

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-PARTIES, AGM CAPITAL FUND I, LLC'S AND AGM CAPITAL FUND II,
LLC'S COMBINED REPLY TO THE RECEIVER'S RESPONSE TO ITS 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-parties, AGM CAPITAL FUND I, LLC and AGM CAPITAL FUND II, LLC (collectively, "AGM"), by and through undersigned counsel and pursuant to Rules 26(c) and 45, Fed. R. Civ. P., hereby files its Combined Reply to the Receiver's Response [D.E. 315] to AGM Capital Fund I, LLC's Objections to the Subpoena *Duces Tecum* served by the Receiver, Motion for Protective Order and Motion to Quash, or, in the Alternative, Motion for the Fees Necessary to Respond to the Subpoena *Duces Tecum* [D.E. 294] and AGM Capital Fund II, LLC's Objections to the Subpoena *Duces Tecum* served by the Receiver, Motion for Protective Order and Motion to Quash, or, in the Alternative, Motion for the Fees Necessary to Respond to the

Subpoena *Duces Tecum* [D.E. 295] (collectively, the “Motions”)¹ and in support thereof, states as follows:

I. AGM Attempted to Meet & Confer in Good Faith

The Receiver argues that the Court should deny AGM’s Motions because counsel allegedly failed to comply with Local Rule 7.1 regarding the requirement to meet and confer. *See* Response at ¶ II. In doing so, the Receiver gives the impression that the undersigned purposefully ignored Local Rule 7.1 without cause. This is untrue and the Response fails to provide the whole factual background.

The undersigned was retained by AGM in the days prior to the deadline to respond to the Subpoenas. After getting up to speed on the matter and preparing AGM’s Motions to meet the impending deadline to file the same, the undersigned attempted to contact counsel for the Receiver to discuss AGM’s arguments and items that could be resolved between the parties. The undersigned and counsel for the Receiver were able to speak regarding AGM’s positions near the close of business on the deadline to object to the Subpoenas.

During the brief conversation, counsel for the Receiver indicated that he was not in a position to discuss AGM’s arguments in-depth but was willing to speak at a later date once he had sufficient time to review AGM’s positions. Counsel for the Receiver offered to extend the time to respond to the Subpoenas. The undersigned reasonably turned down this offer and filed the Motions in an abundance of caution in order to preserve AGM’s objections. The undersigned also

¹ AGM Capital Fund I, LLC and AGM Capital Fund II, LLC initially filed separate Motions regarding the Subpoenas. *See* [D.E. 294] and [D.E. 295]. Because the issues and arguments in support of the Motions are identical, AGM Capital Fund I, LLC and AGM Capital Fund II, LLC has elected to file a combined Reply to the Receiver’s Response.

believed that counsel for the Receiver would be in a better position to discuss the Motions if the same were filed with the Court.

The undersigned specifically informed counsel for the Receiver that he would file the Motions that evening. More importantly, he requested that counsel for the Receiver review AGM's Motions and subsequently contact the undersigned to continue their initial discussion. Counsel for the Receiver agreed that he would review the Motions and contact the undersigned for a more in-depth conversation. Despite this understanding and agreement, counsel for the Receiver has not attempted to contact the undersigned.

Since AGM filed the Motions, AGM believed that it left the door open for an in-depth discussion with counsel for the Receiver. It is unfortunate that the Receiver chose to file his Response rather than attempt to resolve the dispute. AGM clearly laid out its objections in the Motions. The Receiver has chosen to fight AGM on the merits rather than attempt to reach a resolution. While the motion practice is unfortunate, AGM again remains ready, willing and able to meet and confer in a good faith attempt to resolve the dispute.

II. AGM's Clients' and Investors' Personal Information are Protected from Disclosure Because it is Irrelevant

In addressing the merits of AGM's Motions, the Receiver argues that his duties and responsibilities necessitate that he be given wide-latitude to discover personal, confidential information regarding AGM's clients and investors. Specifically, the Receiver claims that his duties and responsibilities include "identifying all investors who may be victims of the alleged fraudulent scheme, determining who may have a claim to recover funds from the Receivership Entities, and tracing the funds that flowed to and from the Receivership Entities." Response at 10. While these may be the Receiver's duties and responsibilities, personal identifying information of

AGM's clients and investors is not relevant for one simple reason: AGM's clients and investors do not have any direct relationship with the Receivership Entities.

The Receiver is well aware that AGM is the entity that invested funds into the Receivership Entities. AGM received investments from certain clients and subsequently used the invested monies to make its own investments. Some of AGM's assets were invested in the Receivership Entities. To AGM's knowledge, none of its investors directly invested in the Receivership Entities. To the extent that an investor may have directly invested in the Receivership Entities, such an investment would have been done away from AGM without its oversight or knowledge.

Accordingly, AGM is the investor into the Receivership Entities that the Receiver seeks to identify. To the extent that the Receiver wishes to identify investors who may be victims of the alleged fraudulent scheme, the Receiver need not look further than AGM. AGM may have a claim to recover funds from the Receivership Entities. AGM's clients and investors would not have a claim to recover funds from the Receivership Entities because they did not invest in the Receivership Entities.

