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Receiver of the Assets of
DebtWorks, Inc., and
Andris Pukke
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Federal Trade Commission v. Ameridebt, Inc., et al.
CASE No. 8:06-MC-00012

Non-Parties' Objection to Magistrate Day's Order Dated Order dated October 12, 2006 and Motion to Reconsider, Modify or Set Aside

Filed October 26, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Southern Division

FEDERAL TRADE COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 8:06-MC-00012
	)	
AMERIDEBT, INC. et al.	)	
	)	
Defendants.	)	
	)	

NON-PARTIES' OBJECTION TO MAGISTRATE DAY'S ORDER DATED OCTOBER 12, 2006 AND MOTION TO RECONSIDER, MODIFY OR SET ASIDE

Non-Parties John Vipulis and Rachlin, Cohen & Holtz LLP (hereinafter collectively referred to as "Petitioners"), by and through their undersigned counsel and pursuant to 28 U.S.C. §636(b), Federal Rule 72, and Local Rule 301, hereby jointly submit this Objection to Magistrate Day's Order Dated October 12, 2006 and Motion to Reconsider, Modify or Set Aside. As set forth in detail below, Magistrate Day's Order is clearly erroneous and contrary to law.

INTRODUCTION

This Motion seeks reconsideration of Magistrate Day's Memorandum Opinion dated October 12, 2006 (hereinafter "Opinion") in which Magistrate Day refused to properly quash or otherwise limit a vastly overreaching and improper subpoena issued by a Receiver appointed at the behest of the Federal Trade Commission ("FTC"). The requested documents belong to an affected non-party, John Vipulis ("Mr. Vipulis"), and are being sought from yet another non-party, Rachlin, Cohen & Holtz LLP ("Rachlin"). A reading of the subpoena reveals that compliance will capture documents belonging to a myriad of non-parties, none of whom have apparently been given notice. In addition to being

excessively broad, the subpoena at issue seeks documents clearly irrelevant to the underlying proceeding and which are protected from disclosure by various privileges. Thus, Petitioners sought protection in the form of an Order quashing the subpoena or otherwise properly limiting the scope of the subpoena.

Robb Evans & Associates, L.L.C., (the "Receiver") was appointed as Receiver to marshal, conserve, protect and operate the assets constituting the receivership property of Andres Pukke ("Mr. Pukke") and Debtworks, Inc. In PJM 03-3317, the Court issued a preliminary injunction to "increase the likelihood of preserving assets, pending final determination of this matter." The instant dispute involves the Receiver's investigation as it relates to non-parties, Petitioners Mr. Vipulis and Rachlin.

Petitioners' respective objections to the subpoena were filed in the United States District Court, Southern District of Florida. The matter was then transferred from the United States District Court for the Southern District of Florida pursuant to that Court's Order on January 4, 2006. Magistrate Day then considered the objections of Petitioners and the memoranda related thereto. After determining that no hearing was necessary, Magistrate Day, on October 12, 2006 granted in part and denied in part Petitioners' Motion for Protective Order, to Terminate or Limit Inspection, and/or Quash Subpoena Issued to Rachlin and Objections to Subpoena.

PROCEDURAL HISTORY

On or about November 19, 2003, the FTC filed an action against Ameridebt, Inc. ("Ameridebt"), Debtworks, and Mr. Pukke, for, among other things, allegedly engaging in unfair or deceptive acts or practices affecting commerce in violation of Section 5(a) and 13(b) of the Federal Trade Commission Act ("the FTC Act"), 15 D.S.C. §§ 45(a) and 53(b), and against Ameridebt for failure to provide consumers with disclosures as required by Sections 503 and S05(a)(7) of the Gramm-Leach-Bliley Act

("GLB Act"), 15 U.S.C. §§ 6803 and 6805(a)(7) ("Complaint")[1]. The Complaint was filed in the United States District Court, District of Maryland.

Ameridebt is a non-profit organization that provides credit counseling to consumers through Debtworks, a company in which Mr. Pukke was the founder and sole shareholder. According to the Complaint, Defendants Ameridebt, Debtworks and Mr. Pukke operated as a common enterprise to deceive consumers into paying for high cost debt management plans. Mr. Vipulis, however, is not a party to that action. In fact, he is not *mentioned* in the Complaint. Mr. Vipulis has no ownership interest in, or any association with, Ameridebt or Debtworks. He is not in the credit counseling business. He is not accused of wrongdoing, and he is not accused of wasting assets. Mr. Vipulis neither sat on the board of directors of Ameridebt or Debtworks, nor was he an officer of either company.

