UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES, Plaintiff, v. NANCY ZAK, CLAUD CLARK III, ECOVEST CAPITAL, INC., ALAN N. SOLON, ROBERT M. MCCULLOUGH, and RALPH R. TEAL, JR., Defendants.	)	Case No. 1:18-cv-05774-AT

UNITED STATES' MOTION FOR RELIEF FROM DISCOVERY ORDERS

Pursuant to Fed. R. Civ. P. 16 and 26, the United States respectfully requests that the Court: (1) permit the United States to issue subpoenas duces tecum to non-parties under Fed. R. Civ. P. 45; and (2) expand the current geographical limitations (ECF No. 119) on the issuance of deposition and document subpoenas or, in the alternative, modify the current restrictions to permit service on third-parties located in the 26 additional states where we have now identified – in our proposed amended complaint – additional marketing of the scheme and

conservation easement activity.[1] As explained below, all of these adjustments to the discovery process are warranted by the magnitude, significance, and geographic range of the conduct alleged in this case.

BACKGROUND

The United States filed a complaint in December 2018 seeking injunctive and other equitable relief against six defendants who are organizing, promoting, and selling an abusive income-tax-deduction scheme involving syndicated conservation easements. (ECF No. 1 ¶¶ 6-7.) For more than ten years, Defendants have been making false or fraudulent statements to induce individuals to "invest" in at least 96 syndicates and to claim grossly inflated deductions for noncash charitable contributions of real property easements made by those syndicates. (*Id*. ¶¶ 1-5.) Significant numbers of non-parties to the litigation have been participating in or assisting with these multi-step easement transactions, including financial advisors, broker-dealers, tax-return preparers, landowners, land trusts, lawyers, accountants, appraisers, and of course thousands of individual customers from at least 45 states. (*Id*. ¶¶ 61-62, 113.) According to the original complaint, real

[1] Contemporaneous with this motion, the United States is filing a motion for leave to file an amended complaint, along with the proposed amended complaint itself. (ECF Nos. 174, 174-1.) In addition, after travel and other restrictions from the COVID-19 public health crisis are lifted, the United States anticipates filing a motion to address the amount of time still needed for discovery.

properties upon which the syndicates were then known to have granted easements were located in eight states (Alabama, Georgia, Indiana, Kentucky, North Carolina, South Carolina, Tennessee, and Texas). (*Id*. ¶ 112.)

The United States' proposed amended complaint further elaborates on Defendants' scheme – identifying their involvement in at least 138 syndicates with broker-dealers and front-line sellers located in 33 different states, customers located in 45 different states and the District of Columbia, and real property in 11 states. (Prop. Am. Compl. ¶¶ 162-163.) The additional states where Defendants allegedly engage in the penalty conduct identified in the proposed amended complaint (but not in the original complaint) are: Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, , Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Utah, Virginia, Washington, and Wisconsin. (*Id.* ¶ 50, 51, 154-162.)

This scheme is causing substantial harm to the United States Treasury, Defendants' customers, and the American public, including more than $3 billion in claims for improper federal income tax deductions nationwide thus far. (*Id.* ¶ 5, 32, 46, 58, 163.) This litigation is certainly not the first case dealing with the recent scourge of illicit charitable deductions for conservation easements. *See, e.g.*, *R.R.*

Holdings, LLC v. Comm'r, 2020 WL 569926 (T.C. 2020); *Coal Prop. Holdings, LLC v. Comm'r*, 2019 WL 5549313 (T.C. 2019); *Wendell Falls Dev., LLC v. Comm'r*, 2018 WL 6131529 (T.C. 2018). But it is the largest – by any measure – and the first civil action in the country against a promoter of syndicated conservation easements.

Considering the size, scope, novelty, and importance of this case, and the fact that this is an action in equity to protect the public good rather than vindicate purely private interests, the United States initially requested a commensurate amount of discovery and explained to the Court its reasons for that request. (ECF No. 56 at 16–30.) The Court acknowledged that this case "contains a number of complex issues" and that "the discovery universe – including both fact and expert discovery – may be quite extensive. . . ." (ECF No. 86 at 2, 5.)

On December 10, 2019, the Court largely denied the motions to dismiss filed by Defendants Zak and Clark, and allowed third-party discovery in eight states where the United States alleged Defendants caused easements to be placed on real property, and requested a telephonic case-planning conference. (ECF No. 119 at 20-21.) At the Court's direction, the parties submitted a joint proposed amended scheduling order (ECF No. 128) in which the United States, among other things, requested clarification of the geographic-scope limitation and notified the Court of

its intention to continue issuing non-party document subpoenas within that limitation or as otherwise permitted by the Court (*id*. at 27-32).

