ROBB EVANS & ASSOCIATES LLC
Receiver of the Assets of
DebtWorks, Inc., and
Andris Pukke
11450 Sheldon Street
Sun Valley, California 91352-1121
Telephone No.: (818) 768-8100
Facsimile No.: (818) 768-8802

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

Memorandum Opinion Re: Emergency Motion of Non-Party Stephen Todd Cook to Quash Subpoena or, in the Alternative, for Protective Order; and Motion of Non-Party Media Choice, LLC to Quash Subpoena or, in the Alternative, for Protective Order

Filed September 11, 2006

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
Southern Division

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. PJM 03-3317**
	)	
AMERIDEBT, Inc., et. al.	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

Pursuant to the referral of this case to me for resolution of discovery disputes, the Court has received the Emergency Motion of Non-Party Stephen Todd Cook to Quash Subpoena or, in the Alternative, for Protective Order ("Cook's Motion") (Docket Item No. 359) and Motion of Non-Party Media Choice, LLC to Quash Subpoena or, in the Alternative, for Protective Order ("Media Choice's Motion) (Docket Item No. 477). The Court has reviewed Cook's Motion and Media Choice's Motion and the memoranda related thereto. No hearing is deemed necessary. Local Rule 105.6 (D. Md.). The Court hereby GRANTS IN PART and DENIES IN PART Cook's Motion and Media Choice's Motion.

BACKGROUND

The Federal Trade Commission ("FTC") commenced this civil enforcement action against AmeriDebt, Inc. ("AmeriDebt"), DebtWorks, Inc. ("DebtWorks"), and Andris Pukke in November 2003. This action involves various violations of FTC regulations relating to unfair and deceptive trade practices while providing debt counseling services. Robb Evans &

Associates, LLC, ("the Receiver") was appointed as Receiver by this Court's Preliminary Injunction Order with Asset Freeze, Appointment of a Receiver, Repatriation of Assets, and Other Equitable Relief ("Preliminary Injunction Order") dated April 20, 2005, to "increase the likelihood of preserving assets, pending final determination of this matter." (Docket Item No. 122).

The instant disputes arise out of the Receiver's investigation to ascertain the extent of the Receivership's property. Both non-parties, Cook and Cook's wholly-owned company, Media Choice, LLC, have bank accounts with the Bank of America which were subpoenaed by the Receiver. The Receiver, Cook and Media Choice have agreed that Bank of America should defer production of the documents in response to the subpoenas until the present disputes are resolved. As a result, no documents have been produced.

A. The Pukke-Cook Connection

On November 16, 2005, Cook submitted to a deposition by the Receiver. By all accounts, Cook is a close friend of Mr. Pukke and a high-school acquaintance. At deposition, Cook testified that in 1999, he filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code which was discharged after his creditors were fully repaid under his plan. He then moved to Maryland where he worked for a car dealership and a headhunter firm prior to joining AmeriDebt. After six months at AmeriDebt, Cook left and founded Debt Products, Inc. ("Debt Products"), as the sole shareholder.

At Debt Products, Cook co-authored the financial management book "Road to Debt Freedom" which AmeriDebt sold to its clients. Debt Products made "royalty" payments to AmeriDebt in the amount of $370,000 through 2003 for AmeriDebt's sale of the book. After

Debt Products, Cook opened a new company, NASCO Financial Consultants, LLC ("NASCO"), which also sold leads to DebtWorks and AmeriDebt. Cook owns or was involved in several business entities providing marketing and leads to other Pukke businesses including Debt Products, NASCO, Debt Saviors, Inc., and currently Media Choice.[1]

In 2003, at the time the Federal Trade Commission's action against Pukke, AmeriDebt and DebtWorks commenced, Cook and Pukke formed Prudent Choice, LLC. From 2003 to 2005, Infinity Resource Group, Inc. ("Infinity"), a former Pukke-owned entity which is under the control of the Receiver, provided Prudent Choice over $3,000,000 in funds. Currently, Prudent Choice owes $2,339,725 to Infinity. At one point, Cook was either on the board of directors for, or the vice-president of, Infinity. Cook recently infused $2,000,000 into Prudent Choice. There are significant investments between Pukke and Cook related business entities involving unwritten agreements and undocumented interest-free loans. The Receiver attributes Cook's wealth to his sale of stock in Sportingbet.com for an amount of approximately $3,300,000 during 2005. However, the Receiver believes that Cook's wealth is better explained by his connection to Pukke and that Cook's money, or a portion thereof, is in fact Pukke's money and property of the Receivership.

