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.

RESPONSE TO MOTION TO INTERVENE AND QUASH, IN PART, NON-PARTY SUBPOENA TO JENNIFER WEDDLE

I. INTRODUCTION

Respondents Lula Williams, Gloria Turnage, George Hengle, Dowin Coffy, and Marcella P. Singh ("Plaintiffs" or "Respondents") respectfully request that this Court deny Matt Martorello's motion to intervene and to quash the subpoena issued to attorney, Jennifer Weddle. Martorello filed his motion nine weeks after learning about the subpoena and six weeks after the subpoena's deadline for compliance. Martorello's motion is untimely and should be denied. *See Williams v. Big Picture Loans, LLC*, 303 F. Supp. 3d 434, 442-43 (E.D. Va. 2018) (denying a

motion to quash a subpoena filed by Martorello because it was filed weeks after the subpoena's compliance deadline).

Martorello's motion to quash also should be denied on the merits. Martorello has waived any attorney client privilege by raising a subjective "good faith defense" to Plaintiffs' claims, maintaining that multiple attorneys advised him "about the legality of the tribal business model and LVD's lending operations." *See* Docket #11-4 at Int. No. 13. In addition, Martorello should be prohibited from asserting any privilege or work product because Virginia law, which is the law applicable to Plaintiffs' claims, criminalizes the conduct at issue in the case and, thus, the crime/fraud exception to the attorney-client privilege applies.

But this Court need not reach these merits issues. Plaintiffs have requested that Weddle's motion be transferred to the Eastern District of Virginia so that Judge Payne can address all the issues efficiently and consistently. *See* docket #11. To the extent Martorello's motion is not denied outright for untimeliness, it should be transferred along with Weddle's motion to quash.

II. AUTHORITY AND ARGUMENT

A. Martorello's motion should be denied because it is untimely.

Rule 45(d)(3) requires a court to quash or modify a subpoena upon "timely" motion, but it is silent on what constitutes timely. Fed. R. Civ. P. 45(d)(3)(A). Some courts have held that "timely" means within the fourteen-day time limit for objections to the subpoena as proscribed by Rule 45(d)(2)(B). *See, e.g., Tutor-Saliba Corp. v. United States*, 30 Fed. Cl. 155, 156 (Fed. Cl. 1993). Other courts have held that "timely" means before the subpoena's return date. *See, e.g., United States v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 270, 278 (D.D.C. 2002); *Nova Biomedical Corp. v. i-STAT Corp.*, 182 F.R.D. 419, 422 (S.D. N.Y. 1998); *Flynn v.*

Square One Distribution, Inc., 2016 WL 2997673, at *1 (M.D. Fla. 2016) (motion to quash is timely if served before time for compliance); *Central States, Southeast & Southwest Areas Pension Fund v. GWT 2005 Inc.*, 2009 WL 3255246 (N.D. Ill. 2009) (motion to quash is timely if served before time for compliance); *Joplin Schools v. P1 Group, Inc.*, 2016 WL 3512262, at *1 (W.D. Mo. 2016) (movant knew about deposition for two weeks, but did not file motion to quash until three days before deposition).

Either way, Martorello's motion here is untimely. Plaintiffs served Martorello with their Notice of Intent to Serve Subpoena on November 16, 2018. Exhibit A. The return date on the subpoena was December 14, 2018. Exhibit B. Yet Martorello's counsel did not reach out to Plaintiffs' counsel about the subpoena until February 1, 2019, which is over six weeks after the December 14, 2018 return date and over nine weeks after being notified that Plaintiffs intended to serve the subpoena. Exhibit C.

This is not the first time that Martorello has filed an untimely motion to quash. Martorello also filed an untimely motion to quash during the jurisdictional discovery phase of the underlying litigation. *See Williams*, 303 F. Supp. 3d at 442-43. In *Williams*, Martorello did not file his motion to quash until long after the 14-day deadline for objections and weeks after the return date for complying with the subpoena. *See id.* The motion was transferred to the Eastern District of Virginia, where Judge Payne held, "Martorello's motion is not timely within the meaning of Rule 45(d)(3)(A)." *Id.* at 443. The same is true here. Thus, as Judge Payne put it, "Martorello's motion can be denied for its untimeliness alone." *Id.* at 443-44.

