

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PROFICIO MORTGAGE VENTURES, LLC,

Plaintiff,

vs.

THE FEDERAL SAVINGS BANK,

Defendant.

Case No. 2:15-cv-510-RFB-VCF

ORDER

MOTION FOR PROTECTIVE ORDER OR, IN THE
ALTERNATIVE, MOTION TO QUASH (DOC. #38);
MOTION TO QUASH SUBPOENAS (DOC. #39)

This matter involves Plaintiff Proficio Mortgage Ventures, LLC's civil action against Defendant The Federal Savings Bank (hereafter "TFSB"). Before the court are Proficio's motion for protective order or, in the alternative, motion to quash (Doc. #38), TFSB's response (Doc. #42), and Proficio's reply (Doc. #45). Also before the court are non-party North American Marketing, Inc.'s motion to quash (Doc. #39), TFSB's response (Doc. #43), and North American's reply (Doc. #46). The court held a hearing at 3:00 p.m. on April 13, 2016. For the reasons stated below, Proficio's motion (Doc. #38) is granted in part and denied in part. North American's motion (Doc. #39) is also granted in part and denied in part.

I. Background

In March 2015, Plaintiff Proficio Mortgage Venture, LLC sued Defendant TFBSB for alleged misappropriation of Proficio's proprietary customer information. (Doc. #1). Proficio alleged that former Proficio employees Frank Naranjo, Russell Riddle, Shawn O'Brien, Eddie Gomez, and Dian Stevens (hereafter collectively "the former Proficio employees") took Proficio's proprietary information with them when the group left Proficio and began working for TFBSB. (*Id.*). Proficio alleges that TFBSB knowingly used Proficio's proprietary information for TFBSB's benefit. (*Id.*). TFBSB contends that the

1 information Proficio claims is Proficio's proprietary information is either (1) not proprietary or (2)
2 belongs to an individual or entity other than Proficio. (Doc. #43).

3 As part of discovery, TFSB subpoenaed documents from non-parties Evofi One Mortgage¹, First
4 National Bank of Layton, Resolute Bank, and North American Marketing, Inc. (Doc. #39). TFSB
5 alleges that North American developed and owns Proficio's allegedly proprietary information. (Doc.
6 #42). TFSB also claims that North American may have provided Evofi, First National, and Resolute
7 Bank with Proficio's allegedly proprietary information. (*Id.*).

8 Proficio now moves to quash the subpoenas served on First National and Resolute Bank. (Doc.
9 #38). In the alternative, Proficio asks the court to enter a protective order. (*Id.*). Non-party North
10 American also moves to quash the subpoena served on First National and Resolute Bank as well as the
11 subpoena served on North American. (Doc. #39).

12 **II. Legal Standard**

13 "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain
14 discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and
15 proportional to the needs of the case, considering the importance of the issues at stake in the action, the
16 amount in controversy, the parties relative access to relevant information, the parties' resources, the
17 importance of the discovery in resolving the issues, and whether the burden or expense of the proposed
18 discovery outweighs its likely benefits." FED. R. CIV. P. 26(b)(1).

19 "A party or any other person from whom discovery is sought may move for a protective order in
20 the court where the action is pending." FED. R. CIV. P. 26(c)(1). "The court may, for good cause, issue
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24 ¹ At the hearing, TFSB stated that its process server was unable to serve Evofi and that TFSB believes Evofi is no longer in
25 business. As Evofi was never served with TFSB's subpoena, Proficio and North American's requests, as to TFSB's unserved
Evofi subpoena, are denied as moot.

1 an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or
2 expense.” FED. R. CIV. P. 26(c)(1).

3 “On timely motion, the court for the district where compliance is required must quash or modify
4 a subpoena that: (i) fails to allow a reasonable time to comply; (ii) requires a person to comply beyond
5 the geographical limits specified in Rule 45(c); (iii) requires disclosure of privileged or other protected
6 matter, if no exception or waiver applies; or (iv) subjects a person to undue burden.” FED. R. CIV. P.
7 45(d)(3)(A).