B. Cook's Motion

Non-Party Stephen Todd Cook was served a copy the subpoena duces tecum dated November 3, 2005 issued by the Receiver commanding Bank of America, N.A. to produce and permit inspection of documents relating to Cook's financial accounts. The Receiver seeks

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[1] Media Choice, as a non-party moving to quash the Receiver's subpoena, will be discussed separately below.

Cook's bank records because "for the last six years, every financial endeavor Cook has been involved in has been connected to Pukke." The Receiver points to Cook: (1) investing $700,000 in Trident Mariculture, Ltd., a shrimp farm in Belize co-owned with Pukke; and (2) investing $2,000,000 into Prudent Choice, LLC, a company co-owned with Pukke.[2] The Receiver wants to investigate and determine if Pukke is the beneficial owner of some or all of Cook's assets, which would make them Receivership property under the Preliminary Injunction Order.

On November 11, 2006, Cook moved to quash to the subpoena and proffered three reasons in support of its Motion to Quash. First, the sensitive banking information sought by the Receiver is intrusive in nature as Cook is a non-party against whom no claims have been asserted. Second, the subpoena exceeds the scope of the Receiver's authority. Third, the Receiver did not comply with §§ 1-301 through 1-305 of the Financial Institutions Article, Maryland Code Annotated, requiring that notice be served upon the bank account's owner prior to the bank records being produced.

The Receiver responds that any privacy concerns Cook raises regarding the bank records can be addressed by a limited protective order and consents to the same. The Receiver also contends that the Preliminary Injunction Order granted the power to issue the instant subpoena

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[2] The Court does not recite the long history of personal financial dealings between Pukke and Cook relating to the purchase of houses, personal loans and financial support after the Receiver was appointed. In short, the history includes (1) Cook's $250,000 post-receivership loan to Mr. Baker to act as a "front man" for Pukke's purchase of a multimillion dollar house in Laguna Beach, California; (2) lending Pukke his personal credit card to pay for living and travel expenses during this litigation; and (3) Cook's assignment of a purchase contract to Pukke to purchase a home in Newport Coast, California, which Pukke then verbally leased to Cook rent-free with a three and a half year option to buy the property at the fixed price of $250,000 above the original $3,000,000 purchase price. The information recited above provides sufficient context for this Court's analysis. Arguments involving these facts will not be addressed in this opinion.

without leave of the Court. Next, the Receiver argues in the alternative that the Financial Institutions Article does not apply to federal subpoenas and, if applicable, the requirements were fulfilled.

C. The Pukke-Media Choice Connection

At Cook's deposition, he testified that he is the sole owner and member of Media Choice, LLC. However, the Receiver proffers that Pukke's father, Janis Pukke, testified at deposition that he made a $200,000 payment to Media Choice as an investment in exchange for ownership interest in that company. Pukke's father used his Hansabanka account to transfer the $200,000 payment to Media Choice. However, Pukke, in a sworn financial statement, listed the same Hansabanka account as his asset when purchasing the Newport Coast property.[3] This $200,000 transfer to Media Choice was made within six weeks of the appointment of the Receiver. Media Choice shares the same address as Prudent Choice, a Cook-Pukke co-owned company. The Receiver, again, wants to determine if these funds belong to the Receivership under the Preliminary Injunction Order.

D. Media Choice's Motion

On June 6, 2006, the Receiver issued a subpoena to Bank of America to produce and permit the inspection of documents relating to Media Choice's financial accounts. Media Choice was not served with a copy of the subpoena and only learned of its existence through Bank of America. Media Choice moves to quash the subpoena and argues that it is a non-party formed in February 2005, well after the commencement of this civil enforcement action against AmeriDebt, DebtWorks, and Pukke. Since its formation, Media Choice has had no business

[3] Cook resides in Newport Coast, California as Pukke's tenant.

dealings with any party to this lawsuit. As a result, Media Choice claims its bank records are irrelevant to the Receivership.