Following the conference on January 10, 2020, the Court ordered the Government to file copies of all the subpoenas that it had already served along with drafts of all subpoenas that it planned to serve. (ECF No. 135.) The Court simultaneously — and completely — barred the Government from issuing any additional subpoenas until further notice. (*Id*.) The United States immediately complied with the Court's instructions, explained why obtaining relevant documents from non-parties is so important in a case that centers on false statements the Defendants made to non-parties, and outlined material information that the Government had learned through the subpoenas that it had already issued. (ECF No. 138 at 1-4.)

On January 17, 2020, via text order, the Court then directed the United States to file "any motions to quash, objections, or similar oppositional statements that have been received by the Government or filed by a third-party in response to a subpoena in this case." We promptly complied and reported that of the 15 document-subpoena recipients, none had filed a motion to quash (or similar objection) with any court, and only one had served a written objection on the

Government (concerning a single document request). (ECF No. 142 at 1-2.) We also reiterated the importance of third-party subpoenas here. (*Id*. at 3.)

Subsequently, in the parties' joint response to the Court's order of January 10, 2020 (ECF No. 146), the United States:

- requested that the Court not limit the number of document subpoenas that may be served on non-parties or, in the alternative, set the limit provisionally at 50 subpoenas per side (*id*. at 19); and
- asked the Court to clarify its order imposing a geographic limit on discovery (*id*. at 21-23).

Finally, contemporaneous with this motion, the United States is seeking leave to amend its complaint. Since the filing of the original complaint on December 18, 2018, the United States has discovered additional information about Defendants' conservation easement syndication scheme – specifically the breadth of the scheme, how widespread Defendants' conduct is, and the harm caused by Defendants' conduct. The United States' proposed amended complaint enlarges allegations set forth in the original complaint regarding the pervasive nature of the Defendants' scheme including, among other things, significant more detail with respect to the Defendants' nationwide, sophisticated marketing strategy. These new

allegations serve to further highlight the need for additional (albeit proportional) discovery, particularly from third parties.

DISCUSSION

While not unlimited, the scope of discovery under Rule 26 "is to be broadly construed with a bias in favor of wide-open discovery." *Alig-Mielcarek v. Jackson*, 286 F.R.D. 521, 525 (N.D. Ga. 2012). Courts must employ a liberal and broad scope of discovery in keeping with the spirit and purpose of the Federal Rules of Civil Procedure. *In re Arby's Rest. Grp. Inc. Litig.*, 2018 WL 8666473, at *1 (N.D. Ga. 2018); *see Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) ("The Federal Rules of Civil Procedure strongly favor full discovery whenever possible."). The need for wide-ranging discovery is even greater where defendants have allegedly worked together to achieve their aims and control access to much of the relevant information. *See In re Delta/AirTran Baggage Fee Antitrust Litig.*, 846 F. Supp. 2d 1335, 1363 (N.D. Ga. 2012) ("antitrust plaintiffs must be given ample opportunity for discovery" because "proof is largely in hands of alleged conspirators") (internal quotations omitted).

The generally expansive scope of federal civil discovery also extends to third-party subpoenas under Rule 45. Unlike other discovery methods, the federal rules place no presumptive limit on the number of subpoenas duces tecum that a

party may serve. Limiting third-party discovery contravenes the district courts' "general preference for a broad scope of discovery." *U.S. Dep't of the Treasury v. Pension Benefit Guar. Corp.*, 301 F.R.D. 20, 25 (D.D.C. 2014) (quoting *North Carolina Right to Life, Inc. v. Leake*, 231 F.R.D. 49, 51 (D.D.C. 2005)). Courts should not deny discovery merely because the recipient of the request is a non-party. *In re County of Orange*, 208 B.R. 117, 121 (Bankr. S.D.N.Y. 1997). And no rule prohibits a party from seeking to obtain the same documents from a non-party as can be obtained from a party. *Fudali v. Pivotal Corp.*, 2009 WL 10668516, at *5 (N.D. Ga. 2009). It may be important to obtain what should be the same documents from two different sources, as any differences between them could be relevant. *Id.*

The broad scope of civil discovery necessarily affects and informs the exercise of judicial authority to supervise it. The discovery regime in the Federal Rules of Civil Procedure is "extremely permissive," and "the rules generally do not place any initial burden on parties to justify their deposition and discovery requests." *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 69 (2d Cir. 2003) (Sotomayor, J.). Thus, even with the broad discretion afforded to district courts to manage the discovery process, judges should generally prevent proposed discovery only when justified by particular facts and circumstances. *Id*. at 69-70.

