IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 2:07-MC-39
JUDGE SMITH
MAGISTRATE JUDGE KING

RICHARD D. SCHULTZ,

Defendant.

OPINION AND ORDER

This matter is before the Court for consideration of Defendant's *Motion for Protective Order*. Doc. No. 5. For the reasons that follow, the motion is denied.

I.

The United States seeks to depose Defendant Richard D. Schultz in connection with its efforts to collect on a civil judgment entered by the United States District Court for the Northern District of California and which was allegedly assigned to the United States. Defendant Schultz moves for a protective order, pursuant to Fed. R. Civ. P. 26(c), prohibiting the deposition on the basis that the United States has no enforceable interest in the judgment.. Before discussing the merits of this argument, the Court outlines the pertinent, rather convoluted, factual background.

Defendant Richard Schultz was a plaintiff in an action filed in the Northern District of California arising from the decline of stock associated with his investments in a thoroughbred horse breeding farm. *See McGonigle v. Combs*, 968 F.2d 810 (9th Cir. 1992). The claims were

resolved in favor of defendants and three sets of defendants – Frank Bryant ["Bryant"]; Bateman Eichler, Hill Richards, and Robert McGuinness; and Charles Hembree and his law firm, Kincaid, Wilson Schaeffer and Hembree ["Hembree"] – were awarded attorneys fees as against Schultz and another plaintiff, Blas R. Casares. *See Schultz v. Hembree*, 975 F.2d 572 (9th Cir. 1992).

The district court awarded more than $1.6 million to Charles Hembree and his law firm from Schultz and Casares, jointly and severally. More than $200,000 was awarded to Hembree from Schultz individually. The district court awarded $780,000 to Kemper Securities ["Kemper"], the successor to Bateman Eichler, from Schultz and Casares, jointly and severally. The court also awarded Kemper $174,156.65 from Schultz individually. The court entered judgment on these amounts on October 26, 1994. Exhibit A attached to *United States' Memorandum contra*, Doc. No. 12. The district court also awarded Frank Bryant more than $900,000 from Schultz and Casares, jointly and severally, and $281,387.11 from Schultz individually. Judgment on these amounts was entered on December 19, 2004. Exhibit B, *id.*

Those judgments were the subject of appeals. *Layman v. Bryant*, Nos. 94-16391, 94-17067, 94-17070, 95-15343, 95-15344, 97-15340, 1997 WL 255540 (9th Cir. May 7, 1997). Following proceedings on remand, as a result of which one award was reduced by a relatively small amount, a *Final Consolidated Judgment* was entered on December 20, 1999. *See* Exhibit E attached to *United States' Memorandum contra*.

Between the entry of the 1994 judgments and the entry of the *Final Consolidated Judgment* in 1999, three companies purchased the judgments from Hembree, Kemper and Bryant: Judgment Acquisition Corporation ["JAC"] purchased the Hembree judgment; Judgment Procurement Corporation ["JPC"] purchased the Kemper judgment; and Judgment

Resolution Corporation ["JRC"] purchased the Bryant judgment. In January 1998, the three companies assigned to one Gloria McPeak all rights in the judgments entered against Richard D. Schultz and Blas R. Casares. *See* Exhibits H, K, *id.* In October 2004, – *i.e.*, after the entry of the *Final Consolidated Judgment* in 1999 – Gloria McPeak sought renewal of "the judgment" for a 10-year period, which application was granted by the issuing court. Exhibit L, *id.* McPeak then filed an *Acknowledgment of Assignment of Judgment* to the United States Government, specifically identifying the *Final Consolidated Judgment* as inclusive of the underlying judgments entered against Schultz. *See* Exhibit M, *id.* The assignment to the United States was the result of an agreement involving Francis McPeak (Gloria McPeak's husband) and the United States in connection with Mr. McPeak's negotiated guilty pleas in *United States of America v. Ronald G. Bogart, et al.*, 2:10-CR-164 (S.D. Ohio).[1]

The United States now seeks to depose Schultz in furtherance of its collection efforts on the *Final Consolidated Judgment*. Schultz moves for a protective order arguing, *inter alia*, that Gloria McPeak had no interest in the *Final Consolidated Judgment* and therefore could not have assigned any interest in that judgment to the United States. Shultz argues that, under these circumstances, to subject him to a deposition would impose an unreasonable burden on him. The United States disagrees.