Media Choice raises the same arguments as Cook with slight variation, namely: (1) the subpoena seeks a broad range of intrusive information regarding the financial records of a non-party against whom no claims have been asserted; (2) the information sought is beyond the scope of the Receiver's authority; and (3) Receiver did not comply with §§ 1-301 through 1-305 of the Financial Institutions Article, Maryland Code Annotated, requiring that notice be served upon the bank account's owner prior to the bank records being produced.

The Receiver again consents to a limited protective order and contends that the Preliminary Injunction Order granted the power to issue the instant subpoena without leave of this Court. This time, however, the Receiver argues that the Maryland Financial Institutions Article does not apply to federal subpoenas.

Given the relationship of the non-parties, the identity of counsel, legal arguments and law required to resolve both motions, judicial economy is served by a joint discussion of the law.

ANALYSIS

Non-parties Cook and Media Choice lack standing to bring the present motions to quash the Receiver's subpoenas.[4] The doctrine of standing is applicable here and dispositive for two reasons. First, neither Cook nor Media Choice were the non-parties served with subpoenas in the instant matter. Second, neither non-party asserts a privilege or right which precludes disclosure of these financial records.

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[4] The standing required for a motion to quash is based on Rule 45. This is separate and distinct from the standing required for a motion for protective order which is based on Rule 26. Non parties Cook and Media Choice lack of standing relates only to Rule 45.

As a preliminary matter, neither non-party has been served with these subpoenas. As a result, these non-parties cannot move to quash under Federal Rule of Civil Procedure 45(c) which applies to persons commanded to produce documents. As one commentator notes, "A motion to quash, or for protective order, should be made by the person from whom the documents or things are requested." 9A CHARLES ALAN WRIGHT, & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2459 (2d ed. 1994) (hereinafter "WRIGHT & MILLER"). Only Bank of America has standing to move to quash these subpoenas because Bank of America is the entity from whom the documents are requested.

Second, neither Cook nor Media Choice assert any privilege or right to prevent the disclosure of the subpoenaed bank records. *Clayton Brokerage Co., Inc. v. Clement*, 87 F.R.D. 569, 571 (D. Md. 1980) (bank customer had no legitimate expectation of privacy in the contents of checks, deposit slips and other banking documents subpoenaed from his bank and, therefore, lacked standing to challenge the subpoena issued to the bank). Again, Bank of America has neither entered an appearance nor moved to quash the Receiver's subpoenas. It is clear, "Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action unless the party claims some personal right or privilege with regard to the documents sought." 9A WRIGHT & MILLER § 2459. Nevertheless, the Court agrees that some measure of protection of certain confidential material is warranted under Rule 26.

A. The Receiver is Entitled to Production of Cook's and Media Choice's Bank Records, Subject to a Protective Order Limiting Public Disclosure.

1. The Receiver Has Established the Relevance of Cook's and Media Choice's Bank Records.

Production of these non-parties' bank records are required under the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 26(b) is liberally interpreted to permit wide-ranging discovery of information even though the information may not be admissible at the trial. *See* Fed. R. Civ. P. 26.[5] In this case, Cook has many business dealings with Pukke, both business and personal, which involve the transfers of large amounts of money to co-owned businesses. Additionally, Pukke still has a 35% ownership interest in Prudent Choice. Discovery of Cook's bank accounts is relevant to the pending AmeriDebt enforcement action. The same can be said of Media Choice. While Media Choice had no dealings with Ameridebt, DebtWorks, and/or Pukke, there are some activities which merit the Receiver's investigation including receiving large amounts of money from Pukke's father after the formation of the Receivership from a bank account that can be traced directly to Pukke. Both non-parties may possess funds which may be property of the Receivership. Given the activities between Mr.

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[5] Federal Rule of Civil Procedure 26(b) reflects the historical boundaries of discoverable information:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it related to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and locations of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1).

Cook and the target entities, the Court finds there is a legitimate and substantial basis for the materials sought by the Receiver.

Rule 45 allows parties to request documents and other information in the possession of non-parties. "The non-party witness is subject to the same scope of discovery under this rule as that person would be as a party to whom a request is addressed pursuant to Rule 34." Advisory Committee Notes to 1991 Amendment. Investigation into the bank records of both Cook and Media Choice "appears to be reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Cook's Motion and Media Choice's Motion are DENIED as to these arguments.