This is not a case where untimeliness can be excused due to Martorello's efforts to meet and confer. *Cf. Hartz Mountain Corp. v. Chanelle Pharmaceutical Veterinary Profs. Mfg. Ltd.*,

235 F.R.D. 535, 536 (D. Me. 2006) (excusing untimely motion to quash because the delay resulted from the movant's attempts to "come to an agreement … on the terms of a confidentiality order covering the documents sought by the subpoena"). To the contrary, Martorello's counsel did not tell Plaintiffs' counsel Martorello planned to file a motion until 6:00 p.m. EST on February 1, 2019. *See* Exhibit C. Plaintiffs told Martorello's counsel that this was not fair, pointing out "You guys have known about the subpoena for 9 weeks and the motion to quash for 6 weeks." *Id.* Plaintiffs' counsel specifically requested that if Martorello "want[s] to have a meaningful discussion, please send us details on who you claim is the privilege holder and the specific information you seek to protect through the motion." *Id.* Martorello's counsel filed the motion three days later on February 4, 2019 anyway.

The fact that Martorello has moved to intervene under Fed. R. Civ. P. 24(a)(2) does not change the outcome. The timeliness of a motion to intervene "is determined in light of all the circumstances." *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010). "When the applicant appears to have been aware of the litigation but has delayed unduly seeking to intervene, courts generally have been reluctant to allow intervention." *Id.* (quoting Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Fed. Prac. & Proc. § 1916, at 539-40 (3d ed. 2007)). Here, Martorello knew about the subpoena for nine weeks before seeking to intervene and knew about Weddle's motion to quash for six weeks. Nothing prevented him from intervening earlier. Thus, his motion is presumptively untimely under Rule 24(a)(2).

Even if this Court granted the motion to intervene, it still would have to consider Martorello's motion to quash under Rule 45. *See Furr v. Ridgewood Surgery & Endoscopy Ctr., LLC*, No. 14-1011-RDR, 2014 WL 6472885, at *2 (D. Kan. Nov. 18, 2014) (noting that "just

because a movant may have standing to move to quash does not mean the subpoena will be quashed under Rule 45(d)(3)(A)(iii)"). As described above, according to the cases interpreting Rule 45, including a case involving a motion to quash filed by Martorello in another subpoena-related action concerning the underlying litigation, Martorello's motion to quash is untimely. Thus, regardless of whether you conduct the analysis under Rule 24 or Rule 45, Martorello's motion should be denied.

B. Martorello's motion should be denied because he has waived any attorney-client privilege.

A subpoena that "requires disclosure of privileged or other protected information" may be quashed only "if no exception or waiver applies." Fed. R. Civ. P. 45(d)(3)(A). Here, quashing the subpoena would be improper because Martorello has waived the attorney-client privilege by asserting that he acted in "good faith" based on information provided by his attorneys, including Ms. Weddle. Plaintiffs have fully explained the basis for Martorello's waiver in a motion currently pending in the underlying litigation. *See Williams v. Big Picture Loans, LLC*, No. 3:17-cv-00461-REP, ECF No. 341 (Jan. 28, 2019 E.D. Va.).

The facts are as follows: On December 28, 2018, Martorello revealed his intent to assert a good faith defense to the claims in this case. Docket #11-4 at Int. No. 13. Martorello further indicated that this defense was based "on non-privileged information provided by attorneys Jennifer Weddle, Karrie Wichtman, Blake Sims, John Williams, Jennifer Galloway, Dan Gravel, Saba Bazzasieh and Rob Rosette…about the legality of the tribal business model and LVD's operations." *Id.* These attorneys "who had intimate knowledge of the entire operations of the Tribe's lending business and relationships, routinely issued opinion letters—which Martorello received…expressing [their] confidence in the Tribe's sovereign status, the legality of the

Tribe's lending businesses…." Exhibit D at Rog 15. According to Martorello, this legal advice provided him "with the assurances that the servicing relationship whereby Bellicose or Sourcepoint would assist the Tribe's lending businesses was lawful in all respects." *Id.*

