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

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

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTIONS TO QUASH AND FOR A PROTECTIVE ORDER AND BRIEF IN SUPPORT

DEFENDANTS ERWIN & JOHNSON LLP AND CHRISTOPHER ERWIN (jointly "E&J") urge this Court to deny Plaintiff's Motions to Quash E&J's Subpoena to Sovereign Bank and for a Protective Order for the following reasons:

- The relevancy of the documents requested in the Subpoena is apparent based on the faces of the Subpoena, Plaintiff's Amended Complaint and E&J's Answer;
- The Subpoena is not overbroad as it's crafted to obtain information on a specific claims asserted by Plaintiff and is expressly limited to a specific transaction that occurred during a narrow time period;
- There is no evidence that the information sought constitutes a trade secret or similar confidential information; nor is there any evidence that disclosure would cause harm to Sovereign Bank;
- There is no evidence that responding to the Subpoena will impose an undue burden on Sovereign Bank; and
- There is no evidence that a Subpoena to Sovereign Bank will impose an undue burden on the Plaintiff.

INTRODUCTION

A court looks to the claims and defenses asserted by all parties to a lawsuit when determining whether discovery is relevant. *See* FED. R. CIV. P. 26. As a result, there is a logical correlation between the breadth of the allegations in a plaintiff's complaint and the scope of discovery. If a plaintiff prepares a complaint that asserts limited factual allegations and a few narrowly circumscribed causes of action, then the scope of permissible discovery may – at least in some cases – be similarly limited and circumscribed. Conversely, if the plaintiff drafts a complaint that alleges numerous different types of wrongful conduct, in hopes that by throwing a lot of mud something will stick, then the scope of relevant discovery is going to be very broad indeed.

Plaintiff knows this and therefore, in his Motion to Quash, he represents to the Court that there is only *one* limited and circumscribed matter at issue in this lawsuit; specifically, E&J's alleged under-funding of the ABC Premium Escrow Account and Plaintiff's effort to recover damages equivalent to the amount of that under-funding. It is Plaintiff's contention that because the premium escrow account was under-funded when he was appointed Receiver, then his conduct with respect to the handling of the Policy Portfolio and the payment of premiums is irrelevant since the damages were fixed on the day that he became Receiver.[1] Even a cursory review of the Plaintiff's Amended Complaint will show that Plaintiff's representations regarding the scope of the allegations against E&J are untrue.

[1] It is arguably logical that if the money was not in the account when Plaintiff assumed responsibility for the account, that he could not be responsible for its absence or damages arising from its absence. But that logic conflicts with Plaintiff's theory that E&J is *solely* responsible for the entire under-funding. The prior escrow agent testified that the premium escrow account was likely under-funded by nine million dollars when he transferred it to E&J. Plaintiff does not credit E&J with an off-set equal to this amount. Therefore, Plaintiff's contributory negligence is relevant by its own theory, even if Plaintiff's representations that his claim solely involves the under-funding of the escrow account were correct– which they are not.

GENERAL BACKGROUND

I. The Allegations in Plaintiff's Amended Complaint and E&J's Answer, Counter-Claim and Third-Party Claim Determine What Discovery is Relevant

Plaintiff wishes to limit the definition of what is relevant to that which concerns a *claim*, but not a *defense*. Plaintiff's claims are not as circumspect as he would have the Court believe; but even going by those claims, the subpoena is reasonably calculated to lead to the discovery of admissible evidence. In the Amended Complaint, Plaintiff makes wide-ranging allegations of wrongful conduct by E&J. He alleges causes of action, *inter alia*, for breach of fiduciary duty, aiding and abetting corporate waste, negligence and gross negligence. For each of the counts, he seeks "all relief, legal or equitable, general or special to which he is entitled." *See* Amended Complaint at 11-12. Indeed, he specifically seeks exemplary damages based on E&J's alleged "knowing misrepresentations of material fact, causing willful deprivation of property to ABC, the Trusts and its investors" and because "[E&J] authorized and/or ratified the acts of malice, fraud or oppression committed by Erwin as its officer, director or managing agent." Amended Complaint, ¶ 46.

