

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.	)	

**REPLY IN SUPPORT OF OBJECTION AND MOTION TO QUASH**

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**”), by counsel, and respectfully file their *Reply in Support of Objection and Motion to Quash* (the “**Reply**”). The Movants state as follows:

1. The Receiver is seeking from Nicole Broyles of Broyles & Company CPA’s LLC:  
  
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; and Jeffrey A. Cherry and Cherry Investor Group, LLC

(Def. Mot. To Quash, Dkt. 256, PageID# 3807-10.)

2. On August 19, 2016, the Movants filed their *Objection and Motion to Quash* (the “**Motion**”) (Dkt. 256, PageID# 3801-06). Contrary to assertions in the *Receiver’s Response to*

*Objection and Motion to Quash* (the “**Response**”) (Dkt. 263, PageID# 3833-42), counsel for the Movants stated in the Motion that a privilege log would follow within ten (10) days of the filing of the Motion. (Dkt. 256, PageID# 3803, n.2.) A privilege log was timely provided to the Receiver on August 29, 2016.

3. In his Response, the Receiver incorrectly asserts that federal law governs the rule of decision involving the applicability of Indiana’s statutory accountant-client privilege to a non-party subpoena based on the nature of the litigation commenced by the U.S. Securities and Exchange Commission, without regard to whether the documents being requested are relevant to such litigation. (Dkt. 263, PageID# 3834-35.)

4. As the Receiver acknowledges, Federal Rule of Evidence 501 states that

[t]he common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense *for which state law supplies the rule of decision*.

Fed. R. Evid. 501 (emphasis added).

5. In carrying out his duties under the *Agreed Order Appointing Receiver* (the “**Receiver Order**”) the Receiver may investigate and prosecute claims in order to recover Receivership Property, as that term is defined in the Receiver Order. (Dkt. 34, PageID# 706-28.)

6. Although the underlying matter in which the Receiver has been appointed was brought under the federally codified Securities Act, Exchange Act, and Advisers Act, neither the Receiver, nor the SEC, has alleged or suggested that these federal statutory causes of actions, or any other federal claims, are being considered against the Movants. *See* (Dkt. 1, PageID# 1-32; Dkt. 57, PageID# 844-75.)

7. The documents the Receiver seeks are not relevant to the claims set forth in the SEC's Complaint or any pending federal causes of action and, as such, the application of federal privilege law is inappropriate. *See Pain Center of SE Indiana, LLC v. Origin Healthcare Solutions, LLC*, No. 1:13-cv-00133-RLY-DKL, 2015 WL 2166708 at \* 2 (applying state law privilege in federal matter when only claims arising under Indiana state law remained in the matter). In fact, the Receiver explicitly states in his Response that the documents he seeks "are needed so that Receiver can investigate whether there has been any improper transfer of funds from Cherry Farms, LLC in order to avoid satisfaction of its outstanding loan obligations to Veros Partners, Inc." (Dkt. 263, PageID# 3840.)

8. In fact, the Receiver concedes that the subpoenas in question are part of a larger expedition to pursue the Receiver Defendant's<sup>1</sup> state law claims against borrowers of Veros Partners, Inc. in advancement of his duties under the Receiver Order. Such claims are not, by way of the Receiver Order, or any pending order before this Court, required to be brought under the caption of this matter or in federal court. *See e.g. WML Gryphon Fund, LLC v. Wood, Hat & Silver, LLC*, No. 13-c-156, 2013 WL 2405439 at \*1-2 (E.D. Wis. 2013) (noting that a receiver appointed in a federal case was not prohibited from filing an action related to the receivership in state court as opposed to the federal court which authorized the underlying receivership.) Additionally, if the Receiver determined it necessary to file state law claims against the Movants in federal court, pursuant to Rule 501 of the Federal Rules of Civil Procedure "state law governs privilege regarding a claim or defense for which state law supplies the rules of decision."

9. Thus, while the Receiver's investigation may fall under the purview of the Receiver Order, the documents he is requesting are not relevant to the federal causes of action brought by the

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<sup>1</sup> Capitalized terms not defined herein shall have the meaning ascribed to them in the Motion or Response.

SEC as part of this particular litigation. As such, pursuant to Federal Rule of Evidence 501, Indiana law regarding privilege is the appropriate standard under which to consider the Motion.

10. Accordingly, the Movants' reliance on state law is appropriate and Indiana's accountant-client privilege, as codified at Indiana Code section 25-2.1-14-1, applies.

11. The Receiver next asserts that the Motion must be denied based on his claim that the Movants are requesting a "blanket" privilege over the documents at issue.

12. However, as the Receiver acknowledges, the Movants have already provided him with a privilege log that describes, on a document-by-document basis, the rationale for their assertion of the accountant-client privilege.

13. Additionally, the Movants have also produced a variety of documents to the Receiver upon learning that certain documents were previously produced, and thus the privilege for those specific items was waived.

14. The Receiver's reliance on *Brown v. Katz*, 868 N.E.2d 1159, 1168 (Ind. Ct. App. 2007) is also misplaced. While the court in *Brown* did find that the proffered privilege log was insufficient, it was the culmination of multiple refusals to comply with discovery orders where a party "completely refused the appellees' requests to disclose documents or answer questions" regarding the documents. *Brown*, 868 N.E.2d at 1168 (distinguishing *Hartford Fin. Servs. Grp., Inc. v. Lake Cty. Park & Recreation Bd.*, 717 N.E.2d 1232 (Ind. Ct. App. 1999) where the court did not find a blanket claim of privilege where the party submitted a privilege log).

