

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA ex rel,
VICTOR E. BIBBY and BRIAN J.
DONNELLY,

Relators,

v.

Case No.: _____

MORTGAGE INVESTORS
CORPORATION, and WILLIAM L.
EDWARDS, individually,

Defendants.

**NON-PARTY MARKETING SOLUTION PUBLICATIONS, INC.’S
OBJECTIONS TO AND MOTION TO QUASH SUBPOENA**

Pursuant to Rules 45 and 26, Federal Rules of Civil Procedure, non-party Marketing Solution Publications, Inc. (“MSP”) moves on the following grounds to quash the Relators’ “Subpoena to Testify at a Deposition in a Civil Action” (the “Subpoena”).¹ The Subpoena purports to direct MSP to designate an individual to testify on its behalf regarding various topics, allegedly in furtherance of the ongoing discovery in the matter styled *U.S. ex rel Victor Bibby & Brian Donnelly v. William L. “Bill” Edwards & Mortgage Investors Corporation* (“Edwards” and “MIC”), Case No. 1:12-cv-004020-AT, pending in the Northern District of Georgia, Atlanta Division for nearly ten years (the “Underlying Action”). Alternatively, should the Court decline to quash the Subpoena, MSP respectfully requests that the Court modify the Subpoena in light of the objections raised in this motion. MSP further reserves the right to object to the individual deposition topics set forth by Relators in the Subpoena, in the event the Court declines to quash the Subpoena.

¹ A copy of the Subpoena is attached as **Exhibit A**.

Introduction

The Underlying Action is a False Claims Act *qui tam* suit, in which the Government has declined to intervene. On August 12, 2016, the Court dismissed Relators' state law claims against MIC, leaving only the False Claims Act claim. The Court also dismissed Relators' claims against Edwards. In so doing, the Court expressly stated that it offered no opinion on whether Relators will ultimately prove their allegations. Subsequently, the Court allowed Relators to pursue a corporate veil piercing theory against Edwards. On November 22, 2016, the Court in the Underlying Action (the "Atlanta Court") entered a Scheduling Order limiting remaining fact discovery to Relators' veil-piercing theory of liability, as to the relationship between Edwards and co-defendant MIC.

Relators served a document subpoena on non-party MSP on January 6, 2017, demanding that MSP produce information irrelevant to the limited veil-piercing issue and, in any event, sought confidential, sensitive business, and proprietary information. MSP filed a motion to quash that subpoena in this District, and the matter was stayed. Without participation by MSP, the Atlanta Court heard argument on the "MSP Discovery Dispute" and ordered Edwards – a party to the Underlying Action – to produce documents related to two out of nine of Relators' document requests. Despite the Atlanta Court's narrowing and attempt to minimize the burden on non-party MSP, Relators served the present Subpoena, demanding that MSP designate and prepare a corporate representative to testify regarding various topics. The testimony Relators seek from MSP is irrelevant to their veil-piercing theory as to Edwards and MIC, exceeds the scope of the Atlanta Court's Order, or is cumulative and duplicative to the documents produced by Edwards, which speak for themselves.

The Underlying Action²

1. MIC is a veteran owned and operated mortgage lending company that originated home loans backed by the U.S. Department of Veterans Affairs (“VA”). MIC is incorporated in Ohio and, at times during the relevant time period, employed over 2,000 people in more than two dozen states. MIC’s primary product was Interest Rate Reduction Refinance Loans (IRRRLs), which are mortgage refinance loans designed by the VA to lower borrowers’ monthly payments. MIC has served hundreds of thousands of satisfied customers.

2. The Underlying Action is a False Claims Act *qui tam* suit, in which the Government has declined to intervene. The Relators are two former mortgage brokers who brought suit against numerous financial services companies on the basis of knowledge they allegedly gained while brokering loans for those companies. They allege that the companies originated mortgages that included third-party fees, such as for title examination, which were either excessive or unallowable under VA regulations. (N.D. Ga., Case No. 12-04020, Docs. 352, 395, 416 & 427.) The case against MIC has been severed from the original action. (N.D. Ga., Case No. 06-547, Doc. 318.)

3. MIC has steadfastly maintained its innocence, and its pleadings set forth a detailed refutation of the Relators’ allegations. (*See, e.g.*, N.D. Ga., Case No. 12-04020, Docs. 395, 566-1, 588.) The Relators never brokered any loans for MIC, and therefore appear to lack any direct evidence of wrongdoing. (N.D. Ga., Case No. 12-04020, Docs. 588 & 639-1.) Their case appears to rely principally on an allegation that title-related fees may never exceed \$200 on any loan, regardless of geography, loan amount, or any other variable. (N.D. Ga., Case No. 12-04020, Docs. 352 & 395.) According to MIC’s pleadings, information obtained through discovery conclusively rebuts that theory. (*See, e.g.*, N.D. Ga., Case No. 12-04020, Docs. 395, 566-1, 588, 639-1.)

