

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOON MOUNTAIN FARMS, LLC,)	Case No. 14-mc-80099-SC
)	
Plaintiff,)	ORDER GRANTING MOTION TO
)	<u>TRANSFER</u>
v.)	
)	
RURAL COMMUNITY INSURANCE)	
COMPANY,)	
)	
Defendant.)	
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I. INTRODUCTION

Now pending before the Court are three motions: (1) Plaintiff Moon Mountain Farms, LLC's ("MMF") motion to compel; (2) MMF's motion to transfer; and (3) nonparty Wells Fargo & Company's ("Wells Fargo") motion to disqualify counsel. These motions all relate to a subpoena issued from this District in October 2013 for an action pending before the District of Arizona (Case No. 2:13-cv-00349-DJH). All three motions are fully briefed¹ and suitable for

¹ ECF Nos. 1 ("MMF Mots."), 21 ("Wells Fargo Opp'n"), 30 ("MMF Reply"), 13 ("DQ Mot."), 23 ("DQ Opp'n"), 29 ("DQ Reply").

1 decision without oral argument per Civil Local Rule 7-1(b). For
2 the reasons set forth below, the Court GRANTS MMF's motion to
3 transfer and TRANSFERS all pending motions to the District of
4 Arizona.

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6 **II. BACKGROUND**

7 These motions arise out of an insurance dispute between MMF
8 and Defendant Rural Community Insurance Company (RCIC). MMF
9 alleges that RCIC erroneously denied an insurance claim that MMF
10 made in 2007. The claim was arbitrated, and the arbitrator found
11 that RCIC was required to indemnify MMF. MMF brought suit in
12 Arizona, alleging that RCIC acted with bad faith in handling the
13 insurance claim and subsequent arbitration. MMF Mots. at 3. It is
14 that lawsuit, currently being heard before the United States
15 District Court for the District of Arizona, to which the subpoena
16 at issue in these motions relates.

17 In January 2014, Judge Bolton, who was then presiding over the
18 Arizona case,² granted MMF's motion to compel discovery of (1)
19 RCIC's post-denial claims file, (2) RCIC's counsel's coverage
20 opinion, and (3) communications between RCIC and its consulting
21 experts. Case No. 2:13-cv-00349-DJH ECF No. 73 ("Production
22 Order"), at 2, 7. The order to compel RCIC's counsel's opinion was
23 premised on a finding that RCIC had impliedly waived attorney-
24 client privilege. Id. at 5. RCIC has disclosed approximately
25 fifteen pages of discovery. MMF Mots. Ex. A ("Axel Decl.") ¶¶ 33,
26 38, Ex. 12. The parties disagree as to whether RCIC has complied

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28 ² The case has since been reassigned to Judge Humetewa.

1 with the order, and MMF argues that Wells Fargo, which is RCIC's
2 parent company, possesses discoverable documents. As a result, MMF
3 issued a subpoena from this District in October 2013. Wells Fargo
4 objected, and MMF now brings this motion to compel.

5 Wells Fargo has also brought a motion to disqualify counsel
6 for MMF. Wells Fargo argues that lawyers for MMF currently
7 represent certain Wells Fargo subsidiaries, which creates an
8 impermissible conflict of interest. DQ Mot. at 1-2. MMF has
9 requested that the Court transfer the motion to compel, along with
10 the related motion to disqualify counsel, to the District of
11 Arizona for resolution. MMF Mots. at 8; DQ Opp'n at 4. Wells
12 Fargo has also requested judicial notice of a transcript of
13 proceedings before Judge Bolton in the underlying Arizona action.
14 ECF No. 29. MMF has opposed the request. ECF No. 31.

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16 **III. LEGAL STANDARD**

17 Federal Rule of Civil Procedure 45, which governs the use of
18 subpoenas, was significantly amended last year. The amendments
19 were adopted in April 2013 but did not take effect until December
20 1, 2013. The subpoena at issue here was issued in October, prior
21 to the effective date of the amendments. However, the amended
22 version of the Rules applies to proceedings after the effective
23 date in pending cases unless the Supreme Court specifies otherwise,
24 or applying them would be infeasible or work an injustice. Fed. R.
25 Civ. P. 86(a)(2). The amended version of Rule 45 requires that
26 subpoenas be issued from the court where the action is pending.
27 Fed. R. Civ. P. 45(a)(2). If compliance is required elsewhere, the
28 amended rule permits the compliance court to "transfer a motion

1 under this rule to the issuing court if the person subject to the
2 subpoena consents or if the court finds exceptional circumstances."
3 Fed. R. Civ. P. 45(f).