2. Once Relevance Is Established, Non-parties Cook and Media Choice Cannot Prevent Disclosure of the Bank Records Without Asserting a Personal Right or Privilege.

Despite the arguments proffered by the non-parties, it remains clear that neither Cook nor Media Choice asserts any recognized privilege, personal right, or law which prevents disclosure of thier respective bank records. In *Clayton Brokerage Co., Inc. v. Clement*, 87 F.R.D. 569 (D. Md. 1980), this Court was faced with an analogous situation. There a non-party bank moved to quash a subpoena of certain financial records from a bank customer who was a civil litigant. This Court held that a "bank customer has no inherent right to assert either ownership, possession, or inferentially, control over the release of a bank's records of his transactions." *Clayton Brokerage,* 87 F.R.D. at 571. Bank "records are not confidential communications but instruments of commercial transactions" and are the bank's business records. *Id.*

The *Clayton Brokerage* Court applied the Supreme Court's reasoning set forth in *United States v. Miller*, 425 U.S. 435 (1975). In *Miller*, the Supreme Court held a bank customer has no

legitimate expectation of privacy under the Fourth Amendment "in the contents of checks, deposit slips and other banking documents." *Miller*, 425 U.S. at 442. Non-parties Cook and Media Choice have no personal right or privilege to prevent disclosure of the bank's records to the Receiver. As in *Clayton Brokerage*, these non-parties have "failed to identify a personal right on which a challenge to the subpoena may be based." *Clayton Brokerage*, 87 F.R.D. at 571. As a result, Bank of America must produced the subpoenaed bank records of both non-party Cook and Media Choice. Cook's Motion and Media Choice's Motion are DENIED as to these arguments.

3. A Limited Protective Order Is Required to Prevent the Public Disclosure of Certain Private Information Contained in Non-party Cook's and Media Choice's Bank Records.

It must be noted that the Receiver is not the ordinary civil litigant, but is instead a neutral court officer appointed to "increase the likelihood of preserving assets, pending final determination of this matter." The Receiver reports to the Court and otherwise publishes the results of the ongoing investigation to both the Court and the public. Thus, there is some potential for public disclosure of private information which properly does not belong in the public realm. In *Bush Dev. Corp. v. Harbour Place Assocs.*, 632 F. Supp. 1359 (E.D. Va. 1986), the court found that bank customers had no standing to quash a subpoena filed in a civil action, yet the court issued the following protective order:

> Plaintiff's counsel shall not disclose the contents to any other person or entity other than the agents of his client and the information contained shall be used solely for purposes of this law suit and the disclosure, if any, of the documents or any part thereof by plaintiff's counsel and his agents and employees or by the agents or employee of the plaintiff corporation for any other purpose is expressly forbidden.

Id. at 1364. Despite the fact that non-parties Cook and Media Choice have no privilege of personal right which precludes the discovery of Bank of America's bank records, this Court will enter a protective order against public disclosure. While the public has a right to know the results of the investigation, specific information such as records themselves, including personal identifying information such as addresses, phone numbers, and bank account numbers should be protected from public disclosure. Cook's Motion and Media Choice's Motion are GRANTED with respect to requests for protective orders from public disclosure.

B. Issuing Subpoenas Without Leave of this Court is Specifically Enumerated Within the Receiver's Power under the Preliminary Injunction Order.

Non-parties Cook and Media Choice contend that the Receiver was required to obtain leave of this Court before issuing the present subpoenas. The argument continues, that without such leave, the subpoenas are beyond the power granted to Receiver by this Court. The non-parties liken the Receiver to a bankruptcy trustee, who must first seek leave prior to issuing subpoenas. However, non-parties Cook's and Media Choice's contentions are easily resolved by reference to Section XIII of the Preliminary Injunction Order which specifically grants the Receiver power issue subpoenas: "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 . . . ". Additionally, Section VI.A.7 authorizes the Receiver to bring legal actions as appropriate in discharging the Receiver's duties. Issuing subpoenas for documents and taking depositions of persons relevant to the pending matter is within the power granted by this Court. Cook's Motion and Media Choice's Motion are DENIED as to these arguments.

