UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD CONVERTINO,

Plaintiff,

Case No. 07-CV-13842-DT

v.

Hon. Robert H. Cleland

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

_____/

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MOTION FOR PROTECTIVE ORDER AND REMISSION
BY NON-PARTY MEDIA RESPONDENT DAVID ASHENFELTER

MOTION

Respondent David Ashenfelter respectfully requests that the Court (1) issue a protective order prohibiting Plaintiff Richard Convertino from taking discovery from him; (2) stay its consideration of this request pending resolution of an identical request that Ashenfelter has simultaneously made of Judge Royce Lamberth of the District Court for the District of Columbia; (3) enter a protective order consistent with Judge Lamberth's ruling.

In accordance with local rule 7.1, the undersigned submits that on October 13, 2008, he spoke with Attorney Eric Snyder, counsel for plaintiff, to seek concurrence in this motion, and that concurrence was not refused.

In support of his motion, Ashenfelter offers the following brief.

BRIEF

ISSUES PRESENTED

Where:

- Rule 26 permits Non-Party Respondent Ashenfelter to seek a protective order from the court in which the case is pending;
- The rule and long-standing practice further encourage this Court to stay its consideration of the issue and defer to the determination of the trial court;
- Resolution of Ashenfelter's request requires assessment of the merits of Plaintiff Convertino's case and application of D.C. First Amendment case law; and
- This Court has determined that it is barred from making these determinations;

Should this Court consider and hold in abeyance Ashenfelter's request for a protective order, and remit the parties to the trial court in D.C., and defer to that court's decision on the issue?

CONTROLLING / MOST APPROPRIATE AUTHORITY

In re Sealed Case, 141 F.3d 337, 342-343 (D.C. Cir. 1998)

Prosonic Corp. v. Baker, 2008 U.S. Dist. LEXIS 36035 (S.D. Ohio Apr. 7, 2008) (Ex C)

Zerilli v. Smith, 656 F.2d 705, 710-11, 712 (D.C. Cir. 1981)

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I. INTRODUCTION

The Court's August 29, 2008 order[1] granting Plaintiff Convertino's motion to compel Respondent Ashenfelter's testimony left open a critical issue that this Court found it did not have jurisdiction to resolve. Specifically, in opposing the motion, Ashenfelter argued that the Court should weigh the merits and status of Convertino's underlying lawsuit when determining his need for the discovery. Indeed, the Rule 26-based analytical approach that this Court adopted (rather than the qualified First Amendment privilege standard advanced by Ashenfelter) requires that the Court "balance the potential harm to the free flow of information that might result *against the asserted need for the requested information*."[2] As the Court acknowledged,[3] Sixth Circuit Judge McKeague and many other courts have found implicit in this requirement a need to evaluate the strength of the requestor's case as part of weighing "the asserted need for the requested information." If Convertino's underlying Privacy Act claim is doomed to fail on summary judgment for reasons other than the requested discovery, then there can be no justification for the injury that such discovery will inevitably inflict on Ashenfelter and First Amendment public policy in general.

But here, because Convertino's Privacy Act lawsuit is pending in another district, this Court found itself without jurisdiction to undertake what it called a "cart-before-horse determination that the merits of [Convertino's] claim are weak or lacking."[4] This conclusion became dispositive of the motion to compel, since it left Convertino free to contest the merits of Ashenfelter's arguments, but deprived Ashenfelter of the reciprocal ability to question Convertino's premises.

This jurisdictional barrier works an especially acute prejudice on Ashenfelter in the unique circumstances of this case, given the Court's additional determination that the Sixth Circuit is a "minority of

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1 D/E 27.

2 *Omokehinde v. Detroit Bd. of Educ*., No. 06-15241 (E.D. Mich. Dec. 13, 2007) (Whalen, MJ) (emphasis added), cited at p. 10 of the Court's Order.

3 D/E 27 at 20 n. 16.

4 *Id*.

one" that does not recognize a qualified First Amendment privilege to protect confidential sources. As the Court's order noted, the District of Columbia Circuit, where Convertino's Privacy Act case is pending—along with every other circuit to consider the issue—does recognize the privilege. Only the accident of Ashenfelter's residence has prevented a D.C.-recognized privilege from being applied in this D.C. litigation.

The Federal Rules of Civil Procedure contain a mechanism for addressing problems just such as this: remission. The Rules required this Court to hear Convertino's motion in the first instance, since Ashenfelter resides in this District and Convertino's subpoena accordingly issued from this Court. But Rule 26 expressly allows Ashenfelter to seek a protective order from the trial court hearing Convertino's Privacy Act case. Indeed, where—as here—it is necessary or prudent for the trial court with the underlying case to decide an extraterritorial discovery dispute, the Rules and longstanding federal practice encourage the subpoena-issuing court to remit the matter to that court, and defer to its decision.

