

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

FEDERAL TRADE COMMISSION,)
) Civil Action No. PJM03-3317
Plaintiff,)
v.)
)
AMERIDEBT, INC., *et al.*,)
)
Defendants.)
_____)

**EMERGENCY MOTION OF NON-PARTY STEPHEN TODD COOK TO QUASH
SUBPOENA OR, IN THE ALTERNATIVE, FOR PROTECTIVE ORDER**

Stephen Todd Cook ("Cook"), a non-party, by his undersigned counsel, pursuant to Federal Rules of Civil Procedure 26 and 45, hereby moves to quash, or in the alternative for a protective order with respect to, the Subpoena dated November 3, 2005 (the "Subpoena") issued by counsel for Robb Evans & Associates LLC, in its capacity as Receiver (the "Receiver"), commanding Bank of America, N.A. to produce and permit the inspection of documents relating to Cook's financial accounts. The Subpoena should be quashed, or an appropriate protective order should be issued, for at least three reasons. First, the Subpoena seeks intrusive discovery of a broad range of personal information regarding the financial accounts of a non-party against whom no claims have been asserted. Second, the Subpoena seeks discovery of information that is far beyond the scope of the Receiver's authority, both under the Court's order appointing the Receiver and under applicable law. Third, the Receiver has failed to follow Maryland law by including a required certification on the face of the Subpoena that is designed to protect the due process rights of a person whose financial records are being sought.

In further support of this motion, Cook states:

Background Regarding the Receivership Order and the Subpoena

1. The Receiver was appointed pursuant to the Court's Preliminary Injunction Order with Asset Freeze, Appointment of a Receiver, Repatriation of Assets, and Other Equitable Relief dated April 20, 2005 (the "Receivership Order"). The purpose of the Receivership Order was to "increase the likelihood of preserving existing assets, pending final determination of this matter." Receivership Order, Finding No. 3.

2. Cook is a non-party. No claims have been asserted against him by the Receiver in this or any other Court. His personal financial information is in no way relevant to the issues raised in the pending litigation.

3. On November 3, 2005, counsel for the Receiver issued the Subpoena commanding Bank of America, N.A. to produce and permit the inspection and copying of documents at the office of counsel for the Receiver in Los Angeles. A copy of the Subpoena is attached hereto as Exhibit 1. In particular, the Subpoena commands the production of the following:

All Documents, including but not limited to signature cards, account agreements, applications, bank statements, transaction records, disbursement requests, wire transfer requests, receipts, deposit tickets, checks (front and back), drafts, credits, debits, and all communications concerning such account, including but not limited to e-mail, voice recordings, notes, and correspondence, concerning all accounts of Cook, including but not limited to account number 913002757, from inception of such accounts to the present.

4. The Subpoena does not include an address or contact person for Bank of America. As of the date of the filing of this motion, Cook does not know if the Subpoena has been served on Bank of America or if Bank of America has agreed to produce documents in response to the Subpoena.

Legal Analysis and Argument

5. Federal Rule of Civil Procedure 45(c)(3)(A) provides in relevant part:

On timely motion, the court by which a subpoena was ordered shall quash or modify the subpoena if it....

- (iv) subjects a person to undue burden.

FED. R. CIV. P. 45(c)(3)(A).

6. Federal Rule of Civil Procedure 26(c) provides in relevant part:

Upon motion by . . . the person from whom discovery is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a . . . person from annoyance, embarrassment, oppression, or undue burden or expense[.]

Upon showing of good cause, the court may order “that the disclosure or discovery not be had.”

FED. R. CIV. P. 26(c)(1). The decision of whether to grant a protective order is soundly in the discretion of the court. Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977).

7. Here, the Subpoena should be quashed to prevent undue burden to Cook or, alternatively, a protective order should be issued to protect Cook from annoyance, embarrassment, oppression, undue burden and/or expense. The Subpoena seeks the production of a broad range of confidential financial records of a non-party that have no relevance to the pending litigation. Even if sought from a party, this type of intrusive discovery generally would not be permitted in civil litigation absent a strong justification (which does not exist here and has not even been offered) and a court-approved confidentiality order. Cook’s legitimate interest in preserving sensitive personal financial information is in jeopardy. The Receiver has issued at least two reports (dated June 28, 2005 and September 19, 2005) containing detailed information regarding the Receiver’s activities. These reports, which are available on the Internet, are laden

with suggestion and innuendo and include copies of financial records obtained by the Receiver. If the Receiver is permitted to obtain Cook's personal financial records, they likely will end up posted on the Internet. It is difficult to imagine a situation which involves a greater potential for annoyance, embarrassment and oppression.