C. The Receiver's Subpoenas Are Exempt from the Financial Institutions Article of the Maryland Code Annotated's Bank Certificate Requirements.

Non-parties Cook and Media Choice argue that the Receiver's subpoenas lacked a certificate as required by Section 1-301, *et seq.* of the Financial Institutions Article of the Maryland Code. While in Cook's case the Receiver served Cook's counsel with a copy of the subpoena, no such accommodation was made to Media Choice. Generally, under Maryland law, a bank may not make any disclosure concerning a customer's account without the customer's express or implied consent. *Bond v. Slavin*, 157 Md. App. 340, 851 A.2d 598 (2004). However, the applicability of these provisions of the Financial Institutions Article to discovery requests issued in federal courts is already the subject matter of an opinion by this Court.

In *United States v. Equitable Trust Co.*, 524 F. Supp. 1133 (D. Md. 1981), this Court was called upon to resolve motions to compel where Maryland financial institutions were served with discovery requests and the parties objected arguing that the Maryland Code prevents such disclosure. However, as this Court noted then, the Maryland General Assembly specifically created an exemption for "reports or returns required by Federal law." MD. CODE ANN., FIN. INST. § 1-303(5) (2005). Then as now, "exemption (5) permits Maryland financial institutions to disclose customer records when required to do so under federal law." *Equitable Trust*, 524 F. Supp. at 1136. Responding to a subpoena issued under Rule 45 of the Federal Rules of Civil Procedure is a requirement of federal law. The Court notes that non-parties Cook and Media Choice have made no arguments that the Receiver's subpoenas did not comply with Federal Rule of Civil Procedure 45. Since the subpoenas were properly issued under federal law, these subpoenas fall within a recognized exemption of the Maryland Code. Thus, the Receiver's

subpoenas need not comply with this aspect of Maryland law. Cook's Motion and Media Choice's Motion are DENIED as to these arguments.

CONCLUSION

The Court GRANTS IN PART and DENIES IN PART Cook's Motion and Media Choice's Motion to quash the Receiver's subpoenas. The Court's finds:

(1) that the Receiver's subpoenas for non-parties Cook's and Media Choice's bank records from Bank of America are relevant;

(2) that non-parties Cook and Media Choice assert no privilege or personal right which precludes the disclosure of these bank records;

(3) that a protective order preventing the public disclosure of certain private information is necessary;

(4) that the Receiver is empowered to subpoena relevant non-party financial records without leave of Court; and,

(5) that the Receiver's subpoenas are not subject to the Financial Institutions Article of the Maryland Code Annotated.

/s/
Charles B. Day
United States Magistrate Judge

September 11, 2006

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Sanford M Saunders, Jr saundersS@gtlaw.com
Gary C Adler gadler@oconnorhannan.com, jmurphy@oconnorhannan.com
Ramona Dee Elliott relliott@ftc.gov
Daniel E Johnson djohnson@mckennalong.com
Stuart M Fischbein Stuart.M.Fischbein@usdoj.gov, eastern.taxcivil@usdoj.gov
Charles Kevin Kobbe kevin.kobbe@dlapiper.com
John Buchanan Williams jbwilliams@jonesday.com, aypowell@jonesday.com
Robert M Adler Radler@oconnorhannan.com, jcomisiak@oconnorhannan.com, jtowell@oconnorhannan.com
Peder van Wagonen Magee pmagee@ftc.gov
Mark David Taylor taylor.mark@arentfox.com
Kevyn D Orr korr@jonesday.com
Gilbert David Dean, II gdean@saul.com
Lucy Emily Morris lmorris@ftc.gov
Allison Ilene Brown aibrown@ftc.gov, jcrouse@ftc.gov
Kevin Clark Maclay kcm@capdale.com

Lesley Anne Hawes lhawes@mcken! nalong.com, pcoates@mckennalong.com
Gary Owen Caris gcaris@mckennalong.com, pcoates@mckennalong.com
Jeffrey Mark Reisner jreisner@irell.com
William N Lobel wlobel@irell.com
Geoffrey Smith Irwin gsirwin@jonesday.com
Jamie E Hine jhine@ftc.gov

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Federal Trade Commission
600 Pennsylvania Ave NW
Washington, DC 20580

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Jones Day
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