

serve as the sole member of PHA's Board of Commissioners. By this point, HUD had also appointed Michael P. Kelly ("Kelly") to serve as an administrative receiver and as PHA's interim Executive Director. On March 24, 2011, Richman directed Kelly to release to HUD unredacted invoices for any legal services paid for by PHA from 2005 to the present. (Richman's directive is attached as Exhibit B.)

On April 4, 2011, in response to Richman's directive, Greene filed a motion for a Temporary Restraining Order and Preliminary Injunction against PHA, Kelly, and Richman (the "Defendants"). (ECF No. 1). Greene moves to enjoin Defendants from producing unredacted legal invoices (the "legal invoices") that might include notes from Greene's meetings with counsel that took place during his tenure as Executive Director. Defendants oppose Greene's motion. (ECF No. 8). HUD has filed a separate Statement of Interest opposing the motion. (ECF No. 7). Greene has replied. (ECF No. 10). Greene argues that the production of the legal invoices concerning those meetings might include documents subject to his attorney-client privilege.

On April 5, 2011, I held a hearing on Greene's motion. At the hearing, the parties agreed on the record to a Standstill Order, under which PHA would refrain from producing the legal invoices while Greene's motion remains pending with this Court. After two conversations with counsel, Greene now agrees that certain invoices subject to the HUD subpoena can be released. Because I have jurisdiction to consider whether to quash or modify the HUD subpoena, I will rule that PHA may release certain legal invoices identified in the HUD subpoena. Additionally, PHA must review the remaining legal invoices identified in the HUD subpoena to determine whether the legal invoices contain any information that might be privileged.

I. Subject Matter Jurisdiction over Greene's Motion

Although neither Defendants nor HUD directly questions my jurisdiction, a court must determine that it has jurisdiction before it can consider the merits of a motion. Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). Greene's claims against the Defendants as set forth in his motion fail to raise a federal question over which this court has subject matter jurisdiction.

First, Greene's motion was not accompanied by a Complaint or any other Pleading setting forth a proper basis for jurisdiction. Rule 3 of the Federal Rules of Civil Procedure states that "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. In the absence of a complaint requesting particular relief, and setting out the basis for jurisdiction, the Court lacks the jurisdiction to grant either a temporary restraining order ("TRO") or a preliminary injunction. See Powell v. Rios, 241 F. App'x 500, 505 n.4 (10th Cir. 2007) ("[O]nly a properly-filed 'complaint' can commence a civil action. Absent a properly-filed complaint, a court lacks power to issue preliminary injunctive relief." (citations omitted)); Stewart v. INS, 762 F.2d 193, 198-99 (2d Cir. 1985); In re Warrant Authorizing the Interception of Oral Commc'ns, 673 F.2d 5, 7 (1st Cir. 1982); Gometz v. Knox, No. 07-cv-1734, 2007 WL 2986165, at *1 (D. Colo. Oct. 9, 2007); Adair v. Eng., 193 F. Supp. 2d 196, 200 (D.D.C. 2002).

Second, although Greene attaches a proposed Complaint to his Reply brief, the Complaint fails to properly invoke federal subject matter jurisdiction. Greene claims that federal question jurisdiction exists over his motion pursuant to 28 U.S.C. § 1331 because the motion "involves the question of whether a federally-appointed one-woman Board of Commissioners can force a waiver of the attorney client privilege on behalf of a former officer of the state agency over which she now has control." Pl.'s Reply at 3. In other words, Greene claims that a federal question

exists because Richman, who has been appointed to take the place of the PHA Board of Commissioners, is also the Chief Operating Officer of a federal agency. Because Richman is a HUD employee, Greene argues that PHA is acting as an “‘agency’ or ‘official’ of the United States,” thus giving rise to a federal question. Staten v. Hous. Auth. of Pittsburgh, 638 F.2d 599, 603 (3d Cir. 1980). Richman’s position at HUD, however, does not transform the actions of this local housing authority into the actions of a federal agency sufficient to raise a federal question.

