

the Middle District of Pennsylvania, the Court-appointed Receiver, Melanie E. Damian, Esq. (the “Receiver”) for the Estate (the “Estate”) of Sean Nathan Healy (“Mr. Healy”), by and through undersigned counsel, hereby respectfully submits her Motion to Compel Tim Cash (“Mr. Cash”), the Healys’ bodyguard, to disclose the Identity and Location of Bank Accounts of Mr. Healy and/or Relief Defendants Shalese Rania Healy (“Mrs. Healy”), which Mr. Cash refused to disclose to the Receiver pursuant to Mr. Cash’s counsel’s (and the Healys’ counsel’s) objection based on an assertion that such information is “privileged.”¹ In support of this Motion, the Receiver respectfully states as follows:

I. BACKGROUND

The Receiver’s counsel served a subpoena on Mr. Cash on July 15, 2009 and Mr. Cash was deposed on July 20, 2009. A copy of the transcript of Mr. Cash’s July 20, 2009 Deposition (“Cash Depo”) is attached hereto as **Exhibit A**. As set forth below, Mr. Cash was questioned by the Receiver’s counsel concerning the identity and location of the Healys’ bank accounts which he refused to answer based upon his (and the Healys’) attorney’s invocation of privilege. For the reasons set forth below, Rule 26(b)(3)(A)(ii) of the Federal Rules of Civil Procedure require that this information be provided. As such, the Receiver respectfully requests the entry of an Order requiring Mr. Cash to reappear before the Receiver for deposition and to testify as to the identity and location of all Healy bank accounts.

¹ This relief is also sought pursuant to this Court’s July 13, 2009 *Temporary Restraining Order, Order Freezing Assets and Granting Other Relief, and Order to Show Cause* (the “SEC TRO”) [Case No. 1330, D.E. 12], and *Order Granting Plaintiff’s Ex Parte Emergency Motion for Statutory Restraining Order, Expedited Discovery, Preliminary Injunction, and Other Equitable Relief* (the “CFTC TRO”) [Case No. 1331, D.E. 14] (collectively, the “TROs”), as modified and extended by the Court’s July 20, 2009 *Stipulation and Order granting Preliminary Injunction, freezing Assets and other Relief* [Case No. 1330, D.E. 21] and *Consent Order of Preliminary Injunction and for Other Equitable Relief Against Defendant Sean Nathan Healy* [Case no. 1331, D.E. 19], (collectively with the “TROs”, the “Preliminary Injunctions”).

II. MEMORANDUM OF LAW

A. The Court's Previous Orders Require all of Mr. Healy's Agents to Provide the Receiver with Financial Information Concerning the Healys.

Pursuant to the SEC TRO [Case No. 1330, D.E. 12], this Court ordered that Mr. Healy and those agents "acting on his behalf" provide the Receiver with information concerning the identity and whereabouts of all of Mr. Healy's assets and financial information:

9. The Receivership Defendant as well as those acting in his place, are hereby ordered and directed to preserve and turn over to the Receiver forthwith all paper and electronic information of, and/or relating to, the Receivership Defendant and/or all Receivership Property; such information shall include but not be limited to books, records, documents, accounts and all other instruments and papers.

* * *

11. The Receiver may issue subpoenas to compel testimony of persons or production of records, consistent with the Federal Rules of Civil Procedure and applicable Local Rules, except for the provisions of Fed. R. Civ. P. 26(d)(1), concerning any subject matter within the powers and duties granted by this Order.

[Case No. 1330, D.E. 12, pp. 22-23]. Similarly, this Court provided for the same relief in the CFTC TRO [Case No. 1331, D.E. 14]:

34. Representatives of the CFTC and the Receiver shall immediately be allowed to inspect the books, records, and other documents of Defendant, Relief Defendants, and their agents, including, but not limited to, electronically stored information, tape recordings, and computer discs, wherever they may be situated and whether they are in the person of Defendant, Relief Defendants, or others and to copy said documents, information and records either on or off Defendant's or Relief Defendants' premises.