More specifically, Plaintiff alleges that E&J prepared marketing materials regarding its services and provided those materials to ABC knowing that ABC would provide them to investors in order to entice investors to buy viatical shares. *See* Amended Complaint, ¶¶ 9 & 12. Indeed, he alleges that E&J directly provided information to investors in order to persuade them to invest. Specifically, Plaintiff says "as a further inducement to investors regarding the safety of their investment and the proper performance of their duties [E&J] touted the fact that the law firm had malpractice insurance ....and ...provided many [investors] with a copy of the insurance certificate." Amended Complaint, ¶ 17. Plaintiff further alleges that "the representations made

to the investors regarding premium escrows were blatantly false and known by [E&J] to be false." Amended Complaint, ¶ 14.

He specifically claims that "*in addition to not knowing or making the required premium escrow deposit*, E&J also allowed ABC to use the account as its own piggy bank." Amended Complaint, ¶ 18 (emphasis added). Plaintiff alleges that E&J "knew that the conduct of ABC constituted corporate waste as to both ABC and each of the Trusts. [E&J] gave substantial assistance to ABC in accomplishing the corporate waste and as a result aided and abetted ABC in wasting those assets." Amended Complaint, ¶¶ 37 & 38.

The Amended Complaint shows that the Plaintiff's claims are not narrow and circumscribed. He is not solely complaining about the under-funding of the premium escrow account. Plaintiff is alleging breaches related to the solicitation of investor money and he is alleging breaches related to the use of funds from completely separate escrow accounts. He is alleging "malice, fraud and oppression." He is seeking "all relief legal or equitable, general or special" to which he is entitled. This is a much broader damage claim than indicated in his Motion to Quash.

Rather than truncate the analysis at Plaintiff's claims, E&J's defenses, affirmative defenses, counterclaims, and third-party claims must be considered when determining the relevancy of the request. These defenses include that Plaintiff is being less than forthright as to the premiums expense and the amount of time necessary to calculate that load, that he failed to mitigate the loss, and assertions that supervening and intervening causes and/or the actions of third parties over whom E&J has no control caused some or all of the loss. The Bank's records will likely contain communications with Plaintiff as to these defenses.

II. The Relevance of the Information Requested in the Subpoena is Apparent on its Face

The Subpoena requested communications regarding financing to pay premiums for the ABC Policy Portfolio, documents regarding financing to pay premiums for the Portfolio, and the credit file for the ABC Policy Portfolio.

First, even Plaintiff acknowledges that he is seeking $971,815.00 in interest payments made in connection with a line of credit on the Policy Portfolio. *See* Mot. to Quash at p. 2, n. 2. Despite this admission, he then contends that no documents related to that interest payment are relevant other than the schedule of premiums paid and the "calculation" of interest. This is untrue. The factors considered by the Bank in setting the interest rate are relevant since that affected the amount of the alleged interest rate damages.

Second, E&J is entitled to discover the communications between Plaintiff and the Bank regarding the premium expense of the portfolio. Plaintiff's claims are predicated, in part, on the supposition that a certain amount of funds were required to be available for payment of premiums for an extended period of time when Plaintiff became the trustee. After becoming the trustee, Plaintiff had to have communicated with the Bank as to the amount of necessary funds to cover the premiums obligation. Plaintiff has also complained that E&J was derelict in calculating the necessary premium amount, in that it only took Plaintiff a brief period of time to perform that calculation. It is expected that Plaintiff provided some mathematical support in that regard to the Bank in requesting a certain amount of funds to cover the premiums. Both the date of such submission/application and the content thereof is relevant to this aspect of Plaintiff's claims. E&J is entitled to those communications and documents, as they are relevant to Plaintiff's damages calculations and substantive claims.

The information sought is relevant to several other specific claims and defenses. As discussed, Plaintiff is alleging that E&J aided and abetted the waste of corporate assets from an account that was completely separate from the premium escrow account. He is alleging that to the extent E&J participated in the waste, it is responsible for damages from the loss of those corporate assets. It is undisputed that the Policy Portfolio was the most valuable asset of ABC. Preserving the value of the Policy Portfolio was the most important factor in minimizing the damage, if any, to ABC from E&J's alleged breaches related to the waste of corporate assets. Plaintiff has publicly testified that he was forced to sell the Policy Portfolio at a "fire-sale price," *inter alia*, because he could not continue to finance the premium payments. Information regarding *all* of Plaintiff's efforts to obtain financing is relevant to E&J's defense.