Furthermore, the Receiver does not need to know personal identifying and financial information regarding AGM's clients and investors to trace the funds that flowed to and from the Receivership Entities. AGM is aware of the amount of money it invested in the Receivership Entities and the amount of money it received in return. Determining the flow of funds between AGM and its clients and investors is outside of the scope of the Receiver's alleged duties and responsibilities. Indeed, to honor the Receiver's logic on relevance, the Receiver would be entitled to information regarding all further levels of *indirect* ownership of every dollar invested in Par Funding, such as in the case where an AGM investor is an entity like an LLC. May the Receiver properly seek information regarding that entity's, members and investors as well (who are three

times removed from privity with Par Funding)? And up the next level? If AGM's investor is an individual, may the receiver appropriately obtain confidential information regarding that individual's spouse and heirs (who may similarly have an indirect interest in the Receivership Entities, consider themselves victims and have questions about Par Funding)? Accordingly, any and all information related to AGM's clients and investors is irrelevant and must be protected from disclosure. Because there is no relevant or compelling reason to compel the disclosure of AGM's investor's personal financial information, the Court should grant AGM's Motions. *See Rowe v. Rodriguez-Schmidt*, 89 So. 3d 1101, 1103 (Fla. 2d DCA 2012) ("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.") (citing *Borck v. Borck*, 906 So. 2d 1209, 1211 (Fla. 4th DCA 2005)).

III. The Court is Required to Conduct an Evidentiary Hearing Before Compelling Production of Protected Information

In the event that the Court may believe that AGM's clients' and investors' personal financial information is relevant, the Court is required to conduct an evidentiary hearing before compelling production of the same. The Receiver's position that an evidentiary hearing is not required "when the pleadings make clear that the information is relevant" is misplaced. *See TTT Foods Holding Co. LLC v. Namm*, 16-CV-81798, 2017 WL 4876209, at *2 (S.D. Fla. Jan. 19, 2017); *see also* [D.E. 315] at 9. The Court may look at the pleadings and forgo an evidentiary hearing **when the financial discovery is sought from parties to the case**. *See id.* (citing *Elsner v. E-Commerce Coffee Club*, 126 So. 3d 1261, 1263 (Fla. 4th DCA 2013) ("declin[ing] to adopt a per se rule requiring a trial court always to conduct an evidentiary hearing before ordering financial discovery from a party.")) The financial discovery at issue herein is **sought from non-parties to the case**.

In fact, the Second District Court of Appeals held that whether the information sought belongs to a party or non-party is an important factor in determining whether an evidentiary hearing is required. *See id.* (citing *Inglis v. Casselberry*, 200 So. 3d 206, 211 (Fla. 2d DCA 2016), *reh'g denied* (Sept. 2, 2016)). Where, like here, the **financial information at issue belongs to non-parties**, courts in Florida have held that “[w]here a trial court orders the disclosure of a nonparty's financial information without considering any evidence regarding its relevance, the trial court departs from the essential requirements of law.” *Rowe*, 89 So. 3d at 1103.

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. As such, an evidentiary hearing is required.

The Court, however, does not need to address this argument because it is clear that information regarding AGM's clients and investors is irrelevant. The documents and information that the Receiver requires to satisfy his alleged duties and obligations relates to AGM. AGM believes it can provide sufficient documentation to permit the Receiver to comply with his alleged duties and obligations without the need to disclose private and confidential information about any of AGM's clients and investors. Accordingly, the Court should issue a protective order regarding AGM's clients' and investors' personal information.

IV. AGM—not the Receiver—is Entitled to its Fees

AGM reiterates its request for attorneys' fees. Requiring AGM to produce the documents called for in the Subpoena would subject AGM to annoyance, embarrassment, and oppression. It

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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 issues for AGM.

In light of the above, it is clear that the Receiver did not take reasonable steps to avoid imposing an undue burden on AGM as required by Rule 45. The Subpoena seeks irrelevant, confidential and private documents from third-parties twice removed from the Receivership Entities. There is no reasonable basis for this intrusion into the private lives of innocent investors. 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 Subpoenas issued to non-parties, AGM Capital Fund I, LLC and AGM Capital Fund II, LLC, should be quashed. 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 and AGM Capital Fund II, LLC are not forced to reveal confidential information regarding its investors and its business operations. Finally, AGM Capital Fund I, LLC and AGM Capital Fund II, LLC should be awarded the reasonable lost profits, costs and attorneys' fees associated with compliance with any aspect of the Subpoena.

WHEREFORE, Non-Parties, AGM Capital Fund I, LLC and AGM Capital Fund II, LLC, respectfully requests that this Honorable Court grant the following relief: 1) sustain their

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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; and 5) grant such other and further relief as this Court deems just and proper.

Dated: October 22, 2020

Respectfully submitted,

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*Attorneys for Non-Parties,
AGM Capital Fund I, LLC and
AGM Capital Fund II, LLC*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October, 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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