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.	§	

REPLY SUPPORTING PLAINTIFF'S
MOTION TO QUASH SUBPOENA TO SOVEREIGN BANK

Michael J. Quilling, as the appointed Receiver for ABC Viaticals, Inc. and other related entities, ("Plaintiff" or "Receiver") files this reply supporting his motion to quash [Dkt. No. 76] the subpoena to Sovereign Bank, N.A. He would respectfully show the Court as follows:

A. The Parties' Burden Of Proof

Defendants note the split of authority in this district about who bears the initial burden of proof before it shifts to the other side. (Defs.' Resp. [Dkt. No. 82] at 6.) In either case, the party resisting discovery must "show specifically" that each request is irrelevant, overly broad, burdensome, or oppressive. *McLeod, Alexander, Powell and Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990). The Receiver has done exactly that. His motion is not a "recitation" of "merely conclusory" objections that might appear in written discovery responses. *See* i*d.*

Instead, it describes the claims and damages at issue and shows why Defendants' requests for "all communications," "all documents," and the entire "credit file" fall outside the scope of relevant information. Therefore, no matter which authority this Court follows, the burden is on Defendants to justify an overly broad subpoena that seeks documents not relevant in this case.

B. The Receiver Has Clearly Stated The Issues Relevant In This Case

1. Background Facts Supporting The Receiver's Causes Of Action

On November 17, 2006, this Court appointed Plaintiff as Receiver for ABC Viaticals, Inc. and other related companies and trusts (collectively, "ABC").[1] At that time, the primary asset in the estate was a portfolio of 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. (Am. Compl. [Dkt. No. 41] at ¶ 19.) When the Receiver took over, however, the premium escrow account had less than $300,000. (*Id.*) He now sues Defendants, who acted as ABC's trustee and escrow agent, to recover this nearly $20 million shortfall and related expenses.

In their response brief, Defendants read the Amended Complaint in its broadest possible context by citing select background facts and even the concluding prayer for "all relief legal or equitable, general or special." (Defs.' Resp. [Dkt. No. 82] 3-4.) Defendants, however, do not state that any of those factual allegations relate to the information they seek from Sovereign Bank. (*Id.*)

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

2. Calculation Of Damages In This Case

It is undisputed that the Receiver's causes of action are based on the following damage calculations:

a. a nearly $20 million shortfall in ABC's premium escrow account that occurred before the Receiver took over;

b. $971,815.00 in interest payments for the receivership estate's line of credit;[2]

c. Defendants' fees received from or traceable to ABC;

d. exemplary damages; and

e. the receivership estate's reasonable attorneys fees, pre-judgment interest, and post-judgment interest.

While the nearly $20 million shortfall may have resulted in diminished value to the portfolio and its ultimate sale price, the Receiver's causes of action do not address that amount and Defendants cannot pretend for purposes of discovery that they do. (Mot. to Quash [Dkt. No. 76] at 2 n.2; Defs.' Resp. [Dkt. No. 82] 8.) This has been made clear to opposing counsel in numerous pleadings, motion conferences, and in written discovery.[3]

C. Sovereign Bank's Documents

As explained in the Receiver's motion, Sovereign Bank likely has two kinds of records that are relevant. First, it has premium schedules from the Receiver. That information, however, was already produced 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

[2] If Defendants had deposited nearly $20 million in the premium escrow account, the Receiver would not have needed the line of credit or paid this out-of-pocket expense.

[3] Defendants ignore this point in their response brief and ask the Court to enforce their subpoena to Sovereign Bank because it "is the only known source of information. . . that [the Receiver's] inability to continue financing the premium payments for the policies held in the Portfolio forced him to sell the Portfolio at a Fire Sale." (Defs.' Resp. [Dkt. No. 82] at 8.) Since the Receiver is not stating claims or seeking damages for the alleged "Fire Sale," that issue is irrelevant in this case.

