

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

SECURITIES & EXCHANGE)	CIVIL ACTION NO. 3:01CV00116
COMMISSION,)	
)	
Plaintiff,)	
)	<u>MEMORANDUM OPINION</u>
v.)	
)	
TERRY L. DOWDELL, et al.,)	
)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

Before the court are the “Emergency Motions by Non-Party Susan Mason and by Defendants Kenneth G. Mason and Birgit Mechlenburg for a Protective Order,” filed August 7, 2002, and Plaintiff SEC’s Memorandum in Opposition to the aforementioned motion, filed August 13, 2002.

I.

In brief, this is an SEC enforcement action. The defendants in this case orchestrated and operated a Ponzi or pyramid scheme. According to the Permanent Injunction Order, which incorporated the Consent and Stipulation of defendant Terry Dowdell, under the “Vavasour program,” clients were promised high profits for their investments, while the defendants would simply use the money put in by the newest investors to pay earlier investors their promised “profits.” Defendants would then misappropriate the remaining funds, which amounted to approximately \$29,000,000.00.

On November 19, 2001, the court granted the motion of the plaintiff Securities and Exchange Commission (SEC) for an *ex parte* temporary restraining order (TRO), which included provisions enjoining the defendants from committing federal securities violations, freezing the

assets of certain of the defendants and setting various discovery deadlines. In granting the *ex parte* TRO on November 19, 2001, the court found that the SEC had met its burden of providing a proper showing, as required by 15 U.S.C. § 78u(d)(1) and 15 U.S.C. § 77t(b), that such relief was warranted. Namely, the SEC put forth what the court deemed sufficiently credible information presenting a case that a violation had occurred of the statutes involved, including, *inter alia*, 15 U.S.C. § 77q(a), 15 U.S.C. § 78j(b), and 15 U.S.C. § 78o, and that such violations were occurring or would continue to occur. The TRO provided, among other things, for the freezing of assets of three individuals, Terry L. Dowdell, Birgit Mechlenburg and Kenneth G. Mason and two business entities, Dowdell Dutcher & Associates, Inc., and Vavasseur Corporation. Then, on March 14, 2002, the court issued an Order of Preliminary Injunction, which incorporated the asset freeze order found in the TRO. Finally, on June 4, 2002, this court entered a Permanent Injunction Order, which again incorporated the asset freeze order.

Since the entry of the Permanent Injunction Order, the SEC has continued its investigation of the Vavasseur Program. Specifically, the Commission has, *inter alia*, sought to (1) depose various individuals associated with the Vavasseur Program; (2) obtain an accounting of sources and uses of Vavasseur-related funds; and (3) obtain other relevant discovery. Non-party Susan Mason and defendants Mason and Mechlenburg now move the court (1) to issue a protective order providing that their respective depositions not be taken; (2) to issue a protective order vacating and setting aside plaintiff's Third Set of Interrogatories and Third Set of Document Requests addressed to Birgit Mechlenburg; and (3) to vacate the September 24, 2002 hearing date and decide all matters on the papers. For the reasons stated

herein, the court shall deny the motion.

II.

The first argument asserted by the moving parties is that the SEC's "pending discovery is not authorized by the Discovery Order in the Preliminary Injunction." Defense Motion, page 4. First, the Preliminary Injunction Order has been superceded by this court's entering of the Permanent Injunction Order on June 4, 2002. Provision V of the Permanent Injunction Order expressly authorizes the SEC to "engage in continued discovery regarding any unresolved issue in the case with respect to Dowdell, DDA, EMS *or any other defendant*, which shall include, but not be limited to, discovery for purposes of determining the amount of ill-gotten gain and civil penalties, if any." Permanent Injunction Order, provision V (emphasis added). To that end, the Permanent Injunction Order provides the SEC with broad discretion when it comes to discovery matters. The court, therefore, fails to see how the SEC is not authorized to seek the discovery at issue here.

The moving parties next argue that the court, pursuant to Federal Rule of Civil Procedure 26(c), should enter a protective order on behalf of non-party Susan Mason and defendants Mason and Mechlenburg providing that their respective depositions not be taken. As a threshold matter, under the liberal discovery principles articulated in the Federal Rules, defendants are required "to carry a heavy burden" of showing why discovery should be denied. *See, e.g., Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). It is especially difficult to show grounds for ordering that discovery not be had when, as here, it is a deposition that is sought. 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2037 (2d 1994) (citations omitted). Not only are protective orders prohibiting depositions rarely granted, but

the plaintiff has a heavy burden of demonstrating the good cause for such an order. See, e.g., *CBS, Inc. v. Ahern, Inc.*, 102 F.R.D. 820 (S.D.N.Y. 1984).