8 “[A] party lacks standing under Fed. R. Civ. P. 45[(d)(3)(A)] to challenge a subpoena issued to a
9 non-party unless the party claims a personal right or privilege with respect to the documents requested in
10 the subpoena.” *G.K. Las Vegas Ltd. Partnership v. Simon Property Group, Inc.*, Case No. 2:04-cv-
11 1199-DAE-GWF, 2007 WL 119148 at* 4 (D. Nev. Jan. 9, 2007); *but see In re Rhodes Companies, LLC*,
12 475 B.R. 733, 740 (D. Nev. Apr. 30, 2012) (declining to adopt the ‘personal right or privilege’ standing
13 rule for motion to quash subpoenas). “A party’s objection that the subpoena issued to the non-party
14 seeks irrelevant information or imposes an undue burden on the non-party are not grounds on which a
15 party has standing to move to quash a subpoenas issued to a non-party, especially where the non-party,
16 itself, has not objected.” *G.K. Las Vegas Ltd. Partnership*, 2007 WL 119148 at* 4.

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18 “A party can, however, move for a protective order in regard to a subpoena issued to a non-party
19 if it believes its own interest is jeopardized by discovery sought from a third party and has standing
20 under Rule 26(c) to seek a protective order regarding subpoenas issues to non-parties which seek
21 irrelevant information.” *Id.*

22 **III. Discussion**

23 The parties present four issues: (1) whether Proficio has standing to quash the subpoenas issued
24 on non-parties, (2) whether Proficio should be granted protective order as to information sought by
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1 subpoenas issued on non-parties, (3) whether non-party North American has standing to quash
2 subpoenas issued on other non-parties, and (4) whether non-party North American may quash the
3 subpoena that was issued to it.

4 1. Proficio Lacks Standing to Quash Subpoenas Issued to Non-Parties

5 Proficio asserts no personal right or privilege to the documents responsive to the subpoenas
6 issued on the non-parties. Proficio objects to the subpoenas issued on three non-parties on the grounds
7 that: (1) the subpoenas seek responsive documents that are not relevant to any party's claim or defense,
8 (2) the subpoenas are overbroad, and (3) the production of responsive documents creates an undue
9 burden on the non-parties. The court has held that objections based on relevance and undue burden on
10 the non-parties do not constitute a party's personal right or privilege. *G.K. Las Vegas Ltd. Partnership*,
11 2007 WL 119148 at* 4. Proficio presents no facts that would cause the court to depart from its prior
12 decision. Similarly, Procificio's overbreadth objection does not constitute a personal right or privilege in
13 the responsive documents. Only non-party, North American, has moved to quash the subpoenas issued
14 to it. Proficio may not assert a generic overbreadth objection on First National and Resolute Bank's
15 behalf given that neither of the aforementioned non-parties has brought its own overbreadth objections.
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17 2. A Protective Order Will be Entered as to Non-Parties First National and Resolute Bank that
18 Limits Their Duty to Respond to the Subpoenas Issued to Them

19 Proficio is granted a protective order that limits non-parties First National and Resolute Bank
20 duty to produce documents responsive to TFSB's document requests. TFSB contends that the
21 information Proficio claims is its proprietary information, is either not proprietary or belongs to an
22 individual or entity other than Proficio. The subpoenas issued to First National and Resolute Bank are
23 accompanied by over thirty separate document requests. TFSB's subpoenas request information about
24 the non-parties access, or lack of access, to Proficio's allegedly proprietary information as well as
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1 information about the non-parties internal governance, employment relationships with former Proficio
2 employees, and other business dealings. Many of TFSB's document requests seek irrelevant
3 information or are duplicative of other document requests. After reviewing TFSB's document requests,
4 the subpoenaed non-parties are protected as follows:

5 a. First National is only required to respond to Document Requests: 2, 3, and 32.

6 b. Resolute Bank is only required to respond to Document Requests: 2, 3, and 34.

7 First National and Resolute Bank is required to produce requested documents, if the
8 requested documents were created between 2010 to 2014, the approximate time period when the
9 former Proficio employees worked for North American.

10 3. North American Lacks Standing to Quash Subpoenas Issued to Other Non-Parties

11 "[A] party lacks standing under Fed. R. Civ. P. 45[(d)(3)(A)] to challenge a subpoena issued to a
12 non-party unless the party claims a personal right or privilege with respect to the documents requested in
13 the subpoena." *G.K. Las Vegas Ltd. Partnership*, 2007 WL 119148 at* 4. If a party lacks standing to
14 challenge a subpoena issued to a non-party, then a non-party may not challenge subpoenas issued to
15 other non-parties. *See id.* Although North American lacks standing to quash the subpoenas issued to
16 First National and Resolute Bank, North American may seek a protective order. FED. R. CIV. P. 26(c)(1)
17 (a "party or any other person from whom discovery is sought may move for a protective order"). Here,
18 North American is granted a protective order in order to protect its confidential research, development,
19 and commercial information from public disclosure. On or before May 16th, 2016, North American will
20 prepare, and serve on TFSB, a description of the information is claims as proprietary. TFSB is
21 prohibited from disclosing to the public any information North American designates as proprietary.