² The information in this section is derived primarily from Defendants’ Motion to Dismiss, and other filings in the Underlying Action.

4. For example, MIC's filings indicate that it has produced evidence that its loans were extensively audited by the VA, including for the specific types of violations alleged in the Underlying Action, and that the VA never found that any title-related fee on an MIC loan exceeded permissible levels. (N.D. Ga., Case No. 12-04020, Doc. 639-1.)

5. The Relators have pointed to their own experience as brokers as a source of knowledge, but have admitted that they never brokered loans for MIC and never did business directly with MIC. (N.D. Ga., Case No. 12-04020, Docs. 588, 639-1.)

6. Meanwhile, according to information filed by MIC, the company has provided detailed, loan-level explanations of why its loans fully comply with the law. (N.D. Ga., Case No. 12-04020, Doc. 395-1.)

7. In addition to failings in the Relators' basic fact allegations, MIC contends that the Relators' claim will fail at summary judgment because it is precluded by the False Claims Act public discourse bar. (N.D. Ga., Case No. 12-04020, Doc. 639-1.) Additionally, recent filings in the related case from which MIC was severed indicate that the Relators likely will not be able to prove that at-issue fees were material in light of *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989 (2016). (N.D. Ga., Case No. 06-547, Doc. 1225.) Indeed, the Government has filed a statement of interest explaining that an incorrect fee does not void the government guarantee. (N.D. Ga., Case No. 06-547, Doc. 1187.)

8. The history of the Underlying Action reflects that Relators have, from the outset, sought to turn this litigation into a broad and protracted fishing expedition. The original complaint was filed on March 8, 2006—nearly 11 years ago—and then amended twice before the case was unsealed in 2011. (Case No. 1:06-cv-00547 at Dkt. Nos. 1, 31, 54, 61.)

9. Shortly thereafter, Relators conducted extensive written discovery, exhausting their allotted interrogatories, and propounding more than 150 complex requests for production and 195 requests for admission. (*See* 1:12-cv-04020 at Dkt. No. 46 at 2.)

10. MIC has produced tens of thousands of documents and provided numerous substantive responses to written discovery requests.

11. After the case against MIC was severed from the original action, the Atlanta Court set a ten-month discovery period, which was subsequently extended. (*See id.* at Dkt. No. 59; Dkt. No. 63.) Relators took just one deposition and eventually, on May 12, 2015, the Atlanta Court administratively closed the Underlying Action. (*See id.* at Dkt. No. 128).

12. On June 25, 2015, the Atlanta Court reopened the Underlying Action and discovery resumed. (*Id.* at Dkt. No. 144.)

13. On August 12, 2016, the Atlanta Court dismissed Relators' state law claims against MIC in the Underlying Action, leaving only the False Claims Act claim. The Atlanta Court also dismissed Relators' claims against Edwards.³ In so doing, the Atlanta Court expressly stated that it offered no opinion on whether Relators will ultimately prove their allegations.

14. Subsequently, the Atlanta Court allowed Relators to pursue a corporate veil piercing theory against Edwards.

15. On November 22, 2016, the Atlanta Court entered a Scheduling Order limiting remaining fact discovery to Relators' veil-piercing theory of liability.

³ Edwards was initially dismissed from the case altogether, and the Court reversed itself after Relators filed a motion for reconsideration. As reflected in Composite **Exhibit B**, Defendants moved for interlocutory appeal to contest the Court's determination that it has personal jurisdiction over Edwards, that it need not apply the Rule 9(b) pleading standard to Relators' veil-piercing theory of liability, and that it need not address the merits of MIC's argument for dismissal of the FCA claim against MIC.

16. On January 6, 2017, Relators served a subpoena (the “January 6, 2017, Subpoena”) on non-party MSP, an entity which provides copyrighted sales materials to MIC per license agreements.

17. The subpoena purported to direct MSP to produce the documents requested in Attachment A to the January 6, 2017, Subpoena on or before January 23, 2017, at 10:00 a.m. A true and correct copy of the January 6, 2017, Subpoena is attached as **Exhibit C**.