The rule empowering the court to issue a protective order, Rule 26(c), provides, in pertinent part, that “[u]pon motion by a party or by the person from whom discovery is sought, ... and for *good cause shown*, the court ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” FED R. CIV. P. 26(c) (emphasis added). Rule 26(c)’s requirement of a showing of good cause before the issuance of a protective order indicates that “[t]he burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” *In re Terra Int’l*, 134 F.3d 302, 306 (5th Cir. 1998) (quoting *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)).

A. *Defendants Mason and Mechlenburg*:

In this matter, defendants Mason and Mechlenburg offer little more than stereotyped and conclusory statements in support of their motion for a protective order. The defendants argue, for example, that due to the asset freeze they “simply do not have the financial ability to pay for the expense of travel for their counsel from Arizona to Illinois to Virginia” and that “[d]efendant Mechlenburg is now resident in Europe, unemployed, and unable to pay for her own travel.” Defense Motion, page 9. These charges are troubling for a myriad of reasons.

First, it is worthy of note that the defendants inability to fund their attorney’s travel expenses cannot be blamed on the asset freeze, since the remaining frozen funds cover only a fraction of the amount currently owed to defense counsel. Put differently, even if the asset

freeze were dissolved, neither Mason nor Mechlenburg, based on their representations to the court, could afford to pay the balance owed to their attorney. The asset freeze notwithstanding, undue expense is rarely enough to justify issuing a protective order providing that a deposition not be taken. 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2037 (2d 1994).

Second, defendant Mechlenburg voluntarily decided to leave the United States while a lawsuit was pending. To that end, awarding Mechlenburg would, as the plaintiff argues, “create a perverse incentive that rewards recalcitrant defendants who simply run away from their legal problems.” Plaintiff’s Memorandum, page 14. Even more troubling, however, is Mechlenburg’s assertion of financial difficulty considering her mother’s receipt of \$450,000 from Vavasseur after seeking the same amount on behalf of her daughter. It would be hard to believe that the proceeds from this suspect transaction did not find their way into defendant Mechlenburg’s possession. To that end, Mechlenburg’s assertion that she cannot afford to travel to the United States to be deposed is puzzling. The court is aware of the exuberant travel rates now prevalent, but it refuses to believe that \$450,000 is not enough to fund a trip from Europe to Charlottesville.

The defendants next contend that the court should enter a protective order providing that the “cumulative and irrelevant discovery against defendants Mason and Mechlenburg not be had.” Defense Motion, page 8. In support of the preceding contention, the defendants argue that

the burden and expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Id. At best these assertions are conclusory, at worst they are inaccurate.¹ The SEC alleges that defendants Mason and Mechlenburg were key players in the Vavasour Program, which embezzled nearly thirty million dollars from innocent investors. To that end, the SEC's efforts to take depositions and interrogatories of the aforementioned defendants appears both relevant and proper. The Commission's interest in seeking continued discovery in this matter is not driven by malicious intent, but rather by an effort to recover embezzled funds, some of which were allegedly misappropriated by defendants Mason and Mechlenburg. The court, therefore, fails to see how discovery from two principle participants in this suspect scheme "outweighs its likely benefit."

Even assuming, *arguendo*, that the defendants are correct and the discovery sought does outweigh its *likely* benefit, the court still cannot issue a protective order providing that discovery not be taken. "It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *see also* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2037. Additionally, in the few cases in which a protective order has been granted, it clearly appeared that the information sought was wholly irrelevant and could have no possible bearing on the issue. *See* 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2037. *See, e.g., Rosin v. New York Stock Exchange, Inc.*, 484 F.2d 179 (1973), *certiorari denied* 94 S.Ct. 1564. Even the defendants do not assert that the

¹ The undersigned is struck by the fact that the record in this matter is replete with examples of the defendants playing marbles on the coattails of the court. There has been at the very least a diffusion, if not a complete obstruction, of information that is relevant to this civil action.

information sought by the SEC is wholly irrelevant or has no possible bearing on the issue. Instead, the defendants only contend that the burden and expense of the SEC's discovery requests "outweighs its likely benefit." The motion, therefore, by defendants Mason and Mechlenburg requesting a protective order (1) providing that their respective depositions not be taken and (2) vacating and setting aside the SEC's Third Set of Interrogatories and Third Set of Document Requests addressed to defendant Mechlenburg shall be DENIED.

