

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff,

v.

INTERNATIONAL FIDUCIARY CORP., S.A.,
DANIEL ERIC BYER,
MALCOLM CAMERON BOYD STEVENSON,
and PRESTON DAVID PINKETT II

Defendants.

TERRY MARTIN, CD2E, INC., WINCHELL
CORPORATION, M&M TECHNOLOGIES
ROBERT LOWREY, SZE COAST
OPERATING CORP. and

Relief Defendants.

CIVIL ACTION
FILE NO.

1:06-CV-1354
GBL/TRJ

VERIFIED OPPOSITION OF RESPONDENT
UNITED STATES SECURITIES AND EXCHANGE COMMISSION
TO MOTION FOR ORDER PURSUANT TO CUSTOMER CHALLENGE
PROVISIONS OF THE RIGHT TO FINANCIAL PRIVACY ACT

Robert E. Lowrey has filed a Motion for an Order pursuant to the customer challenge provisions of the Right to Financial Privacy Act of 1978 ("RFPA") (12 U.S.C. §§ 3401-22) in response to a subpoena issued by this Court at the request of the United States Securities and Exchange Commission ("Commission"). The subpoena is directed towards Horizon Bank of Bellingham, Washington, and seeks production of documents relating to any accounts held there by Lowrey. Pursuant to the customer challenge provisions of the RFPA, the Commission also

served a copy of the subpoena on Mr. Lowrey and notified him of his rights under the provision.

In response, Lowrey has filed a motion with this Court in which he asserts that his bank records “are not relevant to the legitimate law enforcement inquiry stated in the Customer Notice. . . . because of the failure of the SEC to establish jurisdiction and the failure of the SEC to provide full disclosure as to the nature and cause [of its claims].” *See* Lowrey Affidavit (attached to Lowrey Motion) at 2.

For the reasons set forth below, Lowrey’s motion should be denied, and the subpoena should be enforced. Lowrey has not provided this Court with any cognizable basis upon which to quash or modify the subpoena. The Commission has complied with the requirements of the RFPFA (see 12 U.S.C. 3410(c)) and the subpoena seeks the production of bank records that are reasonably related to a legitimate Commission law enforcement inquiry and the pending civil enforcement action. That is all the law requires.

BACKGROUND

On December 4, 2006, the Commission filed an emergency civil enforcement action against defendants IFC, Pinkett, Byer, and Stevenson in this Court. The Commission alleged that the defendants defrauded investors of more than \$18 million in connection with a fraudulent prime bank/ponzi scheme. Specifically, the Complaint alleges that IFC represented to investors that it had "developed a business relationship with an international bank that operates an asset growth program by buying and selling 1st tier medium-term bank notes." Investors contributing a minimum of \$100,000 to designated banks were promised that their initial investment would be housed in a separate account at one of the banks and would remain there 100% intact. Investors were promised that they would receive a return on their investment ranging between 4 - 6% per month. Also on December 4, 2006, the staff obtained a temporary restraining order ("TRO"), which imposed an asset freeze and ordered the defendants to perform an accounting and repatriate funds to the United States. The terms of the TRO were carried over into a preliminary injunction entered by the Court on December 11, 2006. Since the filing of the Complaint, the staff has learned, through civil discovery, that, from at least April 2004, the defendants defrauded at least 140 investors of approximately \$40 million in connection with this fraudulent prime bank/Ponzi scheme. To date, the staff has frozen proceeds totaling approximately \$9 million.

Civil discovery has revealed that Lowrey received approximately \$500,000 in investor funds from IFC for identifying investors willing to contribute funds into IFC's scheme, and that he received these funds either (1) via transfers into a personal bank account in his name at Horizon Bank (to which the Commission's subpoena was directed) or (2) through fund

transfers to SZE Coast Operating Corporation, an entity through which Lowery did business.

In light of this information, the Commission has filed a First Amended Complaint naming both Lowery and SZE Coast Operating Corp. as Relief Defendants. See First Amended Complaint ¶¶ 4, 20.