18. MSP served its Response and Objections to the January 6, 2017, Subpoena, indicating that it would produce a copy of its royalty agreement(s) with MIC and a third party analysis of same in response to Request No. 9. A true and correct copy of MSP’s Response and Objections to the January 6, 2017, Subpoena is attached as **Exhibit D**.

19. MSP filed a Motion to Quash Subpoena and for Protective Order in the Middle District of Florida. That action was stayed as the Atlanta Court considered the MSP Discovery Dispute.

20. The Atlanta Court heard argument from the parties on May 15, 2017. Non-party MSP did not participate in the hearing.

21. On May 17, 2017, the Atlanta Court entered an order directing Edwards to produce documents responsive to Relators’ Request No. 1, which sought documents “reflecting the corporate organization and ownership structure” of MSP. (*See* Case No. 1:06-cv-00547 at Dkt. No. 770).

22. The Court also ordered Edwards to produce the following categories of documents in response to Relators’ Request No. 9:

- a. MSP documents relating to any licensing or royalty agreements between MIC and MSP, and any amendments to those agreements;

- b. Records reflecting the amounts paid to MSP pursuant to those licensing or royalty agreements;
- c. Corporate records reflecting MIC or MSP's approval of any such agreements and amendments; and
- d. Documents reflecting any payments from MIC to MSP for services or items other than those paid in connection with the royalty or licensing agreement(s). These documents should include invoices, itemized billing statements, or other records of payments made by MIC to MSP during 2011, 2012, and 2013.

(*Id.* at 2-3).

23. Regarding Relators' additional requests, the Court noted: "Relators did not withdraw Requests No. 2, 3, 5, 7, and 8, but did indicate that they could live without them. The Court declines to require Edwards to produce documents responsive to these requests at this time."

(*Id.* at 2 n.2).

24. The Court further explained: "At this time, the Court is requiring production of documents reflecting compensation for work allegedly done by MSP for MIC, not documents showing what work actually *was* done." (*Id.* at 3 n.5) (emphasis in original).

The Subpoena

25. Despite the Court's guidance and attempt to reduce the burden on non-party MSP, Relators served the present Subpoena requesting that MSP designate a person to testify on its behalf regarding the following topics:

- a. The corporate organization and ownership structure of MSP.
- b. All agreements between MIC and MSP.
- c. The work performed by MSP pursuant to the February 20, 2001 contract as amended between January 1, 2010 and October 12, 2013.

- d. The work performed by MSP for entities other than MIC from 2011 to the present, including any agreements for said work.
 - e. The identity and number of employees of MSP on the following dates
 - i. January 1, 2012;
 - ii. January 1, 2013;
 - iii. January 1, 2014; and
 - iv. September 17, 2015.
 - f. The identity and compensation of employees of MSP that also served as employees of MIC, from 2010 to the present and all agreements between MIC and MSP reflecting the same.
 - g. The transactions identified on Garavaglia 0000008 and Garavaglia 00000010.
 - h. MSP's 2012 Federal Tax Returns.
26. As an initial matter, the topics proposed by Relators exceed the scope of the May 17, 2017, Order from the Atlanta Court.
27. That issue notwithstanding, the Subpoena places an undue burden on MSP, because the topics identified are irrelevant to the limited issue of Relators' veil-piercing theory of liability, as to the relationship between Edwards and *MIC*.
28. Further, the Subpoena seeks cumulative and duplicative information, as the documents provided speak for themselves.
29. Even assuming *arguendo* that additional explanation regarding the documents produced is warranted, as explained below, the information sought by Relators can be obtained by less burdensome means than the deposition of a MSP corporate representative.

The Subpoena places an undue burden on non-party MSP.

30. “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 a subpoena.” *Darnell v. Rivera*, No. 615CV999ORL37TBS, 2016 WL 4183386, at *1 (M.D. Fla. Aug. 8, 2016).