B. *Non-Party Susan Mason:*

Like defendants Mason and Mechlenburg, non-party Susan Mason also requests a protective order providing that the SEC's discovery against her not be had. First, although the Discovery Order contained in provision V of the Permanent Injunction does not expressly authorize the plaintiff to depose non parties, Federal Rule of Civil Procedure 30(a)(1) provides that "[a] Party make take the testimony of *any person...*" (emphasis added).

As explained in greater detail in the preceding paragraphs, in order to obtain a protective order prohibiting a deposition, the proponent must convince the court that the information sought lacks relevance to the extent that the likelihood and severity of the harm caused by the deposition outweighs the need for the information. *See, e.g., UAI Technology, Inc. v. Valutech, Inc.*, 122 F.R.D. 188, 191 (M.D.N.C. 1988). This is a difficult burden to meet, especially considering that relevancy is construed more broadly for purposes of discovery and is not tied to admissibility. *Id.* (citing FED.R.CIV.P. 26(b)(1)). The Supreme Court has defined relevant information in this context as "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

Defendant Mason, Susan Mason's husband, has indicated that in excess of \$28,000 of assets located in his Lincoln National Life Insurance account were transferred to one of Susan Mason's accounts on November 21, 2001, the day after the asset freeze became effective. The SEC now alleges that "virtually all of this money has been spent in violation of the Court's asset freeze order." Plaintiff's Memorandum, page 14. To that end, the SEC seeks information from Susan Mason, including information pertaining "to what monies she received from her husband, when she received them, and what she did with them." *Id.* Considering that the money transferred from defendant Mason to his wife has allegedly been tainted by ill-gotten gains, the information sought from Mrs. Mason clearly "bears on" an issue "that is in this case" and, consequently, is relevant.

Susan Mason further asserts that the information sought from her "violates her right to privacy." Defense Motion, page 7. Mrs. Mason's privacy argument may or may not be valid, but it is an argument that she must assert during her deposition. The court is in no position to address this issue at the present time. The mere possibility that the plaintiff's discovery requests may infringe on Susan Mason's right to privacy, therefore, is not a ground on which this court can issue a protective order. For the preceding reasons, non-party Susan Mason's request for a protective order shall be DENIED.

III.

For the reasons stated in this court's June 25, 2002 Order and accompanying Memorandum Opinion, the defendant's request to have the September 24, 2002 hearing date vacated shall be DENIED. To that end, defendant Mason must appear before this court on September 24, 2002 to show cause why he should not be held in civil contempt for the various

contempts alleged in the “Plaintiff SEC’s Motion for an Order to Show Cause Why Defendant Kenneth G. Mason Should Not be Held in Civil Contempt,” filed June 20, 2002. The ultimate disposition of defendant Mason’s alleged contempt shall be determined at the hearing.

IV.

In accordance with the foregoing, the “Emergency Motions by Non-Party Susan Mason and by Defendants Kenneth G. Mason and Birgit Mechlenburg for a Protective Order,” filed August 7, 2002, shall be DENIED. An appropriate order shall this day enter.

ENTERED: _____
Senior United States District Judge

Date

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FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

SECURITIES & EXCHANGE)	CIVIL ACTION NO. 3:01CV00116
COMMISSION,)	
)	
Plaintiff,)	
)	<u>ORDER</u>
v.)	
)	
TERRY L. DOWDELL, et al.,)	
)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying memorandum opinion, it is this day

ADJUDGED, ORDERED AND DECREED

as follows:

(1) the “Emergency Motions by Non-Party Susan Mason and by Defendants Kenneth G. Mason and Birgit Mechlenburg for a Protective Order,” filed August 7, 2002, shall be, and they hereby are, DENIED;

(2) the rescheduled depositions of non-party Susan Mason and of defendants Mason and Mechlenburg shall be attended.

The Clerk of the Court hereby is directed to send a certified copy of this Order and accompanying Memorandum Opinion to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date