IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISON

MICHAEL J. QUILLING, Receiver for ABC VIATICALS, INC., and Related Entities,	§	**Cause No. 3:07-CV-1153-P-BF**
Plaintiff,	§	**ECF**
v.	§	
ERWIN & JOHNSON, LLP and CHRISTOPHER R. ERWIN,	§	
Defendants,	§	
v.	§	
MILLS, POTOCZAK & COMPANY,	§	
Third-Party Defendants.	§	

MOTION TO QUASH DEFENDANTS' SUBPOENA TO SOVEREIGN BANK AND FOR PROTECTIVE ORDER ALONG WITH BRIEF IN SUPPORT

Michael J. Quilling, as the appointed Receiver for ABC Viaticals, Inc. and other related entities, ("Plaintiff" or "Receiver") files this motion to quash the subpoena that Defendants served on Sovereign Bank, N.A. on June 11, 2009. In support, the Receiver would respectfully show the Court as follows:

I. SUMMARY

Courts must generally quash or modify subpoena requests that are unreasonable. Defendants' subpoena requests to Sovereign Bank are unreasonable because they seek confidential information that is irrelevant and overbroad on its face. It, therefore, appears those requests would only annoy, embarrass, oppress, or unduly burden Sovereign Bank and its relationship with the Receiver.

II.
BACKGROUND FACTS

1. On November 17, 2006, the United States Securities and Exchange Commission filed a lawsuit against ABC Viaticals, Inc. and others for violations of securities laws.[1] In that case this Court appointed Plaintiff as Receiver for ABC Viaticals, Inc. and other related companies and trusts (collectively, "ABC").

2. When the Receiver took over, the primary asset in the estate was a portfolio of 55 life insurance policies with a combined death benefit value exceeding $236 million. Those policies had premium obligations approaching $10 million a year. At that time, ABC's premium escrow account should have held nearly $20 million to meet its stated premium obligations for each policy. When the Receiver took over, however, the premium escrow account had less than $300,000.

3. The Receiver filed this lawsuit alleging that Defendants, while acting as ABC's Trustee and escrow agent, negligently disbursed funds from the purchaser escrow account and/or failed to require that ABC, as Trustor, fully fund the premium escrow account. The Receiver's principal damage calculation in this case is the nearly $20 million shortfall in that premium escrow account.[2] (Am. Compl. [Dkt. No. 41].)

4. When the Receiver took over, the entire ABC receivership estate only had enough liquid assets to pay premiums for a matter of months before policies would begin to lapse. To

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[1] That case is styled *SEC v. ABC Viaticals, Inc.*, *et al.*, Cause No. 3:06-CV-2136-P (N.D. Tex.).

[2] The Receiver also seeks (1) to recover all fees that Defendants received from ABC, including any pre-paid and unearned fees, (2) to recover $971,815.00 of interest for the line of credit that would have been unnecessary if Defendants had deposited nearly $20 million in the premium escrow account, and (3) the receivership estate's reasonable attorneys fees, pre-judgment interest, and post-judgment interest. Although the nearly $20 million shortfall alleged in this lawsuit may have diminished the portfolio's value and its ultimate sale price, the Receiver is not trying to recover damages in this case for the diminished value.

prevent that the Receiver asked for authority to secure a line of credit from Sovereign Bank, N.A. ("Sovereign Bank") so he could pay premiums and keep all policies in force until they could be sold or otherwise mature. The Court approved the Receiver's terms for that line of credit and several extensions.[3]

5. Defendants in this case sent Sovereign Bank a subpoena for documents dated June 10, 2009. (Proof of Service [Dkt. No. 73].) That subpoena requested the following records:

a. "All communications between Michael J. Quilling as receiver . . . and Sovereign Bank regarding financing to pay premiums for the ABC Viaticals, Inc. policy portfolio."

b. "All communications between Sovereign Bank and any third party regarding financing to pay premiums for the ABC Viaticals, Inc. policy portfolio."

c. "All documents regarding, referencing or referring to financing to pay premiums for the ABC Viaticals, Inc. policy portfolio."

d. "The credit file for the ABC Viaticals, Inc. policy portfolio."

(*Id.*) If Sovereign Bank responded to these requests as written, it would have to disclose all of its loan records relating to the receivership estate along with its internal and external e-mails and other correspondence going back to November 2006.

6. The Receiver's counsel has conferred with Defendants' counsel in an effort to understand the purpose of their subpoena and resolve the matter without court intervention. Defendants' counsel explained that their objective is to learn how Sovereign Bank formulated its line of credit and valued ABC's portfolio of insurance policies. As explained more fully below, the Receiver believes that inquiry is not permissible for several reasons.

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[3] *See* Orders [Dkt. Nos. 18, 32, 66, 117, 121, 147], Cause No. 3:06-CV-2136-P (N.D. Tex.).