readily available from another source); *Gresh v. Waste Servs. of Am., Inc.*, 189 F. Appx. 359, 361 (6th Cir. 2006) (discovery properly denied when party had already produced information sought). Defendants do not dispute this in their response brief. It is not true that Sovereign Bank is the "only source of information" regarding the Receiver's representations about "the premium load" or the "credibility of Plaintiff's representations that a certain amount of premiums were required to be available to fund the policies." (Defs.' Resp. [Dkt. No. 82] 7-8.) Obviously, the Receiver also has the calculations he produced to Sovereign Bank, National Viatical, Inc. prepared those calculations, and Defendants already obtained them through discovery.[4]

Second, Sovereign Bank may have some documents relating to interest calculated on the line of credit. The underlying loan documents, however, are already a matter of public record and do not need to be obtained from Sovereign Bank. FED. R. CIV. P. 26(b)(2)(C)(i). Again, Defendants did not dispute this in their response brief. While it is true that Sovereign Bank knows the factors used to calculate interest on that loan, those factors do not affect the Receiver's claim to recover out-of-pocket payments he already made. (Defs.' Resp. [Dkt. No. 82] at 7.) The factors, therefore, are irrelevant to the damages sought in this case. Even if Defendants actually wished to conduct discovery on the amount of interest, the Court should protect Sovereign Bank from the much broader requests for "all communications," "all documents," and the entire "credit file."

Defendants accuse the Receiver of making the "unilateral" conclusion that bank records are typically kept confidential. (Defs.' Resp. [Dkt. No. 82] at 9.) That, however, is Sovereign Bank's policy and those documents should not be subject to discovery without good cause. The

[4] Since National Viatical, Inc. determined the policies' premium obligations, it—not Sovereign Bank—is properly described as the "only known source of information . . . that E&J was derelict in calculating that amount." (Defs.' Resp. [Dkt. No. 82] at 8.)

Federal Rules of Civil Procedure do not protect just trade secrets but allow courts to exercise judgment in protecting any kind of confidential commercial or personal information—especially when the discovering party seeks irrelevant information. FED. R. CIV. P. 26(c)(1)(G); FED. R. CIV. P. 45(c)(3)(B)(i); s*ee In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 612-613 (E.D. Va. 2008) (request to non-party that included personal information not relating to claims at issue was overbroad and, therefore, imposed an undue burden).

In this case, the Receiver has standing to object to such a subpoena because his own interests are jeopardized. It forces Sovereign Bank to incur legal expenses that the Receiver will pay as an administrative expense of the receivership estate. It is also a fishing expedition intended to embarrass the Receiver and strain his relationship with one of the few lenders willing to extend credit to receivership estates.

Furthermore, although Defendants conclude their subpoena does not present an undue burden, Courts may find that a facially overbroad subpoena itself presents such a burden. *Wiwa v. Royal Dutch Pet. Co*., 392 F.3d 812, 818 (5th Cir. 2004); s*ee also In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d at 612-613. Defendants ignore the fact that the Court will weigh that burden against the relevance of the information requested. *Wiwa,* 392 F.3d at 818.

D. Defendants' Stated "Defenses" Do Not Justify The Overbroad Subpoena

Obviously the scope of discovery is, in part, set by viable defenses that actually relate to the litigation. Defendants, however, justify their subpoena by raising "defenses" without explaining how they support this subpoena. (Defs.' Resp. [Dkt. No. 82] at 4.)

For example, Defendants raise a defense 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." (*Id.*)

But they do not explain this statement or even allege that Sovereign Bank has records relating to those third parties.

They also accuse the Receiver of contributory negligence and believe he "failed to mitigate the loss." (*Id.* at 2 n.1, 4.) Again, they do not explain how the Receiver could possibly mitigate or contribute to the transfer of nearly $20 million out of ABC's escrow accounts before he was appointed. Furthermore, Defendants do not cite a single document they hope to obtain from Soverign Bank in connection with this defense.

Finally, Defendants allege that "Plaintiff is being less than forthright as to the premium expenses and the amount of time necessary to calculate that load." (Defs.' Resp. [Dkt. No. 82] at 4.) Sovereign Bank, however, simply received premium calculations from the Receiver that were generated by National Viatical, Inc. As explained above, Defendants already have those calculations and must look to the Receiver and National Viatical, Inc. to determine how long it took to calculate them.

Respectfully submitted,

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