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Federal Trade Commission v. Ameridebt, Inc., et al.
CASE No. PJM 03-3317

Memorandum of Law in Support of Receiver's Opposition to Motion of Non-Party Media Choice, LLC to Quash Subpoena or, in the alternative, for Protective Order

Filed July 10, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. AMERIDEBT, INC., et al., Defendants.	Civil Action No. PJM 03-3317

MEMORANDUM OF LAW IN SUPPORT OF RECEIVER'S OPPOSITION TO MOTION OF NON-PARTY MEDIA CHOICE, LLC TO QUASH SUBPOENA OR, IN THE ALTERNATIVE, FOR PROTECTIVE ORDER

Robb Evans & Associates LLC as Receiver over the assets of Andris Pukke and DebtWorks, Inc. ("Receiver") hereby submits its Memorandum of Law in support of the Receiver's opposition to the Motion of Non-Party Media Choice, LLC ("Media Choice") to Quash or, in the Alternative, for Protective Order ("Motion") pertaining to a subpoena to Bank of America ("Bank") seeking production of bank account records for accounts of Media Choice. The Receiver contends the Motion should be denied based on the following.

I. THE RECEIVER IS ENTITLED TO PRODUCTION OF THE RECORDS

The Media Choice Motion raises three primary grounds on which it challenges the Subpoena. First, Media Choice claims that the Subpoena is unduly intrusive in that it seeks information regarding "financial accounts of a non-party against whom no claims have been asserted." Motion, p. 1. Media Choice also claims in the Motion that the Receiver exceeded its authority in issuing the Subpoena because it is beyond the scope of the Receiver's authority under the Preliminary Injunction Order and applicable law. Third, Media Choice contends that the Receiver did not follow Maryland state law by including a certificate on the face of the

subpoena that a copy of the Subpoena was served on the party whose records were requested.

None of the three grounds interposed by Media Choice for the Court to quash the Subpoena have merit. The Motion is not supported by any evidence concerning the alleged intrusiveness of the information sought or the private or confidential nature of the information. The conclusory attestations of Stephen Todd Cook ("Cook"), one of Pukke's closest friends and a close business associate of Pukke's that Media Choice has not had any dealings with Ameridebt, DebtWorks or Pukke and has not held assets for them does not demonstrate that the Subpoena is unduly intrusive or improper nor should the Receiver be required to rely on Cook's self-serving statements and conclusions under the circumstances.[1]

By Cook's testimony under oath, Media Choice is his wholly owned limited liability company that he formed within two months of the Preliminary Injunction Order being issued. Cook has testified he is the sole owner and member. Yet, Pukke's father has testified under oath that six weeks after the Preliminary Injunction Order Janis Pukke made a $200,000 payment to Media Choice to buy an investment/ownership interest in the company. The transfer of $200,000 from an account at Hansabanka in Latvia to Media Choice on June 10, 2005 is documented by the bank account statements from the Hansabanka account. This same Hansabanka account is listed by Pukke as his asset on a sworn financial statement given to a third party lender in connection with Pukke's acquisition of a multi-million dollar residence, 35 Ocean Heights, Newport Beach, California ("Ocean Heights"). The Ocean Heights property is the property that Cook lives in rent-free under what Cook claims is a purported lease and below-market purchase option.

The argument that the financial records have no relevance to the Receiver's duties to investigate and locate potential Receivership Property is belied by these facts and documentation

[1] Indeed, it is noteworthy that in connection with the related discovery dispute pending before this Court involving a subpoena for records of Cook's personal account at Bank of America to which the Receiver has traced funds, Cook has not submitted any evidence, including his own declaration, supporting the lack of relevance and alleged improper intrusion into his private accounts or anything to refute the detailed allegations and evidence provided by the Receiver as to the deep personal and business connections between Pukke and Cook.

and by the additional documentation attached to the Supplemental Declaration of Gary Owen Caris requested to be filed under seal. Moreover, the contention that the Subpoena should have had a certificate required under Maryland state law regarding service of the Subpoena on Media Choice is meritless, since the Subpoena was issued under federal procedures and in any event, the Receiver in fact served Media Choice's counsel with the Subpoena. Each of the grounds for quashing the Subpoena should be rejected.