ARGUMENT AND AUTHORITY

I. Plaintiff Has Not Met his Burden of Establishing That there is no Possibility that the Information Sought Has Even the Slightest Relevancy to Any Party's Claims or Defenses.

The party opposing the discovery has the burden of establishing that the information sought is irrelevant. *See Merrill v. Waffle House, Inc.*, 227 F.R.D. 475, 477 (N.D. Tex. 2005) (citing *McLeod, Alexander, Powell and Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990.)).[2] This is a high burden to meet because relevancy is broadly construed when the issue arises in the context of a discovery request. A request for discovery should be considered relevant if there is *any* possibility that the information sought may be relevant to the claim or defense of any party. *See SEC v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006).

[2] Apparently, there is a split in the Northern District regarding the burden of proof on relevancy. *See Canada v. Hotel Dev.-Tex., Ltd.*, No. 3-07-CV-1443-D, 2008 WL 3171940, at *1 (N.D. Tex. July 30, 2008) (Kaplan, J.) (stating that the party seeking discovery bears the burden, but citing *McLeod* and Judge Lynn's decision for the opposite proposition). Although we believe that it is properly Plaintiff's burden to establish that the information sought is not relevant – and *McLeod* controls – the relevancy of the request is facially apparent, and if it is not facially apparent, the reasons the request is relevant are explained herein.

Plaintiff's motions based on lack of relevancy ignore the factual allegations, the causes of action, defenses thereto, and the damages sought in the Amended Complaint. Yet, it is the allegations, causes of action, defenses thereto, and claimed damages that control what is relevant. Plaintiff has failed to meet his burden of proof, because the subpoena has been shown to be directed at obtaining information relevant to all of those aspects of this litigation.

II. The Subpoena is Not Overbroad or Unduly Burdensome

Similarly, Plaintiff has not met his burden of establishing that the subpoena is overbroad. *See Wiwa v. Royal Dutch Petroleum Co.,* 392 F.3d 812, 818 (5th Cir. 2004) (party seeking to quash a Rule 45 subpoena has the burden of proof). In determining whether the subpoena presents an undue burden, the court considers: 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 documents; and 6) the burden imposed. *Id.* If the request is made to a non-party the court may consider the expense and inconvenience to the non-party. *Id.* The court may also find that the subpoena is burdensome when it is facially overbroad. *Id.*

As demonstrated above, the information sought is relevant. Moreover, E&J has a need for the information requested in the subpoena. Sovereign Bank is the only source of information regarding the factors used in setting the interest rate on the credit line for the Policy Portfolio. Sovereign Bank is the only source of information regarding the representations made to Sovereign Bank by the Plaintiff regarding the premiums load and the value of the Portfolio, and the only source of information regarding the representations made to Sovereign Bank regarding the premiums load and the sale of the Policy Portfolio. Sovereign Bank is the only known source of information regarding the credibility of Plaintiff's representations that a certain amount of

premiums were required to be available to funds the policies, that E&J was derelict in calculating that amount, and that his inability to continue financing the premium payments for the policies held in the Portfolio forced him to sell the Portfolio at a Fire Sale price.

Plaintiff next contends that the discovery should not be allowed because it is Sovereign Bank's policy to "keep such documents, communications and customer files confidential." Mot. to Quash at 7. The Bank's policy on confidentiality does not determine whether or not information can be protected from discovery. If so, then virtually anything could be deemed non-discoverable based on a third-party's unilateral determination that such information should be deemed confidential. A party or a third-party may withhold discovery if it establishes that the information sought is a "trade secret" or similarly confidential and it demonstrates that disclosure would be harmful to that party. *See e.g. Centurian Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981). There is no evidence that Sovereign Bank considers this information to be the equivalent of a trade secret nor is there any evidence that its disclosure would be harmful to Sovereign Bank.

While we assume that Sovereign Bank makes some effort to keep its customers' files private, this is for the protection of the customer, not Sovereign Bank. Hence, there is no reason to protect the files related to a credit transaction, when the bank's customer – here, Plaintiff – has voluntarily filed a lawsuit and the information in the credit file is relevant to the claims asserted by that customer and the damages sought by that customer. *Cf. Rosenblatt v. Nw. Airlines, Inc.*, 54 F.R.D. 21, 22-23 (S.D.N.Y. 1971) (defendant's bank must produce records even if confidential when they are relevant to the Plaintiff's claim as no banker client privilege exists).[3]

[3] There is no evidence that there is any "confidential" information related to Plaintiff in the file.

