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 SILVER POINT

Michael J. Quilling, as the appointed Receiver for ABC Viaticals, Inc. and other related entities, ("Plaintiff" or "Receiver") files this reply supporting his motion [Dkt. No. 83] to quash the subpoena to Silver Point Capital L.P. ("Silver Point"). He would respectfully show the Court as follows:

I.
SUMMARY

Courts will quash or modify a subpoena that is unreasonable or overly broad in scope. In their subpoena to Silver Point, Defendants hope to explore an issue that is not logically related to any of the Receiver's causes of action or any viable defense. It is, therefore, unreasonable and overly broad and should be quashed or otherwise modified.

Silver Point is an investment company that had nothing to do with ABC Viaticals, Inc. or the fraudulent investment scheme run by its principal officers. Silver Point was just one of several companies that bid on the receivership estate's portfolio of life insurance policies. (Shneider Aff., Ex. A at ¶ 3.) Defendants now wish to explore whether Silver Point could have bid more than it did. (Defs.' Resp. Br. [Dkt. No. 88] at 6.) As explained more fully below, that inquiry has nothing to do with the Receiver's causes of action against Defendants or their viable defenses. The subpoena, therefore, is overbroad on its face and seeks irrelevant information.

II.
ARGUMENTS AND ANALYSIS

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. Br. [Dkt. No. 88] at 6 n.2.) 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 id.* Instead, it describes the claims and damages at issue and shows why Defendants' requests for "all documents" and "all communications" from an unrelated party fall outside the scope of relevant information. Therefore, no matter which authority this Court follows, the burden is now on Defendants to justify their unreasonable, irrelevant, and overly broad subpoena to a non-party that seeks documents unrelated to any issue in this case.

B. The Court Should Quash Or Otherwise Modify The Subpoena

1. Defendants' Inquiry Is Irrelevant Because The ABC Portfolio's Final Sale Price Is Not An Issue In This Case

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.*) The Receiver now sues Defendants, who acted as ABC's trustee and escrow agent, to recover this nearly $20 million shortfall and other related expenses.[2]

In their response brief, Defendants read the Amended Complaint in an unreasonably expansive context by citing select background facts and even the concluding prayer for "all relief legal or equitable, general or special." (Defs.' Resp. Br. [Dkt. No. 88] at 3-4.) Defendants, however, do not state that any of the selected factual allegations relate to the information they seek from Silver Point. (*Id.*)

The only cause of action Defendants cite is the Receiver's claim for aiding and abetting corporate waste. (*Id.* at 4.) That claim is based on the following facts as described in the Amended Complaint:

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[1] That order was entered in the main receivership proceeding, which is styled *SEC v. ABC Viaticals, Inc., et al.*, Cause No. 3:06-CV-2136-P (N.D. Tex.).

[2] The Receiver also seeks to recover (1) all fees that Defendants received from ABC, including any pre-paid and unearned fees, (2) $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, (3) exemplary damages, and (4) 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.

> As investor funds were received, Erwin & Johnson deposited them into an account styled the Erwin & Johnson ABC Escrow Account. From that account, Erwin & Johnson had a written obligation to (1) pay all sales and administrative costs with respect to the policy purchased and (2) fund the necessary amount into a separate premium escrow account for each policy. However, in addition to not knowing or making the required premium escrow deposit, Erwin & Johnson also allowed ABC to use the account as its own piggy bank. Despite its obligations under the Trust Agreement, Erwin & Johnson followed every instruction from Keith LaMonda about disbursing money from that account.

(Am. Compl. [Dkt. No. 41] at ¶¶ 18, 36-39.) Clearly this cause of action relates to Defendant Erwin & Johnson's duties as trustee and escrow agent in 2005 and 2006. Erwin & Johnson should have used money in ABC's purchaser escrow account to meet funding obligations for the premium escrow account. It did not. Instead, Erwin & Johnson complied with every request that ABC's principal officers made to divert funds away from the premium escrow account and towards other unrelated purchases. This caused the nearly $20 million deficit the Receiver discovered when he took over the premium escrow account.

Silver Point's records do not relate in any way to this cause of action. Defendants try to make them seem relevant by offering a "defense" that the Receiver could somehow "mitigate the loss" or "minimize[] the damage" that the premium escrow account suffered under Defendants' control. (Defs.' Resp. Br. [Dkt. No. 88] at 5, 6-7.) Obviously those losses occurred before this Court placed ABC in receivership. The amount of the premium escrow deficit was fixed at that time and there is nothing the Receiver could to do mitigate it when he was appointed in November 2006 and discovered it. Defendants suggest he could have mitigated the loss by obtaining a higher sale price for the ABC policy portfolio.[3] (*Id.* at 6-7.) But that price has nothing to do with the Receiver's claims or damages in this lawsuit and, therefore, is not a viable

[3] That auction and sale was carried out according to this Court's orders and approved sales procedures in the main receivership case. (Orders, Cause No. 3:06-CV-2136-P [Dkt. Nos. 115, 179, 200, 205].)

defense. The Receiver does not allege—either as a cause of action or an element of damages—that Defendants diminished the portfolio's ultimate sale price. Since the premium escrow deficit was fixed before the Receiver took over, that damage calculation would be the same no matter what price he realized from the portfolio's sale. Therefore, Defendants' inquiry about Silver Point's ability to bid more is irrelevant.

As explained in the Receiver's motion, Silver Point likely has only one kind of record that is relevant in this case. It has premium illustrations and a schedule showing premiums paid for each month that the receivership estate owned ABC's portfolio. 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 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). The attached affidavit of Silver Point's representative confirms that many of its responsive documents can be obtained directly from the Receiver. (Shneider Aff., Ex. A at ¶ 5.)

2. Defendants Seek Documents That Silver Point Considers Highly Confidential

From their initial correspondence with Silver Point, Defendants mistakenly conclude that Silver Point stands "ready and willing to deliver the requested documents" and will not object that those records contain confidential commercial information. (Defs.' Resp. Br. [Dkt. No. 88] at 1, 3, 8.) To the contrary, Silver Point performed analyses and created internal documents that it considers "proprietary" and "highly confidential business information." (Shneider Aff., Ex. A at ¶¶ 6, 7.) This is obvious because those documents reflect Silver Point's investment strategy and methodology that form the core of its competitive business practices. (*Id.*) The Federal Rules of Civil Procedure protect exactly this kind of confidential commercial information—

especially when the discovering party seeks documents not relevant to the lawsuit. FED. R. CIV. P. 26(c)(1)(G); FED. R. CIV. P. 45(c)(3)(B)(i); s*ee also In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 612-613 (E.D. Va. 2008) (request to non-party for confidential information not related to claims at issue was overbroad and, therefore, imposed an undue burden).

3. Defendants Misstate Silver Point's Willingness To Produce Documents

Although Silver Point is willing to respond to Defendants' discovery requests, it has not waived it right to object to them or withhold documents. (Schneider Aff., Ex. A at ¶ 7.) To the contrary, if Silver Point eventually responds to the subpoena it would object to requests that it deems facially overbroad and unduly burdensome. (*Id*.) It apparently joins in the Receiver's belief that requests for "all documents" and "all communications" are too broad given the volume of Silver Point's documents and its attenuated relationship to the issues in this case.

III.
CONCLUSION

For these reasons, the Court should exercise its discretion to quash or otherwise modify Defendants' subpoena to Silver Point because (1) it seeks information not relevant to a claim or viable defense at issue in this case, (2) it is facially overbroad, (3) it seeks information already in the Defendants' possession or more readily available from the Receiver, and (4) it seeks confidential commercial information.

Respectfully submitted,

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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