SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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WHITE OAK COMMERCIAL FINANCE, LLC,

Plaintiff,

- v -

EIA INC., ELECTRONIC INTERFACE ASSOCIATES, INC., EIA DATACOM, INC., EIA ELECTRIC, INC., GEORGE ENGEL LIC, LLC, YOLANDA DELPRADO, ALEXANDRA ENGEL, DAVID ENGEL, GEORGE ENGEL, MATTHEW ORENT, ANDREEA ORENT, CHARLES SCHWAB & CO., INC. (A NOMINAL DEFENDANT), ADP TOTALSOURCE, INC. (A NOMINAL DEFENDANT), 1861 ACQUISITION LLC (A NOMINAL DEFENDANT), GREAT MIDWEST INSURANCE COMPANY (A NOMINAL DEFENDANT), and SOFIA ENGEL

Defendants.

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INDEX NO. 650346/2023

MOTION DATE 03/20/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 79, 80, 81, 82, 83, 86, 87, 88, 91

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

Plaintiff White Oak Commercial Finance, LLC (White Oak) brings this action for, *inter alia*, breach of contract, replevin, conversion, negligent misrepresentation, fraudulent misrepresentation, and fraudulent conveyance. Presently before the Court is defendant Matthew Orent's (Orent) motion, pursuant CPLR 2304, 3101, and 3103, to quash a subpoena *duces tecum* issued by White Oak to nominal defendant Charles Schwab & Co., Inc. (Schwab). White Oak opposes the motion.

Background

The court assumes the parties' familiarity with the factual background of this matter, which was thoroughly recounted in this court's Amended Decision and Order, dated June 23, 2023 (NYSCEF # 163 – PI Order). To summarize, White Oak entered into a credit agreement with certain defendants (the Borrowers) to extend a $10 million revolving secure line of credit (the Credit Agreement) (NYSCEF # 103). As a condition to White Oak extending this line of credit, the Borrowers executed a promissory note under which they covenanted and agreed to repay the principal amount set forth in the Credit Agreement (NYSCEF # 106). White Oak also

obtained unconditional and absolute personal guarantees from certain individuals, including, as is relevant here, Orent (NYSCEF # 104).

Eventually, the Borrowers defaulted under the Credit Agreement because of collection issues tied to their accounts receivable (*see* NYSCEF # 102 ¶ 48). In response, White Oak issued a reservation of rights letter, but it nevertheless agreed, at the Borrowers' request, to advance additional funds pursuant to the Credit Agreement (*id.* ¶¶ 53, 63). White Oak conditioned this advance on the guarantors, including Orent, pledging additional security as collateral (*id.* ¶¶ 58-62). For his part, Orent agreed to pledge a cash brokerage account maintained by Schwab (the Brokerage Account), and he executed a pledge agreement that granted White Oak a security interest in all of Orent's rights, title, and interest to the Brokerage Account (*id.* ¶¶ 58-59).

Despite receiving additional funds from White Oak, the Borrowers' struggles continued, and they eventually ceased operations and discontinued funding payroll for employees (*id.* ¶¶ 65-66). White Oak alleges that the Borrowers were unwilling or unable to provide it with certain requested financial information, or to pledge sufficient collateral, resulting in White Oak discontinuing funding and submitting a demand letter, dated December 12, 2022, for the outstanding indebtedness due under the Credit Agreement (*id.* ¶¶ 65, 70, 75, 77).

White Oak soon after commenced this action on January 17, 2023, and, the next day, moved by order to show cause for, among other relief, a preliminary injunction restraining Matthew from using, transferring, or disposing of any collateral, including the Brokerage Account (NYSCEF # 1, 41). The parties partially resolved this motion by stipulation dated January 25, 2023 (NYSCEF # 69). As part of this stipulation, Orent agreed to not "use, remove, transfer, hypothecate, sell, pledge, encumber, convey, assign, destroy, erase, mutilate, conceal, alter or dispose of the Brokerage Account or any investments therein" (*id.* ¶ 7).

The next month, on or about February 28, 2023, White Oak served a subpoena duces tecum upon Schwab (the Schwab Subpoena) seeking:

1) "All Documents concerning the Charles Schwab brokerage account in which Matthew Orent has an interest . . . including, but not limited to" account statements, account opening documents, account closing documents, signature cards, cancelled checks, wire transfer confirmations, and all other documents related to such accounts; and

2) "All Documents identifying or concerning any Charles Schwab investment, brokerage, or retirement account(s) in which Matthew Orent has an interest, including, but not limited to" account statements, account opening documents, account closing documents,

> signature cards, cancelled checks, wire transfer confirmations, and all other documents related to such accounts.

(NYSCEF # 83 – Subpoena at 6). The Schwab Subpoena indicates that White Oak sought "documents material and necessary to the prosecution or defense of this action" (*id.* at 2). The time frame applicable to the Schwab Subpoena is "September 7, 2022, through the present" (*id.* at 5).