31. In conducting this analysis, federal courts have routinely held that “non-party status is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue.” *Aeritas, LLC v. Delta Airlines, Inc.*, No. 11-CV-00969-SLR, 2013 WL 454452, at *2 (N.D. Ga. Feb. 7, 2013) (citation omitted); *see Fadalla v. Life Auto. Products, Inc.*, 258 F.R.D. 501, 504 (M.D. Fla. 2007) (“The status of a person as a non-party is a factor that weighs against disclosure.”); *ACI Worldwide Corp. v. Mastercard Techs., LLC*, No. 8:14CV31, 2016 WL 3647850, at *2 (D. Neb. July 1, 2016) (“[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.”); *Eramo v. Rolling Stone LLC*, 314 F.R.D. 205, 211 (W.D. Va. 2016) (“District courts give extra consideration to the objections of non-party, non-fact witnesses when weighing burden versus relevance.”); *Schaaf v. SmithKline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D.N.C. 2005) (“In the context of evaluating subpoenas issued to third parties, a court will give extra consideration to the objections of a non-party, non-fact witness in weighing burdensomeness versus relevance.”) (quotation omitted); *Simmons v. Morgan Stanley Smith Barney, LLC*, No. 11CV2889-WQH MDD, 2013 WL 310330, at *1 (S.D. Cal. Jan. 25, 2013) (“[N]on-party status is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue.”) (citation omitted); and *Whitlow v. Martin*, 263 F.R.D. 507, 512 (C.D. Ill. 2009) (“Non-party status is a significant factor to be considered in determining whether the burden imposed by a subpoena is undue.”).

32. Relators' Subpoena places an undue burden on non-party MSP, because, among other reasons, the information sought is either irrelevant to Relators' veil-piercing claim as to *MIC*, or (as discussed below) already available from information produced by Edwards.

33. When asked why a 30(b)(6) deposition of MSP would be relevant to the Underlying Action, Relators' counsel pointed primarily to Relators' Update Regarding MSP Discovery Dispute, Request for Additional Relief Pursuant to Order of May 17, and Request for Partial Reconsideration ("Relators' Update") (*See* 1:12-cv-04020 at Dkt. No. 776.)

34. In that filing, Relators provide: "Despite defendants' repetitive accusations, Relators are not seeking evidence to pierce the MSP corporate veil or to conduct post-judgment discovery." (1:12-cv-04020 at Dkt. No. 776 at 2.) In sum, Relators accuse Edwards of allegedly transferring funds from MIC to MSP in order to fund "his personal living expenses and the activities of his other entities." (*Id.*).

35. Despite their emphatic representations to the contrary, however, Relators effectively seek to pierce the corporate veil of non-party MSP, and Relators' Update only supports that conclusion. For example:

- a. "For purposes of veil piercing, Relators are entitled to test Edwards' claim that MSP was a fully functioning, separate marketing company that provided valuable marketing services to MIC *and* to other companies." (1:12-cv-04020 at Dkt. No. 776 at 4) (emphasis in original.)
- b. "If, as Relators believe, MSP did no work, or virtually no work, for companies other than MIC, that supports a finding that MSP was not a functioning entity capable of performing the work being paid for by MIC." (1:12-cv-04020 at Dkt. No. 776 at 5.)

36. Relators proceed to request that the Atlanta Court enter an order directing Edwards to produce (among other things): MSP's W-2s for the years 2011-2015; contracts, work orders or work-product showing marketing work performed by MSP entities other than MIC from 2011-2015; and MSP's 2012 Federal Tax returns.

37. As noted above, the Atlanta Court previously declined to require Edwards – a party to the Underlying Action – to produce similar information. (*See* Case No. 1:06-cv-00547 at Dkt. No. 770 at 2 n.2.) The Atlanta Court further explained: “At this time, the Court is requiring production of documents reflecting compensation for work allegedly done by MSP for MIC, not documents showing what work actually *was* done.” (*Id.* at 3 n.5) (emphasis in original.)

38. Relators' Subpoena seeks similarly sensitive and proprietary business information from MSP – substantially the same information which forms the basis of Relators' request for reconsideration included in Relators' Update.

39. The topics included in Relators' Subpoena are outside the scope set forth in the Atlanta Court's May 17, 2017, Order. Relators should not be permitted to use a corporate representative deposition of MSP as an end-run around the Atlanta Court's directive.

40. In any event, MSP is privileged to conduct its business as a separate enterprise. How Edwards utilizes MSP is irrelevant, because Relators are not creditors of MSP, nor do they have claims against MSP. (*See* 1:12-cv-04020 at Dkt. No. 782 at 5.)

41. The relationship between MIC and MSP is long standing, such that Relators cannot contend that MSP was created to divert MIC's funds in order to avoid Relators' claims. In fact, the operative MSP license specifically provides that the license fees would not be a drain on MIC by providing that fees were only payable to the extent that the net income to MIC was greater than or equal to the license fee for the respective time period. (*Id.*)

42. Further, a third party has determined that the license represents fair market value, and Relators have not rebutted that fact with any credible evidence to the contrary.