III.
ARGUMENTS & AUTHORITY

A. Standards For Determining Motions To Quash Subpoenas And Motions For Protective Orders

Discovery decisions, including decisions to quash depositions or issue protective orders, are left to the sound discretion of the district court. *Theriot v. Parish of Jefferson*, 185 F.3d 477, 491 (5th Cir. 1999). Federal Rule of Civil Procedure 45 states that a court must quash or modify a subpoena that "requires disclosure of privileged or other protected matter" or "subjects a person to undue burden." FED. R. CIV. P. 45(3)(A)(iii), (iv). It also states that a court may quash or modify a subpoena that impermissibly seeks "confidential . . . or commercial information." FED. R. CIV. P. 45(3)(B)(i).

Requests for protective orders are governed by Federal Rule of Civil Procedure 26. In relevant part, that rule states as follows:

> The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
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> (A) forbidding the disclosure or discovery;
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> (B) specifying terms, including time and place, for the disclosure or discovery;
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> (C) prescribing a discovery method other than the one selected by the party seeking discovery;
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> (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

FED. R. CIV. P. 26(c)(1). There is good cause for a protective order when justice requires protection from annoyance, embarrassment, oppression, or undue burden or expense. *Bucher v. Richardson Hospital Authority*, 160 F.R.D. 88, 92 (N.D. Tex. 1994). The Court must also limit discovery requests that are unreasonably cumulative or duplicative, that can be obtained more

conveniently from another source, or when the burden to produce information outweighs its likely benefit. FED. R. CIV. P. 26(b)(2)(C)(i), (iii).

B. Defendants' Subpoena Should Be Quashed Or Otherwise Modified

There is good cause to quash Defendants' subpoena and enter a protective order. Courts must quash or modify a subpoena that subjects a person to undue burden. FED. R. CIV. P. 45(3)(A)(iv). The following factors will determine whether a subpoena imposes an undue burden: (1) the relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed. *Wiwa v. Royal Dutch Pet. Co.*, 392 F.3d 812, 818 (5th Cir. 2004). Courts may find that a facially overbroad subpoena imposes an undue burden. *Id.* Courts will also balance the need and relevance of the discovery sought against the harm, prejudice, or burden to the other party. *SEC v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006). Taken together, these factors weigh in favor of quashing the subpoena and entering a protective order.

1. The Subpoena Includes Information That Is Not Relevant In This Case

Courts do not permit subpoenas to third-parties seeking information that is irrelevant. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 820-21 (5th Cir. 2004) (limiting subpoena inquiries only to topics relevant in that litigation). Material is relevant if the information sought bears a relation to the central accusations of the lawsuit. *United States ex rel. Fisher v. Network Software Assocs.*, 217 F.R.D. 240, 245 (D.D.C. 2003). Courts view a relevance analysis in the light of the complaint's allegations, not whether the evidence obtained could be admissible. *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 304 n. 8 (5th Cir. 1973); *Jones v. DeRosa*, 238 F.R.D. 157, 163 (D. N.J. 2006). Courts properly quash or modify third-party subpoenas that

seek information unrelated to the parties' allegations. *See Wiwa*, 392 F.3d at 820-21; *Gresh v. Waste Servs. of Am., Inc.*, 189 F. Appx. 359, 361 (6th Cir. 2006).

In this case, Defendants' subpoena seeks Sovereign Bank's credit file along with other documents and communications regarding "financing to pay premiums for the ABC Viaticals, Inc. policy portfolio." (Subpoena Return [Dkt. No. 73]). In a conference regarding that subpoena, Defendants' counsel explained they are seeking documents showing how Sovereign Bank valued the portfolio and formulated the credit agreement. That information, however, has nothing to do with the nearly $20 million shortfall in ABC's premium escrow account. The Court should, therefore, quash the subpoena outright. *Wiwa*, 392 F.3d at 820-21; *see also Greenberg v. Malkin*, 39 F. Appx. 633, 637 (2d Cir. 2002) (denying discovery request that is "plainly irrelevant"); *Wiesenberger v. W. E. Hutton & Co.*, 35 F.R.D. 556, 557 (S.D.N.Y. 1964) (holding that information was not discoverable when parties had "not tendered any issue" on that matter).

Sovereign Bank has only two types of records that are likely even relevant in this case. The first is the schedule showing premiums paid for each month that the receivership estate owned ABC's portfolio. The Receiver, however, already produced that information to Defendants during written discovery. FED. R. CIV. P. 26(b)(2)(C)(i) (courts must limit discovery requests that are unreasonably cumulative, duplicative, or more readily available from another source); *Gresh,* 189 F. Appx. at 361 (discovery properly denied when party had already produced information sought). The second is the calculation of interest for the Receiver's line of credit.[4] The underlying loan documents, however, are already a matter of public record and do

[4] If Defendants had deposited nearly $20 million in ABC's premium escrow account, the Receiver would not have needed the line of credit from Sovereign Bank. Therefore, he intends to recover the $971,815.00 paid in interest for that loan.

not need to be obtained from Sovereign Bank.[5] FED. R. CIV. P. 26(b)(2)(C)(i); *SEC v. Samuel H. Sloan Co.*, 369 F. Supp. 994, 995 (S.D.N.Y. 1973) (discovery request is unnecessary if documents are public record accessible to all parties). The subpoena, therefore, appears overreaching in its requests for "all communications," "all documents," and the entire "credit file" for ABC's line of credit. (Subpoena Return [Dkt. No. 73]).

