IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

JOINT DISCOVERY MEMORANDUM REGARDING SUBPOENAS ISSUED BY LISA MCELHONE TO ROD ERMEL ASSOCIATES, INC., ROD ERMEL, AND KENNETH BACON

Pursuant to the Court's Paperless Order dated June 13, 2022 [DE 1266], Defendant Lisa McElhone ("McElhone") and non-parties Rod Ermel Associates, Inc., Rod Ermel, and Kenneth Bacon (collectively the "Ermel Parties") hereby submit this Joint Discovery Memorandum regarding the discovery dispute scheduled for hearing on June 22, 2022 at 12:30 p.m. The subject of this discovery dispute are certain subpoenas issued to the Ermel Parties (the "Subject Subpoenas"), copies of which are attached as Composite Exhibit A.

1. On or about May 17, 2022, McElhone served the Subject Subpoenas on the Ermel Parties, which called for the Ermel Parties to produce responsive documents by email on or before 5 p.m. on June 6, 2022.

2. On June 6, 2022, counsel for the Ermel Parties corresponded with McElhone's counsel to advise that no documents would be produced and raising two issues regarding the Subject Subpoenas. (A copy of the letter is attached as Exhibit B). First, the Ermel Parties asserted that

compliance with the Subject Subpoenas would impose undue burden and expense, and that McElhone has not taken steps to avoid imposing such burden pursuant to Rule 45(d)(1). Second, the Ermel Parties asserted that the Subject Subpoenas do not comport with Rule 45(c)(2) because they require that documents be produced by email to counsel based in Florida, rather than seeking production within 100 miles of where the Ermel Parties (who are based in Colorado) reside or regularly conduct business.

3. Counsel for McElhone provided a response to the letter from the Ermel Parties within a few hours of receipt. (A copy of McElhone's response is attached as Exhibit C). In the response, counsel for McElhone disputed the application of the requirement that production be made within 100 miles of where the Ermel Parties conduct business, asserting that the provision of Rule 45 upon which the Ermel Parties rely on has been superseded by §78aa in this case. McElhone's also sought to meet and confer on the burden issue, explaining that time was of the essence due to the limited window for McElhone to conduct discovery, and the July 1, 2022 deadline for her to respond to the SEC's Amended Omnibus Motion for Final Judgments.

4. The parties have exchanged further correspondence in an effort to meet and confer but were unable to reach an agreement on these discovery issues, and therefore requested a discovery hearing before Magistrate Judge Reinhart.

MEMORANDUM

1. Whether the 100 Mile Requirement of Rule 45(c)(2) Applies in this Case

The parties agree that Rule 45(c)(2) provides that a subpoena for documents must command production within 100 miles of where the subpoenaed person resides, is employed or regularly transacts business in person. However, the parties dispute whether rule 45(c)(2) applies in this case.

McElhone's position is that, in SEC proceedings (such as this case), the one-hundred-mile provision of Rule 45 is preempted by § 78aa and has no application. The Dodd-Frank Wall Street Reform and Consumer Protection Act provides for nationwide service of process – including subpoenas. *SEC v. Church-Koegel*, Civil Action No. 20-21001-Civ, 2020 U.S. Dist. LEXIS 168090, at *19 (S.D. Fla. Sep. 15, 2020) (citing 15 U.S.C. §§ 77v(a); 78aa(a)). The pertinent part of the statute states:

> In any action or proceeding instituted by the Commission under this chapter in a United States district court for any judicial district, a subpoena issued to compel the attendance of a witness or the production of documents or tangible things (or both) at a hearing or trial may be served at any place within the United States. ***Rule 45(c)(3)(A)(ii) of the Federal Rules of Civil Procedure[1] shall not apply to a subpoena issued under the preceding sentence.***

See 15 U.S.C. § 78aa (emphasis added). "Thus, § 78aa 'authorizes nationwide service of a subpoena to compel attendance of a witness in a securities enforcement action.'" *SEC v. AIC, Inc.*, No. 3:11-CV-176, 2013 U.S. Dist. LEXIS 135535, at *3-4 (E.D. Tenn. Sep. 23, 2013) (quoting *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1323 (M.D. Fla. 2011)). Thus, the one-hundred-mile provision of Rule 45 is preempted by § 78aa and does not apply in this case.

The Ermel Parties do not dispute that 18 U.S.C. § 78aa authorized nationwide service of subpoenas in securities enforcement actions. In fact, as acknowledged in note 1, *supra*, McElhone's invocation of 18 U.S.C. § 78aa is unnecessary since the December 1, 2013 amendments to the Federal Rules of Civil Procedure provide for nationwide service of subpoenas in all civil cases. Fed.R.Civ.P. 45(b)(2).

The issue of concern here, however, has nothing to do with the validity of service (which is not in dispute), but everything to do with the manner of compliance of a properly served

[1] Rule 45(c)(3)(A)(ii) has been revised since the codification of 15 U.S.C. §78aa and is now found at Rule 45(c)(2). *Compare* Fed. R. Civ. P. 45(c)(3)(A)(ii) (2012 ed.) and Fed. R. Civ. P. 45(c)(2) (2020 ed.).

subpoena. The Ermel Parties can find no lawful exception to, or modification of Rule 45(c)(2)(A) that requires them to do anything other than insist on strict compliance with Rule 45(c)(2).

Careful review of the Ermel Parties' letter to McElhone's counsel (Exhibit B) reveals no complaint regarding service of process, but only the facial deficiency of the Subject Subpoenas because it directs compliance in a manner not authorized under Rule 45(c)(2). In fact, review of the counsel's letter reveals that counsel for the Ermel Parties was happy to accept service of "Rule 45-compliant subpoenas."

2. Whether the Subject Subpoenas Impose an Undue Burden on the Ermel Parties

The parties agree that Rule 45(d)(1) applies in this case. *See id*. ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena"). However, the parties dispute whether the Subject Subpoenas impose an undue burden. "The undue burden analysis requires the court to balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it." *In re Subpoena Dated June 18, 2020, 20-MC-82327-BER*, 2021 WL 7540812, at *6 (S.D. Fla. Apr. 14, 2021) (internal citation omitted). Facts pertinent to the analysis include the relevance of the information requested to the underlying litigation, the burden imposed by producing the information, the necessity of the documents sought, the breadth of the request and expense and inconvenience involved. *Id*.; *Garcia v. E.J. Amusements of New Hampshire, Inc.*, 89 F. Supp. 3d 211, 215 (D. Mass. 2015).

McElhone's position is that she and her attorneys have taken reasonable steps to limit the burden or expense imposed on the Ermel Parties. The Subject Subpoenas seek tax returns, audit reports, and related records pertaining to financial services provided by the Ermel Parties to McElhone and the corporate entities that are the subject of the within enforcement action. These

document requests are limited in time and scope and are proportional to the needs of this case (and the disgorgement proceedings in particular). Moreover, the Subject Subpoenas seek the production of documents and information which the Ermel Parties prepared in the ordinary course of their business. McElhone's attorneys conferred with the attorneys for the Ermel Parties in an attempt to address any potential burden, but no modification or limitation to the Subject Subpoenas has been proposed (*i.e.*, the Ermel Parties maintain blanket objections and are unwilling to produce any records). Finally, because the Subject Subpoenas request that the Ermel Parties produce responsive documents electronically, the costs associated with physical production have been obviated and any potential burden on the Ermel Parties is further reduced. For all these reasons, McElhone and her counsel have taken reasonable steps to avoid imposing undue burden or expense on the Ermel Parties in responding to the Subject Subpoenas – thus satisfying Rule 45(d)(1). *See Revak v. Miller*, 7:18-CV-206-FL, 2020 WL 1164920, at *12 (E.D.N.C. Mar. 9, 2020) (finding that Plaintiff's subpoena seeking documents prepared in the ordinary course of business and conferrals with Defendants' counsel regarding discovery dispute constituted reasonable steps to avoid undue burden or expense); *Certain Underwriters at Lloyd's v. Nat'l R.R. Passenger Corp.*, 16-MC-2778 (FB), 2016 WL 6902140, at *5 (E.D.N.Y. Nov. 23, 2016) (finding that subpoena requesting documents from third-party which were previously produced on behalf of its clients was not unduly burdensome); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, 17-MD-2785-DDC-TJJ, 2018 WL 2445098, at *5 (D. Kan. May 31, 2018) ("[C]ompliance with a subpoena inevitably involves some measure of burden to the producing party, [but] the court will not deny a party access to relevant discovery because compliance inconveniences a nonparty or subjects it to some expense").

The Ermel Parties maintain that compliance with the Subject Subpoenas imposes undue burden and expense. By way of background, the Court should know that for several years before the Securities and Exchange Commission (SEC) commenced this matter, the Ermel Parties provided bookkeeping and/or tax return preparation services to the "individual Ermel clients" and the "Ermel clients," (terms defined in the Subject Subpoena). By the time the SEC commenced this action, the Ermel Parties were providing services to more than 30 entities.

Second, the Court should also know that at the time the SEC commenced this action, McElhone and/or the Ermel clients she controlled, including but not limited to the "Trust Entities," owed the Ermel Parties nearly $90,000 for past services, which remains outstanding.

Third, McElhone minimizes the burden of compliance to the Ermel Parties. In this memorandum above, McElhone states:

> The subject of the subpoena seeks tax returns, audit reports, and related records pertaining to financial services provided by the Ermel Parties to McElhone and the corporate entities that are the subject of the within enforcement action. These documents are limited in time and scope and are proportionate to the needs of this case (and the disgorgement proceedings in particular).

Review of the subpoena, however, reveals a different and much broader scope than suggested above. Even if the subpoena requested only tax returns and audit reports, each and every one of these tax returns and audit reports were provided to the relevant entity at the time that the services were provided.

Additionally, much of this information requested has already been produced to the SEC and/or the Receiver. Therefore, McElhone can certainly obtain this information from a party, as opposed to burdening third-party witnesses who are owed a significant receivable.

Lastly, the Ermel Parties do not agree that non-authorized production via email minimizes the burden and expense of compliance. The documents still must be gathered, organized, and

produced. Given the scope of responsive documents (which exceeds tens of thousands of pages), the amount of time and associated expense is something a third-party witness should not be required to incur especially when many, if not most, of the responsive documents have already been provided to the clients and/or produced to the SEC and/or the Receiver.

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

Pursuant to Local Rule 7.1(a)(3)(A), the undersigned hereby certify that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in this discovery dispute in a good faith effort to resolve the issues but have been unable to resolve the issues.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2022, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

By: /s/ *James M. Kaplan*
JAMES M. KAPLAN