43. The discovery sought by Relators will do nothing to advance their alter ego claim regarding MIC. Even if the amount of the license fee is substantial, Relators cannot show that the license was created to deprive MIC of the ability to respond to a judgment in this case, which is the essence of the alter ego allegations in the Fourth Amended Complaint. (*Id.* at 5-6).

44. Relators fail to demonstrate that the information sought from MSP (which has been providing services to MIC since 1994) is relevant to their veil-piercing claim as to Edwards and MIC.

45. Accordingly, the utility of the requested information is greatly outweighed by the undue burden placed on non-party MSP, and the Subpoena should be quashed.

The Subpoena seeks duplicative and cumulative information.

46. District courts have broad discretion to limit discovery where the discovery sought is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b)(2)(C).

47. “Limits should be imposed where the burden or expense outweighs the likely benefits.” *Aeritas, LLC v. Delta Airlines, Inc.*, No. 11-CV-00969-SLR, 2013 WL 454452, at *2 (N.D. Ga. Feb. 7, 2013); *see Simmons v. Morgan Stanley Smith Barney, LLC*, No. 11CV2889-WQH MDD, 2013 WL 310330, at *1 (S.D. Cal. Jan. 25, 2013) (same).

48. Here, the testimony sought is duplicative and cumulative of documents previously produced by Edwards, who is a party to the Underlying Action.

49. The documents produced by Edwards speak for themselves and no testimony concerning their contents is necessary.

50. Even assuming *arguendo* that Relators could state a valid basis upon which they seek clarification of the documents produced, there are less burdensome ways for Relators to obtain that information:

Any information sought by Plaintiff can be obtained by less burdensome means than the deposition of a Verizon representative. In fact, Verizon had offered to produce a declaration clarifying any information in the documents already produced to the extent that is not clear from the face of the documents. (Verizon Br. 9-10.) Therefore, the discovery sought “can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. R. 26(b)(2)(C). Verizon, a nonparty, is afforded greater protection than a party to a case. *See Chazanow*, 2014 WL 2965697, at *3. Accordingly, the Court grants Verizon’s motion to quash the Deposition Subpoena of a Verizon corporate representative seeking testimony regarding the collection of fees.

Kelley v. Enhanced Recovery Company, LLC, No. CV 15-6527 (CCC), 2016 WL 8673055, at *3 (D.N.J. Oct. 7, 2016); see *U.S. E.E.O.C. v. Pinal Cty.*, 714 F. Supp. 2d 1073, 1078 (S.D. Cal. 2010) (determining the testimonial subpoena was duplicative and cumulative in light of documents produced). MSP is similarly willing to consider providing a declaration clarifying any information in the documents previously produced, to the extent it was not clear from the face of the documents.

51. Relators have failed to “take reasonable steps to avoid imposing undue burden or expense on” MSP, and the Subpoena should be quashed. Fed. R. Civ. P. 45(d)(1).

Conclusion

52. “The subpoena power is a substantial delegation of authority to private parties, and those who invoke it have a grave responsibility to ensure it is not abused. Informing the person served of his right to object is a good start ... but it is no substitute for the exercise of independent judgment about the subpoena’s reasonableness.” *Theofel v. Farey Jones*, C.A.9th, 2003, 341 F.3d 978, 984 (Kozinski, J.).

53. Relators’ Subpoena to non-party MSP is unreasonable and should be quashed, because it seeks information irrelevant to the limited issue of Relators’ veil piercing theory as

between Edwards and MIC; places an undue burden on MSP; and seeks cumulative and duplicative information, as that the documents produced by Edwards speak for themselves.

54. MSP is willing to provide a declaration clarifying information in the documents previously produced, if and to the extent something is not clear from the face of the documents. MSP respectfully requests that it not be subjected to the unnecessary burden of preparing for and defending a corporate representative deposition.

55. Alternatively, should the Court decline to quash the Subpoena, MSP respectfully requests that the Court modify the Subpoena in light of the objections raised in the present motion. MSP further reserves the right to object to the individual deposition topics set forth by Relators in the Subpoena, in the event the Court declines to quash the Subpoena.

WHEREFORE, non-party Marketing Solution Publications, Inc. respectfully requests that the Court enter an order quashing the Relators’ “Subpoena to Testify at a Deposition in a Civil Action” or, alternatively, modifying the Subpoena in light of the objections raised in the present motion.⁴

Respectfully submitted,

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⁴ MSP reserves the right to seek recovery of its attorney fees and costs per Rule 45, Federal Rules of Civil Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 20, 2017, the foregoing was filed with the Clerk of the U.S. District Court, Middle District of Florida, Tampa Division, and copies were emailed to the following:

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