UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-CIV-81205-RAR

SECURITIES AND EXCHANGE
COMMISSION

Plaintiff,

vs.

COMPLETE BUSINESS SOLUTIONS
GROUP, INC., d/b/a PAR FUNDING, *et al.*,

Defendants.
_____________________________________/

NON-PARTY, AGM CAPITAL FUND I, LLC'S OBJECTIONS TO SUBPOENA *DUCES TECUM*, MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH, OR, IN THE ALTERNATIVE, MOTION FOR THE FEES NECESSARY TO RESPOND TO THE SUBPOENA

Non-party, AGM CAPITAL FUND I, LLC ("AGM"), by and through undersigned counsel and pursuant to Rules 26(c) and 45, Fed. R. Civ. P., hereby files its objections to the Subpoena *Duces Tecum* served by the Receiver, moves for protective order precluding disclosure of confidential documents and communications, moves for an order quashing the Subpoena, or, in the alternative, moves for an order protecting AGM from bearing the expenses necessary to respond to the Subpoena *Duces Tecum*, and in support thereof, states as follows:

INTRODUCTION AND FACTUAL BACKGROUND

The instant lawsuit concerns allegations that Complete Business Solutions Group, Inc. d/b/a Par Funding ("Par"), its officers, directors and related entities—the Defendants herein—fraudulently raised nearly half a billion dollars in investments through unregistered securities offerings. The Complaint alleges eight counts of violations of federal securities laws. The Court subsequently appointed a Receiver over the Defendant entities.

Now, the Receiver has served a Subpoena *Duces Tecum* (the "Subpoena") that burdens and harasses a non-party business. The Subpoena is directed to AGM. AGM is an early stage company that has been organized to operate as a lending company to merchant cash advance businesses, who in turn, provide cash advance financing to small and mid-sized businesses in need of working capital as an alternative to traditional business loan financing. AGM offered units of its securities to investors. Pursuant to its business plan, AGM in turn loaned investor's money to merchant cash advance businesses, including Par.

The Subpoena improperly seeks discovery of highly confidential and irrelevant documents at the burden and expense of AGM, a non-party. Indeed, the sole purpose of the Subpoena appears to be the disclosure of AGM's investors and its business operations. AGM, however, cannot and will not disclose this information pursuant to Article 1, Section 23 of the Florida Constitution, 17 CFR Part 248 (Regulation S-P), which implements 15 U.S.C. § 6802, and AGM's Privacy Policy.

This Court should quash the Subpoena insofar it purports to command the production of the records on the grounds that: 1) the Subpoena is directed to AGM, which is not a party to these proceedings; 2) the Subpoena requires disclosure of AGM's investors' confidential financial and personal information; 3) the Subpoena requires disclosure of AGM's confidential commercial information and trade secrets; 4) the Subpoena is not reasonably calculated to lead to the discovery of admissible evidence and does not go to the heart of any claims or defenses; and 5) production of the documents would subject AGM to annoyance, embarrassment, oppression, and undue burden and expense and thwart the public interest in protecting the confidentiality of customer records.

ARGUMENT AND MEMORANDUM OF LAW

I. Standard of Review

Rule 45 permits the discovery of documents or other tangible things from non-parties through the service of a subpoena commanding that the items sought be produced "at a place within 100 miles of where the person [subpoenaed] resides, is employed, or regularly transacts business in person." *See, generally*, Fed. R. Civ. P. 45(c)(2)(A); *see also* Fed. R. Civ. P. 34(c).

A non-party may challenge a subpoena in several different ways, including by filing a motion for a protective order pursuant to Rule 26(c), a motion to quash or modify the subpoena under Rule 45(d), or a motion requesting both types of relief alternatively. While the movant in connection with such a motion bears "[t]he burden of proof in demonstrating that compliance with the subpoena[] requires the disclosure of privileged or protected information. . . or presents an undue burden . . . [the subpoenaing party always has the burden] to prove its requests are relevant." *See Fadella v. Life Auto. Prods., Inc.*, 258 F.R.D. 501, 504 (M.D. Fla. 2007).

Rule 45(d)(3) identifies the instances where the quashing of a subpoena by a district court is either mandatory or permissive. *See* Fed. R. Civ. P. 45(d)(3)(A)-(B). Significantly, a court "**must quash or modify a subpoena that** . . . (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c); (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden." *See* Fed. R. Civ. P. 45(d)(3)(A)(ii)-(iv) (emphasis added). The Subpoena at issue violates the three aforementioned standards and therefore the Subpoena must be quashed.

Specifically, the Subpoena: 1) fails to comply with the geographical limitations; 2) seeks documents that are protected from disclosure; 3) seeks documents that are confidential; and 4)

places an undue burden on a non-party with no interest in the outcome of this litigation. The Court should not permit the Receiver to abuse the discovery process in such an egregious manner.