8. Significantly, the Receiver did not seek court approval (as a duly appointed bankruptcy trustee would have been required to do) prior to issuing the Subpoena. Rather, the Receiver unilaterally issued the Subpoena and, in doing so, ignored Cook's due process rights. The Receiver's powers and authority are not unlimited, particularly when it comes to the exercise of rights vis-à-vis non parties. The Receivership Order was entered to maintain the status quo and to preserve assets pending the outcome of the pending litigation. It was not entered to provide the Receiver with blanket authority to obtain confidential financial records of non-parties. Moreover, there is no federal statute that would authorize the Receiver to take such action. Absent express statutory authorization, the Receiver should not be permitted to unilaterally take such action.

9. Under Maryland law, a bank customer's account information is confidential and, absent compulsion by law, a bank may not make any disclosures concerning a customer without the customer's prior authorization. Suburban Trust Co. v. Waller, 44 Md. App. 335, 344, 408 A.2d 758, 764 (1979). *See also* MD. FIN. INST. CODE ANN. §§ 1-301 through 1-305; Taylor v. NationsBank, N.A., 365 Md. 166, 776 A.2d 645 (2001) (holding that a bank breached its duty of disclosure when it disclosed information regarding one of its customers). Furthermore, Maryland law requires that a litigant issuing a subpoena seeking bank financial records (such as those sought here by the Receiver) must include on the face of the subpoena "a certification that a copy of the subpoena has been served on the person whose records are sought by the party

seeking the disclosure or production of the records” or “ a certification that service has been waived by the court for good cause.” MD. FIN. INST. CODE ANN. § 1-304(b). Here, the Subpoena issued by counsel for the Receiver does not contain the required certification.

Certification of Good Faith

10. Pursuant to Federal Rule of Civil Procedure 26(c), a certification that counsel for the movant has in good faith conferred with opposing counsel in an effort to resolve this matter without court action is attached hereto as Exhibit 2.

WHEREFORE, Cook requests that the Court:

- (a) Quash the Subpoena or, in the alternative, issue an appropriate protective order; and
- (b) Grant such other and further relief as is just and appropriate under the circumstances.

Respectfully submitted,

DATE: November 11, 2005

/s/ C. Kevin Kobbe
C. Kevin Kobbe (Bar No. 07968)
Jason W. Hardman (Bar No. 27470)
DLA PIPER RUDNICK GRAY CARY US LLP
6225 Smith Avenue
Baltimore, Maryland 21209
(410) 580-3000
Counsel for Stephen Todd Cook

EXHIBIT 1

AO 88 (Rev. 11/94) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

FEDERAL TRADE COMMISSION,

SUBPOENA IN A CIVIL CASE

v.
AMERIDEBT, INC., et al

Case Number: 1 PJM 03-3317
US District Court, District of
Maryland

TO: BANK OF AMERICA, N.A.

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
---------------------	---------------

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

SEE EXHIBIT 1 ATTACHED HERETO AND INCORPORATED HEREIN BY REFERENCE.

PLACE Frاندzel Robins Bloom & Csato, L.C. 6500 Wilshire Boulevard, 17th Floor Los Angeles, CA 90048-4920	DATE AND TIME November 14, 2005 10:00 a.m.
---	--

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
----------	---------------

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) <i>Lesley Anne Hawes</i> LESLEY ANNE HAWES, Attorney for Receiver ROBB EVANS & ASSOCIATES LLC	DATE November 3, 2005
ISSUING OFFICER'S NAME ADDRESS AND TELEPHONE NUMBER FRANDZEL ROBINS BLOOM & CSATO, L.C., 6500 Wilshire Blvd., 17th Floor, Los Angeles, CA 90048-4920; telephone: (323) 852-1000; fax: (323) 651-2577	

(See Rule 45, Federal Rules of Civil Procedure, parts C & D on reverse)

¹ If action is pending in district other than district of issuance, state district under case number.

AO 88 (Rev. 11/94) Subpoena in a Civil Case

PROOF OF SERVICE

DATE PLACE

SERVED

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED BY (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ DATE SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance,

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to

the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or the demanding party to contest the claim.