35. Defendant, Relief Defendants, their agents, servants, employees, assigns, attorneys, and persons in active concert or participation with Defendant or Relief Defendants, including any successor thereof, who receive actual notice of this Order by personal service or otherwise, including facsimile or other electronic transmission, shall cooperate fully with the CFTC and Receiver to locate and provide to representatives of the CFTC and Receiver all books and records of Defendant and Relief Defendants, wherever such books and records may be situated.

[Case No. 1331, D.E. 14, pp. 18-19].

Mr. Cash, the Healys' bodyguard, was hired in December 2008 to provide the Healy family with typical "bodyguard" services. *See* Cash Depo, Exhibit A, p. 50:11-24. In March of 2008, upon receiving the target letter of a Grand Jury Investigation concerning Mr. Healy's activities, Mr. Cash was supposedly engaged by Mr. Healy's former Florida criminal defense counsel (Alan Ross) and current Pennsylvania defense counsel William Costopoulos, to provide "investigative services" to Mr. Ross and Mr. Costopoulos, in addition to providing his bodyguard services to the Healys. *See* Cash Depo, Exhibit A, pp. 32:12 - 33:22. During the deposition, Mr. Cash stated that he was aware that the Healys maintained a banking relationship with Bank of America (Cash Depo, Exhibit A, p.98:14-17) and Northern Trust (Cash Depo, Exhibit A, p.100:4-6). Mr. Cash also testified that he has knowledge of at least one additional bank account of the Healys, the identity and location of which he refused to divulge pursuant to an inapplicable and/or waived privilege:

Q. Are you aware of any other banks that the Healys have a banking or had a bank relationship with?

MR. SALLAH: And again, I'll just advise you to the extent you, in the context of providing any services to Mr. Ross or Mr. Costopoulos to the extent he said, look, go out create a list, find out for me where they do their banking and compile a list. I'm saying that is covered by the privilege and Mr. Healy is not waiving it.

MR. HUNTER: If that is the case, then I advise you not to answer; if it is not the case, then you can answer.

THE WITNESS: That is the case.

MR. HUNTER: I am advising Mr. Cash not to answer that question based on the work product doctrine.

BY MR. QUARANTA:

Q. We went through this drill earlier where I asked Mr. Cash were you retained by Mr. Ross or Mr. Costopoulos to create an investigative file on the Healys and I believe your testimony was no, correct?

A. Correct. The file was not on the Healys.

Q. Right. So –

MR. SALLAH: Let's forget the statute for a second. I am talking much broader. I am talking work product privilege or attorney/client privilege again to the extent that he said go out and find out from X, Y, Z those conversations will be privileged.

MS. DAMIAN: I know -- where I bank?

MR. SALLAH: No, no.

MS. DAMIAN: That is the question. The question is: Where the Healys banking? Why would he investigate it already?

MR. SALLAH: Because let's say for example, Mr. Ross -- target letter. Here is what I want you to do for me. Go out and he is instructing Mr. Cash to do this, go out and make a list for me, compile a list of X, Y, Z. I don't care whether it pertains to the Healys, the man in the moon, whoever it is. He is acting in the instruction and furtherance of the direction from Mr. Healy's counsel. At that point anything he is doing from -- it is in connection with the body guarding activities or hey, do me favor and drop this off at the bank. I have no problems with him answering. I really don't. But I got to protect this -- the mistakes that you all understand are pretty high here. The guy got a target -- you can lean back and smile, but there is --

MS. DAMIAN: We need to parse it out so what we need to do and try to compel from the court and what basis --

MR. SALLAH: And that is fine.

MS. DAMIAN: -- you're claiming, because he has said he didn't investigate the Healys and this, I would think, would be under investigating the Healys if he was asked to find where the Healys banked. And that is all we are asking about, not where the plaintiff in some other case are banking or what might had happened -- to the criminal proceedings. We are asking information if he has about where the Healys bank -- Northern Trust or Bank of America and Bank United.

MR. SALLAH: To the extent gather that information at the direction of Mr. Healy's attorneys, I'm again -- he can do whatever he wants -- not waiving privilege.

BY MR. QUARANTA:

Q. Did you gather that information about these additional banking activities on the behalf of Mr. Ross or Mr. Costopoulos?

A. Yes.

MS. DAMIAN: Just so we don't have unnecessary motion practice, are there other banks?