Orent now files a motion to quash the Schwab Subpoena (NYSCEF # 79). In the alternative, Orent seeks a protective order (*id.*). Orent advances three arguments in support of his motion. *First*, Orent argues that, procedurally, the Subpoena fails to state a proper purpose on its face as required under CPLR 3101(a)(4) (NYSCEF # 80 at 5-6). *Second*, Orent contends the Schwab Subpoena is a fishing expedition designed to acquire information about Orent's financial holdings prior to his interposing of an answer or response to White Oak's complaint[1] (*id.*). *Finally*, Orent avers that the Schwab Subpoena does not seek information material and necessary to the prosecution of this action (*id.* at 6).

In opposition, White Oak preliminarily explains that it issued the Schwab Subpoena after learning, upon information and belief, that Orent emptied the Brokerage Account and transferred the proceeds therein to another account that he and/or his wife, defendant AnDreea Orent, maintain at Schwab (NYSCEF # 86 ¶¶ 11-12).[2] With regard to Orent's motion, White Oak argues that Orent does not have standing to challenge the Schwab Subpoena (NYSCEF # 88 at 6). But even if he did, White Oak avers, the Schwab Subpoena properly complies with the notice requirement of CPLR 3101(a)(4) and the information sought is relevant to White Oak's cause of action seeking a transfer of proceeds from the Brokerage Account to White Oak (currently the eighth cause of action in the Amended Complaint) (*id.* at 7; *see also* NYSCEF # 102 ¶¶ 133-36).[3]

Discussion

At the outset, the court notes that the subpoena *duces tecum* at issue in this motion is directed at a nominal defendant to this action, not a non-party. A reading of the plain text of the CPLR at least calls into questionable whether such a subpoena is proper (*see e.g.* CPLR 3120[1] ["After commencement of an action, any party may serve on any other party a notice *or on any other person a subpoena duces tecum*[.]" [emphasis added]]).[4] Nevertheless, because neither Orent nor

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[1] After this motion was filed, White Oak filed its Amended Complaint (*see* NYSCEF # 102). A motion to dismiss certain causes of action set forth in the Amended Complaint is currently pending (NYSCEF # 141).

[2] As detailed in the PI Order, Orent later confirmed that he had transferred funds from the Brokerage Account to various accounts held by him or his wife (NYSCEF # 94) (*see* PI Order at 5-6).

[3] The Amended Complaint also asserts various fraudulent conveyance claims related to, among other things, Orent's transfer of funds from the Brokerage Account (*see* NYSCEF # 102 ¶¶ 160-177).

[4] Some federal courts, in the context of analyzing subpoenas issued pursuant to Federal Rule of Civil Procedure 45, have concluded that such subpoenas can be properly served on a party (*see e.g. Mortgage Info. Servs. v Kitchens*,

Schwab has raised this issue—and given that White Oak chose to avail itself to this procedural mechanism rather than the disclosure tools available for party discovery under the CPLR—the court will analyze Orent's motion pursuant to the general legal principles underlying motions to quash subpoenas.

The court first addresses the threshold issue of Orent's standing to challenge the Schwab Subpoena. Generally speaking, "[a] person other than one to whom a subpoena is directed has standing to move to quash the subpoena where he or she has a proprietary interest in the subject documents or where they involve privileged communications (*Hyatt v State Franchise Tax Bd.*, 105 AD3d 186, 194-195 [2d Dept 2013] [citations and quotation marks omitted]). However, the First Department has recognized that bank customers lack standing to quash a subpoena directed at a bank that seeks records from those customers' accounts (*see AQ Asset Management LLC v Levine*, 111 AD3d 245, 260 [1st Dept. 2013] [explaining that "a depositor has no ownership or other interest in a bank's records of his accounts" and that this proposition applies even "more strongly in the civil context"]; *Reilly v 5504-301 E. 21st St. Manhattan LLC*, 2022 N.Y. Slip Op. 31435[U], at *2 [Sup Ct, NY County, May 3, 2022] ["In cases in which bank customers attempted to quash subpoenas seeking their records from their banks, the First Department has made clear that the bank customers lack standing to challenge a third-party subpoena."]; *United Realty Mgmt. Co., Inc. v Capital One Bank, N.A.*, 2016 WL 3855956, at *1 [Sup Ct, NY County, July 13, 2016 [concluding that bank customer could not challenge subpoena seeking her personal information that was served on her bank]). Indeed, as explained by the First Department in *Norkin v Hoey*, "bank customers have no proprietary interest in the records kept by the banks with which they do business" because those records are "the property of the bank" and "bank customers do not have a sufficient expectation of privacy in such records to confer upon them the standing necessary to challenge a subpoena seeking those records . . . . (181 AD2d 248, 251 [1st Dept. 1992]).

Here, Orent has not made a showing of proprietary interest in the records sought by the Schwab Subpoena necessary to overcome the holdings in *AQ Asset Management* and *Norkin*. In the absence of such a showing, the court concludes that Orent lacks standing to challenge the Schwab Subpoena (*see 38-14 Realty Corp. v N.Y.C. Dept. of Consumer Affairs*, 103 AD2d 804, 804 [2d Dept. 1984] [concluding that petitioner lacked standing to challenge subpoena, even assuming that it was a party to the contracts required to be produced by the subpoena]).