The general rule of discovery is that a party is entitled to discover not only documents and information that constitutes admissible evidence but also that may lead to the discovery of admissible evidence. See generally F. R. Civ. P. 26. "The scope of material obtainable under a Rule 45 subpoena is as broad as that permitted under discovery pursuant to Rule 26; that is, if the material is not privileged and is relevant to the claim or defense of any party, or, even if not admissible at trial, appears to be reasonably calculated to lead to the discovery of admissible evidence, it may be obtained by a Rule 45 subpoena." 9 Moore's Federal Practice § 45.02, p. 45-17 (Matthew Bender 3rd ed. 2005). The burden is on the party asserting a privilege or other ground for non-disclosure of information responsive to discovery to prove that the information falls within a recognized privilege or other valid ground for non-disclosure. Wilson v. Cook Group Inc., 149 F. 3d 249, 252 (4th Cir. 1998) ("To obtain a protective order under Rule 26(c), the party resisting discovery must establish that the information sought is covered by the rule and that it will be harmed by disclosure. [Citations omitted.]"); Graham v. Casey's General Stores, Inc., 206 F.R.D. 251, 253 (S.D. Ind. 2002) (burden is on party opposing discovery to show it is overly broad or information sought is not relevant).

A. Privacy Concerns Can Be Addressed by A Limited Protective Order

Media Choice's first and principal objection to the Subpoena is that the Subpoena seeks private and confidential records of a non-party. Rule 45(c)(3)(B) of the Federal Rules of Civil Procedure provides the Court with the discretion to quash, modify or condition a subpoena if the subpoena would require the disclosure of confidential, proprietary, trade secrets or commercial information, the disclosure of which may harm the subpoenaed party. "Modifying a subpoena to accommodate the needs and interests of those affected is encouraged, and failure at least to

consider modification can be an abuse of discretion." 9 Moore's Federal Practice § 45.04[4], pp. 45-50 (Matthew Bender 3rd ed. 2005), citing Northrup Corp. v. McDonnell Douglas Corp., 751, F. 2d 395, 407 (D.C. Cir. 1984). See also Wilson v. Cook Group, Inc., 149 F. 3d 249 (holding that the bankruptcy court properly balanced the harm from disclosure against the other party's need for discovery in ordering disclosure of a sealed memorandum and judgment subject to a protective order).

The evidence supplied by Media Choice does not warrant the conclusion that the bank records of this operating limited liability company should be considered confidential, and the Receiver has also demonstrated a substantial need for these records. Evidence provided by the Receiver demonstrates Media Choice received a $200,000 transfer of funds from a bank account claimed by Pukke as his asset on a written financial statement. The testimony of Cook and Janis Pukke are directly contradictory as to the ownership of Media Choice and the existence and purpose of the transfer of funds. There is a clear and close relationship between Cook and Pukke both personally and as business associates, and Pukke has a history of using friends and associates to hold assets as to which he is the beneficial owner and as to which he directs and controls.

Media Choice argues that the Receiver improperly seeks bank account records for the period covering both the pre-receivership and post-receivership periods. Indeed, Media Choice suggests at the top of page 5 of the Motion that the Subpoena should have been limited to records for the pre-receivership period. Media Choice no doubt suggests this limitation because Media Choice received the $200,000 payment from the Hansabanka account six weeks after the inception of the-receivership. Such a time limitation to the pre-receivership period under the circumstances would be improper and ludicrous given the June 10, 2005 payment received by Media Choice attested to under oath by Pukke's father, and given that one of the Receiver's principal duties is to trace and recover Receivership Property that may have been hidden and moved in violation of the Preliminary Injunction Order.

Moreover, Media Choice's objection based on the alleged confidentiality of the records does not support an order quashing the Subpoena or precluding the Receiver from obtaining the

records in question but at most may support the Court's entry of a narrowly drawn protective order to limit public disclosure of the records, which the Receiver would not oppose. In that regard, while the Receiver would agree that parts of the records themselves, including identifying information such as Media Choice's bank account number and taxpayer identification, should be protected from public disclosure, the Receiver has a duty to report to the Court about the results of its investigation and a protective order should not be drawn so as to prevent the Receiver from reporting its findings regarding Media Choice and its financial dealings to the Court.

The turnover of these records to the Receiver is not a turnover of records to an ordinary civil litigant in an adversarial posture to the party whose records are sought, nor is that the standard by which the Receiver's right to review these records is governed. The Receiver is an arm of the Court which appointed it, with the power and the duty to investigate, locate, recover and preserve assets for the benefit of the creditors of the receivership estate under the Preliminary Injunction Order. Sterling v. Stewart, 158 F. 3d 1199, 1201 n. 1 (11th Cir. 1998) ("A receiver is a neutral court officer appointed by the court, usually to 'take control, custody or management of property that is involved in or is likely to become involved in litigation for the purpose of . . . . undertaking any []appropriate action.' [Citations omitted.]"). The Receiver is an officer of the Court and under the Court's direction and supervision. Resolution Trust Corporation v. Bayside Developers, 43 F. 3d 1230, 1241 n. 8 (9th Cir. 1995) (once appointed "the receiver is an agent of the court"). As a result, Media Choice has not established that merely turning over the records to the Receiver would cause Media Choice harm at all, so long as its concern about the public dissemination of the records is addressed through a protective order.

Under the circumstances, if the Court concludes Media Choice has established that the records in question are confidential and that it would suffer harm from their disclosure, then at most a protective order should issue limiting the public disclosure of the banking records sought.

B. Media Choice's Contention that the Receiver Did Not Have the Power or Authority to Issue the Subpoena Is Utterly Baseless

Media Choice contends the Receiver was required to obtain a court order before issuing the Subpoena, such as a bankruptcy trustee would be required to do, and that the Receiver had no authority to issue the Subpoena. The argument is frivolous.

Section XIII of the Preliminary Injunction Order states that "the Receiver and the FTC are granted leave, pursuant to Rule 45 of the Federal Rules of Civil Procedure, to subpoena documents immediately from any Financial Institution . . . ." See also Section VI.A.7, authorizing the Receiver to bring legal actions as appropriate in discharging the Receiver's duties and Section VI.A.4 authorizing the Receiver to employ counsel. Moreover, even without such provisions in the order, the ability to conduct discovery is inherent in a receiver's exercise of its investigatory powers and duties under a receivership order and necessary to the receiver's ability to perform its duty to locate assets of the receivership. See Securities and Exchange Commission v. Elfindepan, S.A., 169 F. Supp. 2d 420, 427 (holding that "the service of a subpoena to produce documents concerning [receivership defendant and another entity] certainly constitutes a reasonable method of fulfilling her specified duties as receiver" and that the receiver's subpoena to a third party was therefore properly issued).

Media Choice's claim that the documents sought are not "relevant" is simply baseless given the post-receivership $200,000 payment to the Media Choice account from the Hansabanka account and the other evidence of the intimate connections between Cook and Pukke and their various business enterprises, including Cook's receipt of over $2.1 million in loans from Pukke's companies that have yet to be repaid. These connections are further detailed in the Receiver's opposition to Cook's motion to quash the subpoena to Bank of America for Cook's bank account records.

Further, the Receiver's Subpoena cannot be judged on the standards applicable to party litigants in any event, although the Subpoenas would clearly satisfy those standards even if they were applicable. The Receiver's request for these records is not as a party litigant. The "relevance" of the records is not relevance to the FTC's claims or Pukke's defenses to the

underlying action. Rather, the relevance of the records is that they will disclose evidence pertaining to transfers of funds to or from Media Choice's account and may lead to the discovery of assets that constitute Receivership Property because the funds transferred are owned directly or indirectly in whole or in part by Pukke or one of his companies. The track record of suspicious transfers of large sums of money by Pukke through his family and web of close friends and business associates both before and after the inception of the receivership provides ample grounds to provide the Receiver the opportunity to examine these records as part of its investigation.

C. To the Extent Applicable At All, the Purposes of the Maryland Bank Certificate Requirement Have Been Fulfilled

Although the Subpoena is issued in a federal action under Rule 45 of the Federal Rules of Civil Procedure, Media Choice argues that the Subpoena should have borne a certificate under the Maryland Financial Institutions Code attesting to the fact that the Subpoena was served on the party whose account records were sought. First, there is no indication that the statutory scheme in question is intended to apply to federal court subpoenas. Further, there is no indication that the scheme is intended to preclude any production of records by a bank in response to a subpoena or other court order. Finally, if the purpose of the certificate is to provide notice to the depositor of the request for disclosure of the account records, in fact Media Choice has obtained notice of the Subpoena and no records will be produced until the Court has ruled on this Motion. The purposes of the statute have thus been fulfilled. Neither of the Maryland state court cases cited by Media Choice are applicable to these circumstances, as both involved voluntary disclosures of personal or account information by the banks, not in response to a subpoena for records.

II. CONCLUSION

The Receiver respectfully submits that the Motion should be denied for the reasons set forth herein and in the Opposition and other supporting papers.

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