4 The Advisory Committee notes provide some guidance as to when
5 exceptional circumstances may be found:

6
7 The prime concern should be avoiding burdens on local
8 nonparties subject to subpoenas, and it should not be
9 assumed that the issuing court is in a superior position
10 to resolve subpoena-related motions. In some
11 circumstances, however, transfer may be warranted in
12 order to avoid disrupting the issuing court's management
13 of the underlying litigation, as when that court has
14 already ruled on issues presented by the motion or the
15 same issues are likely to arise in discovery in many
16 districts. Transfer is appropriate only if such interests
17 outweigh the interests of the nonparty served with the
18 subpoena in obtaining local resolution of the motion.

19 Fed. R. Civ. P. 45 advisory committee's note.

20
21 **IV. DISCUSSION**

22 Wells Fargo opposes transfer of the motion to compel to the
23 District of Arizona. Consequently, the Court may only transfer the
24 motions related to this subpoena to the District of Arizona upon a
25 finding of exceptional circumstances.

26 **A. Application of Rule 45(f)**

27 As an initial matter, it is not obvious that Rule 45(f)
28 applies at all in this case. The rule permits a transfer "[w]hen
the court where compliance is required did not issue the subpoena."
This Court issued the subpoena, and this Court is also where
compliance is sought. Wells Fargo argues that Rule 45(f) does not
apply at all in this case, and that the Court therefore may not
transfer the case. Wells Fargo Opp'n at 7. However, application

1 of Rule 45 is complicated by the fact that the subpoena was issued
2 in October, prior to the effective date of the 2013 amendments.

3 The subpoena was only issued from this Court because the
4 previous version of the Federal Rules required the subpoena to
5 issue from the court for the district where the deposition is to be
6 taken. Because Wells Fargo is headquartered in San Francisco, the
7 subpoena issued from this Court. Under the current rule, however,
8 the subpoena should have issued from the District of Arizona;
9 indeed, Rule 45(a)(2) in its current form would prohibit this Court
10 from issuing the subpoena to which these motions relate.

11 In a recent case, the United States District Court for the
12 District of Columbia faced precisely this issue. In Wultz v. Bank
13 of China, Ltd., the plaintiffs in a lawsuit pending in the Southern
14 District of New York sought to enforce a subpoena in the District
15 of Columbia. As here, the subpoena was issued prior to the
16 effective date of the 2013 amendments to the Federal Rules of Civil
17 Procedure. In May 2014, the District of Columbia court ruled on a
18 motion to quash the subpoena. That court determined that:

19 [S]ince the text of Rule 45(a)(2) now explicitly requires
20 that "[a] subpoena must [be] issue[d] from the court
21 where the action is pending," and because the underlying
22 litigation is not pending in this Court, this Court could
23 not now have issued the subpoena at issue in accordance
24 with Rule 45(a)(2). Thus, since the subpoena explicitly
25 identifies the Southern District of New York as the court
26 where the underlying action is pending, pursuant to
27 amended Rule 45 the Southern District of New York must be
28 considered the issuing court.

26 Wultz v. Bank of China, Ltd., MC 13-1282 (RBW), 2014 WL 2257296
27 (D.D.C. May 30, 2014) (citations omitted). As in Wultz, the
28 subpoena at issue here specifies the District of Arizona as the

1 court where the underlying action is pending. Axel Decl. Ex. 1.
2 The Court finds the reasoning in Wultz compelling and determines
3 that faithful application of the current version of Rule 45
4 requires the Court to consider the District of Arizona the issuing
5 court. The Court finds that Rule 45(f) applies, and that transfer
6 to the District of Arizona is warranted upon the existence of
7 exceptional circumstances.

8 **B. Exceptional Circumstances**

9 The court where compliance with a subpoena is sought has
10 discretion to transfer related motions to the issuing court only
11 upon a finding of exceptional circumstances. Fed. R. Civ. P.
12 45(f). Such exceptional circumstances include situations in which
13 transfer is "warranted in order to avoid disrupting the issuing
14 court's management of the underlying litigation, as when that court
15 has already ruled on issues presented by the motion" Fed.
16 R. Civ. P. 45 advisory committee's note. When the issuing court
17 has already ruled on issues presented by a subpoena-related motion,
18 exceptional circumstances exist and the court of compliance may
19 transfer the motion to the issuing court.