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210 FRD 562, 565 [WD NC 2002] [holding that "a Rule 45 subpoena may properly be served on a party"]). Although the provisions of Articles 23 and 31 of the CPLR differ from the Federal Rules, it bears noting that the CPLR, like the Federal Rules, does not appear to explicitly preclude the use of a subpoena against parties either (*cf. First City, Texas-Houston, N.A. v Rafidain Bank*, 197 FRD 250, 254 n.5 [SD NY 2000] ["While a Rule 45 subpoena is typically used to obtain the production of documents and/or testimony from a non-party to an action . . . nothing in the Federal Rules of Civil Procedure explicitly precludes the use of Rule 45 subpoenas against parties."]). In its limited research, the court has not identified any New York authority, controlling or otherwise, addressing this issue.

Even if, however, Orent had standing to quash the Schwab Subpoena, the relief he seeks would still not be warranted. Under CPLR 3101(a), there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" by "a party," as well as "any other person, upon notice stating the circumstances or reasons such disclosure is sought or required" (CPLR 3101[a][1], [a][4]; *see also Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 108 [1st Dept 2006] [holding that "[i]t is well settled that the purpose of a subpoena duces tecum is to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding"]). To be considered "material and necessary," the information sought must "bear[] on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Kapon v Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also Forman v Henkin*, 30 NY3d 656, 661 [2018] ["material and necessary—i.e., relevant[.]"]). In the context of subpoenas directed at nonparties, the Court of Appeals has held that "so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided . . . ." (*Kapon*, 23 NY3d at 38). As a result, "[a]n application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious . . . or where the information sought is utterly irrelevant to any proper inquiry" (*id.* at 38-39). It is ultimately "the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances" (*id.*).

As a threshold matter, the court notes that, if it had been issued to a non-party, the Schwab Subpoena likely does not properly comply with the notice requirement of CPLR 3101(a)(4). Although this is a "minimal obligation" (*Ferolito v Arizona Beverages USA, LLC*, 119 AD3d 642 [2d Dept. 2014]), White Oak fails to establish in its opposition that a barebones statement that its subpoena seeks documents "material and necessary to the prosecution or defense of this action" would sufficiently apprise Schwab of the "circumstances or reasons" for its request (*Kapon*, 23 NY3d at 36). Nevertheless, as White Oak notes and as also explained above, the Schwab Subpoena is technically directed at a party to this action, thereby calling into question whether notice under CPLR 3101(a)(4) is required here (*see* CPLR 3101[a][1], [4] [requiring "notice stating the circumstances or reasons" disclosure is sought from "any other person" but not "a party"]. In any event, White Oak's response to Orent's motion has provided the requisite information to cure any defect (*see Hauzinger v Hauzinger*, 43 AD3d 1289, 1290 [4th Dept 2007], *affd* 10 NY3d 923 [2008] [acknowledging that a response to a motion to quash can provide the requisite information to cure a CPLR 3101(a)(4) notice defect).

Regarding the scope of the Schwab Subpoena, Orent fails to establish that the information sought is utterly irrelevant to any proper inquiry. To the contrary, the Schwab Subpoena's requests (including information concerning the Brokerage Account) reasonably bear upon the facts and claims set forth in pleadings,

including, but not limited to, the allegations related to Orent's transfer of funds away from the Brokerage Account to other Schwab accounts, which underpins, among other claims, White Oak's Eighth Cause of Action (*see* NYSCEF # 102 ¶¶ 58-72, 90-99, 133-136,). The Schwab Subpoena is also relatively narrow in its temporal scope, only targeting the period on or after September 7, 2022, which is just one month before Orent pledged the Brokerage Account to White Oak (Subpoena at 2; NYSCEF # 102 ¶¶ 58-59). Thus, unlike subpoenas at issue in the authority cited by Orent, there is no basis here to conclude that the Schwab Subpoena is being used for purposes of engaging in an improper fishing expedition (*cf. Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532, 533 [1st Dept. 2010] [noting that a subpoena was over-broad because it sought to discovery or ascertain the existence of evidence]). Accordingly, the court declines to quash the Schwab Subpoena.

In the alternative, Orent requests a protective order limiting the Schwab Subpoena. CPLR 3103 "permits a court to issue a protective order 'denying, limiting, conditioning or regulating the use of any disclosure device' where necessary 'to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts' " (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 403 [1st Dept 2018], quoting CPLR 3103[a]]). Such a protective order can be issued "at any time on [the court's] own initiative, or on motion of any party . . . from whom or about whom discovery is sought" (CPLR 3103[a]). "Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery. . . . [T]his discretion is to be exercised with the competing interests of the parties and the truth-finding goal of the discovery process in mind" (*Nunez v Peikarian*, 208 AD3d 670, 671 [2d Dept 2022]). Here, Orent has not made the requisite showing needed to warrant the issuance of a protective order.

Conclusion

Based on the foregoing, it is

ORDERED that defendant Matthew Orent's motion to quash the subpoena *duces tecum* directed at nominal defendant Charles Schwab & Co., Inc., or in the alternative for a protective order, is denied.

07/7/2023
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE