

- 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 Silver Point; and the actual evidence indicates that Silver Point does not consider the document requested to be confidential.
- There is no evidence that responding to the Subpoena will impose an undue burden on Silver Point; and the actual evidence indicates that Silver Point has already gathered the responsive documents.
- There is no evidence that a Subpoena to Silver Point will impose an undue burden on the Plaintiff.

GENERAL BACKGROUND

I. The Subpoena

On or about, June 17, 2009, E&J served a subpoena on Silver Point seeking a limited set of documents related to the sale of the ABC Policy Portfolio. On or about, July 2, 2009, Silver Point's general counsel contacted one of E&J's attorneys regarding the Subpoena. (See Appendix page 1-2). He said that he did not anticipate a problem with responding to the Subpoena, but due to the July 4th holiday and other scheduling issues, Silver Point might need an extension. (See Appendix page 1-2)

This request was subsequently confirmed in writing and he was advised in writing that any reasonable request would be granted. (See Appendix page 4-5) In the e-mail, the Silver Point lawyer stated "I don't anticipate us needing much time to pull together any responsive documents..." (See Appendix page 4). Subsequently, outside counsel for Silver Point contacted one of E&J's attorneys to seek a confirmation of the extension in writing. (See

Appendix page 6) Following the filing of the Motions to Quash and for Protection, on the day its response was due, Silver Point's outside counsel understandably notified E&J's counsel that Silver Point would wait for a ruling on the Plaintiff's Motions before delivering the documents. (See Appendix page 7)

There have been multiple communications between Silver Point's lawyers and E&J's lawyers. At no point, has Silver Point ever contended that the documents sought were confidential, that the documents were not described with enough particularity for Silver Point to determine what was being requested or that the request presented an undue burden on Silver Point. (See Appendix page 2-3) Based on information and belief, Silver Point is ready to deliver the documents. Therefore, the only potential basis to grant the Motions to Quash and for Protection is based on lack of relevance.

II. The Parties' Allegations and Defenses

Specifically, the Court must find that there is *no possibility* that the requested documents have *any* relevance to *any* factual or legal allegation made by the Plaintiff. It must also find that there is *no possibility* that the requested documents have *any* relevance to *any* factual or legal defense asserted by E&J.

Significantly, in his Amended Complaint, Plaintiff makes broad allegations of wrongful acts and omissions 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 ¶ 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 insuranceand ...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.

In his Motion to Quash, Plaintiff misrepresents his allegations against E&J. He claims 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, any discovery related to anything that happened after he was appointed Receiver is irrelevant.¹

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 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. Silver Point's records will contain documents relevant to E&J's defenses as discussed below.

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.

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 Appfel, 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).

Plaintiff's motion, based on lack of relevancy ignores 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.

The Subpoena requested communications and documents regarding the valuation of the ABC Policy Portfolio and auction of the ABC Policy Portfolio. 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 actions taken by E&J induced the purchase of viatical shares. It is undisputed that the Policy Portfolio was the most valuable asset of ABC. Therefore, maximizing the sale price of the Policy Portfolio was the most important

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.

factor in minimizing the damage, if any, to ABC from E&J's alleged breaches related to the waste of corporate assets and inducing the purchase of the viatical shares.

The information from Silver Point is particularly important because Silver Point was the stalking horse for the sale of the Portfolio. Its initial bid set the floor for the sales price of the Portfolio. Presumably, Silver Point analyzed the value of the Portfolio prior to submitting its bid. Presumably, Silver Point wanted to acquire the Portfolio at the lowest possible price in order to maximize Silver Point's return on its investment. The factors considered by Silver Point during its analysis are relevant to E&J's defense. 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 a 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. There were only a few bidders for the Policy

Portfolio. These bidders are the only source of information available to E&J regarding how the valuation was performed and the factors affecting valuation.

Plaintiff next contends that the discovery should not be allowed because it is Silver Point's policy to "keep such documents, communications and customer files confidential." There is no evidence in the record that Silver Point deems any of those documents confidential. As discussed above, counsel for E&J had at least two discussions with attorneys representing Silver Point. (See Appendix page 1-3) Logically, if Silver Point considered any of the information requested by E&J to be confidential, it would have advised E&J's lawyers of this and likely requested an accommodation, which would have been granted. There is no evidence that there is anything confidential about any of the documents responsive to the request.

The requested documents are described with particularity in the Subpoena. It seeks communications and documents regarding the valuation of ABC Policy Portfolio and the Portfolio auction. The auction was a discrete event. Silver Point's involvement lasted less than a year. There is no evidence that Silver Point had any difficulty whatsoever in identifying what documents were being sought by E&J. Based on Silver Point's communications with defense counsel, it appears that the documents are ready to be delivered, once this Court rules on the Motion. (Appendix. Page 7)

The claim of undue burden to Silver Point is particularly specious. Silver Point contacted defense counsel and requested an extension because of the July 4th holiday and other scheduling issues. The extension was granted. Moreover, even if E&J's attorneys had refused to cooperate with Silver Point – which they did not –then Plaintiff still would not have standing to object, when Silver Point 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 the Subpoena directed to Silver Point will cause Plaintiff to incur undue time and expense.

Moreover, Plaintiff has presented no evidence that responding to the Subpoena will cause Silver Point 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. The period encompassed by the Subpoena should be less than a year. Moreover, in this case, due to Plaintiff's delay in filing the Motion to Quash, Silver Point has already incurred the expense of gathering the document. The only cost that could be saved by the Court granting the Motion is the cost of mailing the documents to E&J.

CONCLUSION

Plaintiff has presented no evidence in support of his contention that the documents are confidential and/or that responding to the Subpoena will pose an undue burden on Silver Point. The evidence indicates that Silver Point is ready to deliver the documents.

The only basis to grant the Motions to Quash and for Protection is a finding that the documents are not relevant for discovery purposes. Plaintiff has not met his burden of proving that there is no possibility that the documents sought are relevant to any claim or defense. Plaintiff's complaint makes broad allegations of misconduct by E&J. It alleges many causes of

action. He demands "all relief legal or equitable, general or special" to which he is entitled. In response, E&J has asserted all legal defenses that are available to it.

E&J has a right to discover information on every allegation made by the Plaintiff and every defense it has asserted. All the Court has to do is look at the Plaintiff's Amended Complaint and the relevance of the discovery is immediately apparent. Because Plaintiff has presented no evidence in support of his Motions to Quash and for Protection, they should be denied.

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,

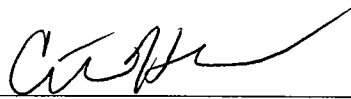


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on this 17th day of August 2009, on all counsel of record as required by the FEDERAL RULES OF CIVIL PROCEDURE, and by facsimile.



Cathlynn H. Cannon