Here, only Judge Lamberth of the U.S. District Court for the District of Columbia can properly determine which issue is the "cart," and which is the "horse." As Ashenfelter has noted, Convertino has repeatedly violated his discovery obligations. He has not lifted a finger to gather supporting evidence, or produced evidence in a timely fashion. He has failed to offer evidence of other elements of his Privacy Act claim, such as damages. And the law of the circuit in which his case is pending gives much greater weight to First Amendment concerns than this circuit's law (as this Court interprets it) does. Convertino's claim could be subject to summary judgment on several grounds that are independent of Ashenfelter's testimony.

Therefore, before the Court rings a bell that cannot be unrung—compelling the disclosure of a reporter's confidential source—it should remit the parties to the one court that does have jurisdiction to resolve all of the issues relevant to when and how discovery should proceed in this case. Ashenfelter asks

that the Court stay consideration of his request pending Judge Lamberth's resolution of the motion for protective order that he has simultaneously filed before the D.C. court.[5]

II. Relevant Background

On February 13, 2004, Convertino filed his Privacy Act complaint against the Department of Justice in the D.C. District Court. Soon thereafter, the case was stayed pending a DOJ investigation.

On March 29, 2006, Convertino was indicted on a total of four counts related to his alleged obstructions of justice.

On July 11, 2006, rather than issuing a subpoena from this Court to Ashenfelter as required by Rule 45, Convertino issued a subpoena from the D.C. court to the Virginia-based Gannett Co., the Detroit Free Press's parent entity, purporting to "define" Gannett to include Ashenfelter. In response, on September 12, 2006, Ashenfelter filed a declaratory judgment complaint in this Court to block the Gannett subpoena. Convertino litigated that case—No. 06-14016, assigned to Judge Duggan—for nine months, until finally agreeing to withdraw the subpoena in exchange for a voluntary dismissal in May 2007.

Also in May 2007, Convertino finally served Ashenfelter and the Free Press with subpoenas issued from this Court. In July 2007, Convertino filed the motion to compel that opened this action.

In August 2007, Judge Lamberth again stayed the D.C. case. At that time, a motion was pending from the DOJ to compel Convertino's responses to discovery he had refused to provide. In September 2007, this Court issued a stay at Convertino's request.

In October 2007, Convertino was acquitted on 3 of the 4 criminal counts against him. On December 7, 2007, the Government dismissed Count IV without prejudice.

On December 13, 2007, Judge Lamberth reopened the D.C. case. On December 20, 2007, based on a joint motion of the parties, he entered a scheduling order that: ordered Convertino respond to all

[5] A courtesy copy of that motion is attached as **Ex A**.

outstanding discovery requests by January 25, 2008; directed the DOJ to file a renewed motion to compel; set the lengths of a discovery period that would begin to run only after the Court resolved the DOJ's motion to compel; and further provided for another discovery period to begin *if* this Court ordered Ashenfelter to testify, and *if* Ashenfelter complied with the order.[6] This scheduling order is still in place.

On February 21, 2008, this Court lifted its stay and ordered Ashenfelter and the Free Press to respond to Convertino's motion to compel, which they did on March 26.

On February 25, 2008, DOJ filed its Renewed Motion to Compel in the D.C. action, which was followed by Convertino's (delayed) opposition on March 21.

On April 17, 2008, this Court granted Convertino's request for leave to file a 20 (as opposed to 5) page reply brief, but denied Ashenfelter's request for leave to file a surreply. In the same order, however, the Court acknowledged that, "[b]ecause of the complexity of the issues before the court, the court may later determine that the parties are *required* to submit further briefing on this matter."[7]

On July 7, 2008, Judge Lamberth granted the DOJ's motion to compel, ordering Convertino to comply within 14 days. Convertino only recently delivered a large set of documents that the DOJ has not finished reviewing. DOJ attorneys have also informed the undersigned that they intend to move for summary judgment in the near future.

On August 29, 2008, this Court granted Convertino's motion to compel Ashenfelter's testimony. The Court held that it was constrained by its interpretation of *In re Grand Jury Proceedings*, 810 F.2d 580, 584-86 (6th Cir. 1987). to find that the Sixth Circuit is a "minority of one" that does not recognize any form of qualified First Amendment privilege to protect confidential news sources, even in civil cases. Instead, the Court endorsed the Rule 26-based balancing test crafted by Magistrate Judge Whalen.[8] The Court further

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6 **Ex B**.

7 D/E 24 at 2 n.1 (emphasis original).

8 D/E 27 at 10.

observed that Ashenfelter had not yet requested a protective order under Rule 26(c)(1), and that this Court saw no basis to grant him one itself based on the factors that were in the Court's jurisdiction to consider.[9]

Convertino has by e-mail requested Ashenfelter's deposition to occur on October 16, 2008.

