

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES SECURITIES AND)	
EXCHANGE COMMISSION)	
)	CAUSE NO: 1:15-cv-659-JMS-MJD
Plaintiff,)	
)	
)	
)	
)	
v.)	
)	
VEROS PARTNERS, INC. ET AL.)	
)	
Defendant.)	

**OBJECTION AND MOTION TO QUASH RECEIVER’S NON-PARTY REQUEST
FOR PRODUCTION**

Comes now Broyles Co., Nicole Broyles, Cherry Farms, LLC, Cherry Family Land, LLC, Cherry Ag Services, LLC, High Voltage Painting, LLC, James E. Cherry, Susan L. Cherry, Chris A. Cherry, Cristi K. Cherry, and Jeffrey A. Cherry (collectively the “Movants”¹), by counsel, and respectfully object to the Receiver’s subpoenas and Non-Party Requests for Production to the Movants, and further respectfully move to quash the same. In support of said objection and motion to quash, the Movants state as follows:

1. Broyles Co. and Nicole Broyles were served with the Receiver’s subpoenas and notices to “Produce Documents, Information or Objects” on or about July 18, 2016.
2. Said subpoenas and notices were not filed with the Court, but true and accurate copies are attached hereto as Exhibit “A” and Exhibit “B.”

¹ Cherry Investor Group, LLC is not include in this motion because the undersigned do not represent Cherry Investor Group, LLC and because there are no records responsive to the non-party request for this entity.

3. The time to object to said subpoenas and non-party requests has not yet expired as this motion is made before the subpoenas' return date. Fed. R. Civ. P. 45(3)(A).
4. Counsel for the Receiver was notified of this motion via telephone on August 18, 2016.
5. Movants object to the subpoenas and non-party requests because (a) the documents being requested are protected under Indiana's accountant-client privilege and (b) they constitute an undue burden on the Movants in that they require production of information by parties unrelated to the underlying receivership and they are overbroad because production would result in the disclosure of substantial personal information irrelevant to the underlying receivership.

Accountant Client Privilege

6. Movants object to the Receiver's subpoenas and non-party requests for production of confidential information because the production of the documents, information, or objects would require disclosing "privileged or other protected matter." Fed. R. Civ. P. 45(3)(A)(iii).
7. The requested information, documents, and objects contain information wholly acquired from a certified public accountant while conducting a professional service and the information is thereby privileged. Ind. Code. § 25-2.1-14-1 (2016).
8. Nicole Broyles, of Broyles Co., is a certified public accountant as evidenced by a true and accurate copy of her current licensing status attached hereto as Exhibit "C."
9. Nicole Broyles and Broyles Co. conducted professional services for Cherry Farms, LLC, Cherry Family Land, LLC, Cherry Ag. Services, LLC, High Voltage Painting, LLC, James E. Cherry, Susan L. Cherry, Chris A. Cherry, Cristi K. Cherry, and

Jeffrey A. Cherry in filing personal tax returns, filing entity tax returns, preparing payroll documents, preparing financial statements, filing tax documents with the state, and performing other services as needed.

10. The Indiana Court of Appeals in *Ernst & Ernst v. Underwriters National Assurance Co.*, in discussing the accountant client privilege stated, “the legislature has made a judgement that the welfare of the client will be best served if matters communicated by the client and accountant are subject to a zone of privacy controlled by the client.” 178 Ind. App 77, 86, 381 N.E.2d 897, 903 (Ind. Ct. App. 1978).
11. The privilege applies here because the documents, information, or objects the Receiver is requesting were produced by a certified public accountant while conducting a professional service.² See *Orban v. Krull*, 805 N.E.2d 450, 453 (Ind. Ct. App. 2004) (holding that information obtained as a result of providing professional accounting services is confidential and privileged).
12. Pursuant to the Federal Rule of Civil Procedure 45(3)(A)(iii), the Receiver may not obtain privileged information, documents, or objects through subpoena and the Court must “quash or modify a subpoena” that would require such production.

Undue Burden

13. Further, in accordance with the case law and Federal Rule of Civil Procedure 45(3)(A)(iv), the Movants hereby object to the Receiver’s subpoenas and non-party requests for production of confidential information, documents, and objects because they “subject[] [the Movants] to an undue burden.”

² A privilege log demonstrating why each individual piece of information is privileged on a document-by-document basis will be provided within ten (10) days of this filing.