The proportionality concept in Rule 26(b)(1) does not override the above principles but rather operates in concert with them. The 2015 amendments to Rule 26 highlighted proportionality considerations that were already present in the federal discovery rules. *Steel Erectors, Inc. v. AIM Steel Int'l, Inc.*, 312 F.R.D. 673, 676 n.4 (S.D. Ga. 2016). They did not alter the traditional presumption of open discovery in the absence of any case-specific facts and circumstances necessitating carefully tailored restrictions. *See id.* ("It remains true today both that claims and defenses provide discovery's outer bounds and that the court is inclined to err in favor of discovery rather than against it.") (internal quotations and citations omitted).

Finally, "[p]roportionality and relevance are 'conjoined' concepts; the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate." *Edmondson v. Velvet Lifestyles, LLC*, 2016 WL 7048363, at *6 (S.D. Fla. 2016) (citation omitted). As set forth below, the size, scope, novelty, and public importance of this case – and the fact that that the discovery sought is both highly important to resolution of the issues and not otherwise available – are all factors that inform the proportionality calculus, and support the Government's request for adjustments to the discovery management rulings.

I. THE COURT SHOULD PERMIT THE UNITED STATES TO ISSUE THIRD-PARTY DOCUMENT AND PROPERTY-INSPECTION SUBPOENAS.

The Court should permit the United States to issue subpoenas duces tecum in this case. This is simply not a case in which the type of third-party discovery we seek might arguably be inappropriate or disproportionate.

This action encompasses six private parties plus the federal government, at least ten years of carefully coordinated fraudulent activities, over 100 pass-through entities, over $3 billion of improper federal tax deductions, and scores of non-party participants of various types (financial advisors, broker-dealers, tax-return preparers, landowners, land trusts, lawyers, accountants, appraisers, individual customers, etc.). Indeed, the proposed amended complaint alleges that Defendants' selling network consists of at least 37 broker-dealers and 185 frontline sellers located in at least 33 different states, and further, that Defendants used service providers from all over the country, including legal services in states such as Minnesota, Nebraska, and Illinois despite not organizing syndicates with real property in those states. It concerns an integrated civil enforcement regime (26 U.S.C. §§ 7402, 7407, and 7408) designed by Congress to protect both the U.S. Treasury and the public at large from organized tax fraud. And it involves an

emerging area of attention in federal tax policy with the potential for many millions of dollars in future harm nationwide.

The need for third-party discovery in such a case is manifest. At its heart, this action involves false statements and real estate. Issuing document subpoenas to the recipients of the Defendants' false statements – who may have retained written evidence of those statements that the Defendants did not – is routine discovery practice in a civil fraud case. And as perpetrators of fraudulent activity rarely admit to knowing of the falsity of their statements, circumstantial evidence of that knowledge often rests in the hands of third parties.

For just one example, EcoVest defends this lawsuit on grounds that its transactions are not tax-driven. But documents obtained by the United States via subpoenas to third-parties reveal a very different story. As one member of Defendants' selling network wrote to a potential investor via email: "the units are not even amounts so it will be close to or a little more than 50,000. That will get you a 200,000 deduction which will reduce your tax by another $100,000+/-." (Ex. 20 (KALOS_227170).) This email directly undermines the theory of EcoVest's defense in this case. Yet it is the very type of evidence the Government can only obtain via issuance of Rule 45 subpoenas to third-parties.

Along similar lines, to the extent any Defendant deliberately avoided written communications (in particular, email), the United States has already obtained notes of conference calls with third parties that provide information and insight. The United States simply cannot obtain this type of information via a Rule 34 document request. Lastly, Rule 45 subpoenas serve the important purpose of verifying or corroborating the completeness of Defendants' document productions. For example, the United States obtained an email from third party Triloma that should have been produced by EcoVest. (Ex. 28 (TRILOMA0602202) (email from Robert "Bob" McCullough stating the "2013 programs have all made it through the statute of limitations, so an exit for each property is a priority for 2018").)

Moreover, without Rule 45 subpoenas, the Government has no method to compel third-party landowners to permit inspection of real properties subject to conservation easements that are no longer owned by the Defendants' syndicates. In a case involving the use and value of real estate, the ability of the Government and its experts to inspect the land is undoubtedly significant. Among other things, expert witnesses who seek to opine on the fair market value of the conservation easements at issue will use site visits to gather information about the value-relevant characteristics of the property.

Furthermore, the Government's subpoenas issued prior to the Court's order were not oppressive, abusive, embarrassing, harassing, frivolous, unreasonably cumulative, or unduly burdensome in any way. Fourteen of the fifteen recipients complied without even a whiff of protest. And in the one remaining instance, the third party apparently did not consider the dispute worth elevating to a court via a motion to quash, and instead produced responsive documents.[2]

In sum, the United States should be permitted to deploy this widely-used discovery tool, especially in a case of this magnitude where the Court needs to hear and evaluate the evidence about the recurring nature of the conduct, the Defendants' scienter and involvement, and the widespread nature and harm of the scheme. Therefore, the Court should permit the third-party discovery we seek.[3]

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[2] The lone third party to lodge objections was represented by the same counsel that represents EcoVest in this matter.