III. Argument

A. Remission

Subpoenas must issue from, and therefore be enforced by, the district court in which a deponent lives. Rule 45 required that Convertino issue his subpoena to Ashenfelter from this Court, and therefore that he move to compel its enforcement in this Court.

But that does not mean that the district court in which the underlying case is pending is irrelevant to resolving discovery disputes that occur in those foreign districts. For example, Rule 26(c)(1) provides that "any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken." This language expressly authorizes Ashenfelter to seek a protective order from Judge Lamberth, as Ashenfelter has now done.

This passage from Rule 26 further suggests a *preference* for resolving discovery disputes where the case is pending. Issuing courts have long followed a practice of deferring to the trial court in such circumstances. The Advisory Committee Notes to the 1970 Amendments to Rule 26(c) explain:

> The subdivision recognizes the power of the court in the district where a deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. [But t]he court in the district where the deposition is being taken may, *and frequently will*, remit the deponent or party to the court where the action is pending.[10]

This is exactly the practice that the D.C. Circuit—where Convertino's case is pending—follows:

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[9] *Id*. at 20.

[10] Emphasis added.

> Rule 26(c) permits that court to stay its proceedings on a nonparty deponent's motion for a protective order pending action by the trial court, and to defer to the trial court's resolution of that motion. . . . Other courts have recently adopted this reading of the Advisory Committee Note. *See*, *e.g.*, *Orthopedic Bone Screw Prods.*, 79 F.3d 46 at 48 (reading the Note's use of "remit" as referring simply to power in court that issued subpoena to stay motion by nonparty witness for protective order and defer to decision of the district court where discovery proceedings in the underlying action were pending under 28 U.S.C. § 1407); *Cent. States, Southeast & Southwest Areas Pension Fund v. Quickie Transport Co.*, 174 F.R.D. 50, 51 n.1 (E.D. Pa. 1997); *Kearney* [*v. Jandernoa*, 172 F.R.D. 381, 383 (N.D. Ill. 1997)]. It appears also to have been the understanding of courts and commentators nearer the time of the 1970 Advisory Note. *See Socialist Workers Party v. Att'y Gen*., 73 F.R.D. 699, 701 (D. Md. 1977) (quoting 1976 Moore's Federal Practice).[11]

Courts in this Circuit do likewise:

> [T]he Court has substantial discretion to stay enforcement proceedings when the issue may be resolved by a ruling from that other court.. . . Many times, the court from which the subpoena has issued will "remit" the matter to the other court by directing the parties to engage in motions practice before that court..[12]

Remission is especially called for where, as here, resolving the protective order motion requires "delv[ing] into the merits of the underlying action."[13] Similarly, now that Ashenfelter has moved for a protective order in D.C., this Court can and should stay its proceedings, remit the matter to Judge Lamberth, and enter a protective order consistent with his ruling.

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[11] *In re Sealed Case*, 141 F.3d 337, 342-43 (D.C. Cir. 1998).

[12] *See*, *e.g.*, *Prosonic Corp. v. Baker*, 2008 U.S. Dist. LEXIS 36035 (S.D. Ohio Apr. 7, 2008) (**Ex C**) (collecting cases).

[13] *Central States, SE and SW Areas Pension Fund v. Quickie Transport Co*., 174 FRD 50, 52 (E.D. Penn. 1997) (remitting protective order motion to Illinois court where "resolution of whether the crime-fraud exception to the attorney-client privilege applies would require this court to delve into the merits of the underlying action"); *see In re Schneider Nat'l Bulk Carriers*, 918 F. Supp. 272, 274 (E.D. Wis. 1996) (noting that the court where underlying action was pending was "more familiar with the factual and legal issues underlying this cause of action and [was] in a better position to rule on the relevancy, undue burden and confidentiality of the respondents' requests within the totality of circumstances surrounding this litigation"); *Bank of Texas v. Computer Statistics, Inc.*, 60 F.R.D. 43, 45 (S.D. Tex. 1973) (same).

B. This Court Should Stay its Decision on a Protective Order for Ashenfelter, and Remit the Parties to Judge Lamberth to Decide the Issue

As the reasoning of this Court's recent order suggests, only Judge Lamberth has the jurisdictional ability to fully weigh and compare all of the competing issues with regard to Convertino's proposed deposition of Ashenfelter. As Ashenfelter has argued, there are several reasons that Convertino may lose his Privacy Act lawsuit that have nothing to do with the identity of Ashenfelter's source. Convertino has repeatedly failed to live up to his discovery obligations in the D.C. action. It has yet to be determined whether his most recent production complied with Judge Lamberth's July 7 order. Moreover, the DOJ has advised Ashenfelter's counsel that it intends to seek summary judgment from Judge Lamberth—probably, although not exclusively, on the grounds that Convertino has not proved the damages portion of his case, as the Supreme Court has ruled that Privacy Act plaintiffs must do in order to prevail.[14]