14. In 2006, this Court held that “non-party status is a significant factor a court must consider when assessing undue burden.” *WM High Yield v. O’Hanlon*, 460 F. Supp. 2d 891, 895 (S.D. Ind. 2006); *see also Margoles v. U.S.*, 402 F.2d 450, 451 (7th Cir. 1968) (holding a subpoena was an undue burden because it requested information not solely limited to the petitioner in the cause).
15. The Movants here are non-parties to the underlying lawsuit. *See Dart Indus. Co., Inc. v. Westwood Chem. Co., Inc.*, 649 F.2d 646, 649 (9th Cir. 1980) (noting discovery restrictions can be more broad where the target is a nonparty).
16. Pursuant to Federal Rule of Civil Procedure 26(b)(1), the scope of discovery is limited to information “relevant to any party’s claim.”
17. Broyles Co., Nicole Broyles, Cherry Family Land, LLC, Cherry Ag. Services, LLC, High Voltage Painting, LLC, Chris A. Cherry, and Cristi K. Cherry are not only non-parties to the underlying lawsuit, but they are not debtors of Veros or connected to the receivership itself. *See Theofel v. Farey-Jones*, 359 F.3d 1066, 1071 (9th Cir. 2003) (finding a request for the production of several documents constituted an undue burden because they included documents from parties unrelated to the litigation).
18. A court may also find a subpoena represents an undue burden when it is overbroad. *Spears v. City of Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996).
19. In *Singletary v. Sterling Transport Company, Inc.*, the court found subpoenas were an undue burden for being overbroad because “[s]uch subpoenas could lead to the production of medical information, social security numbers, payroll information, income tax information, information about family members, and other documents completely extraneous to th[e] litigation.” 289 F.R.D. 237, 241 (E.D. Va. 2012).

20. The information, documents, and objects requested by the Receiver constitute an undue burden to the Movants as they are overbroad because they contain social security numbers, tax returns, names of children and other family members, bank account records, payroll information, and other personal information irrelevant and unrelated to the underlying receivership.

21. Pursuant to the Federal Rule of Civil Procedure 45(3)(A)(iv), the Receiver may not obtain information, documents, or objects that “subject[] a person to undue burden” through a subpoena and the Court must “quash or modify a subpoena” that would require such production.

WHEREFORE, Broyles Co., Nicole Broyles, Cherry Farms, LLC, Cherry Family Land, LLC, Cherry Ag. Services, LLC, High Voltage Painting, LLC, James E. Cherry, Susan L. Cherry, Chris A. Cherry, Cristi K. Cherry, and Jeffrey A. Cherry, by counsel, respectfully requests this Court QUASH the Receiver’s proposed subpoena and Non-Party Request for Production to the Movants, as depicted in Exhibits “A” and “B.”

Respectfully submitted,

McNEELY STEPHENSON

s/ J. Lee McNeely

J. Lee McNeely, Attorney No. 9542-73
Cynthia A. Bedrick, Attorney No. 21547-49
Frank D. Garrett, Attorney No. 32601-49
Attorneys for Movants

CERTIFICATE OF SERVICE

I hereby certify that on the 19th of August, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ J. Lee McNeely

J. Lee McNeely, # 9542-73

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Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

- (2) *For Other Discovery.* A subpoena may command:
- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
 - (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* 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. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (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.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

United States Securities and Exchange Commission

v. Veros Partners, Inc., et al.

Case No.: 1:15-cv-659-JMS-MJD

EXHIBIT A

A complete copy in .pdf format of any and all records including, but not limited to, reports, tax returns, profit and loss statements, balance sheets, check registers, bank account statements, invoices, and any and all other records pertaining to Cherry Farms, LLC; Cherry Family Land, LLC; Cherry Ag Services, LLC; High Voltage Painting, LLC,; James E. Cherry; Susan L. Cherry; Chris A. Cherry; Cristi K. Cherry; Jeffrey A. Cherry; and Cherry Investor Group, LLC, from the date your services were retained through the date of your response hereto.



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Person Information

Nicole Christine Broyles

Address Information

Middleton WI 53562

License Information

License No:	CP19800251
Profession:	Accountancy Board
License Type:	Certified Public Accountant
Obtained By Method:	Application
Issue Date:	6/26/1998
Expiration Date:	6/30/2018
License Status:	Active

Previous Action

No Data Available

Violations

No Data Available

Related Licenses

No Prerequisite Information

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES SECURITIES AND)
EXCHANGE COMMISSION)

Plaintiff,)

CAUSE NO: 1:15-cv-659-JMS-MJD

v.)

VEROS PARTNERS, INC. ET AL.)

Defendant.)

ORDER ON MOTION TO QUASH

Broyles Co., Nicole Broyles, Cherry Farms, LLC, Cherry Family Land, LLC, Cherry Ag Services, LLC, High Voltage Painting, LLC, James E. Cherry, Susan L. Cherry, Chris A. Cherry, Cristi K. Cherry, and Jeffrey A. Cherry (collectively, the “Movants”), by counsel, having filed their Objection and Motion to Quash Receiver’s Non-Party Request for Production, and the Court, being duly advised in the premises, FINDS and ORDERS as follows:

1. The Receiver’s subpoenas and Non-Party Requests for Production request documents that are protected under Indiana’s accountant-client privilege because such documents, information, or objects were produced by a certified public accountant while she was conducting a professional service.

2. The Receiver’s subpoenas and Non-Party Requests for Production constitute an undue burden because they are overbroad, due to the fact that the information, documents, and objects requested by the Receiver contain social security numbers, tax returns, names of children and other

family members, bank account records, payroll information, and other personal information irrelevant and unrelated to the underlying receivership.

3. The Movant's motion shall be GRANTED and the Receiver's subpoenas and Non-Party Requests for Production are hereby quashed.

SO ORDERED.

Dated: _____, 2016

JUDGE, United States District Court for the
Southern District of Indiana

Distribution to:
Counsel of record