

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

Case No.: 8:09-cv-87-T-26TBM

v.

ARTHUR NADEL,
SCOOP CAPITAL, LLC
SCOOP MANAGEMENT, INC.

Defendants,

SCOOP REAL ESTATE, L.P.
VALHALLA INVESTMENT PARTNERS, L.P.,
VALHALLA MANAGEMENT, INC.,
VICTORY IRA FUND, LTD,
VICTORY FUND, LTD,
VIKING IRA FUND, LLC
VIKING FUND, LLC, and
VIKING MANAGEMENT,

Relief Defendants.

**MOTION OF NON-PARTY ATTORNEY DAVID A. HOLMES TO QUASH SUBPOENA
AND FOR PROTECTIVE ORDER AND INCORPORATED MEMORANDUM OF LAW**

Non-party attorney, DAVID A. HOLMES on behalf of himself individually and as an attorney of the law firm of FARR, FARR, EMERICH, HACKETT & CARR, P.A., hereby files this Motion to Quash Subpoena and for Protective Order, and in support thereof states as follows:

Background

1. This is an action filed by the Plaintiff Securities Exchange Commission (the “Commission”) under 15 U.S.C. §§ 78(u)(d), 78(u)(e), and 78(aa) seeking *inter alia* injunctive

and declaratory relief and appointment of a receiver in connection with Defendants' perpetration of a hedge fund ponzi scheme.

2. On January 21, 2009, this court entered its Order Appointing Receiver in this case, appointing Burton Wiand (the "Receiver") as receiver over the Defendants, the Relief Defendants, and their subsidiaries, successors and assigns.

3. Thereafter, the Receiver initiated 134 civil actions before this court seeking to claw back allegedly false profits distributed by the Relief Defendants to certain investors, including:

a. Case No. 8:10-cv-00243-T-27AEP (the "Carrellage Action") against, *inter alia*, Carrelage Multi-Strategy Offshore Fund, Ltd. ("Carrellage"); and

b. Case No. Case No. 8:10-cv-00241-17MAP (the "D&E Action") against, *inter alia*, D&E Unit Trust Associates ("D&E") (hereafter collectively the "Actions").

4. Both Carrellage and D&E are foreign entities organized under the laws of jurisdictions outside of the United States of America.

5. David Ehrlich ("Ehrlich") is affiliated with Carrellage and D&E.

6. Pursuant to Rule 4, Fed. R. Civ. P., the Receiver directed Waivers of Service to certain representatives of Carrellage and D&E (the "Waivers of Service") seeking each entity's waiver of service of process in the Actions.

7. Thereafter, Ehrlich, on behalf of Carrellage and D&E, initiated an attorney-client relationship attorney David A. Holmes, Esquire ("Holmes") and the law firm of Farr, Farr Emerich, Hackett and Carr, P.A. ("Farr").

8. After consultation with Holmes, Carrellage and D&E elected not to waive service of process in the Actions.

9. In the course of Holmes' representation, Ehrlich necessarily communicated various contact information to Holmes.

10. Included within the scope of the representation are matters related to the Waivers of Service, service of process on Carrellage and D&E, and the jurisdiction of the courts in the Actions over Carrellage and D&E.

11. On January 4, 2011, the Receiver served a Subpoena dated December 28, 2010, (the "Subpoena") on Holmes to compel examination and production of documents at the Receiver's office on January 12, 2011. A copy of the Subpoena is attached as Exhibit "A."

12. The Subpoena served on Holmes seeks information regarding contact information for Ehrlich, any Carrellage entity, any and all of the principals of Carrellage, and/or D&E Unity Trust.

13. Holmes is in possession of contact information for certain parties named in the subpoena.

14. Holmes moves to quash the Subpoena and asks this Court to enter a protective order on the ground that the contact information sought through the subpoena is confidential and protected by the attorney-client privilege, and therefore should be protected from discovery.

15. The facts asserted above are established by the Affidavit of David A. Holmes attached hereto as Exhibit "B."

Memorandum of Law

I. The information sought by the Receiver is confidential and protected by the attorney-client privilege.

The subpoena issued by the Receiver is directed to counsel retained to defend the Receiver's lawsuits. The scope of counsel's representation includes matters related to the Waivers of Service, service of process, and jurisdiction over the foreign entity defendants. Thus, the Subpoena seeks discovery of information that is central to the legal representation and that is protected by the attorney-client privilege.

In Securities & Exchange Commission v. Dowdell, 2006 WL 3876294 (M.D. Fla. 2006), this Court considered under what circumstances a receiver can obtain client contact information by subpoena directed to an attorney. In Dowdell, the receiver was unable to effect service on an individual defendant in a disgorgement action. Id. at *2. The receiver identified a real estate transaction to which the defendant was a party, and served a subpoena for production of contact information on the attorneys who had represented the defendant in the transaction. Id. The attorneys refused to disclose subpoenaed contact information citing the attorney-client privilege.

Id. In its order, the Dowdell court discussed the attorney-client privilege at length:

Because the underlying litigation from which [the] subpoenas were issued is based on federal question jurisdiction, the applicability of the attorney-client privilege and any exceptions thereto are governed by federal common law.

