, and VP Compliance Services." ECF No. 915.

At the request of Dropbox, Inc. and GoDaddy.com, LLC, Plaintiffs served second subpoenas to Dropbox, Inc. and GoDaddy.com on September 17, 2020 and September 30, 2020, respectively. ECF No. 940 ¶ 3; ECF No. 941 ¶ 3. The parties have agreed that the Court's ruling on Martorello's motion for a

protective order can also apply to these additional subpoenas. ECF No. 940 ¶ 3; ECF No. 941 ¶ 3.

In response to Martorello's August 17 motion, Plaintiffs argue that, inter alia, (1) the motion was untimely and (2) the attorney-client privilege in question is not Martorello's to assert. ECF No. 925 at 2.

DISCUSSION

Federal Rule of Civil Procedure 26, which governs the scope of discovery in this case, states that a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" Fed. R. Civ. P. 26(b)(1). However, a party "from whom discovery is sought may move for a protective order in the court where the action is pending." Fed. R. Civ. P. 26(c)(1). Upon such a motion, "the court may, for good cause, issue an order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense," by forbidding, limiting, or otherwise restricting the disclosure or discovery at issue. Fed. R. Civ. P. 26(c)(1).

District courts have wide discretion in deciding whether to issue a protective order. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984).

Timeliness

Although Rule 26(c) does not set out specific time limits, courts in this circuit have noted that "there is an implicit requirement that the motion must be timely." Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991). Specifically, a motion for a protective order must be filed before the date that the discovery must be produced. Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991). Given a court's wide discretion in granting or denying a motion for a protective order, a court may excuse for good cause a request for a protective order made after the date that discovery is set to be produced. Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991).

Here, Martorello's motion was untimely, and there is no good cause that would justify excusing that untimely filing. As Plaintiffs correctly note, the production that Plaintiffs requested was due on August 10, 2020. ECF No. 925 at 5. Martorello's motion was not filed until August 17, 2020. ECF No. 925 at 5. At that point, Plaintiffs had already begun receiving responsive documents before Martorello filed his motion. See ECF No. 925 at 5; see also Ex. 12, ECF No. 925-12 (showing VP Compliance providing Plaintiffs with documents on August 17, 2020). No good cause excuses the untimely filing of Martorello's motion. Martorello had been on notice since May 22, 2020 that Plaintiffs had requested and received permission to subpoena the third

parties. Plaintiffs served notice of the eight subpoenas on July 20, 2020, see Exs. 3-10, ECF Nos. 925-3-925-10, and Martorello's attorneys were notified of that fact the same day. See Ex. 11, ECF No. 925-11. Martorello had ample time to file his motion before the responses were due.

Attorney-Client Privilege

"Ordinarily, a party does not have standing to challenge a subpoena issued to a nonparty unless the party claims some personal right or privilege in the information sought by the subpoena." Singletary v. Sterling Transp. Co., 289 F.R.D. 237, 239 (E.D. Va. 2012) (quoting United States v. Idema, 118 Fed.Appx. 740, 744 (4th Cir.2005)). However, a party can challenge "an opposing party's subpoenas directed at a third-party" where a that party does, in fact, have an affected right or privilege. In re Subpoenas for Documents Issued to ThompsonMcMullan, P.C., No. CV 3:16-MC-1, 2016 WL 1071016, at *4 (E.D. Va. Mar. 17, 2016) (Payne, J.).

Here, Martorello, a party, is challenging a subpoena issued to several third parties on the grounds that those third parties have documents covered by attorney-client privilege. However, As Plaintiffs correctly assert, Ascension, not Martorello, is the holder of the attorney-client privilege at issue. Cf. Williams v. Big Picture Loans, LLC, 303 F. Supp. 3d 434, 445 (E.D. Va. 2018) (Payne, J.) (explaining, in depth, that when Bellicose engages an attorney, even if Martorello was the human intermediary, Bellicose

is the client and holder of any attorney-client privilege). Therefore, Martorello does not, in fact, have standing. See Singletary v. Sterling Transp. Co., 289 F.R.D. 237, 239 (E.D. Va. 2012).

CONCLUSION

For the foregoing reasons, the Court finds that Defendant Matt Martorello does not have standing to bring a motion for a protective order, and in any event, the motion is untimely. Martorello's motion for a protective order is based on an erroneous assertion of attorney-client privilege. The attorney-client privilege in question does not belong to Martorello; it belongs to Ascension. Accordingly, it is hereby ordered that:

(1) DEFENDANT MATT MARTORELLO'S MOTION TO STAY SUBPOENAS PENDING ARBITRATION (ECF No. 916) is DENIED as moot; and

(2) DEFENDANT MATT MARTORELLO'S MOTION FOR PROTECTIVE ORDER (ECF No. 915) is DENIED.

It is so ORDERED.

_____/s/ REP_____
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: December 18, 2020