

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

CASE NO. 08-81565-CIV-HURLEY/HOPKINS

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

CREATIVE CAPITAL CONSORTIUM,
LLC, A CREATIVE CAPITAL CONCEPT\$,
LLC, and GEORGE L. THEODULE,

Defendants.

**RECEIVER'S MOTION TO COMPEL THE PRODUCTION OF
CERTAIN DOCUMENTS IN RESPONSE TO HIS REQUEST FOR PRODUCTION
AGAINST WACHOVIA BANK, INCORPORATED MEMORANDUM OF LAW,
REQUEST TO FILE EXHIBIT B UNDER SEAL OR TO DELIVER IN CAMERA AND
REQUEST FOR HEARING**

The Receiver, Jonathan E. Perlman, pursuant to Rule Fed. R. Civ. P. 26(b), 34, 37(a) 45 and S.D. Fla. L.R. 26.1H, moves to compel the production of certain documents with respect to the subpoena ("Subpoena") dated April 20, 2009¹ and served upon Wachovia Bank, N.A. ("Wachovia") and says:

MOTION TO COMPEL

1. The Receiver files this motion to compel Wachovia to produce certain documents requested in the Subpoena, more specifically items 5-22.

2. The requests set forth in the Subpoena are relevant and reasonably calculated to lead to the discovery of admissible evidence in furtherance of the Receiver's obligations and

¹ A copy of the Subpoena is attached hereto as Exhibit "A."

responsibilities established by the Court in the Order Appointing Receiver.

3. The underlying facts in support of this motion demonstrate the existence of a massive Ponzi scheme which was effectuated in part through the use of multiple bank accounts, including those at Wachovia, by the Receivership Entities and their individual and corporate agents, and involved thousands of individual investors and over one hundred investment clubs.

4. Wachovia has not produced the aforementioned documents, nor has otherwise sufficiently responded fully to the Subpoena.

5. The facts, legal argument and citation to authority are set forth in the memorandum of law below.

6. Pursuant to Fed. R. Civ. P. 37(a)(1) , I hereby certify that I have attempted to confer and have conferred in good faith with counsel for Wachovia in an effort to obtain the documents requested without court action but have been unable to do so.

WHEREFORE, the Receiver requests an order compelling Wachovia to produce the aforementioned documents and to otherwise comply fully with the Subpoena. The Receiver further requests permission to file Exhibit "B" as identified herein under seal or to deliver Exhibit "B" to the Court for in camera inspection at the requested hearing of this Motion.

MEMORANDUM OF LAW IN SUPPORT OF MOTION

I. INTRODUCTION

The Receiver seeks to compel the production of documents to a Subpoena to produce certain documents served on Wachovia on April 20, 2009. Pursuant to the Subpoena, the Receiver seeks relevant information within the permissible scope of discovery regarding, among other things, any procedures instituted and loss management inquiry conducted by Wachovia with respect to certain named bank accounts listed on the exhibits to the Subpoena. Wachovia

has produced some bank account documents as well as a spreadsheet of entities for which Wachovia has information; however, to date Wachovia has failed to submit any documents responsive to items 5-22 of the Subpoena.

II. PROCEDURAL HISTORY

On December 29, 2008, the Securities and Exchange Commission (“SEC”) filed its Complaint for Injunctive and Other Relief (the “SEC Complaint”) against George Theodule and certain of the Receivership Entities in an action styled: *SEC v. Creative Capital Consortium, LLC, A Creative Capital Concept\$, LLC and George L. Theodule*, Case No. 08-81565-CIV-HURLEY/HOPKINS, pending in the United States District Court, Southern District of Florida (the “SEC Receivership Action”). The SEC alleged that Theodule, through certain Receivership Entities, sold unregistered securities and violated various sections of the Securities Exchange Act of 1934 (the “Exchange Act”). More specifically, the SEC alleged that Creative Capital Consortium, LLC, A Creative Capital Concept\$, LLC and George L. Theodule (collectively, the “SEC Defendants”) all violated section 10(b) of the Exchange Act. [D.E. 1]