20 The issues raised in the motion to compel relate to orders and
21 discovery from the underlying Arizona case. Wells Fargo's two
22 primary arguments in opposition to the motion to compel are that
23 (1) the subpoena requires Wells Fargo to produce documents that
24 RCIC has already produced in the Arizona case, Wells Fargo Opp'n at
25 13-15; and (2) that documents sought in the subpoena are already
26 under in camera review in the District of Arizona or are not
27 subject to Judge Bolton's production order, id. at 15-16. The
28 second argument clearly presents an issue upon which the District

1 of Arizona has already ruled: determining which documents are
2 subject to Judge Bolton's order involves an existing ruling in the
3 underlying action. Indeed, Wells Fargo seems to acknowledge this
4 fact. In its objection to the subpoena, Wells Fargo stated that
5 MMF's first subpoena request was "an improper attempt to circumvent
6 the authority of the presiding judge over the discoverability of
7 the requested documents, since Request No. 1 is currently the
8 subject of a pending motion to compel in the primary action, in the
9 United States District Court for the District of Arizona"
10 Axel Decl. Ex. 2. Avoiding such an attempt to circumvent the
11 authority of the presiding judge in the underlying action is surely
12 an exceptional circumstance contemplated by Rule 45. Additionally,
13 the District of Arizona is in a much better position to determine
14 which documents have already been produced, which documents are
15 under in camera review, and which documents are subject to the
16 production order.

17 This result is indicated by the text of the Advisory
18 Committee's notes to Rule 45. Additionally, the few courts to
19 consider this issue since the amendments took effect have found
20 exceptional circumstances in analogous situations. In FTC v. A±
21 Financial Center, a judge in the Southern District of Ohio granted
22 a motion to transfer a motion to compel to the Southern District of
23 Florida, where the underlying litigation was pending. The court
24 found exceptional circumstances because a similar motion to compel
25 was pending before the Florida court. That similar motion to
26 compel dealt with a subpoena directed at a different party but that
27 sought similar items. F.T.C. v. A± Fin. Ctr., LLC, 1:13-MC-50,
28 2013 WL 6388539, at *1-3 (S.D. Ohio Dec. 6, 2013). That is also

1 the issue here: MMF seeks documents from Wells Fargo that it has
2 been unable to obtain from RCIC under an existing production order
3 issued in the District of Arizona. See MMF Mots. at 4-5. Other
4 courts facing similar situations have also found exceptional
5 circumstances. See Cont'l Auto. Sys., U.S., Inc. v. Omron Auto.
6 Elec., Inc., 14 C 3731, 2014 WL 2808984, at *2 (N.D. Ill. June 20,
7 2014) (transferring motion because ruling on it risked inconsistent
8 rulings that might disrupt management of the underlying
9 litigation); Chem-Aqua, Inc. v. Nalco Co., 3:14-MC-71-D-BN, 2014 WL
10 2645999, at *3 (N.D. Tex. June 13, 2014) (finding exceptional
11 circumstances because the court presiding over the underlying
12 litigation had already ruled on issues in motion to compel); Wultz,
13 2014 WL 2257296, at *7 (finding exceptional circumstances where the
14 judge presiding over the underlying litigation was "in a better
15 position to rule on the . . . motion . . . due to her familiarity
16 with the full scope of the issues involved").

17 Ruling on the motion to compel would require the Court to
18 duplicate review already conducted by the District of Arizona. It
19 would also risk disrupting the District of Arizona's management of
20 the underlying litigation, because the District of Arizona has
21 already ruled on some of the issues presented in the motion.
22 Moreover, the District of Arizona is in a better position to rule
23 on these motions due its familiarity with the issues involved. The
24 Court finds that exceptional circumstances exist and that transfer
25 is permitted under Rule 45.

26 **C. Burden on Wells Fargo**

27 The Advisory Committee's notes to Rule 45 make clear that the
28 primary focus in determining whether transfer is appropriate should

1 be the burden on local nonparties. Thus the Court proceeds to
2 analyze the burden of a transfer on Wells Fargo, the local nonparty
3 involved in these motions. Wells Fargo argues that it would be
4 "unjustifiably burdened" by transfer to the District of Arizona
5 because (1) it would be expensive, and (2) it would deny Wells
6 Fargo the protection of local laws on attorney-client privilege.

7 The expense argument is unconvincing. "Almost any subpoenaed
8 party could make the same undue burden arguments that [Wells Fargo]
9 makes here." Chem-Aqua, 2014 WL 2645999, at *3. Thus, in
10 situations like this, "the cost of litigation alone does not amount
11 to an unfair prejudice." Wultz, 2014 WL 2257296, at *6.³ Nor is
12 it clear that litigating this motion in the District of Arizona
13 will cost very much at all. "Transferring a motion to the
14 jurisdiction where the underlying litigation is pending that will
15 require few, if any, modifications of the written submissions, [and
16 therefore] does not rise to the level of unfair prejudice." Id.
17 Additionally, the Advisory Committee encourages judges to "permit
18 telecommunications" to minimize travel costs after a Rule 45(f)
19 transfer. Fed. R. Civ. P. 45 advisory committee's note. The Court
20 finds that any costs to Wells Fargo imposed by a transfer to the
21 District of Arizona are outweighed by the importance of consistent
22 management of the underlying litigation and judicial economy.