The requested documents are described with particularity in the Subpoena. It seeks communications regarding "financing to pay premiums for the ABC Viaticals, Inc. policy portfolio." It seeks documents regarding "the financing to pay premiums for the ABC Viaticals, Inc. policy portfolio." It seeks the credit file for financing of the ABC policy portfolio. Unless E&J is given an index to the Bank's records, it can hardly describe the documents sought with any more particularity.

The claim of undue burden to the Bank is particularly specious. First, Plaintiff does not have standing to object, when the Bank has not asserted that the request will impose an undue burden. *See Bramell v. Aspen Exploration, Inc.*, No. 4:05-CV-384, 2008 WL 4425368 at *2 (E. D. Tex. Sept. 24, 2008) (citing *Auto-Owners Ins. Co. v. Se. Floating Docks, Inc.* 231 F.R.D. 426, 429 (M.D. Fla. 2005) (citing 8 Wright & Miller, FEDERAL PRACTICE & PROCEDURE, Civil 2D §2635)). A party only has standing to quash a subpoena directed to another individual or entity if its own interest is jeopardized by the discovery. Plaintiff has presented no evidence that a subpoena directed to a third-party will cause Plaintiff to incur undue time and expense.

Moreover, Plaintiff has presented no evidence that responding to the Subpoena will cause Sovereign Bank to incur undue time and expense. A party objecting to discovery based on a claim of undue burden must make a specific detailed showing of how the request is burdensome. *See Brady*, 238 F.R.D. at 437. This showing is made by affidavit or other evidentiary proof. *See id.* Plaintiff provided no evidentiary proof in support of his motion. It is highly unlikely that a response would consist of more than a banker's box or so of documents. The period encompassed by the subpoena should be no greater than 24 months, since Plaintiff was appointed Receiver in December 2006; and upon information and belief, the portfolio sale closed by the end of 2008. Even if E&J is incorrect about the effort that will be involved in responding to this

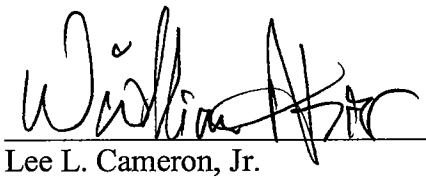
subpoena, Plaintiff is still not entitled to a protective order based on "undue burden," unless and until he produces some *evidence* of "undue burden."

CONCLUSION

Plaintiff's attempts to limit discovery to a narrow subset of his claims is disingenuous. Plaintiff was/is the master of his complaint. He drafted the factual allegations of alleged wrongful conduct. He determined what causes of action to assert. He decided to seek "all relief legal or equitable, general or special" to which he is entitled. E&J thus has a right to discover information relevant to defending those broad claims. If Plaintiff wanted discovery to be limited to some narrow issue, then Plaintiff should not have drafted a complaint replete with baseless allegations of legally and factually diverse wrongful acts and asserted every cause of action conceivably available under law or equity that might potentially arise out of these baseless allegations. E&J is entitled to discovery on every claim asserted by Plaintiff and every defense that E&J has to each claim. All the Court has to do is look at the Plaintiff's Amended Complaint and the relevance of the discovery is immediately apparent. Similarly, Plaintiff presented no evidentiary support for his contention that the Subpoena is overbroad, that it will compel production of confidential information, that the Bank cannot determine what documents are sought because they are not described with particularity, or that responding to the subpoena will impose an undue burden on anyone.

WHEREFORE, Defendants Erwin & Johnson and Christopher R. Erwin ask this Court to deny Plaintiff's Motions to Quash and for Protection and grant Defendants whatever and further relief to which they may be entitled at law or equity.

Respectfully submitted,



Lee L. Cameron, Jr.
State Bar No. 03675380
Cathlynn Cannon
State Bar No. 03747500
William J. Akins
State Bar No. 24011972
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, L.L.P.
Bank of America Plaza
901 Main Street
Suite 4800
Dallas, TX 75202-3758
214.698.8000 (Telephone)
214.698.1101 (Facsimile)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 13th day of July 2009, on all counsel of record as required by the Federal Rules of Civil Procedure.

William J. Akins