The SEC sought a permanent injunction against the SEC Defendants to restrain them from any further securities law violations. Additionally, the SEC sought (1) an order requiring the SEC Defendants to provide a sworn accounting of all proceeds they received, directly or indirectly, as a result of the securities law violations; (2) an order requiring the SEC Defendants to disgorge, with prejudgment interest, any ill-gotten gains they received; (3) the imposition of civil penalties pursuant to section 20 (d) of the Securities Act and section 21 (d)(3) of the Exchange Act; (4) an order freezing the SEC Defendants’ assets pending resolution of the matter; and (5) the appointment of a receiver over the Receivership Entities. [D.E. 1/D.E. 2]

On December 29, 2008, the Court entered an order appointing the Receiver as receiver

over the SEC Defendants, their subsidiaries, successors and assigns, in the SEC Receivership Action (the "Receivership Order") [D.E. 8] Thereafter, by orders dated December 31, 2008 and September 21, 2009, respectively, the receivership was expanded to include United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G\$ Trade Financial, Inc., and Unity Entertainment Group, Inc. [D.E. 14/D.E. 162]

The Receivership Order authorized the Receiver to investigate the affairs of the Receivership Entities, to marshal and safeguard these entities' assets, and to institute legal proceedings for the benefit and on behalf of the Receivership Entities' investors and other creditors. Additionally, and pursuant to the Receivership Order, the Receiver is authorized and has standing to assert claims against third parties including but not limited to: (i) all legal and equitable claims available to the Receivership Entities prior to the institution of the SEC Receivership Action; and (ii) claims to avoid and recover fraudulent and preferential transfers receiver for the Receivership Entities and by virtue of his status as a joint lien creditor of the Receivership Entities pursuant to Florida Statutes, 671.201(13) and 679.1021(1)(zz).

On January 6, 2009, the Court entered a Preliminary Injunction, preventing the SEC Defendants from continuing to violate the securities laws and ordering the disgorgement of ill-gotten gains, the freezing of the SEC Defendants' assets, and the filing of a sworn accounting of all proceeds received. [D.E. 21]

On October 22, 2009, the Court entered a Judgment of Permanent Injunction and Other Relief against George Theodule [D.E. 179] and on March 36, 2010, the Court entered a Judgment of Permanent Injunction against Creative Capital Consortium, LLC. and A Creative Capital Concept\$, LLC. [D.E. 227]

II. FACTS

Subsequent to his appointment, the Receiver has determined that the Receivership Entities had no legitimate business operations. Specifically and during the time period leading up to the SEC Receivership Action and the entry of the Receivership Order, the SEC Defendants, directly and through the Receivership Entities and other third parties, including over 100 investment clubs located in Florida, New Jersey, Georgia and other states, raised in excess of \$63 million dollars by promising to double investments within 90 days risk free, among other material misrepresentations.²

The Receiver has also determined that so-called “profit payments” made to investors by the SEC Defendants and the Receivership Entities, along with other payments that appear to have no legitimate business purpose, could have only come from money raised from other investors and as such the Receivership Entities were operated as classic Ponzi schemes.

In accordance with the Receivership Order, the Receiver and his professionals have attempted to locate and secure money illegally raised, and any proceeds thereof, from investors by and through the Receivership Entities. To that end, the Receiver has initiated a number of lawsuits seeking, among other relief, to avoid and recover assets fraudulently transferred from the possession of the Receivership Entities.

In the course of his investigation, the Receiver has discovered that the principals and agents of the SEC Defendants and the Receivership Entities utilized certain financial institutions, such as Wachovia, as vehicles to establish bank accounts in order to deposit, withdraw, and transfer monies garnered from the investors of the Receivership Entities and of the investment

² At the preliminary injunction hearing held on January 6, 2009, the SEC introduced testimony and other documents evidencing a massive Ponzi scheme by which the Defendants were defrauding investors of millions of dollars based on the Theodule’s alleged investment expertise. [D.E. 21]

clubs in furtherance of the Ponzi scheme.

More specifically, the Receiver has discovered that the SEC Defendants and the Receivership Entities or their agents used the financial institutions, including Wachovia, as ground zero for the Ponzi scheme, amassing in those bank accounts approximately \$63 million dollars in total deposits illegally garnered from investors and subsequently and unlawfully disbursed to themselves, their agents or various third parties.

Insofar as Wachovia and other financial institutions served as the indispensable conduit for the Ponzi scheme, the Receiver believes that bona fide issues exist with respect to the relationship between those institutions and the SEC Defendants, Receivership Entities or their agents. In addition, those same financial institutions may possess knowledge or other information of the actions of the SEC Defendants and the Receiverships Entities or other related third parties which might lead to the discovery and recovery of assets or other claims potentially available to the Receiver.

On April 20, 2009 and in furtherance of the investigative duties established in Order Appointing Receiver, the Receiver served the Subpoena on Wachovia requesting, among other things, the following:

- [5] Any and all documents relating to any financial opinion commissioned by you and related to any of the ENTITIES.³
- [6] Any and all documents relating to any legal opinion commissioned by and related to any of the ENTITIES.
- [7] All know your customer files and risk files relating to any of the ENTITIES.
- [8] All documents and communications regarding your review of any of the accounts of the ENTITIES.

³ The term "Entities" is more specifically defined in the Subpoena.

- [9] All documents and communications regarding closing any of the accounts of any of the ENTITIES.
- [10] All documents and communications regarding your decision to keep open any of the accounts of any of the entities.
- [11] All documents relating to profile exception reviews of any of the accounts of any of the ENTITIES.
- [12] All loan files relating to any of the ENTITIES.
- [13] All documents relating to transfer analysis regarding any of the ENTITIES, including transfers to and from such ENTITIES.
- [14] All Bank Secrecy Act compliance activity reports relating to any of the ENTITIES.
- [15] All dollar and transaction volume reports relating to any of the ENTITIES.
- [16] All international incoming pouch log and/or deposit logs relating to the ENTITIES, concluding, but not limited to, any documents showing the verification of adherence to dual control requirements.
- [17] All risk code rating of any of the accounts of any of the ENTITIES.
- [18] All profile reviews relating to any of the accounts of any of the ENTITIES.
- [19] All wire transfer reviews as to all of the accounts of any of the ENTITIES.
- [20] All documents relating to your policy regarding closing accounts.
- [21] All communications, including any emails, telephone notes, correspondence, reports and any other documents between You and the ENTITIES related to Requests No. 1-20 above.
- [22] All communications, including any emails, telephone notes, correspondences, reports and any other documents between You and any third party related to Requests No.1-20 above.

Wachovia responded to the Subpoena by delivering certain bank account information, including copies of statements, opening account information and transactional activity. The spreadsheet generated by Wachovia listing those bank accounts is identified herein as Exhibit “B,” which, because of the confidential nature of the information, including names and account numbers, the Receiver requests to be delivered separately to the Court under seal or presented to the Court for in camera inspection at a scheduled hearing.

The documents produced by Wachovia to date are not fully responsive to the Subpoena. For example, it is clear that upon review of the pages of the bank statements of certain Receivership Entities, an internal investigation of the account was initiated by Wachovia, as indicated by the term “Loss Management.” Copies of those pages are attached as Composite Exhibit “C.”

Additionally, the Receiver has in his possession by virtue of third party document production a letter sent by Wachovia’s loss management division to at least one investment club, the contents of which indicate Wachovia’s closing of that club’s bank account. A copy of that letter is attached as Exhibit “D.”