2. Defendants Do Not Need Documents Relating To The Receiver's Banking Relationship And Line Of Credit

Defendants do not need all documents evidencing the formulation of Sovereign Bank's credit line to the receivership estate. First, as explained above, it is not relevant to the parties' claims in this case. Second, the information it considered in formulating the line of credit is essentially the same schedule of assets the Receiver made publicly available in his preliminary report.[6] It is Sovereign Bank's policy to keep such documents, communications, and customer files confidential. Therefore, they should not be subject to discovery without good cause. That is why the Federal Rules of Civil Procedure permit courts to protect exactly this kind of confidential information. FED. R. CIV. P. 26(c)(1)(G); FED. R. CIV. P. 45(c)(3)(B)(i).

3. The Subpoena Is Facially Overbroad

A subpoena request may be facially overbroad if it uses an omnibus term (like "relating to" or "concerning") and applies it to a general category or group of documents or a broad range of information. *Moses v. Halstead*, 236 F.R.D. 667, 672 (D. Kan. 2006). This precisely describes Defendants' subpoena to Sovereign Bank. They ask for the following:

a. "All communications" between the Receiver and Sovereign Bank "regarding financing to pay premiums" in this case;

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[5] *See* Receiver's Unopposed Motion to Approve Bank Financing [Dkt. Nos. 31 to 31-10], Cause No. 3:06-CV-2136-P (N.D. Tex.).

[6] *See* Receiver's Preliminary Report [Dkt. Nos. 21 to 21-4], Cause No. 3:06-CV-2136-P (N.D. Tex.).

b. "All communications" between "any third party" and Sovereign Bank "regarding financing to pay premiums" in this case;

c. "All documents" that are "regarding, referencing or referring to financing to pay premiums" in this case; and

d. The entire "credit file" evidencing Sovereign Bank's relationship with the Receiver in this case.

(Subpoena Return [Dkt. No. 73]). If Sovereign Bank responded to these requests as written, it would have disclose all of its loan records relating to the receivership estate along with its internal and external e-mails and other correspondence going back to November 2006. Since those records do not address the claims and damages at issue in this case, it would needlessly disclose that information which would otherwise be held confidential. *See In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 612-613 (E.D. Va. 2008) (request that included personal information not relating to claims at issue was overbroad and, therefore, imposed an undue burden). To the extent Defendants believe Sovereign Bank has any information relating to the Receiver's claims or damage calculations, they should narrowly tailor their subpoena to request only that information.

4. The Subpoena Does Not Describe With Particularity The Documents Sought

In preparing this subpoena, Defendants have taken a shotgun approach that seeks the entire credit file and all communications and documents "regarding, referencing, or referring to financing to pay premiums." (Subpoena Return [Dkt. No. 73].) If Defendants believe Sovereign Bank's credit file has information at issue in this case, then they should particularly describe that information in their subpoena and only seek documents relating to it. Instead, they essentially ask Sovereign Bank for all documents relating to the ABC receivership estate. That can only be described as a fishing expedition.

5. The Subpoena Imposes An Undue Burden Upon Sovereign Bank And The Receiver

The burden of a subpoena request is given extra consideration when served upon a non-party that is not a fact witness in the case. *Schaaf v. SmithKline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D.N.C. 2005). Courts will enter protective orders and quash or modify subpoenas that ask non-parties for documents not relevant to claims at issue in the case. *See*, *e.g.*, *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d at 612-613. The documents requested from Sovereign Bank do not contain anything about Defendants' duties as trustee and escrow agent or the Receiver's allegation that they failed to set aside nearly $20 million in ABC's premium escrow account. Therefore, the only practical result of this subpoena would be (1) to harass Sovereign Bank by forcing it to incur legal expenses and turn over otherwise confidential client information and internal documents and (2) to embarrass the Receiver and strain his ongoing relationship with one of the few lenders willing to extend credit to receivership estates. Such a subpoena is abusive and should be denied. FED. R. CIV. P. 26(c)(1).

WHEREFORE, PREMISES CONSIDERED, the Receiver asks this Court to enter an order that quashes Defendants' subpoena to Sovereign Bank in whole and protects from discovery all of Sovereign Bank's communications, documents, and files regarding its line of credit to the receivership estate, its formulation of the credit terms, and its valuation of the policy portfolio. The Receiver also asks for such other and further relief, general or special, at law or in equity, to which he may show himself entitled.

Respectfully submitted,

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ATTORNEYS FOR RECEIVER

CERTIFICATE OF CONFERENCE

On June 23, 2009, the undersigned personally conferred with Cathlynn Cannon, counsel of record for Defendants, in an effort to resolve this dispute without court intervention. After a lengthy conference, the parties were unable to resolve this dispute and it was determined that Defendants oppose the relief requested in this motion.

/s/ Brent J. Rodine

CERTIFICATE OF SERVICE

A true and correct copy of this pleading was served upon all interested parties through the Court's electronic filing system.

/s/ Brent J. Rodine