A local housing authority is not an “‘agency’ or ‘official’ of the United States” merely because it received “a great deal of [federal] funding.” Id. Similarly, a housing authority does not necessarily become a federal agency or official when HUD takes possession of and appoints a HUD employee to oversee the authority. Indeed, 42 U.S.C. § 1437d(j)(3)(H) specifically provides that HUD personnel appointed to run a housing authority are not operating on HUD’s behalf, but are operating exclusively on behalf of the local housing authority:

If the [HUD] Secretary (or an administrative receiver appointed by the [HUD] Secretary) takes possession of a public housing agency . . . the [HUD] Secretary or receiver shall be deemed to be acting not in the official capacity of that person or entity, but rather in the capacity of the public housing agency, and any liability incurred . . . shall be the liability of the public housing agency.

Id.

The HUD Secretary appointed Richman to PHA’s Board of Commissioners after PHA and HUD signed the Cooperative Endeavor Agreement according to which HUD took possession of PHA. See generally 42 U.S.C. § 1437d(j)(3)(A) (describing the HUD Secretary’s authority to take possession of a local housing authority, or to appoint a receiver to manage a local housing authority). Having been appointed by the HUD Secretary, Richman fits clearly within the scope

of § 1437d(j)(3)(H).² Section 1437d(j)(3)(H) makes clear that although Richman remains HUD's Chief Operating Officer, she was not acting as a HUD official when she directed PHA to produce documents to PHA. Rather, this action was undertaken strictly in Richman's capacity as a member of PHA's Board of Commissioners. For purposes of Greene's motion, neither PHA nor Richman were acting as a federal agency or official over which this Court would have subject matter jurisdiction simply by virtue of Richman's position at HUD. Greene's Complaint, as filed, thus fails to provide a proper basis for subject matter jurisdiction over his claims against the Defendants.

II. Subject Matter Jurisdiction Over the HUD subpoena

Although Greene failed to carry his burden of demonstrating subject matter jurisdiction for the injunctive relief that he seeks against PHA, Richman, and Kelly, I do have subject matter jurisdiction to consider his claims as they relate to the HUD subpoena.³

² Although the statute only specifies that it applies to the HUD Secretary and any administrative receiver appointed by the HUD Secretary, it clearly also applies to Richman. Richman's appointment to PHA's Board of Commissioners was a part of HUD's takeover of PHA. In her capacity as PHA's "federally-appointed one-woman Board of Commissioners," Pl.'s Reply at 3, Richman is an agent of the HUD Secretary, and fits within the ambit of the statute for that reason. Moreover, the clear purpose of the section is to separate the actions undertaken while managing a troubled housing authority from official HUD actions, and to prevent the authority's actions from being attributed to HUD. See Smith v. V.I. Hous. Auth., No. 09-cv-11, 2011 WL 285858, at *5 n.7 (D.V.I. Jan. 28, 2011) (discussing the legislative purpose behind § 1437d(j)(3)(H)). That purpose would be contravened here if Richman's actions in her capacity as a member of PHA's Board were attributed to HUD.

³ In considering whether a court has subject matter jurisdiction over a claim, the court must "construe the complaint in the light most favorable to [the plaintiff]." Alston v. Countrywide Fin. Corp., 585 F.3d 753, 758 (3d Cir. 2009) (citation omitted). Although Greene's Complaint was not directly targeted at the subpoena, his Complaint can be fairly read, at least in part, as a motion to quash the HUD subpoena. Courts have, on occasion, considered free standing motions to quash subpoenas. Cf. Martin v. Neil, No. 08-cv-1311, 2009 WL 1161009, at *1 n.2 (E.D.N.Y.