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24 ³ Wells Fargo urges the Court to consider Garden City Employees'
25 Retirement Systems v. Psychiatric Solutions for the proposition
26 that the cost of travel "is a sufficient showing to overcome a
27 transfer." Wells Fargo Opp'n at 9. Wells Fargo misreads that
28 case. The Garden City court declined to transfer the motions
because exceptional circumstances did not exist. It did not hold
that travel costs are sufficient to overcome exceptional
circumstances where those circumstances exist. No. MISC.A. 13-238,
2014 WL 272088, at *3 (E.D. Pa. Jan. 24, 2014).

1 Second, Wells Fargo argues that it will be prejudiced because
2 hearing the motion in the District of Arizona would deny it the
3 protection of California's attorney-client privilege laws. Wells
4 Fargo Opp'n at 10. Wells Fargo implies that Arizona attorney-
5 client privilege laws would apply were the motion to be
6 transferred. Whether that is actually the case is a complex
7 question.⁴ However, it hardly matters. Notably absent from Wells
8 Fargo's briefings is any mention whatsoever of the Arizona
9 attorney-client privilege. Wells Fargo emphasizes that California
10 law requires narrow construction of waivers of attorney-client
11 privilege. Wells Fargo Opp'n at 10. However, Wells Fargo fails to
12 argue that Arizona law permits any less narrow construction, likely
13 because the states' laws in this area are virtually identical.
14 California law directs that an "implied waiver is narrowly defined
15 and the information required to be disclosed must fit strictly
16 within the confines of the waiver." Transamerica Title Ins. Co. v.
17 Superior Court, 188 Cal. App. 3d 1047, 1052 (Cal. Ct. App. 1987).
18 Similarly, Arizona courts have held that an implied waiver of
19 attorney-client privilege permits only "the fewest and most

20 ⁴ Federal Rule of Evidence 501 specifies that state law privileges
21 apply when state law supplies the rule of decision, but "the rule
22 does not specify which state law should be applied." Wolpin v.
23 Philip Morris Inc., 189 F.R.D. 418, 423 (C.D. Cal. 1999). Thus the
24 process of determining which state's privilege law to apply begins
25 with Arizona's choice of law rules. See id. (applying California
26 choice of law rules to determine which state's privilege law
27 applied, where California law supplied the rule of decision).
28 Arizona follows the Restatement (Second) of Conflict of Laws. See,
e.g., Swanson v. Image Bank, Inc., 206 Ariz. 264, 266 (Ariz. 2003);
Bates v. Superior Court, 156 Ariz. 46, 48 (Ariz. 1988). Whether
communications privileged under California law, but not under
Arizona law, would be inadmissible in the District of Arizona would
then depend upon whether "some special reason" exists not to give
effect to the Arizona law. Restatement (Second) of Conflict of
Laws § 139.

1 narrowly-drawn questions as will provide necessary information
2 regarding the specific issue on which waiver has been found."
3 Ulibarri v. Superior Court, 184 Ariz. 382, 385 (Ariz. Ct. App.
4 1995). It is hard to imagine a scenario in which these laws would
5 conflict; if anything, Arizona law appears to be slightly more
6 protective of the privilege holder than California law. The Court
7 finds that construction of the waiver of attorney-client privilege
8 under Arizona law, if warranted, would not prejudice Wells Fargo.

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V. CONCLUSION

As described above, the Court finds that exceptional circumstances exist, permitting transfer of these motions to the District of Arizona. Any burden on Wells Fargo is outweighed by the importance of ensuring consistency in rulings on the issues involved, preserving judicial economy, and permitting the court with the most experience and knowledge of the facts to rule on these matters. Plaintiff Moon Mountain Farms's motion to transfer the motion to compel and the motion to disqualify to the District of Arizona is GRANTED. Wells Fargo's request for judicial notice, ECF No. 29, is DENIED as moot. The Clerk of the Court is DIRECTED to transfer this case to the District of Arizona for consideration of MMF's motion to compel and Wells Fargo's motion to disqualify in the pending matter of Moon Mountain Farms v. Rural Community Insurance Company, No. 2:13-cv-00349-DJH.

IT IS SO ORDERED.

Dated: July 10, 2014



UNITED STATES DISTRICT JUDGE