In 2002, Mr. Vipulis selected Mr. Pukke to serve as a trustee of two trusts, a family trust and a charitable trust, and as an officer and director of one entity, which were set up for the benefit of Mr. Vipulis and his family, not for Mr. Pukke. As Magistrate Day concluded, Mr. Pukke ceased to have any role as a trustee, officer and/or director of those entities as of September 15, 2003.

On April 20, 2005, the District of Maryland entered a preliminary injunction against Mr. Pukke and Debtworks on the merits of the FTC's claims and appointed a Receiver to represent the FTC to freeze Mr. Pukke's property and liquidate any wasting assets under Maryland law. The Court filed its opinion in support of the Preliminary Injunction Order on May 6, 2005.

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[1] Copies of pertinent pleadings and orders are contained in the Appendix filed contemporaneously with Mr. Vipulis' Motion for Protective Order, To Terminate or Limit Inspection, and/or Quash Subpoena Issued to Rachlin Cohen & Holtz, LLP; Objections to Subpoena; and Supporting Memorandum of Law (hereinafter Mr. Vipulis' Motion and Objection") incorporated herein by reference.

The Receiver, from the date of his appointment on April 20, 2005, has conducted an extensive investigation into the Pukke's assets and financial dealings. The results of the Receiver's investigation obtained to date are reflected in the Receiver's Report of Activities filed with the District Court on June 29, 2005 ("Receiver's Initial Report").[2] The Receiver's Initial Report details millions of dollars of transactions by Mr. Pukke and entities affiliated with Mr. Pukke. Despite this exhaustive and time consuming analysis, Mr. Vipulis is never personally mentioned in that report.[3] Nor were any of the companies listed in the subpoena except for Maple Ventures. Indeed, Magistrate Day concluded that the Receiver has not established a firm connection between Mr. Pukke and Angelfish, Goldfish or Spruce.[4] Defendant, Pukke filed a Response to the Receiver's Initial Report on July 7, 2005.

After filing his report, the Receiver served the subpoena at issue on non-party Rachlin on or about July 12, 2005, with the date for the production set for July 19, 2005. The subpoena was not served by the FTC in its administrative capacity or pursuant to an investigation. Instead, the subpoena was served by Receiver who had been appointed by the District Court to pursue assets at the behest of the FTC. Non-party Mr. Vipulis was not served with the subpoena nor were any of the affected entities.

When Mr. Vipulis became aware of the subpoena, Florida counsel reached an agreement with the FTC (documented in correspondence) with respect to that Mr. Vipulis would have until August 15, 2005

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[2] A copy of the Receiver's Initial Report was attached to Mr. Vipulis' Motion and Objection as Exhibit "4" to the Appendix and is incorporated herein by reference.

[3] Except for the fact that Mr. Vipulis is President of Maple Ventures.

[4] See Opinion at p. 9.

to object to the subpoena and file any appropriate motion with the Court.[5] Mr. Vipulis and Rachlin each filed objections to the Receiver's subpoena in the United States District Court for the Southern District of Florida, and moved for various relief (*e.g.*, to quash or limit the subpoena, and/or for a protective order) pursuant to Rules 45 and 26 of the Federal Rules of Civil Procedure.

While those motions were pending, on January 4, 2006, a magistrate judge in Florida issued an Order which transferred Petitioners' pending Motions to this Court.[6] On October 12, 2006, the Motions were ruled upon by Magistrate Day. Petitioners now object to Magistrate Day's Opinion and seek reconsideration, modification and/or other appropriate relief.

STANDARD OF REVIEW

The Federal Magistrates Act, 28 U.S.C. § 631, et seq., and the Federal Rules of Civil Procedure specifically provide for the District Judge's review of an order issued by a Magistrate Judge. In re Search Warrants Issued on April 26, 2004, 353 F.Supp.2d 584, 586 (D.Md., 2004). Rule 72 provides that, for nondispositive matters,"[t]he district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Id. citing Fed.R.Civ.P. 72(a); see also 28 U.S.C. § 636(b)(1)(A) ("A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."); Local Rule 301 §5 (D.Md.2004).