The HUD subpoena is an administrative subpoena issued by the HUD Office of the Inspector General, pursuant to the Inspector General Act, 5 U.S.C. App. 3 § 6(a)(4). The Inspector General Act specifically provides that subpoenas issued pursuant to the Act are “enforceable by order of any appropriate United States district court.” Id. I thus have jurisdiction to decide whether to quash the HUD subpoena. See Territorial Ct. of V.I. v. Richards, 847 F.2d 108, 109 (3d Cir. 1988) (holding that a district court had jurisdiction to consider a motion to quash an administrative subpoena); cf. Amato v. United States, 450 F.3d 46, 47 (1st Cir. 2006) (discussing a free-standing motion to quash an administrative subpoena).

“Generally speaking, a party does not have standing to quash a subpoena served on a third party. An exception is made, however, where, as here, the party seeks to quash based on claims of privilege relating to the documents being sought.” Thomas v. Marina Assocs., 202 F.R.D. 433, 434 (E.D. Pa. 2001) (quoting Johnson v. Gmeinder, 191 F.R.D. 638, 640 n.2 (D. Kan. 2000)) (internal quotation marks and citations omitted). Although Greene was not the target of the subpoena, he claims that the subpoena “improperly calls for records protected by the attorney-client or work-product privileges.” NLRB v. Interbake Foods, LLC, -- F.3d --, 2011 WL 595562, at *5 (4th Cir. Feb. 22, 2011) (citing Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP, 124 F.3d 1304, 1306-07 (D.C. Cir. 1997)); see also Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 512 (1943). Greene thus has standing to move to quash the HUD subpoena, pursuant to Federal Rule of Civil Procedure 45.⁴

Apr. 28, 2009).

⁴ Although the 1937 Advisory Committee Note to Rule 45 suggests that the Rule may not be applicable to subpoenas issued by administrative agencies, Rule 81(a)(5) provides that the

At this time, Greene has agreed on the record that PHA may release to HUD those legal invoices identified in the HUD subpoena from law firms that have stated that they only represented Greene in his official capacity. PHA must review the remaining legal invoices identified in the HUD subpoena and bring to my attention any that may contain privileged information.

III. Conclusion

In conclusion, I will frame Greene's case as a motion to quash, and will permit the disclosure of some of the legal invoices, while reserving decision as to others.⁵

Federal Rules of Civil Procedure “apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings.” Fed. R. Civ. P. 81(a)(5). The 1946 Advisory Committee Note to Rule 81 also states that Rule 81(a)(5) “is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful.” Fed. R. Civ. P. 81 advisory committee's note.

⁵ I will reserve judgment as to whether I can exercise supplemental jurisdiction over Greene's claims relating to other documents that PHA intends to produce to HUD that were not specifically requested in the HUD subpoena. I also reserve decision as to whether HUD should be joined in this action.

ORDER

AND NOW, this ___11TH_ day of May, 2011, as read into the record on May 10, 2011,

it is **ORDERED** that:

- PHA may **RELEASE** all Fox Rothschild, LLP, legal invoices referenced in the HUD subpoena;
- PHA may **RELEASE** all Schnader Harrison Segal & Lewis, LLP, legal invoices referenced in the HUD subpoena;
- PHA may **RELEASE** all Duane Morris, LLP, legal invoices referenced in the HUD subpoena, except for those invoices related to the five cases listed in their May 4, 2011 letter (attached as Exhibit C);
- PHA shall **REVIEW** all Duane Morris, LLP, legal invoices referenced in the HUD subpoena related to the five cases listed in the attached letter and **IDENTIFY** to the Court those that may be privileged;
- PHA shall **REVIEW** all Flaster Greenberg, PC, legal invoices referenced in the HUD subpoena and **IDENTIFY** to the Court those that may be privileged;
- PHA shall **REVIEW** all Ballard Spahr, LLP, legal invoices referenced in the HUD subpoena and **IDENTIFY** to the Court those that may be privileged;
- PHA shall **REVIEW** all Wolf Block Schorr & Solis-Cohen, LLP, legal invoices referenced in the HUD subpoena and **IDENTIFY** to the Court those that may be privileged;
- PHA shall complete its review by **Friday, May 27, 2011**.

s/Anita B. Brody

ANITA B. BRODY, J.