II. The Subpoena Fails to Comply with the Geographical Limits Specified in Rule 45(c)

Rule 45(c) limits the production of documents "to a place within 100 of where the person resides, is employed, or regulatory transacts business in person". Fed. R. Civ. P. 45(c)(2)(A). The Subpoena violates this geographical limitation because it requires the production of documents to be made over 1,000 miles away.

The Receiver issued the Subpoena to Vinnie Camarda. Mr. Camarda is the CEO of AGM. AGM is a Delaware limited liability company with its principal place of business in Massapequa, New York. Mr. Camarda resides in New York. Nonetheless, the Subpoena commands protection to occur in Miami, Florida—more than 1,000 miles from Massapequa, New York. Accordingly, the Court "**must quash or modify a subpoena** [because] it requires a person to comply beyond the geographical limits specified in Rule 45(c). . . ." Fed. R. Civ. P. 45(d)(3)(A)(ii) (emphasis added); *see also Cincinnati Ins. Co. v. Cochran*, 198 Fed. Appx. 831, 832 (11th Cir. 2006) (affirming order by district court affirming magistrate judge's grant of motion to quash and for protective order and award of sanctions where party issued subpoena in the name of a district court to a nonparty located more than 100 miles from the district court in which the action was pending).

III. Federal Statutory and Regulatory Law Precludes the Disclosure of Client Information

AGM has a regulatory obligation to protect the confidentiality of its clients' and investors' personal information. Under Subtitle A of Title V of the Gramm-Leach-Bliley Financial Modernization Act of 1999 ("GLB"), a financial institution must not disclose nonpublic personal information about a customer to non-affiliated third-parties except under circumstances that do not apply here.

Pursuant to its statutory authority, the SEC promulgated Regulation S-P, which forbids investment advisors from "directly or through any affiliate, disclos[ing] any nonpublic personal information about a consumer to a nonaffiliated third party." 17 C.F.R. § 248.10(a). The regulation states that "[a]n individual is [the advisor's] consumer if he or she provides nonpublic personal information to [the advisor] in connection with obtaining or seeking to obtain brokerage services or investment advisory services." 17 C.F.R. 248.3(g)(2)(i) (emphasis added). It defines a "nonaffiliated third party" as "any person" except an investment advisor's affiliate or a joint employee of both the investment advisor and a company that is not the investment advisor's affiliate. 15 C.F.R. § 248.3(s)(1). An "affiliate" is "any company that controls, is controlled by, or is under common control with the . . . investment adviser." 15 C.F.R. § 248.3(a).

Here, AGM is under common control with A.G. Morgan Financial Advisors, LLC, a Registered Investment Advisor. Vincent Camarda is the CEO of A.G. Morgan Financial Advisors, LLC and the CEO of AGM. James McArthur is the President of A.G. Morgan Financial Advisors, LLC and the President of AGM. Accordingly, because it is under the common control of a Registered Investment Advisor, AGM must comply with Regulation S-P. Put another way, AGM is forbidden by law from complying with the majority of the requests in the Subpoena because it seeks nonpublic personal information about AGM's clients and investors.

Likewise, "Article I, section 23, of the Florida Constitution protects the financial information of persons if there is no relevant or compelling reason to compel disclosure." *Borck v. Borck*, 906 So. 2d 1209, 1211 (Fla. 4th DCA 2005). This is because "personal finances are among those private matters kept secret by most people." *Woodward v. Berkery*, 714 So. 2d 1027, 1035 (Fla. 4th DCA 1998) (citing omitted). Because of the strong public policy underlying this constitutional protection, "[t]he relevance of financial information should be determined only after

an evidentiary hearing." *Id*. Accordingly, it has been held a departure from the essential requirements of the law where a "trial court ordered production of [nonparty] financial information without any evidentiary inquiry as to its relevance." *Borck*, 906 So. 2d at 1211. AGM's financial information and the financial information of its investors are constitutionally protected from disclosure.

Not only does the Subpoena seek financial information of AGM's individual clients, but also their private communications, thoughts, and impressions concerning their financial interests and personal lives. The breadth of the Receiver's requests create a detailed inquiry into the private finances of each individual client, which in turn provides a direct window into their personal lives. That information is simultaneously private and wholly irrelevant to the underlying case. Indeed, the Subpoena seeks all information about AGM's investors "including, but not limited to, age, address, gender, **social security number**, marital status, assets, and occupation." (emphasis added). AGM's clients could not have imagined that merely considering an investment with the company would subject them to having their private financial and personal information exposed, or that their identities and information would become the subject of litigation in a Florida Federal court.