[3] Practical considerations also favor granting the relief sought. The status quo will require the United States to seek leave of the Court prior to issuing any Rule 45 subpoena. The Defendants' will inevitably oppose each such request, and this litigation will be multiplied unnecessarily. And while the COVID-19 public health crisis has caused disruptions to travel that make depositions and site inspections impossible, documentary discovery of non-parties (if permitted) can continue during this otherwise restricted time. For these reasons, too, the Court should permit the United States to issue subpoenas duces tecum to non-parties.

II. THE COURT SHOULD WITHDRAW THE GEOGRAPHICAL LIMITATION ON THIRD-PARTY SUBPOENAS.

In its December 2019 order, the Court stated that, based on the allegations in the original complaint, it would limit subpoenas to third-parties in the eight states that contained the real property that defendants encumbered with bogus conservation easements. The Court should withdraw this restriction.

While the scope of discovery is limited to matters relevant to the parties' claims and defenses as alleged in their pleadings, the relevant evidence of the Defendants' scheme is not neatly confined to eight states, let alone states where the land is located. For example, a broker-dealer that sold interests in syndicates organized in Kentucky and Indiana may have mountains of material documents concerning those transactions. But if the broker-dealer itself is located across the state line in Ohio, then under the Court's order, the Government cannot obtain any of those relevant documents or deposition testimony due to nothing more than happenstance. The same would be true for a land trust domiciled in Mississippi, an accountant practicing in Florida, a customer living in Virginia, etc.

The proposed amended complaint further highlights the need to expand the geographic limitations on discovery in this case. For starters, the United States has amplified the allegations regarding the states where the real property that

Defendants encumbered with bogus conservation easements is located. In its proposed amended complaint, the United States alleges that Defendants caused conservation easements to be granted in three additional states, bringing the total number to 11. To be sure, the United States needs to be able to issue subpoenas to third-parties in those states, especially because the original landowners and current property owners often reside in that state for each of the deals.

But the physical location of the bogus easements is only one small part of the tax scheme at issue in this case. This is because, as also augmented in the proposed amended complaint, Defendants employed a sophisticated, nationwide marketing strategy to sell these deals to customers. Defendants' marketing strategy involved careful coordination and training with a vast network of at least 37 broker-dealers (located in 18 states) and at least 200 financial advisors and other front-line sellers (located in an additional 15 states). Defendants trained and worked tirelessly with these broker-dealers and front-line sellers to market, promote, pitch, and entice customers to participate in these deals. Indeed, Alan Solon and Robert McCullough travelled to the sellers' home states – such as Utah, Idaho, California, and Arizona – to "train" and "explain" the EcoVest transactions. At Defendants' behest and with their encouragement, these subpromoters made

countless statements about these deals, only some of which the United States can discover without the ability to issue subpoenas to where they live.

The United States understands the Court's inclination to keep discovery in this case manageable, and the relief requested here will not undermine that goal. Indeed, third-party discovery places little burden on Defendants and, as described above, has not resulted in any motion practice or serious objection. Also, third-party landowners are unlikely to be burdened significantly by routine inspections of their properties (whether by aerial drones or terrestrial humans), and the United States is committed to working cooperatively with them and any other subpoena recipients to minimize any disruptions to their daily lives resulting from the discovery process. Moreover, as the original and proposed amended complaints make clear, Defendants created the need for nationwide discovery in the first place, by perpetrating a tax scheme involving far-flung third parties. Defendants should not be permitted to profit from extremely restrictive third-party discovery when it was their own conduct (of organizing and selling a nationwide tax scheme) that necessitates that discovery.

Because the United States is seeking to amend its complaint and add 26 more states as locations of sales activity and conservation easements, the Court should at least modify its order to permit third-party discovery in those additional

states as well (i.e., Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, , Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Utah, Virginia, Washington, and Wisconsin). To be sure, such an order would not completely eliminate the disconnect between where the real properties are located and where discoverable documents and information concerning the properties are located. And it would at least allow the United States to inspect properties in all states that are the subject of allegations in the amended pleadings, to take depositions in all of those states, and to procure documents in all of those states.

CONCLUSION

For all of the foregoing reasons, the Court should: (1) permit the United States to issue subpoenas duces tecum to non-parties under Fed. R. Civ. P. 45; and (2) expand the current geographical limitations (ECF No. 119) on the issuance of deposition and document subpoenas or, in the alternative, modify the current restrictions to permit service on third-parties located in the 26 additional states where we have now identified – in our proposed amended complaint – additional marketing of the scheme and conservation easement activity.

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Dated: May 8, 2020

Respectfully submitted,

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*I certify that this motion has been prepared with one of the font and point selections approved by the court in LR 5.1C.