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[5] Receiver has not challenged Petitioners' objections on the grounds of timeliness.

[6] Petitioners maintain that said transfer was improper and unauthorized under the Federal Rules of Civil Procedure, and adopt and incorporate by reference their earlier arguments on this point set forth in their respective Motions for Protective Order and/or to Quash the Subpoena issued to Rachlin, Objections to Subpoena, and supporting Memorandum of Law filed in the Southern District of Florida.

Applying this standard, the United States Court of Appeals for the Fourth Circuit has recognized that "[t]he factual findings of a magistrate are entitled to the same deference upon review as those of the trial court under the clearly erroneous standard." Gairola v. Com. of Va. Dept. of General Services, 753 F.2d 1281, 1288 (4th Cir.1985). When an objection is timely made, the standards set forth above apply to a district court's review of a magistrate judge's decision concerning a discovery dispute. Buchanan v. Consolidated Stores Corp., 206 F.R.D. 123, 124 (D.Md.2002).

SUMMARY OF LEGAL ARGUMENT

Petitioners jointly maintain that Magistrate Day was clearly erroneous in ruling that: (1) the subpoena issued to Rachlin was a reasonable exercise of the Receiver's authority; (2) the subpoena was not overbroad; (3) the subpoena was not unduly burdensome; (4) Florida's accountant-client privilege is inapplicable to the subpoena; (5) the attorney-client privilege is not applicable to the documents requested under the subpoena; (6) Mr. Vipulis failed to meet his burden to invoke the work product privilege; and (7) the tax returns and other confidential business records are not confidential or protected by a right to privacy.

As set forth in detail below, the foregoing rulings are contrary to relevant legal precedent, and as such, are entitled to review by a District Judge pursuant to Local Rule 301 §5(a) (D.Md.2004). Petitioners further object on the ground that Magistrate Day erred in not issuing an appropriately narrow protective order, and by not requiring an *in camera* review. Without further limiting the scope of documents to be produced, Rachlin may be forced to supply documents pertaining to clients who are not a party to this litigation or named in the subpoena. Finally, Petitioners object on grounds that if a production is ordered, Magistrate Day erred in failing to issue a confidentiality order limiting disclosure of the produced documents to the Receiver and to this litigation.

LEGAL ARGUMENT

I. The Magistrate Judge Erred in Ruling that the Subpoena Was Reasonable and Not Overbroad.

The Magistrate Judge clearly erred when he concluded that the subpoena issued to Rachlin was reasonable. A subpoena should be quashed when it is unduly burdensome on the subpoenaed party. See e.g., Concord Boat Corp. v. Brunswick Corp, 169 F.R.D. 44, 48 (S.D.N.Y. 1996). Whether a subpoena places an undue burden on a party depends on many factors, such as the relevance of the documents sought, the necessity of the documents sought, the breadth of the request, the particularity with which the documents are described, and the burden in fact imposed. Id. at 49.

The documents responsive to the subpoena served upon Rachlin involve many pages of personal financial records and tax returns of Mr. Vipulis and entities which he controls that are irrelevant to the FTC's search for Mr. Pukke's assets. Mr. Vipulis selected Mr. Pukke to serve as a trustee of two trusts, and as an officer and director of one entity, which were set up for the benefit of Mr. Vipulis' family, not for Mr. Pukke. In short, the documents sought by the FTC are irrelevant to the stated purpose in the Preliminary Injunction - to locate the assets of Mr. Pukke.

The subpoena served by the Receiver upon Rachlin should be quashed and/or terminated because it is overbroad and overreaching, seeking information regarding Mr. Vipulis' assets, even though Mr. Vipulis is not a party to this action nor has he even been associated with Ameridebt or Debtworks. Mr. Pukke admittedly is a long time personal friend and college roommate, who, in 2002, Mr. Vipulis appointed vice-president and director of Maple Ventures, as general trustee of Bluefish Investments Charitable Remainder Trust and as trustee of JV Descendants Trust (all of which benefit Mr. Vipulis and his family, not Mr. Pukke). Mr. Pukke was never associated with Angelfish Investments, Goldfish Investments and Spruce Investments - entities in which Mr. Vipulis has a controlling interest. Nor has Mr. Vipulis had any involvement in the P Family Trust of the P II Family Trust (Rachlin does not even

have any documents related to these Pukke family trusts). The allegations of any connection between Vipulis and Pukke are purely attenuated, speculative and conjectural.