ARGUMENT

I. **LOWERY HAS NOT STATED ANY BASIS FOR PREVENTING THE COMMISSION FROM OBTAINING THE SUBPOENAED DOCUMENTS.**

The RFPA provides the “sole” means by which a customer may challenge government subpoenas for his or her bank records. 12 U.S.C. 3410(e); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745-46 (1984). RFPA subpoenas must be enforced unless the customer can “show a factual basis” for concluding that the records sought are not relevant to the investigation. *See In re John Doe*, 1990 WL 119321, at *2 (S.D.N.Y. Aug. 10, 1990) (quoting *Hancock v. Marshall*, 86 F.R.D. 209, 211 (D.D.C. 1980)). Accordingly, courts must deny a customer challenge to an RFPA subpoena if the government agency establishes that the subpoenaed documents are relevant to a legitimate law enforcement inquiry. “Upon finding that there is a demonstrable reason to believe that the agency is conducting a legitimate law enforcement inquiry and that the records sought are relevant to the inquiry, the court shall deny the motion to quash.” *See Sandsend Fin. Consultants, Ltd. v. Federal Home Loan Bank Bd.*, 878 F.2d 875, 877 (5th Cir. 1989) (quoting 12 U.S.C. 3410(c)) (emphasis in original). *See also Grafstrom v. SEC*, 532 F. Supp. 1023, 1025 (S.D.N.Y. 1982).

A. **The Commission’s Investigation Is An Ongoing, Legitimate Law Enforcement Inquiry.**

Lowery cannot challenge the legitimacy of the Commission’s ongoing law enforcement inquiry into the actions of IFC and the other named defendants, or its efforts to review his account records. Securities Act Section 20(a) and Exchange Act Section 21(a) empower the

Commission to investigate whether violations of the registration and antifraud provisions of the federal securities laws have occurred.¹ The Commission's Formal Order, entered pursuant to this statutory grant, directed the staff to investigate possible violations of the federal securities laws by IFC and others. The Formal Order provides more than a "demonstrable reason to believe that the law enforcement inquiry is legitimate." *Rodriguez v. FSLIC*, 712 F. Supp. 159, 162 (N.D. Cal. 1989); *see also Pennington v. Donovan*, 574 F. Supp. 708, 709 (S.D. Tex. 1983) ("An investigation is legitimate if it is one the agency is authorized to make and is not being conducted solely for an improper purpose such as political harassment or intimidation or otherwise in bad faith."); *Dawar v. HUD*, 820 F. Supp. 545, 547 n.2 (D. Kan. 1993) (investigations aimed at preventing and detecting fraud are legitimate).

B. The Subpoenaed Bank Records Are Relevant to the Commission's Ongoing Investigation.

Relevance in the RFPA context is very broadly defined. The subpoenaed information is relevant if it "touches a matter under investigation," *Sandsend*, 878 F.2d at 882, or "might throw light' on matters germane to the Commission's inquiry." *CFTC v. Catalano*, 1981 U.S. Dist LEXIS 15728 (N.D. Ill. Nov. 3, 1981). *See also In re John Doe*, 1990 WL 119321, at *2 (S.D.N.Y. Aug. 10, 1990) ("the statute does not require the agency to show that the records are relevant but rather that there is a 'reasonable belief that the records sought are relevant'"); *United States v. Wilson*, 571 F. Supp. 1417, 1420 (S.D.N.Y. 1983) ("the RFPA requires only that

¹ "Congress has endowed the Commission * * * with broad power to conduct investigations - 'such * * * as it deems necessary to' ferret out violations of the federal securities laws and implementing regulations, whether consummated or incipient - and in that connection to call for production of relevant materials by those who seem to have them." *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1023 (D.C. Cir. 1978)(footnotes omitted); *see also U.S.C. 77s(b), 78u(b)*.

financial information be relevant to a 'legitimate law enforcement inquiry,' and not relevant in a narrow, evidentiary sense").² The broad relevance standard under the RFPA dictates that any agency "can investigate merely on the suspicion that the law is being violated, or even just because it wants assurance that it is not." *Sandsend*, 878 F.2d at 882.³

The staff has more than a reasonable belief that the subpoenaed bank records are relevant to key issues in the investigation and civil enforcement action. Most importantly, the bank records may confirm that Lowery received proceeds contributed by defrauded IFC investors and, if so, whether those funds have been retained in Lowery's account or transferred elsewhere. Accordingly, the account information could enable the Commission to trace the transfer of improperly obtained funds for disgorgement and other purposes. *Cf. Rodriguez v. FSLIC*, 712 F. Supp. 159, 160 (N.D. Cal. 1989) (bank records tracing proceeds deposited to an individual's bank account are relevant to the investigation); *Panaro v. SEC*, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,368, 1987 WL 15951, at *2 (E.D.N.Y. Aug. 5, 1987) (financial records may provide information about use of proceeds from offering under investigation). These records may also provide relevant evidence on other issues, such as scienter, motive, and penalties. Therefore, the subpoenaed bank-account records clearly "touch on a matter under investigation" and are relevant – indeed, essential – to the Commission's investigation. *Sandsend*, 878 F.2d at

² Relevance for RFPA purposes is sufficiently established by a sworn statement, such as A. David Williams' Verification attached hereto, that the Commission staff has information that investor proceeds raised in possible violation of the federal securities laws may have been deposited into Lowery's bank account. *See McGloshen v. United States Dept. of Agric.*, 480 F. Supp. 247, 248 (W.D. Ky. 1979).