The attorney-client privilege is one of the oldest privileges recognized in common law. Swidler & Berlin v. United States, 524 U.S. 399 (1998) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Hunt v. Blackburn, 128 U.S. 464, 470 (1888)). This privilege protects communications between a client and his attorney made in confidence and for the purpose of securing legal advice or assistance. Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1414 (11th Cir. 1994). The attorney-client privilege is intended to encourage "full and frank communications 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), quoted in Swidler, 524 U.S. at 403; United States v. Almeida, 341 F.3d 1318, 1324 (11th Cir. 2003). "The party

invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential, intended to remain confidential, and under the circumstances were reasonably expected and understood to be confidential. Bogle v. McClure, 332 F.3d 1347, 1358 (11th Cir. 2003) (quoting United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir. 1991); United States v. Bell, 776 F.2d 965, 971 (11th Cir. 1985)).

Dowdell, 2006 WL 3876294 at *3. Applying the law of attorney client privilege to the facts presented, the Dowdell court essentially found that client contact information was incidental to the attorneys' representation of the client in the real estate transaction and was therefore not protected from subpoena under the attorney-client privilege. Id.

For the reasons set forth below, Dowdell is distinguishable from the case at bar and can not form a basis for allowing the Receiver's subpoena to stand. In Dowdell, the attorney's representation in the real estate transaction was unrelated to the litigation in which the client contact information was sought. Dowdell, 2006 WL 3876294 at *3. The unrelated nature of the representation in the real estate transaction formed the basis for the Court's determination that contact information was incidental to the attorney-client relationship. Here, the subpoena is not directed to counsel in an unrelated matter, but to counsel retained to represent Carrellage and D&E in the Actions, and whose representation includes matters related to the Waivers of Service, service of process, and jurisdictional matters related to the foreign defendant clients. (Affidavit of Holmes). Client contact information is central to these threshold matters.

Addressing whether client contact information can be protected from disclosure pursuant to the attorney-client privilege the Dowdell court noted:

The attorney-client privilege does not include all communications between attorney and client; as a matter of law, it is construed narrowly so as not to exceed the means necessary to support the policy which it promotes. In re Grand Jury Matter No. 91-0186, 969 F.2d 995, 997 (11th Cir. 1992) (citing Fisher v. United States, 425 U.S. 391, 401 (1976)). For example, the identity of a client

and the receipt of attorney's fees normally are not privileged matters. See United States v. Leventhal, 961 F.2d 936, 940 (11th Cir.1992); In re Grand Jury, 969 F.2d at 997.

Dowdell, 2006 WL 3876294 at *4. While the identity of a client is not normally protected by the attorney-client privilege, See United States v. Leventhal, 961 F.2d 936, 940 (11th Cir. 1992), this is a general rule only because contact information, in most cases, “is preparatory or incidental to the attorney-client privilege, and is not provided in order to obtain legal advice.” Andiamo Team, Inc. v. Andiamo Team, Inc., 2008 WL 437255 *3 (S.D. Fla. 2008) (quoting In re Bautista, 2007 WL 4328802 *2 (Bankr. N.D. Cal. 2007) (citing Clark v. American Commerce Nat’l Bank, 974 F.2d 127, 129 (9th Cir. 1992))).¹ In the instant case, the contact information is central to the aspects of the representation related to the Waivers of Service, service of process and jurisdiction. (Affidavit of Holmes).

This motion should be granted because the Receiver’s subpoena is directed to counsel retained to defend the action initiated by the Receiver, because the contact information is central to the attorney-client relationship, and because the facts in the instant case are distinguishable from Securities & Exchange Commission v. Dowdell, 2006 WL 3876294 (M.D. Fla. 2006).

II. The confidential information is protected from disclosure by the Federal Rules of Civil Procedure 26(c) & 45(c)(3)(A).

The scope of discovery is governed by Federal Rule of Civil Procedure 26, which allows “discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending litigation.” Fed. R. Civ. P. 26(b)(1). However, “[d]iscovery of matter not reasonably calculated to lead to discovery of admissible evidence is not within the scope of Rule 26(b)(1).”

¹ In the case of In re Bautista, 2007 WL 4328802, (Bankr. N.D. Cal. 2007), the court reasoned that where contact information was merely “‘preparatory or incidental to, and not part of, information provided . . . for the purpose of obtaining legal advice,’ the court declined to find such information to be protected by the attorney client privilege.” In re Bautista, 2007 WL 4328802 at *2.

Oppenheimer Fund v. Sanders, 437 U.S. 340, 352 (U.S. 1978) (quotations omitted). Moreover, Federal Rule of Civil Procedure 26(c) provides that upon a showing of good cause, a court may grant a protective order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Additionally, courts may further limit discovery under Federal Rule of Civil Procedure 45(c)(3)(A) which provides, in relevant part, that a court must quash or modify a subpoena that requires the disclosure of privileged information. See Fed R. Civ. P. 45(c)(3)(A); e.g., Northwestern Mem'l Hosp. v. Ashcroft, 362 F.3d 923, 935 (7th Cir. 2004).

As previously set forth, the information the Receiver is attempting to gain via the Subpoena is confidential, protected by the attorney client privilege and is otherwise not discoverable under Rule 26(b) or by Rule 45(c)(3)(A). Therefore, pursuant to both Rule 26(c) and 45(c)(3)(A), this Court should enter this Motion to Quash and issue a Protective Order protecting from discovery the herein described privileged contact information.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic or U.S. Mail this _____ day of January 2011 to the following:

Alfred Villoch, III, Esquire
Wiand Guerra King P.L.
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FARR, FARR, EMERICH, HACKETT,
and CARR, P.A.

BY: /s/ David A. Holmes
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