Moreover, the D.C. Circuit (along with every federal circuit to consider the issue except, in this Court's view, the Sixth Circuit) expressly recognizes the qualified First Amendment privilege for reporters to maintain the anonymity of their sources. As explained by the D.C. Circuit's leading *Zerilli* case, that jurisdiction recognizes vital First Amendment interests that require protecting reporters' confidential sources in all but the most extreme cases:

> Compelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems. . . .
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> * * *
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> "[I]n the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters."[15]

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[14] *Doe v. Chao*, 540 U.S. 614, 622 (2004) ("Because presumed damages are . . . clearly unavailable, we have no business treating just any adversely affected victim of an intentional or willful violation as entitled to recovery, without something more"*)*; *Dodge v. Trs. of the Nat'l Gallery of Art*, 326 F. Supp. 2d 1, 12 (D.D.C. 2004) (Lamberth, J.) ("In the absence of evidence indicating that the plaintiff suffered actual damages, the Court cannot grant monetary relief . . . [under] the Privacy Act").

[15] *Zerilli v. Smith*, 656 F.2d 705, 710-11, 712 (D.C. Cir. 1981).

A D.C. court would be in the best position to judge whether Convertino has made sufficiently exhaustive efforts to overcome these interests here. Under its own Rule 26-based balancing test, this Court has found that "Convertino has not 'had ample opportunity to obtain the information by discovery in the action,' and] has tried to use other means of discovery to unmask Ashenfelter's sources."[16] Ashenfelter strongly disputes this conclusion. But the Court's ability to verify this assessment is necessarily limited by its lack of first-hand involvement in the discovery practice that Judge Lamberth has guided for years now.

The sufficiency of Convertino's effort would also be assessed by a much different, First Amendment-based standard in Judge Lamberth's court. Convertino admitted to this Court that his circumstances "seem reminiscent of *Zerilli*,"[17] which rejected a Privacy Act plaintiff's reliance on a DOJ internal investigation. He claims to have "done exactly what the *Zerilli* plaintiffs did not,"[18] however—but only because he says that the DOJ report here contains sworn statements and three depositions. The redacted version of the OIG report says *nothing* about having deposed any of the potential sources. Judge Lamberth has access to the unredacted report, but this Court does not. Even if Convertino is right, however, a mere three depositions falls far short of *Zerilli*'s requirement:

> [T]he litigant need not have deposed every one of the [defendant's] employees. Nonetheless, the obligation is clearly very substantial. In *Carey* we suggested that an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure. . . . Appellants cannot escape their obligation to exhaust alternative sources simply because they feared that deposing Justice Department employees would be time-consuming, costly, and unproductive." [19]

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16 D/E 27 at 17 (citation omitted).

17 Motion to Compel at 11

18 Motion to Compel at 12.

19 656 F2d at 714-15 (emphasis added); *see also In Re Roche*, 448 US at 1316 ("[t]he hardship that [deposing 65 witnesses] would impose—although not negligible—does not outweigh the unpalatable choice that civil contempt would impose upon the [reporter]").

Again, therefore, it is only the accident of Ashenfelter's residence that prevented his claims from being scrutinized according to this standard.

Deferring to Judge Lamberth's discretion on if and when Ashenfelter should be required to testify will not cause Convertino any cognizable prejudice. Both his Privacy Act case and this matter were already delayed and stayed—at Convertino's insistence—during the pendency of his criminal trial. He could have filed and litigated his motion to compel Ashenfelter's deposition as early as *four years ago*, if he had only obeyed Rule 45 and issued a subpoena from this Court in the first instance. Instead, he spent years engaging in procedural fencing by targeting Ashenfelter through a D.C.-issued subpoena to the Gannett Company. What is more, Judge Lamberth's current scheduling order anticipates a delay in obtaining Ashenfelter's testimony, if it is taken at all, and provides the parties with extra time if and when the deposition occurs.

In sum, Convertino cannot raise any substantial reason why this Court should not allow Judge Lamberth to weigh in on the need for, and alternatives to, Ashenfelter's deposition. The vital First Amendment interests that—in the view of the D.C. courts—are at stake here weigh heavily in favor of allowing Judge Lamberth to rule on Ashenfelter's motion for protective order, as Rule 26(c)(1) allows and encourages him to do.

III. Conclusion

For all of the foregoing reasons, Ashenfelter respectfully requests that this Court grant a protective order prohibiting Convertino from taking discovery from Ashenfelter. Ashenfelter further requests that the Court stay its consideration of this request, pending a ruling by Judge Lamberth of the D.C. District Court on the same request.

Date: October 13, 2008

By: /s/ Herschel P. Fink

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2008, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system, which shall send a notice to all counsel of record.

/s/ Herschel P. Fink

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