In fact, there has been no showing that Rachlin possesses any documents responsive to the subpoena which reflect the amount, nature or location of assets or things of value belonging to Mr. Pukke. Due to the broad scope of the subpoena, a great many confidential and privileged tax and business related documents belonging to Mr. Vipulis are responsive to the subpoena. The Receiver has made sweeping requests and made no effort to specify the requested documents with particularity. Without further limiting the scope of documents to be produced, Rachlin may be forced to supply documents pertaining to clients who are not a party to this litigation or named in the subpoena. Therefore, Petitioners object to Magistrate Day's clearly erroneous ruling that the subpoena was reasonable and not overly broad.

II. The Magistrate Judge Erred in Ruling that Mr. Vipulis' Tax Returns Are Not Protected by a Right of Privacy.

The Magistrate Judge erred when he held that "Vipulis is incorrect in his assertion that tax returns are confidential and protected by a right of privacy." Federal law provides a taxpayer with a right to the privacy of his tax returns. 26 U.S.C. §6103. "[A] public policy against unnecessary public disclosures arises from the need, if the tax returns are to function properly, to encourage taxpayers to file complete and accurate returns." Premium Service Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir.1975)(affirming district court's quashing of subpoena seeking non-party's tax returns in antitrust case). "Congress has guaranteed that federal tax returns will be treated as confidential communications between a taxpayer and the government." Demasi v. Weiss, 669 F.2d 114, 119 (3d Cir. 1982). "Public policy disfavors the disclosure of income tax returns." Id. (quoting Cooper v. Hallgartn & Co., 34 F.R.D. 482, 483 (S.D.N.Y. 1964)). Florida law also confers a right to the privacy of tax

returns. See Voytish v. Ozycz, 695 So. 2d 1301 (Fla. 4th DCA 1997)(quashing order for non-party to produce tax returns).

Likewise, federal courts have frequently protected non-parties - which it is important to note Mr. Vipulis and Rachlin are - from over-intrusive subpoenas directed to their confidential financial records. See, e.g., Levine v. Fairbanks Capital Corp., 2003 WL 2006653 (E.D.La. 2003) (There is "no hint as to why the records of the named non-parties to this litigation are relevant in any way. In addition, even if their relevance could be adequately explained, the court will not require their production unless it is provided with the sworn, written consent of the named non-parties requesting and consenting to the release of records concerning their personal financial dealings."); In Re Vitamins Antitrust Litigation, 267 F. Supp. 2d 738 (S.D. Ohio 2003)(granting non-party's motion to quash subpoena directed to confidential financial documents); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Inc., 218 F.R.D. 423 (D.Del. 2003)(quashing subpoena directed to non-party financial records); Semtek Intern, Inc. v. Merkuriy Ltd., 1996 WL 238538 (N.D.N.Y. May 1, 1996)(denying motion to enforce subpoena against non-party which sought confidential commercial information); Catskill Dev., LLC v. Park Place Entertainment Group, 206 F.R.D. 78 (S.D.N.Y. 2002)(quashing subpoena of non-party's banking records, despite contention that such banking information may reveal money used for bride or other impropriety); Perry v. Best Lock, 1999 WL 33494858 (S.D.Ind. Jan. 21, 1999) (quashing subpoenas of records including loss prevention files, compensation records and benefits records as fishing expedition); Greater Rockford Energy & Technology Corp. v. Shell Oil, 138 F.R.D. 530 (C.D.Ill. 1991)(party not permitted to subpoena non-party's confidential business information); Micro Motion, Inc. v. Kane Steel Co., Inc., 894 F.2d 1318 (Fed. 1990)(circuit court reversed district court's denial of motion to quash subpoena of non-party business information); Spar, Inc. v. Dailey, 1988 WL 6741

(N.D.Ill. Jan. 27, 1988)(quashing subpoena of non-party business records); Premium Service Corp. v. Sperry & Hutchinson Co., 511 F.2d 225 (9th Cir. 1975)(circuit court affirmed district court's quashing of subpoena to non-party seeking financial documents and tax returns).