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1 4. TFSB's Subpoena to North America is Modified

2 "It is well established that the scope of discovery under a subpoena issued pursuant to Rule 45 is
3 the same as the scope of discovery allowed under Rule 26(b)(1)." *Painters Joint Committee v.*
4 *Employee Painters Trust Health & Welfare Fund*, Case No. 2:10-cv-1385-JCM-PAL, 2011 WL
5 4573349 at* 5 (D. Nev. Sept. 29, 2011). Here, the subpoena issued to North American is modified to
6 encompass only responsive documents that relate to Proficio's allegedly proprietary information. TFSB
7 alleges that the information that Profocio claims is proprietary is, in fact, not proprietary. TFSB seeks
8 information regarding whether North American shared the allegedly proprietary information with
9 entities other than Proficio.

10 As part of discovery, TFSB subpoenaed North American and made sixty-two document requests.
11 At the hearing, North American stated that it is willing to respond to document requests 2, 4, 6, 15, 16,
12 19, 22, 27, 53, and 61. Pursuant to North American's representations at the hearing, the company is
13 ordered to provide documents requested in the aforementioned document requests. After reviewing
14 TFSB's documents requests, North American is also ordered to provide document requested in
15 document requests 11 and 12. Both requests seek documents relevant to TFSB's defense that Proficio's
16 allegedly proprietary information was never constituted a trade secret.

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18 North American is required to produce requested documents, if the requested documents were
19 created between 2010 to 2014, the approximate time period when the former Proficio employees worked
20 for North American. North American is not required to respond to TFSB's remaining document
21 requests as the remaining document requests either (1) request irrelevant information, (2) are duplicative
22 of the document requests that do seek relevant information, or (3) request information that may be more
23 easily obtained through discovery requests to Proficio.

24 ACCORDINGLY, and for good cause shown,
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1 IT IS HEREBY ORDERED that Proficio's motion for a protective order (Doc. #38) is GRANTED
2 in part and DENIED in part.

3 IT IS FURTHER ORDERED that First National, Resolute Bank, and North American's
4 obligations to produce documents requested by TFSB's subpoenas are limited to documents created
5 between 2010 and 2014.

6 IT IS FURTHER ORDERED that on or before April 21, 2016, TFSB serve a copy of this order
7 on First National and Resolute Bank.

8 IT IS FURTHER ORDERED that First National and Resolute Bank are PROTECTED as follows:

- 9 a. First National is only required to respond to Document Requests: 2, 3, and 32.
10 b. Resolute Bank is only required to respond to Document Requests: 2, 3, and 34.
11 c. Responses by First National and Resolute Bank are due thirty (30) days after service
12 of this order.
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14 IT IS FURTHER ORDERED that Proficio's request for a protective order as the TFSB's unserved
15 Evofi subpoena is DENIED as moot.

16 IT IS FURTHER ORDERED that North American's motion to quash (Doc. #39) is GRANTED in
17 part and DENIED in part.

18 IT IS FURTHER ORDERED that, on or before May 16th, 2016, North American produce
19 documents response to document requests: 2, 4, 6, 11, 12, 15, 16, 19, 22, 27, 53, and 61. North American's
20 obligations to produce documents requested by TFSB's subpoenas is limited to documents created
21 between 2010 and 2014.

22 IT IS FURTHER ORDERED that on or before May 16th, 2016, North American will serve on
23 TFSB a description of the information it claims is confidential. TFSB is prohibited from disclosing to
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1 the public any information North American designates as confidential in accordance with the existing
2 protective order (Doc. #25).

3 IT IS FURTHER ORDERED that North American's request to quash the subpoenas served on
4 First National and Resolute Bank is DENIED for lack of standing.

5 IT IS FURHTER ORDERED that North American's request to quash TFSB's unserved Evofi
6 subpoena is DENIED as moot.

7 IT IS SO ORDERED.

8 DATED this 14th day of April, 2016.

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12 CAM FERENBACH
13 UNITED STATES MAGISTRATE JUDGE
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