Neither AGM nor its individual clients are parties to this action, and they have not assumed the obligations of parties. They have not sued any of the named parties; they have not introduced their personal, financial information as issues in the case; and they have not consented to the disclosure to and review of this information by others. They are subject to an intrusion into their privacy because of an attenuated connection to Par, *i.e.*, AGM making investments into merchant cash advance businesses, like Par.

Fed. R. Civ. P. 26 neither negates the privacy rights of individuals, nor does it grant the Receiver carte blanche to any information it deems relevant by its own accord. Accordingly, because information regarding AGM's investors and its finances are irrelevant, the Court should quash the Subpoena.

IV. The Subpoena Seeks Confidential Commercial Information

AGM further objects to the Subpoenas because it seeks the production of AGM's confidential commercial information and trade secrets. AGM's financial information, investment data, and information on its operation constitutes the confidential commercial information and trade secrets of AGM. From this information, AGM derives independent economic value. If the information were to be disclosed, AGM's competitors could use it to solicit its clients to invest with them and/or usurp AGM's business opportunities. AGM spends substantial recourses safeguarding the privacy of such information by protecting its computer system and files from access by unauthorized persons, by restricting the access of its employees to such information on a need to know basis, and by complying with the privacy mandates contained in federal law and the regulations promulgated thereunder.

AGM's confidential commercial information is irrelevant, and inquiry should be forbidden. Its trade secrets and proprietary information including financial records, client lists, investment and marketing practices, and information regarding other business practice should not be disclosed. AGM is a competitor of other businesses not parties to this lawsuit. Should AGM be required to produce its confidential commercial information, the requested items could damage AGM's business and its relationship with non-parties.

The Receiver's over-broad Subpoena is designed to obtain proprietary information of AGM that have no relevance on the underlying case. This matter involves the alleged fraudulent

actions of the named Defendants. AGM's proprietary and confidential information has no bearing on Defendants' alleged actions and should therefore be protected from disclosure.

V. The Subpoena Seeks Irrelevant Documents and Communications

Rule 26(b)(1) allows discovery of any unprivileged matter "relevant to the subject matter involved in the pending action[.]" Relevancy is not to be presumed; rather, "the party seeking discovery must demonstrate relevance." *Fadalla v. Life Auto. Products, Inc.*, 258 F.R.D. 501, 506 (M.D. Fla. 2007) (citations omitted). "If proof of relevancy or need is not established, **discovery should be denied**." *Centurion Industries, Inc. v. Warren Steurer and Assoc.*, 665 F.2d 323, 325 (10th Cir. 1981) (emphasis added).

"Although irrelevance is not among the litany of enumerated reasons for quashing a subpoena found in Rule 45, courts have incorporated relevance as a factor when determining motions to quash a subpoena" to both a party and to a non-party. *EEOC v. AutoZone, Inc.*, 2007 WL 9717741, at *2 (S.D. Ala. Aug. 3, 2007) (quoting *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Calif. 2005)). "[T]he court must examine whether a request contained in a subpoena duces tecum [to a non-party] is overly broad or seeking irrelevant information under the same standards set forth in Rule 26(b) and as applied to Rule 34 requests for production." *EEOC*, 2007 WL 9717741 at *2 (quoting *Transcor, Inc. v. Furney Charters, Inc.*, 212 F.R.D. 588, 591 (D. Kan. 2003)).

Here, the information sought in the Subpoena has no relevance to any claim or defense. This gravamen of the underlying litigation is whether or not the Defendants fraudulently raised nearly half a billion dollars in investments through unregistered securities offerings. The Complaint does not assert a cause of action asserted against AGM. Indeed, the Complaint does not allege that AGM acted in concert with the Defendants' purported scheme or had any knowledge

of the same. If anything, AGM and its investors are victims of Defendants' alleged fraudulent behavior. Being a potential victim is not reasonable grounds to intrude into non-parties private financial and business matters.

In fact, requiring AGM to produce the documents called for in the Subpoena would subject AGM to annoyance, embarrassment, and oppression. It would open AGM to public scrutiny for its business practices which could harm AGM's future ability to raise funds. Furthermore, being forced to participate in this action could potentially cause AGM's investors to wrongly conclude that AGM's business is in jeopardy, which could cause numerous headaches for AGM. Accordingly, because AGM did not participate in the alleged fraud, AGM will not possess relevant information to support Plaintiff's claims or Defendants' defenses. The Subpoena should be quashed for this reason alone.

VI. The Subpoena Imposes an Undue Burden on a Non-Party

To the extent that AGM may possess relevant information, the Subpoena imposes and undue burden on AGM because the potentially relevant information should be in the possession of parties to this lawsuit. The only reason AGM may possess relevant information is because the Subpoena seeks documents and communications between AGM and the Defendants. Specifically, Item No.: 3 seeks documents and communications related to any of the Defendants.