Q. Don't tell us the identity yet, tell us were there other banks?

A. Yes, sir.

Q. How many other banks?

A. To my knowledge, one.

Cash Depo, Exhibit A, p.100:20 - 104:8 (emphasis added).

B. The Work Product Privilege is Not Absolute: Mr. Healy and His Agents Should Provide the Bank Account Information to the Receiver.

As set forth in Rule 26(b)(3)(A)(ii) of the Federal Rules of Civil Procedure, the work product privilege is subject to certain exceptions which are applicable here. Indeed, the attorney work product privilege “is not absolute, and it may be waived.” *In re Grand Jury (Impounded)*, 138 F.3d 978, 981 (3rd. Cir 1998) (emphasis added).² Rule 26(b)(3)(A)(ii) of the Federal Rules of Civil Procedure provides that putative “work product” (*i.e.*, protected trial preparation material) may be discoverable if:

The party shows it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means.

Id. See also *Smith v. Life Investors Ins. Co. of America*, 2009 WL 2045197 at *4 (W.D. Pa. 2009), citing *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981) (“Fact” work product is discoverable upon a showing of substantial need, while “core or opinion” work product (which consists of the mental impressions, conclusions, opinions and legal theories of an attorney) is afforded almost absolute protection.”). Here, the identity of a bank account is a “fact” and not an

² Upon commencement of a Receivership, federal law affords wide leeway for the Court to fashion remedies that will ensure protection of a defendant’s (or debtor’s) property:

all property in the possession of the debtor passes into the custody of the receivership court, and becomes subject to its authority and control. In the exercise of its jurisdiction over the debtor's property, the court has power to issue injunctions and all other writs necessary to protect the estate from interference and to ensure its orderly administration.

Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc., 929 F. Supp. 369, 372 (D.Colo.1995) (emphasis added); see also *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61, 63 (2d Cir. 1965) (“There is substantial jurisdictional basis for allowing the federal court receiver to have and keep custody and control of the assets in question, and to obtain the relief needed to implement that custody.”).

“opinion” or “conclusion” of counsel. As such, the Receiver has the substantial need to comply with the Court’s TROs and Preliminary Injunctions which order her to marshal and preserve the Estate assets and ensure the orderly administration of the Estate. It is imperative to complete this task that the Receiver have all information regarding bank accounts of the Healys necessary to locate them, request that they be frozen pursuant to the Preliminary Injunctions, and demand the turnover of any account balances. Otherwise, valuable Estate assets could be dissipated or otherwise disposed of to the detriment of the investors who Defendants defrauded. Mr. Cash’s refusal to disclose information that he possesses regarding an existing bank account of the Healys, based on a privilege that is not absolute, not only interferes with the orderly administration of the Estate, but also facilitates the dissipation of Estate assets and hinders the Receiver’s ability to recover them for benefit of the defrauded investors. Accordingly, because the identity of the Healys’ bank accounts is subject to the exception in Rule 26(b)(3)(A)(ii), the Receiver respectfully requests an order requiring Tim Cash to divulge the identity of the bank account for which he currently refuses to do and any other bank accounts of the Healys of which he is aware.

III. CONCLUSION

Wherefore, for the foregoing reasons, the Receiver respectfully requests that this Court enter an Order (i) requiring Mr. Cash to reappear before the Receiver for deposition and to testify under oath as to the identity and location of all Healy bank accounts, without asserting any privilege with respect to such information, and (ii) granting the Receiver such further relief as the Court deems just and proper.

Certificate of Good Faith

Pursuant to Fed. R. Civ. P. 37(a)(1) and M.D. Pa. L. R. 26.3, counsel for Receiver hereby certifies that he has conferred with counsel for all interested parties in a good faith effort to resolve by agreement the issue raised by this Motion without court action. While counsel for the SEC and CFTC have consented to the relief requested herein, counsel for Mr. Healy and counsel for Mr. Cash would not so consent. More specifically, Receiver's counsel contacted Mr. Healy's counsel on August 31, 2009 and Mr. Cash's counsel on September 4, 2009, and an agreement could not be reached.

Respectfully submitted,

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s/Kenneth D. Murena
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing have been sent by U.S. Mail, email, and/or facsimile to the addressees on the attached Service List, this 11th day of September, 2009.

s/Kenneth D. Murena
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