As an initial matter, the Court agrees with the United States that any definitive

[1]The government contends that the original assignments to Gloria McPeak were part of a conspiracy devised by Schultz to reduce his exposure for the award of attorneys fees. On June 13, 2003, Francis McPeak pled guilty in this Court to two counts of conspiracy in connection with his role in assisting Schultz in concealing his assets and defrauding creditors. *United States of America v. Ronald G. Bogart*, et al, 2:01-CR-164 (S.D. Ohio), Doc. No. 105. *See also Second Superseding Indictment*, Exhibit F attached to *Memorandum contra*. McPeak was ordered to pay $3,342,640 in restitution, *Judgment*, Doc. No. 215, but because the civil judgments had been assigned to the United States, his restitution obligation was deemed satisfied. *Restitution Opinion and Order*, Doc. No. 305, at 7 n.6.

construction of the relationship between the *Final Consolidated Judgment* and the 1994 judgments should be left to the court that issued those judgment, *i.e.*, the Northern District of California. However, because the *Motion for Protective Order* calls into question the validity of the assignment and of the ability of the government to enforce that judgment, this Court will consider – only for purposes of resolving the *Motion for Protective Order* – whether the United States has a colorable interest in that judgment.

II.

Rule 26 of the Federal Rules of Civil Procedure provides that a person resisting discovery may move the court, for good cause shown, to protect the person or party from "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). "The burden of establishing good cause for a protective order rests with the movant." *Nix v. Sword*, 11 Fed. Appx. 498, 500 (6th Cir. 2001), citing *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). "To show good cause, a movant for protective order must articulate specific facts showing a 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements." *Id.*, citing *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D. D.C. 1987). Ultimately, the grant or denial of protective orders falls within the "broad discretion of the district court managing the case." *Century Prod., Inc. v. Sutter*, 837 F.2d 247, 250 (6th Cir. 1988).

In addition, the party seeking a protective order must certify that it "has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. P. 26(c)(1). This prerequisite has been met in this case.

III.

Defendant Schultz's *Motion for Protective Order* is based on three arguments. The Court will consider each in turn.

First, Defendant Shultz contends that the United States cannot collect on the *Final Consolidated Judgment* because Gloria McPeak "never received any interest in [the judgment] and therefore could not have assigned the judgment to the government." *Motion for Protective Order* at 4. Shultz's position begins with the premise that Gloria McPeak "received whatever rights she had to the Hambree, Kemper and Bryant judgments in January 1998." *Id.* The *Final Consolidated Judgment*, dated December 20, 1999, was entered in favor of JRC. According to Schultz, Gloria McPeak has never been authorized to act on behalf of JRC. JRC was incorporated in October 1997 and was dissolved in September 2001. As reflected in records obtained from the Florida Secretary of State, the only officers and directors of JRC were Francis McPeak and Ronald J. Bogart. *See* Exhibit F attached to *Motion for Protective Order*. Thus, Schultz contends, the United States cannot claim any right to the *Final Consolidated Judgment* as a result of the purported assignment from Gloria McPeak.

The United States argues that the language in each of the assignments of the initial judgments vests in Gloria McPeak not only an interest in those judgments but also an interest in the *Final Consolidated Judgment*. Each original assignment contains the following language:

> [JRC, JAC and JPC do] hereby bargain, transfer, assign and convey to Gloria McPeak ("Assignee") the following:
>
> 1. all Assignor's rights, title and interest in the JUDGMENT RE ATTORNEYS' FEES AND LEGAL EXPENSES, filed [in 1994] against Richard D. Schultz and Blas R. Casares, obtained by Assignor's predecessors in interest in the United States District court for the Northern District of California . . . and all amendments and supplements thereto, and all certifications of the Judgment for

> registration in other Districts, and all rights pertaining to appeals in the United States Court of Appeals for the Ninth Circuit . . .;
>
> 2. any and all derivative collection/priority rights from the Judgment, including levies, garnishments, liens, post-judgment actions, creditor bill actions, fraudulent transfer actions, and proceedings supplementary to the Judgment, all of the foregoing whether pending or capable of being brought currently or in the future;
>
> 3. all future interest or rights arising out of or in connection with the Judgment or collection efforts now or in the future in connection therewith. . . .