Based on this authority, Petitioners jointly object to Magistrate Day's clearly erroneous ruling requiring the production of Mr. Vipulis' confidential personal financial records and tax returns.

III. The Magistrate Judge Erred in Ruling that the Accountant-Client Privilege is Inapplicable to This Subpoena.

The Magistrate Judge clearly erred when he held that there is no applicable accountant-client privilege. Florida recognizes an accountant/client privilege. Fla. Stat. 473.316 (2002); Choice Restaurant Acquisition Ltd. v. Whitley, Inc., 816 So. 2d 1165 (Fla. 4th DCA 2002).[7] Federal Rule of Evidence 501 provides that any person may assert a state law privilege in any federal civil proceeding "with respect to an element or defense as to which State law supplies the rule of decision ...." Id. Federal courts have construed this rule to permit the assertion of a state law privilege when state law claims or defenses are raised in the underlying litigation. See, e.g., Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851 (3d Cir.1994)(granting writ of mandamus and finding that lower court should have quashed subpoena on accounting firm where state law had an accountant/client privilege); see also Davis v. Leal, 43 F. Supp. 2d 1102, 1107-1108 (E.D.Cal. 1999)(FTIC was not entitled to apply federal law when it was acting as a receiver to collect a debt under state law claims).

This action, though traveling under federal statutes, also presents numerous state law claims and defenses, which, in turn, trigger the application of state law privileges to the requested documents. The FTC's Complaint raises numerous state law claims for relief, including: (1) the equitable relief they are

[7] As does Maryland law. See e.g., Md. Code Ann., Cts. & Jud. Proc.§ 9-110.

seeking; (2) claims for rescission; (3) claims for reformation; (4) claims for restitution; (5) claims for disgorgement; (6) claims for misrepresentation; (7) claims for accounting; and (8) the interpretation of contracts. Likewise, Defendants raised numerous state law defenses including: (1) failure to mitigate; (2) release, accord and satisfaction; (3) laches; (4) estoppel; (5) waiver; and (6) lack of vicarious liability and common enterprise.[8] Still further, like the federal agency in Davis, *supra*, the FTC is acting as a receiver and state law will come into play during the collection of assets. In fact, in its May 9, 2005 Order, this Court stated that "[f]reezing the assets in this case would do no more than effectuate Maryland law by preserving the Pukkes' gains for eventual return to their victims." (Appendix, Exhibit 3, p. 9). Furthermore, if the Receiver contends that Mr. Vipulis' assets are Mr. Pukke's assets, in whole or in part, state law will govern that contention. Lastly, if any misconduct by Mr. Pukke were to create a liability for Mr. Vipulis, he would have potential state law claims he could make against Mr. Pukke in this action. The Magistrate Judge did not address any of these claims specifically.

Given the plethora of state law issues raised by this action, Mr. Vipulis is legally entitled, under Federal Rule of Evidence 501, to assert a state law claim of accountant/client privilege. Since the vast majority of requested documents seek information that was subject to the accountant/client privilege (and given that the Receiver has made no effort to phrase the requests to exclude such documents), the Magistrate Judge's Order requiring production of the records was clearly contrary to the relevant law.

[8] This Court has stricken some of the Defendant's affirmative defenses, but as they were state law defenses this would have entailed the application of state law.

IV. The Magistrate Judge Erred in Ruling that the Attorney-Client Privilege and the Work Product Privilege Are Inapplicable.

The Magistrate Judge clearly erred in holding that Petitioners failed to meet the burden necessary to invoke the attorney-client privilege or the work product privilege. Yet, the Magistrate Judge also held that "[t]he attorney client privilege and corresponding work product doctrine may prevent disclosure of some of Rachlin's documents." This is inconsistent, and leaves open the issues of which documents were deemed privileged and which ones were not.

Federal Rule of Civil Procedure 45 (c)(3)(A)(iii) permits a Court to quash or modify a subpoena if the subpoena requires disclosure of privileged or other protected matters and no exception or waiver applies. See e.g., In re Grand Jury Proceedings, 624 F.2d 17 (5th Cir. 1980) (overruling the trial court's denial of a party's motion to quash a subpoena *duces tecum* on the basis of attorney client privilege and attorney work product).