15. Thus, despite the Receiver's arguments to the contrary, *Brown* did not find that a privilege log is insufficient for a document-by-document review, but rather that an *improper* privilege log is not sufficient. *Id.*

16. The Movants have, through both their Motion and the information contained on the privilege log, met their burden to specifically allege that the accountant-client privilege extends to the documents requested by the Receiver. *See Airgas Mid-Am., Inc. v. Long*, 812 N.E.2d 842, 845 (Ind. Ct. App. 2004).

17. The Receiver has not provided either the Movants or this Court with an explanation of what he would consider a sufficient document-by-document review to assert privilege. If the document-by-document privilege log provided by the Movants does not satisfy the document-by-document review articulated by Indiana courts, then it is not clear how anyone can invoke the accountant-client privilege when a party sends a bulk document request to her accountant.

18. The Receiver also suggests that the documents in the accountant's files are not privileged because they are "documents prepared by third parties, involving communications with third parties, or intended to be communicated to third parties (i.e. state and federal tax returns, bank records, etc)." (Dkt. 263, PageID# 3837.) The Receiver then claims that dicta in *Airgas* supports his claim that "[s]uch documents are not protected by the Accountant-Client privilege." *Id.* However, the court in *Airgas* was specifically addressing only communications made to one party that were intended to be transmitted to a third party. Here, the Receiver attempts to extend such reasoning to materials such as bank statements and payroll records, which the Movants never intended on communicating to anyone other than Ms. Broyles.

19. The Receiver also asserts that the Movants have waived their privilege pursuant to the Loan Agreements between Veros Partners, Inc. and Cherry Farms, LLC. (Dkt. 263, PageID# 3838.) The Receiver's position is that a provision in a loan agreement allowing examination of a borrower's books and records at "reasonable" times serves to destroy the privilege between a borrower and its third-party accountant, despite Indiana law invoking such privilege.

20. The Movants note that the Receiver has failed to provide any case law to support this position, and his argument goes substantially beyond the scope of the “examination of books” provided for in the Loan Agreement. It also flies in the face of codified Indiana protection of account-client documents and information. Ind. Code § 25-2.1-14.2. Finally, if the Receiver’s position is upheld, it would be disastrous for lenders and borrowers throughout Indiana because no borrower could then assert its statutory accountant-client privilege if it signed a financing agreement containing boilerplate language providing the lender access to its relevant books and records.

21. The Receiver then asserts that communications from James, Chris, and Jeffrey Cherry, when the individuals and entities named herein as Movants were unrepresented by counsel, served as a pledge of “full cooperation and access to information.” (Dkt. 263, PageID# 3838.)

22. While the Movants acknowledge that in the summer of 2015 James Cherry granted the Receiver some limited authority to speak to Nicole Broyles, such a statement cannot be considered a full waiver of any and all documents or communications that were ever sent by the Movants to their accountant. The Movants note that the Receiver has failed to cite a single case supporting his position that conduct similar to that which occurred here acts to permanently waive Indiana’s accountant-client privilege.

23. In the context of the attorney-client privilege, Indiana courts have noted that “when a client testifies as to the content of attorney-client communications . . . then she has waived the attorney-client privilege *as to the content of those communications.*” *Taylor v. Taylor*, 643 N.E.2d 893, 898 (Ind. 1994) (emphasis added).

24. Here, the Movants acknowledge that they *partially* waived their accountant-client privilege concerning certain documents associated with Cherry Farms, LLC that Nicole Broyles

sent to the Receiver, and have, in fact, produced such documents in response to the Receiver's subpoenas.

25. However, such a partial waiver cannot serve as unmitigated consent by the Movants for any and all communications or documents that they ever provided to their accountant. If the Court were to determine otherwise, it would serve to significantly deter individuals and businesses from cooperating with court-appointed receivers in receivership matters based on the knowledge that such cooperation could lead to the waiver of the statutory privilege that exists between a client and her accountant.

26. The Receiver's requests for information are overbroad and present an undue burden because they seek an unreasonable scope of information and such requests could lead to the production of both irrelevant and protected personal information. *See Ormond v. Anthem, Inc.*, No. 1:05-cv-1908-DFH-TAB 2009 WL 2590825 at \*1 (S.D. Ind. Aug. 19, 2009) (finding a request for "[a]ll documents and communications with Ernst & Young (or any of its professional employees) or concerning Ernst & Young's engagement" to be overbroad); *Singletary v. Sterling Transp. Co., Inc.*, 289 F.R.D. 237, 241 (E.D. Va. 2012) (granting a motion to quash and finding subpoena requesting entire file relating to a party "both overbroad and not tailored to a particular purpose" and that it "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 this litigation"); *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 612 (E.D. Va. 2008); *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 53 (S.D.N.Y. 1996).

27. The Receiver's intent, a fishing expedition, is clear from its Response wherein the Receiver claims he is entitled to the requested information "to properly assess the finances of

Cherry Farms, LLC and its outstanding loan obligations to Veros Partners, Inc.” and “investigate whether there has been any improper transfer of funds from Cherry Farms, LLC in order to avoid satisfaction of its outstanding loan obligations to Veros Partners, Inc.” However, despite the Receiver’s ability to narrow his concerns to certain transfer or indorsements, he has not yet done so. *See* (Dkt. 263, PageID# 3840.)

28. Finally, while the Movants are not opposed to a protective order, they wish to point out that the Receiver has already filed documents with unredacted protected information in conjunction with his pursuit of these non-party requests. The Movants respectfully reiterate the need to protect such information from public filings.

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 that this Court QUASH the Receiver’s proposed subpoena and Non-Party Request for Production to the Movants.

Respectfully submitted,

McNEELY STEPHENSON

s/ J. Lee McNeely

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**CERTIFICATE OF SERVICE**

I hereby certify that on the September 12, 2016, 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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