Exhibit H attached to *United States' Memorandum contra.*

The Court agrees that – for purposes of resolving the *Motion for Protective Order* – the assignment to Gloria McPeak of the 1999 judgments "and all amendments and supplements thereto" is sufficient to convey to Gloria McPeak an interest in the *Final Consolidated Judgment*, notwithstanding the fact that the *Final Consolidated Judgment* was entered in favor of JRC. As the United States points out, to the extent that JRC received an interest in the *Final Consolidated Judgment*, "it was merely as a nominee for Gloria McPeak, who was the true owner of the *Final Consolidated Judgment*." *United States' Memorandum contra* at 8.

Defendant Schultz's second argument in support of his *Motion for Protective Order* is that the *Final Consolidated Judgment* has expired. As noted *supra*, the *Final Consolidated Judgment* was entered on December 20, 1999 and the earlier judgments were entered in late 1994. Under California law, unless renewed, a judgment expires ten years after entry. Cal. Civ. P. Code § 683.020 and § 683.120. Shultz argues that, although the 1994 judgments were renewed by McPeak, she did not – and could not – renew the 1999 *Final Consolidated Judgment*, which could have been renewed only by JRC.

For the reasons stated *supra*, the Court concludes that it was Gloria McPeak who held all right and interest in the 1994 judgments and in the 1999 *Final Consolidated Judgment.* In the

Court's view, the renewal effected by McPeak in 2004, as evidenced by Exhibit L attached to the *United States' Memorandum contra* was sufficient to renew all interest held by her in the initial three judgments as well as in the *Final Consolidated Judgment*. The Court agrees with the United States that the *Final Consolidated Judgment* did not extinguish the awards contained in the three judgments entered in 1994. Rather, the *Final Consolidated Judgment* served to supplement the earlier judgments; the only purpose served by the *Final Consolidated Judgment* was to reflect the slight reduction of the award following Schultz's appeal from the original judgments. Thus, the Court concludes that the *Final Consolidated Judgment* has not expired and can be properly pursued by the United States. Schultz's second argument in support of his *Motion for Protective Order* is unavailing.

Schultz's third argument in support of his *Motion for Protective Order* is that the United States takes in this matter a position inconsistent with that taken in *United States v. Ronald G. Bogart*, 2:01-CR-136 (S.D. Ohio). In that criminal case, the United States asserted that the assignments of the 1994 judgments were fraudulent, thus making Shultz "the true beneficial owner of the judgments." *Motion for Protective Order* at 8. According to Schultz, the United States should not, in this action, be permitted to contend that Gloria McPeak ever became the true and lawful owner of the judgments entered in the Northern District of California.

The Court finds no inconsistency in the positions taken by the United States. The criminal case in this Court established that Schultz was engaged in a conspiracy to defraud and conceal assets by virtue of the initial assignments of the judgments. By avoiding collection on the judgments, Shultz benefitted from those assignments but, as noted *supra*, Gloria McPeak was the title owner of the judgments. She later assigned her interest to the United States and this

Court concludes that that assignment was valid and effective to transfer to the United States all right in the judgments. In short, Schultz's third argument in support of his motion is without merit.

Because this Court concludes that, for purposes of resolving Defendant's Motion for Protective Order, the United States is vested with a colorable claim in the judgments entered against Defendant, the Court finds no basis for the issuance of a protective order under Rule 26(c). Defendant Schultz may properly be deposed by the United States in connection with its effort to collect on the judgments assigned to the United States by Gloria McPeak.

IV.

Defendant Schultz's *Motion for Protective Order*, **Doc. No. 5**, is **DENIED**.

November 9, 2010
DATE

s/ Norah McCann King
NORAH McCANN KING
UNITED STATES MAGISTRATE JUDGE