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

EXHIBIT 1 TO SUBPOENA FOR PRODUCTION OF DOCUMENTS

DEFINITIONS

As used in this Subpoena the words and phrases below shall have the following meanings:

1. "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule Civil Procedure 34(a), including, but not limited to, all electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term.
2. "Concerning" means referring to, relating to, describing, evidencing, itemizing, or constituting.
3. "Any" means any and all.
4. The term "Cook," unless otherwise specified, refers to Stephen T. Cook, aka Stephen Todd Cook and shall include the STC Family Trust dated March 31, 2005.
5. The term "Company" shall refer to Bank of America, N.A., the party to whom the accompanying subpoena is directed.

DIRECTIONS

1. Business records: To the extent that documents the Company produces in response to this subpoena are records of regularly conducted business activities as described in Fed. R. Evid. 803(6), include a certification consistent with Fed. R. Evid. 902(11) for those documents.
2. Scope of Search: Documents covered by this subpoena are those in the possession or under the actual or constructive custody or control of the Company, including but not limited to documents in the possession, custody, or control of the Company's attorneys, accountants, directors, officers, and employees, whether or not such documents were received from or disseminated to any person or entity.
3. Document Identification: Documents that may be responsive to more than one request of this subpoena need not be submitted more than once; however, the Company's response should indicate, for each document submitted, each request to which the document is responsive.
4. Submission of Magnetically-recorded information: Magnetic media shall be submitted in the following forms and formats:
 - a. Magnetic storage media. The Receiver will accept: (1) 9 track computer tapes recorded in ASCII or EBCDIC format at either 1600 or 6250 BPI; (2) 3.5

inch microcomputer floppy diskettes, high density, double sided, formatted for IBM compatible computers (1.44 MB capacity); (3) Iomega ZIP disks formatted for IBM compatible PCs (100 or 250 MB capacity); (4) CD R74 CD ROM readable disks formatted to ISO 9660 specifications (650 MB capacity); (5) Iomega DITTO mini data cartridges (2000 MB capacity). The Receiver will accept 4mm & 8mm DAT and other cassette, mini-cartridge, cartridge, and DAT/helical scan tapes by pre-authorization only. In all events, files provided on 4mm DAT cassettes must not be compressed or otherwise altered by proprietary backup programs. Where data is to be transferred from a UNIX system the Receiver will accept data provided on 8mm DAT created using TAR, CPIO, or DD.

b. File and record structures.

(1) Magnetically recorded information from centralized non microcomputer based systems:

(i) File structures. The Receiver will accept sequential files only. All other file structures must be converted into sequential format.

(ii) Record structures. The Receiver will accept fixed length records only. All data in the record is to be provided as it would appear in printed format: i.e., numbers unpacked, decimal points and signs printed.

(2) Magnetically recorded information from microcomputers. Microcomputer based data: word processing documents should be in DOS-text (ASCII), WordPerfect 8 or prior version, or Microsoft Word 2000 or prior version format. Spreadsheets should be in Microsoft Excel 2000 (.xls) or prior version, or Lotus compatible (.wk1) format. Database files should be in Microsoft Access 2000 (.mdb) or earlier version, or dBase compatible (.dbf), version 4 or prior, format. Database or spreadsheet files also may be submitted after conversion to ASCII delimited, comma separated or fixed length field format, with field names as the first record. Graphic images must be in TIFF 4 format, compressed and unencrypted. Other proprietary software formats for word processing documents, spreadsheets, databases, graphics and other data files will be accepted by pre authorization only. For microcomputer files that are too large for one disk, files may be provided in a compressed WINZIP® format.

c. Documentation.

(1) Data must be accompanied by the following information: (a) full pathname of the file and (b) the identity of the media on which it resides, e.g. the identity of the cd, zip disk or floppy that holds the file. In

the case of complex files or directories of files, all component files that are part of a given directory must be specified with their full pathnames. Where necessary, the subdirectories that must be created in order to successfully read these submitted files must be provided.