III. LEGAL ARGUMENT AND CITATION TO AUTHORITY

Rule 26(b) of the Federal Rules of Civil Procedure defines the scope of discovery as including “any matter, not privileged, that is relevant to the claim or defense of any party” “the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”

It is well established that courts must employ a liberal discovery standard in keeping with the spirit and purpose of the discovery rules. *Graham v. Casey's Gen. Stores*, 206 F.R.D. 251,

253 (S.D.Ind.2002); e.g., *In re Theragenics Corp. Secs. Litigation*, 205 F.R.D. 631, 636-37 (N.D.Ga.2002); *White v. Kenneth Warren & Son, Ltd.*, 203 F.R.D. 364, 366 (N.D.Ill.2001). Accordingly, discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought has no possible bearing on the claims and defenses of the parties or otherwise on the subject matter of the action. *Dunkin' Donuts, Inc. v. Mary's Donuts, Inc.*, 2001 WL 34079319 *2 (S.D.Fla. Nov. 1, 2001). See *PharMerica, Inc. v Health Prime, Inc.*, 2008 WL 779329 (N.D. Georgia March 19, 2008) (Congress has created liberal discovery rules and has tried to ensure both parties' ability to obtain the information needed to resolve their dispute.)

Any objections to a motion to compel must, therefore, show that the requested discovery has no possible bearing on the claims or defenses of the case. *See Id.* (citing *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C.1978)); *Graham*, 206 F.R.D. at 254 (“[t]he party opposing discovery has the burden of showing the discovery is overly broad, unduly burdensome, or not relevant”). This means that the requested discovery (1) does not come within the broad scope of relevance as defined under Rule 26 or (2) is of such marginal relevance that the potential harm occasioned by discovery would far outweigh the ordinary presumption in favor of broad disclosure. *Giardina v. Lockheed Martin Corp.*, 2003 WL 21276348 (E.D.La. May 30, 2003); *Gober v. City of Leesburg*, 197 F.R.D. 519 (M.D.Fla.2000).

Applying the above referenced authority, the facts and circumstances which precipitated this action by the Securities and Exchange Commission and the resultant appointment of the Receiver point to the massive perpetration of a Ponzi scheme by which hundreds, if not thousands, of investors were parted from their earnings by false promises of investment returns

made by individuals who unlawfully used the investors' monies for personal gain or who fraudulently transferred those monies to third parties for other purposes.

The role of the financial institutions, including that of Wachovia, as the necessary conduit of the movement of money so essential to the success of the Ponzi scheme at issue requires the Receiver at minimum to examine the documents and other information possessed or generated by those institutions in order to more fully understand the factual developments and connections of all those involved. In furtherance of this, it would appear to the Receiver that, based on certain documents gathered to date, Wachovia initiated an inquiry with respect to the Receivership Entities, their agents or other third parties in association with them. The Receiver believes that this inquiry would have been based on written policies and procedures formally or informally adopted by Wachovia as well as other possible communications either internally or between Wachovia and those parties. This inquiry the Receiver believes would have generated in this specific matter correspondence, emails, memorandum, records of telephone calls and other documents clearly falling within the purview of the Subpoena and which have not been produced to date.

IV. CONCLUSION

The information requested by the subpoena served on Wachovia dated April 20, 2009 is within the permissible scope of authority as set forth in Fed. R. Civ. P. 26(b), 34, 37(a) and 45, S.D. Fla. L.R. 26.1H as well as the relevant case law.

WHEREFORE, the Receiver respectfully requests that the Court order Wachovia to produce all documents in response to the Subpoena, to permit the filing under seal or the in camera inspection of Exhibit B, to schedule a hearing on this Motion and to award such further relief as the Court deems just and proper and further requests.

Dated: April 13, 2010

Respectfully submitted,

/s/David C.Cimo

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2010, the foregoing document is being served on all counsel of record and entities identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/David C. Cimo
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SERVICE LIST

**Securities and Exchange Commission v. Creative Capital Consortium, LLC, et al.
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