³ "Once a person's connection to apparently illicit conduct has been shown, it is relevant to know whether that person's bank account contains evidence of such conduct." *See In re John Doe*, 1990 WL 119321, at *2.

882 (plaintiff's "tangential" connection to fraud was sufficient to uphold RFPA subpoena over relevancy objection). Since it is a basic principle of securities fraud investigations that one "follows the money," *see, e.g., Panaro*, 1987 WL 15951, at *2, the subpoenaed account records are clearly relevant to this ongoing investigation.⁴

II. LOWERY HAS FAILED TO DEMONSTRATE THAT THE SUBPOENAED ACCOUNT RECORDS ARE NOT RELEVANT TO THE COMMISSION'S INVESTIGATION, AND HAS FAILED TO ARTICULATE A LEGAL BASIS FOR THEIR NONPRODUCTION.

A movant under RFPA bears the burden of offering proof that the requested documents are not relevant to an investigation. *See, e.g., Breakey v. IG*, 836 F. Supp. 422, 425 (E.D. Mich. 1993) ("initial burden of production is on the movant to offer proof of facts which show that the documents requested have no connection with the subject matter of the investigation"); *Davidov v. SEC*, 415 F. Supp.2d 386, 391 (S.D.N.Y. 2006) (RFPA subpoenas must be enforced unless the customer can "show a factual basis" for concluding that the records sought are not relevant to the investigation); *Hancock*, 86 F.R.D. at 211 (customer must provide a "factual basis for concluding that there is no reason to believe the financial records [which] are being sought contain information relevant to a legitimate law enforcement purpose") (emphasis provided). Vague, conclusory assertions do not satisfy the customer's burden of proof in challenging a subpoena under RFPA. *Id.*

Lowrey has failed to provide any factual basis for his assertion that the subpoenaed account records "are not relevant to the legitimate law enforcement inquiry stated in the

⁴The RFPA subpoena was narrowly tailored to obtain only those records the Commission needs. Specifically, the subpoena was limited to the time period from April 2004 to the present, the time period when the discovery indicates Lowrey received funds.

Customer Notice . . . because of the failure of the SEC to establish jurisdiction and the failure of the SEC to provide full disclosure as to the nature and cause [of its claims].” See Lowrey Affidavit (attached to Lowrey Motion) at 2. This unsupported statement does not even establish a *prima facie* case of irrelevance. See *Panaro*, 1987 WL 15951, at *2 (movants who relied on unsupported statements to support RFP challenge did not meet initial burden). Moreover, assuming, *arguendo*, that Lowrey’s unsupported statement provided a basis to challenge the subpoena (which it does not), Lowrey’s stated concerns have been rendered moot by the filing of the First Amended Complaint which names Lowrey as a relief defendant, and which provides “full disclosure as to the nature and cause” of the Commission’s interest in Lowrey and his account records.

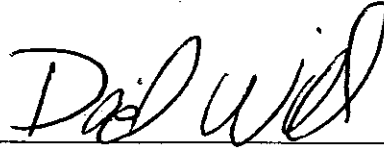
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CONCLUSION

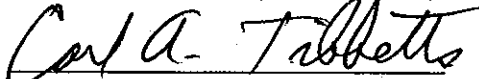
Because Lowrey’s bank records are clearly relevant to a legitimate Commission investigation, the Court should deny Lowrey’s motion and should instead enforce the subpoena.

Dated: Washington, D.C.
May 2, 2007

Respectfully submitted,



A. David Williams (Pro Hac Vice)



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CERTIFICATE OF SERVICE

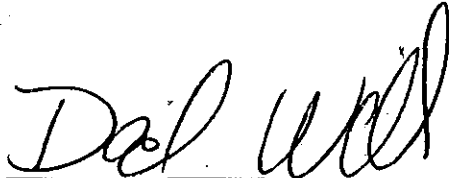
I HERBY CERTIFY that on May 2, 2007, I mailed the foregoing Plaintiff's Verified Opposition To Motion For Order Pursuant To Customer Challenge Provisions Of The Right To Financial Privacy Act to:

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