The documents in Rachlin's possession relating to Mr. Vipulis and the entities named in the subpoena include correspondence between Mr. Vipulis, Rachlin (as Mr. Vipulis' agent) and Greenberg Traurig, who were Mr. Vipulis' attorneys in the formation of the entities listed in the subpoena. The Supreme Court has expressly recognized that the attorney-client privilege enjoys a special position as "the oldest of the privileges for confidential communications known to the common law" and that the privilege serves a salutary and important purpose: to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Accordingly, if a party demonstrates that attorney-client privilege applies, the privilege affords all communications between attorney and client absolute and complete protection from disclosure. *See In re Grand Jury*

Proceedings, 102 F.3d 748, 750 (4th Cir.1996) ("No doubt exists that under normal circumstances, an attorney's advice provided to a client, and communications between attorney and client are protected by attorney-client privilege."). See also, In re Allen, 106 F.3d 586 (4th Cir. 1997)(confidential attorney-client communications and investigations are essential to providing legal representation of the client. Magistrate Day should have quashed or modified the subpoena because these privileged documents are subject to attorney client privilege and/or work product privilege.[9]

Magistrate Day also improperly relied on the fact that the privileged documents were in the hands of Mr. Vipulis' accountants, and that somehow this fact rendered them non-privileged. But Mr. Vipulis placed those documents into the hands of his Florida accountants, with whom under Florida law he enjoys an accountant-client privilege, long before any subpoena was ever served. Mr. Vipulis never left the umbrella of his state law privileges on which he reasonably relied, and the subpoena should not vitiate them. Moreover, the Magistrate Judge was clearly erroneous in failing to review the documents to determine the scope of privilege, or fully articulate the reasons it would not apply, and on this basis also Mr. Vipulis objects to the Magistrate Judge's ruling.

V. The Magistrate Judge Erred in Ruling that the Subpoena Was Within the Authority Granted to the Receiver by the District Court's Order.

The Magistrate Judge clearly erred in ruling that the issuance of the subpoena was within the Receiver's authority under the Preliminary Injunctive Order. The April 20, 2005 Preliminary Injunction Order which appointed the Receiver states that "The Receiver shall ... [u]se *reasonable* efforts to

[9] Mr. Vipulis provided a privilege log to the Receiver.

determine the nature, location, and value of all *Receivership* Property."[10] For the reasons stated herein, this unwarranted and intrusive fishing expedition is not reasonable. Moreover, the Receiver is pursuing property that is not "receivership property" - it is Mr. Vipulis' property. The subpoena does not even ask for, or limit its scope to, documents relating to Mr. Pukke or Debtworks; instead, it asks for the listed non-parties' records. For these reasons, the Magistrate Judge clearly erred in finding that the subpoena was authorized by this Court.

VI. The Magistrate Judge Erred by too Narrowly Construing the Protective Order When Petitioners' Were Entitled to Broader Relief.

Petitioners object on grounds that the Magistrate Judge clearly erred in Ordering an insufficient protective order. Mr. Vipulis moved for a protective order limiting the subpoena to those documents related to Mr. Pukke, and requiring that a Magistrate Judge review all documents requested *in camera*. Mr. Vipulis also moved that a confidentially order be entered prohibiting disclosure of the produced documents to anyone other than the Receiver.

There is no question that federal courts have the authority to modify subpoenas. See Fed. R. Civ. P. 45; see also Adair v. Rose Law Firm, 867 F. Supp. 1111, 1119 (D.D.C.1994) ("It is a legitimate exercise of the [federal] court's authority to modify the terms of a subpoena by providing additional confidentiality protections for a person or entity to whom the subpoena is directed ...." (citing United States v. Exxon Corp., 628 F.2d 70, 77 (D.C.Cir.1980)). To succeed on a request for a protective order, a requestor must make a showing of good cause. Equal Employment Opportunity Comm'n v. Nat'l Children's Center, Inc., 98 F.3d 1406, 1411 (D.C.Cir.1996) (citing Seattle Times Co. v. Rhinehart, 467

[10] Mr. Vipulis' Motion and Objection at Appendix, Ex. 2 p. 10 adopted and incorporated herein by reference.