It is well settled where a party raises a defense about his good faith believe that he was following the law, he cannot prevent disclosure of any advice related to that belief. *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir. 1991) (upholding trial court's ruling that if defendant testified about his good faith belief he as 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."); *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); *see also United States v. Moazzeni*, 906 F. Supp. 2d 505, 518 (E.D. Va. 2012) ("By placing his attorney's representation at the center of his defense, Moazzeni has waived any privilege to communications within the scope of that issue."); *Rhone-Poulenc Rorer v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994); *see also United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Selective disclosure for tactical purposes waives the attorney-client privilege.").[1]

Martorello attempts to avoid this well-established principle by arguing that his good faith defense "is based on non-privileged communications and other public information." Docket #19

[1] *See also Leviton Mfg. Co. v. Greenberg Traurig LLP*, 2010 WL 4983183, at *3 (S.D.N.Y. Dec. 6, 2010) ("Courts have recognized that a party need not explicitly rely upon advice of counsel to implicate privileged communications. Instead, advice of counsel may be placed in issue where, for example, a party's state of mind, such as his good faith belief in the lawfulness of his conduct, is relied upon in support of a claim of defense."); *Arista Records LLC v. Lime Grp. LLC*, 06 Civ.

at 2. Martorello apparently maintains that he can utilize non-privileged information, such as attorney publications, without being required to disclose the privileged information received by those same attorneys. But the law is clear: when a party asserts a defense based on advice received from attorneys, the party may not reveal "beneficial communication[s]" but withhold other "less helpful, communication(s) on the same matter." *E.I. Dupont de Nemours & Co. v. Kolon Indus., Inc.*, 269 F.R.D. 600, 605 (E.D. Va. 2010). This principle, often referred to as the issue doctrine, is rooted in fairness—when a jury evaluates Martorello's good faith defense, it must be able to assess the full story to evaluate his belief of the legality of his conduct, not just the beneficial communications. *See Seneca Ins. Co., Inc. v. Western Claims, Inc.*, 774 F.3d 1272, 1277-78 (10th Cir. 2014) (discussing the at-issue doctrine and referencing the "well-established principle that attorney-client communications cannot be used both as a sword and a shield").

Martorello cannot avoid application of the "at issue" doctrine by limiting the disclosure of legal advice to non-privileged documents. The "at issue" doctrine does not draw a distinction between privileged and non-privileged legal advice. Instead, when a party contends it acted in good faith based on its understanding of the law, "then the extent of its investigation and the basis for its subjective evaluation are called into question." *Hege v. Aegon USA, LLC*, No. 1:10-CV-1635-GRA, 2011 WL 1791883, at *4 (D.S.C. May 10, 2011) (citing *City of Myrtle Beach v. United Nat'l Ins. Co.*, No. CIV.A. 4:08-1183, 2010 WL 3420044, at *5 (D.S.C. Aug. 27, 2010) ("if a defendant voluntarily injects an issue in the case, whether legal or factual, the insurer voluntary waives, explicitly or impliedly, the attorney-client privilege."); *see also Favors v.*

5936(KMW), 2011 WL 1642434, at *3 (S.D.N.Y. Apr. 20, 2011) ("[e]ven if ... [Defendant's] beliefs about the lawfulness of his conduct were actually separate from legal advice ... Plaintiffs still would be entitled to know if [Defendant] ignored counsel's advice.").

Cuomo, 285 F.R.D. 187, 199 (E.D.N.Y. 2012) ("forfeiture of the privilege may result where the proponent asserts a good faith belief in the lawfulness of its actions, even without expressly invoking counsel's advice.").

By injecting the issue of legal advice into the case, Martorello has opened the door to discovery regarding the full breadth of legal advice received concerning the legality of his lending enterprise and the structure of his businesses. In his initial disclosures, Martorello disclosed Ms. Weddle as a witness with knowledge of the "[r]elationship between Martorello, Bellicose, and Sourcepoint with LVD and Red Rock; and related facts." Docket #11-2. In the underlying litigation, Martorello also produced documents authored by Weddle regarding her views on the legality of the tribal lending model. By asserting a good faith defense, Martorello has opened the door to discovery from, and cross examination of, Weddle regarding any advice he received so the trier of fact may assess whether Martorello honestly and reasonably followed the advice of his counsel. *See United States v. Bilzerian*, 926 F.2d 1285, 1292 (2nd Cir. 1991) (finding waiver where a defendant testified that he thought his actions were legal based on his knowledge of the law, reasoning: "His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent.").