(2) Files provided on tape must be accompanied by the following information: (a) filename; (b) the identity of the tape on which the file resides; (c) the position of the file on the tape. For sequential files, the documentation also must include (a) the number of records contained in the file; (b) the record length and block size; and (c) the record layout, including (i) the name of each element, (ii) the element's size in bytes, and (iii) the element's data type. The documentation should be included in the same package as the tape, along with a printout of the first 100 records in report format.

d. Shipping. Magnetic media should be carefully packed to avoid damage, and must be shipped clearly marked: **MAGNETIC MEDIA DO NOT X-RAY.**

DOCUMENTS REQUESTED

1. All Documents, including but not limited to signature cards, account agreements, applications, bank statements, transaction records, disbursement requests, wire transfer requests, receipts, deposit tickets, checks (front and back), drafts, credits, debits, and all communications concerning such account, including but not limited to e-mail, voice recordings, notes, and correspondence, concerning all accounts of Cook, including but not limited to account number 913002757, from inception of such accounts to the present.

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

FEDERAL TRADE COMMISSION,)	
)	Civil Action No. PJM03-3317
Plaintiff,)	
v.)	
)	
AMERIDEBT, INC., <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

CERTIFICATION OF C. KEVIN KOBBE

I, C. Kevin Kobbe, hereby certify as follows:

1. I am counsel for Stephen Todd Cook, a non-party, who has filed the accompanying Emergency Motion to Quash Subpoena or, in the Alternative, for Protective Order.

2. Before filing the motion, I have attempted in good faith to resolve the dispute described in the motion with counsel for the Receiver. In particular, on November 11, 2005, I spoke by telephone with counsel for the Receiver (Lesley Anne Hawes) and requested that the Subpoena that is the subject of the motion be withdrawn. Counsel for the Receiver indicated during the November 11, 2005 telephone call that she will not withdraw the Subpoena.

3. Despite the good faith effort described above, I have been unable to resolve the dispute described in the motion without the assistance of the Court.

THE UNDERSIGNED HEREBY CERTIFIES UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Respectfully submitted,

DATE: November 11, 2005

/s/ C. Kevin Kobbe
C. Kevin Kobbe (Bar No. 07968)
DLA PIPER RUDNICK GRAY CARY US LLP
6225 Smith Avenue
Baltimore, Maryland 21209
(410) 580-3000
Counsel for Stephen Todd Cook

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 11th day of November, 2005, copies of the foregoing *Emergency Motion of Non-Party Stephen Todd Cook to Quash Subpoena or, in the Alternative, for Protective Order* and accompanying *Order Granting Emergency Motion of Non-Party Stephen Todd Cook to Quash Subpoena or, in the Alternative, for Protective Order* were sent by email and first-class mail, postage prepaid, to the following:

Lesley Anne Hawes, Esquire
Franzel Robins Bloom & Csato, L.C.
6500 Wilshire Boulevard, 17th Floor
Los Angeles, CA 90048-4920
lhawes@franzel.com

/s/ Jason W. Hardman
Jason W. Hardman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

FEDERAL TRADE COMMISSION,)	
)	Civil Action No. PJM03-3317
Plaintiff,)	
v.)	
)	
AMERIDEBT, INC., <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

**ORDER GRANTING EMERGENCY MOTION OF NON-PARTY
STEPHEN TODD COOK TO QUASH SUBPOENA OR,
IN THE ALTERNATIVE, FOR PROTECTIVE ORDER**

Upon consideration of the Emergency Motion to Quash Subpoena or, in the Alternative, for Protective Order (the "Motion") filed by Stephen Todd Cook ("Cook") and any response to the Motion; and it appearing that the Subpoena dated November 3, 2005 (the "Subpoena") issued by counsel for Robb Evans & Associates LLC, in its capacity as Receiver (the "Receiver"), commanding Bank of America, N.A. to produce and permit the inspection of documents relating to Cook's financial accounts should be quashed; and the Court having determined that the factual and legal bases set forth in the Motion establish sufficient cause for the relief granted herein; it is, by the United States District Court for the District of Maryland, ORDERED as follows:

1. The Motion is hereby granted.
2. The Subpoena is hereby QUASHED.
3. Bank of America, N.A. is hereby relieved of any obligation to comply with the Subpoena.
4. As soon as practicable after the entry of this Order, counsel for the Receiver shall serve a copy of this Order on Bank of America, N.A. and all other parties in interest.

5. The Court shall retain jurisdiction over any matter arising from or relating to the implementation of this Order.

SO ORDERED:

DATE: November ____, 2005

Peter J. Messitte, United States District Judge