U.S. 20, 37 (1984)). According to Rule 26(c), [t]he court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden ..., including ... that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.... Fed.R.Civ.P. 26(c)(7). Rule 26(c), therefore, provides for the issuance of protective orders that restrict the dissemination and use of documents containing confidential information. Zenith Radio Corp. v. Matsushita Electric Industrial Co., 529 F. Supp. 866, 890-91 (E.D. Pa. 1981). If it is established that confidential information is being sought, then the burden is on the party seeking discovery to establish that the information is sufficiently relevant and necessary to his case to outweigh the harm disclosure would cause to the person from whom he is seeking information. Shields Enterprises v. First Chicago Corp., 1988 WL 142200 * 4 (N.D. Ill.).

In addition, a trial court possesses broad discretion in issuing a protective order and in determining what degree of protection is required. Purcell v. MWI Corp.,209 F.R.D. 21, 27 (D.D.C.2002) (citing Seattle Times, 467 U.S. at 36). In exercising that discretion, the court must assess factors including the requestor's need for the information from this particular source, the relevance of the information to the litigation at hand, the burden of producing the sought-after material, and the harm which disclosure would cause to the party seeking to protect the information. *Id.* at 27-28.

Applying this test, Mr. Vipulis met his burden of showing good cause that the documents requested are confidential and privileged, that they are not relevant, that the Receiver has no need for them, that his claim of privilege is well founded, and that he would be burdened and prejudiced by the requested production. By contrast, the Receiver has made no effort whatsoever to show a need for all of the documents, or made any attempt to narrow the scope of the subpoena to something reasonable. Accordingly, the subpoena should have been limited and/or modified.

In the event the Court were to order production of any or all of the documents, Mr. Vipulis justifiably moved that the Court enter an Order strictly limiting disclosure of the documents to the Receiver only, *to be disclosed to no other person,* and to be used for purposes of this litigation and for no other purpose. The Magistrate Judge erred by granting insufficient protection for the documents.

CONCLUSION

"[A] court is not required to permit discovery based merely on the hope on the part of a plaintiff that it might find evidence to support its complaint." Brubaker Amusement Co., Inc. v. U.S., 304 F. 3d 1349 (Fed. Cir. 2002). Yet, that is what the Receiver is attempting to do (only worse since this subpoena is to a non-party) by preparing broad, sweeping discovery with no legitimate reason for doing so, merely in the unwarranted hope that something will turn up. This Court should not permit this abuse of the subpoena power. For the reasons and citations of authority cited herein, Mr. Vipulis' Motion for Protective Order, to Terminate or Limit Inspection, and/or to Quash Subpoena Issued to Rachlin Cohen & Holtz, LLP; the Objections to Subpoena; the Supporting Memorandum of Law; and Rachlin's Objection, Motion to Quash and/or Motion for Protective Order, the Magistrate Judge's rulings were error.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October, 2006, a copy of Non-Parties' Objection To Magistrate Day's Order Dated October 12, 2006 And Motion To Reconsider, Modify Or Set Aside was filed electronically. A copy of the Opposition was also sent via first class mail postage prepaid to the following on October 26, 2006:

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/s/
James M. Timmerman, Esquire

Coates, Pamela

From: Hawes, Lesley Anne
Sent: Friday, October 27, 2006 6:46 AM
To: Coates, Pamela
Cc: Caris, Gary
Subject: FW: Activity in Case 8:06-mc-00012 Federal Trade Commission v. Ameridebt, Inc. et al Motion for Miscellaneous Relief

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Case Name: Federal Trade Commission v. Ameridebt, Inc. et al
Case Number: 8:06-mc-12
Filer: Rachlin Cohen & Holtz, LLP
John Vipulis
Document Number: 48

Docket Text:
Joint MOTION Objection to Magistrate Day's Order Dated October 12, 2006 and Motion to Reconsider Modify or Set Aside by John Vipulis, Rachlin Cohen & Holtz, LLP. Responses due by 11/13/2006 (Timmerman, James)

8:06-mc-12 Notice has been electronically mailed to:

James M Timmerman jtimmerman@milesstockbridge.com

8:06-mc-12 Notice will not be electonically delivered to:

The following document(s) are associated with this transaction:

Document description: Main Document
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Electronic document Stamp:
[STAMP dcecfStamp_ID=1046883720 [Date=10/26/2006] [FileNumber=1254716-0] [0f839d7c17d3894abbf1a68f06ed5b9ee05d2f3809b3db204573ae9b0aed4c00db946ced1c1e902003ca327b61e96277e984d4406b1517c428527ccdb63d54a0]]