

United States Court of Appeals
For the Eighth Circuit

No. 19-2002

In re: Grand Jury Subpoenas

Appeal from United States District Court
for the District of North Dakota - Bismarck

Submitted: April 6, 2020
Filed: August 28, 2020
[Published]

Before LOKEN, COLLOTON, and KELLY, Circuit Judges.

PER CURIAM.

Y Corp. noticed an appeal from an order of the district court that compels the production of documents under subpoena by a federal grand jury. The district court ordered both Y Corp. and Z Corp. to produce two documents to the grand jury, but Y Corp. contends that the documents include information that is protected from disclosure by the attorney-client privilege or the attorney work-product doctrine. Y Corp. seeks to bring an interlocutory appeal, but we conclude that this court lacks appellate jurisdiction, so we dismiss the appeal.¹

¹We use essentially the same pseudonyms that were employed by the magistrate judge in the district court. *See* Appellant’s App. 269. The appellant is a subsidiary of the corporation that the magistrate judge identified as “Y Corp.,” but the district court ordered the subsidiary rather than the parent to produce the documents, so we refer to the appellant by the same pseudonym.

Y Corp. owned a company, X Corp., which it sold to Z Corp. in 2015. The present grand jury investigation relates to an incident that killed an employee of X Corp. in October 2014. The grand jury issued subpoenas to Y Corp. and Z Corp. for information about interviews conducted as part of X Corp.’s internal investigation of the incident. Y Corp. directed Z Corp. to resist compliance with the subpoena in some respects based on attorney-client privilege and work-product protection, and both companies withheld certain documents. The government moved to compel production. The district court determined that X Corp. had waived attorney-client privilege and work-product protection in relevant part by filing a position paper with a government agency. The court then ordered both Y Corp. and Z Corp. to produce the disputed documents to the grand jury.

Ordinarily, “one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey.” *United States v. Ryan*, [402 U.S. 530, 532](#) (1971); *see Cobbledick v. United States*, [309 U.S. 323, 328](#) (1940). Among other reasons for this rule, “[r]equiring a person who objects to a disclosure order to refuse to comply, be subjected to sanctions in contempt, and then appeal from the sanctions, puts the objecting person’s sincerity to the test by attaching a price to the demand for immediate review.” *In re Grand Jury*, [705 F.3d 133, 143](#) (3d Cir. 2012) (internal quotation, ellipsis, and brackets omitted). “It forces the objector to weigh carefully the likelihood of success of its challenge to the underlying disclosure order against the seriousness of the sanctions it would face—whether incarceration, a hefty monetary fine, or some other penalty—if it disobeys the order to disclose.” *Id.* “Self-interest cuts down dramatically on the number of appeals taken to obtain delay.” *In re Klein*, [776 F.2d 628, 631](#) (7th Cir. 1985).

Y Corp. invokes an exception to this rule based on the decision in *Perlman v. United States*, [247 U.S. 7, 13](#) (1918). The *Perlman* rationale “permits an individual

claiming a privilege or other interest in subpoenaed documents to appeal from an order to produce directed to a third party custodian of the documents.” *In re Berkley and Co.*, [629 F.2d 548, 551](#) (8th Cir. 1980). “The theory for allowing immediate appeal is that the appellant himself cannot resist compliance in order to obtain review in contempt proceedings, and the third party custodian cannot be expected to risk contempt to secure review on his behalf.” *Id.*

The narrow *Perlman* exception does not apply here, because Y Corp. is subject to the district court’s order compelling production of the disputed documents. If Y Corp. wishes to pursue an objection to disclosure, then it may resist compliance, submit to contempt sanctions, and secure appellate review. Unlike *Perlman* and similar cases where the party asserting privilege had no avenue to obtain timely appellate review, Y Corp. has a readily available means to do so.

Y Corp. argues that because Z Corp. is likely to produce the documents in conjunction with a plea agreement or otherwise, Y Corp. should be allowed to appeal without submitting to contempt sanctions. Likelihood of production by a third-party custodian, however, is not sufficient by itself to invoke *Perlman*. The *sine qua non* of the *Perlman* exception is the inability of the privilege holder to obtain appellate review at the juncture when documents otherwise would be produced. Even where *Perlman* applies, the third-party custodian could produce the requested documents; the privilege holder must obtain a stay of the production order or rely on forbearance of the government pending appeal. See, e.g., *Gotham Holdings, LP v. Health Grades, Inc.*, [580 F.3d 664, 665](#) (7th Cir. 2009); *In re Sealed Case*, [146 F.3d 881, 883](#) (D.C. Cir. 1998). Where the privilege holder is subject to the production order, it may place itself in the same position *vis à vis* third-party production as the non-party privilege holder who may appeal under *Perlman*: Y Corp. may go into contempt, pursue immediate appellate review of the contempt sanction, and seek a stay of the production order as to both parties pending appeal. The potential willingness of Z Corp. to produce documents is thus no cause to expand the *Perlman* exception here.

Y Corp. relies on a thirty-year-old decision of the Tenth Circuit as support for extending *Perlman* to this situation. See *In re Grand Jury Proceedings (Company X)*, [857 F.2d 710](#) (10th Cir. 1988). Citing commentary from an earlier decision, the court in *Company X* concluded that the willingness of a third-party custodian to produce documents was sufficient reason to apply *Perlman*, even where the privilege holder was subject to the same order of production. *Id.* at 712. The earlier decision, however, had concluded only that a third-party custodian’s willingness to produce documents was a *necessary* condition for invoking *Perlman*, not that it was sufficient. *In re Grand Jury Proceedings (Vargas)*, [723 F.2d 1461, 1466](#) (10th Cir. 1983). The privilege holder in *Vargas* was not required to produce records, and thus could not secure appellate review through contempt proceedings, but the court nonetheless declined to apply *Perlman* because the third-party custodian was motivated to resist production and risk contempt. *Id.* The *Company X* decision then converted the third party’s willingness to produce from a necessary condition to one that is sufficient. The court applied *Perlman* solely because the third-party custodian was likely to produce documents, even though the privilege holder in that case could have submitted to a contempt citation. [857 F.2d at 712](#). We find no other decision since 1988 that has followed the Tenth Circuit’s broadening of *Perlman*, and we respectfully conclude that the expansion would be ill-advised.²

If there is merit to Y Corp.’s objection to the district court’s decision, then it is not “powerless to avert the mischief of the order.” *Perlman*, [247 U.S. at 13](#). Because Y Corp. has “the option of defying the order and securing appellate review

²Y Corp. also relies on *United States v. Gorski*, [807 F.3d 451](#) (1st Cir. 2015), but the production order against the privilege holder in that case had been stayed, and the only order before the court of appeals compelled production by a third-party custodian. *Id.* at 459 n.2. The privilege holder’s appeal thus presented “a classic *Perlman* situation,” *id.* at 459, and *Gorski* does not support Y Corp.’s proposed expansion of the exception.

in contempt proceedings,” *In re Berkley*, [629 F.2d at 552](#), interlocutory appeal is not authorized. The appeal is dismissed for lack of jurisdiction.