A subpoena cannot subject its target to undue burden, or it will be quashed pursuant to Rule 45. *See* Fed. R. Civ. P. 45(c)(3)(A)(iv) ("On timely motion, the issuing court **must quash** or modify a subpoena that: . . . subjects a person to undue burden.") (emphasis added). In considering whether a subpoena poses undue burden, courts consider "whether [] compliance with the subpoena would be 'unreasonable' and 'oppressive' within the meaning of Rule 45(b), Federal Rules of Civil Procedure." A determination of a subpoena's reasonableness requires the court to

balance the interests served by complying with the subpoena against the interests served by quashing it.

It is unreasonable to require a non-party with no interest in the outcome of this litigation to undergo the burden and expense of searching its records and producing responsive documents that should be in the possession, custody or control of named parties. Indeed, there does not appear to be any interest in ordering compliance with the Subpoena at issue. The Receiver can and should request the documents and communications in Item No.: 3 of the Subpoena directly from the Defendants.

Furthermore, it is unreasonable to force a non-party business to disclose confidential, nonpublic personal information of its investors and the company's confidential commercial information. As stated above, AGM is unlikely to possess any relevant information that would support Plaintiff's claims or Defendants' defenses. Accordingly, the interest served by quashing the Subpoena far outweigh any interests in complying.

VII. The Court Should Grant AGM Its Lost Earnings and Reasonable Attorneys' Fees

Rule 45(d)(1) imposes a duty on the subpoenaing party to "take reasonable steps to avoid imposing undue burden or expense on [non-parties]." The court, for its part, "must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorneys' fees—on a party or attorney who fails to comply." *Id.*

It is clear that the Receiver took no steps to avoid imposing an undue burden and expense on AGM because the Subpoena seeks confidential documents and communications; irrelevant documents and communications; documents and communications within the possession of Defendants; and documents and communications that serve no purpose in the underlying litigation. Accordingly, in the event that the Court orders compliance with the Subpoena (including any

modifications thereto), AGM respectfully requests that the Court grant the advancement of costs as a condition for the denial of this Motion. *See Cantaline v. Raymark Indus., Inc.*, 103 F.R.D. 447, 449–50 (S.D. Fla. 1984) ("The advancement of costs as a condition for the denial of a motion to quash is committed to the sound discretion of the court").

CONCLUSION

The Receiver's Subpoena issued to non-party, AGM Capital Fund I, LLC, should be quashed, as it seeks the discovery of confidential information protected from disclosure by Federal statutory and regulatory law; seeks confidential and proprietary information; seeks irrelevant information; is facially overbroad and burdensome; and seeks information within the possession of Defendants. Alternatively, all nonpublic personal information and confidential and proprietary information should be protected by the issuance of a protective order so that AGM Capital Fund I, LLC is not forced to reveal confidential information regarding its investors and its business operations. Finally, AGM Capital Fund I, LLC should be awarded the reasonable lost profits, costs and attorneys' fees associated with compliance with any aspect of the Subpoena.

WHEREFORE, Non-Party, AGM Capital Fund I, LLC, respectfully requests that this Honorable Court grant the following relief: 1) sustain AGM Capital Fund I, LLC's objections to the Receiver's Non-Party Subpoena pursuant to Rule 45(b)(1) of the Federal Rules of Civil Procedure; 2) enter an Order quashing the Receiver's Non-Party Subpoena pursuant to Rule 45(c)(3) of the Federal Rules of Civil Procedure; 3) enter a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure; 4) award attorneys' fees and costs to AGM Capital Fund I, LLC; and 5) grant such other and further relief as this Court deems just and proper.

CERTIFICATE OF GOOD FAITH CONFERENCE; CONFERRED BUT UNABLE TO RESOLVE ISSUES PRESENTED IN THE MOTION

Pursuant to Local Rule 7.1(a)(3)(A), I hereby certify that on September 30, 2020, counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues but has been unable to resolve the issues because of the short time window between the retention of the undersigned and the deadline to respond to the Subpoena. Counsel for the movant and the Receiver have agreed to continue to attempt to resolve the pending discovery dispute set forth herein in the coming days. Counsel for the movant and the Receiver shall update the Court if they are able to resolve any portion of the discovery dispute set forth herein.

Dated: September 30, 2020

Respectfully submitted,

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Attorneys for Non-Party,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September, 2020, I electronically filed with the Clerk of the Court by using the CM/ECF which will send a copy of the Notice of Electronic Filing to counsel of record.

/s/ Benjamin J. Biard
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