C. Martorello's motion to quash should be denied because the crime/fraud exception to the attorney-client privilege applies.

"The crime/fraud exception to the attorney-client and work product privileges provides that otherwise privileged communications or work product made for, or in furtherance of, the purpose of committing a crime or fraud will not be privileged or protected." *Rambus, Inc. v. Infineon Tech. AG*, 222 F.R.D. 280, 287 (E.D. Va. 2004) (citing *Chaudhry v. Gallerizzo*, 174

F.3d 394, 403 (4th Cir. 1999)). While this concept is often referred to as an "exception" to privilege, in fact it is actually an "exclusion of certain activity from the prospective reach of the privileges." *Id.* The policy underlying the crime/fraud exception is that advice in furtherance of "fraudulent or unlawful goals" is "not worthy of protection." *Id.* (quoting *In re Grand Jury Subpoena*, 731 F.2d 1032, 1038 (2nd Cir. 1984).

The crime/fraud exception applies here. The crux of Plaintiffs' claims in the underlying litigation is that Defendants, including Martorello, violated Virginia's usury laws. It is a Class 2 misdemeanor in Virginia if "[a]ny person" violates or "participates in the violation" of the Virginia Consumer Finance Act, which prohibits the making of loans with interest rates greater than 12% without obtaining a license. Va. Code. §§ 6.2-1540, 1501. Further, the entire arrangement was a fraud—although Red Rock claimed to be "wholly owned" and "operated" by the LVD, it was really a vehicle designed to "shield Martorello and Bellicose from liability." *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 280 (E.D. Va. 2018). And when regulators caught on, Martorello and the Tribe continued the fraud through a restructure that allowed him to remain in control of the enterprise, to still reap the majority of its profits, but at the same time create additional layers of protection from liability by selling Bellicose to the LVD. Thus, the crime/fraud exception bars assertion of a privilege respect to advice provided in furtherance of Martorello's unlawful lending enterprise.

Here, Martorello seeks to rely on advice given by Weddle in furtherance of his unlawful lending scheme. In his initial disclosures, Martorello listed Weddle as a person with discoverable information that he may use to support his defenses. Docket #11-2 at 2. He also has stated in interrogatory responses that Weddle and her firm provided opinion letters regarding tribal

lending and his business structures. Exhibit D. Accordingly, the crime/fraud exception prevents him from asserting attorney-client privilege.

D. Martorello's motion should be denied on the merits, but alternatively, the Court should transfer the motion to the Eastern District of Virginia.

Martorello's motion should be denied as untimely or on the merits, but to the extent it is considered, the motion should be transferred to the Eastern District of Virginia with Weddle's motion to quash. Plaintiffs already have explained to this Court why exceptional circumstances warrant transferring Weddle's Motion to Quash to the Eastern District of Virginia. *See* docket ##11, 14, 15, 22, and 23. The same exceptional circumstances apply here. Judge Payne is certain to rule on the privilege issues, including whether Martorello waived any privilege and whether the crime/fraud exception applies. *See* docket #22 at 3-5. Briefing is nearly complete on Plaintiffs' motion to compel, which thoroughly addresses these issues. *See* docket #19 at 5. Judge Payne has indicated that he is willing to resolve all discovery disputes related to *Williams* to ensure consistency. *See* docket #15 at 3. Courts across the country have been transferring subpoena-related motions to the Eastern District of Virginia, including a motion to quash filed by another one of Martorello's attorneys, Jennifer Galloway. *See* docket #23. Martorello has also joined in the request for transfer.

III. CONCLUSION

For all the above reasons, Martorello's motion should be denied. Alternatively, the motion should be transferred to the Eastern District of Virginia together with Weddle's motion to quash.

RESPECTFULLY SUBMITTED AND DATED this 25th day of February, 2019.

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CERTIFICATE OF SERVICE

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