

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

CASE NO. 08-81565-CIV-HURLEY/HOPKINS

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

CREATIVE CAPITAL CONSORTIUM, LLC,  
A CREATIVE CAPITAL CONCEPTS, LLC, and  
GEORGE L. THEODULE

Defendants.

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**NON-PARTY WACHOVIA BANK, N.A.'S MOTION TO VACATE OR MODIFY  
ORDER GRANTING RECEIVER'S MOTION TO COMPEL**

Non-party, Wachovia Bank, N.A. ("Wachovia"), by and through its undersigned counsel and pursuant to Federal Rules of Civil Procedure 59 and 60, requests reconsideration of or relief from the Court's May 4, 2010 Order Granting Receiver's Motion to Compel the Production of Certain Documents by Wachovia.

**I. BACKGROUND**

1. The Securities and Exchange Commission ("SEC") filed its Complaint for Injunctive and Other Relief in this matter on December 29, 2008, accusing Defendants Creative Capital Consortium, LLC, A Creative Capital Concept\$, LLC and Mr. George L. Theodule of running a "Ponzi" scheme that targeted the Haitian-American community in Florida.

2. Also, on December 29, 2008, this Court appointed a Receiver, Mr. Jonathan E. Perlman (the "Receiver").

3. In the course of this matter, the Receiver propounded a subpoena directed to Wachovia, dated April 20, 2009, seeking certain documents. *See* D.E. # 233, Ex. A.<sup>1</sup>

4. In approximately April 2009 and May 2009, former in-house counsel for Wachovia, Mr. Edward Rosenblatt, spoke with and exchanged multiple e-mails and documents with counsel for the Receiver in an effort to provide responsive documents within Wachovia's possession

5. In approximately June and July 2009, Wachovia produced two (2) boxes of documents to counsel for the Receiver in response to the subpoena. Additionally, Wachovia made many additional documents available to counsel for the Receiver by electronic data transfer.

6. In approximately June and July 2009, in-house counsel for Wachovia and counsel for the Receiver discussed the status of additional production documents and in-house counsel for Wachovia inquired as to whether a protective order or nondisclosure agreement was in place. Counsel for the Receiver indicated that there was no confidentiality order in place but that the Receiver would entertain an agreement if provided by non-party Wachovia.

7. Thereafter in October 2009, counsel for the Receiver called in-house counsel for Wachovia seeking additional documents pursuant to the subpoena. In-house counsel for Wachovia requested a telephone conference with counsel for the Receiver to discuss the documents sought by the Receiver and to discuss the status of previously produced documents. The proposed dates for the telephone conference were unsuitable for counsel for the Receiver so in-house counsel for Wachovia offered several additional dates and times for a telephone

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<sup>1</sup> The Subpoena attached to the Receiver's Motion to Compel does not include any evidence that it was properly served on Wachovia. However, Wachovia admits that it received the subpoena at some point in time in late April 2009.

conference in November 2009, and also provided a status update on the additional documents the Receiver was seeking. Eventually a date and time were agreed upon for the telephone conference, but counsel for Receiver did not call in-house counsel for Wachovia at the appointed time and ate.

8. There was no additional communications between counsel for the Receiver and anyone at Wachovia, including in-house counsel for Wachovia, between November 2009 and the filing of the Motion to Compel.

9. In January 2010, prior to the filing of the Receiver's Motion to Compel [D.E. # 233], the in-house counsel for Wachovia that was handling this matter, Mr. Rosenblatt, resigned from Wachovia.

10. Ms. Pamela Pearson, current in-house counsel for Wachovia, was able to access Mr. Rosenblatt's Wachovia e-mail account from January 22, 2010 until February 22, 2010 to check e-mail messages. During that time, Mr. Rosenblatt did not receive any e-mails from counsel for the Receiver. After that time period, anyone who e-mailed Mr. Rosenblatt should have received a No Delivery Recipient bounce back e-mail.

11. Mr. Rosenblatt's Wachovia telephone number was forwarded to his assistant at Wachovia and any inquiries received by the assistant were forwarded to Ms. Pearson to handle. Any U.S. Mail addressed to Mr. Rosenblatt at Wachovia was also forwarded to Ms. Pearson's attention.

12. Accordingly, when counsel for the Receiver attempted to reach Mr. Rosenblatt by e-mail on March 13, 2010, Mr. Rosenblatt was no longer with Wachovia. Furthermore, because counsel for Receiver was attempting to reach Mr. Rosenblatt by e-mail more than thirty (30) days after his resignation from Wachovia his e-mail account no longer would accept e-mail and

counsel should have received a No Delivery Recipient bounce back e-mail. Therefore, Wachovia was not aware that the Receiver was attempting to obtain additional documents from Wachovia and was not aware that the Receiver planned to file a Motion to Compel directed to Wachovia.

13. If counsel for the Receiver had telephoned Mr. Rosenblatt, counsel would have reached his former assistant and inquiries would have been directed to Ms. Pearson (current in-house counsel for Wachovia). Unfortunately, based on information and belief, counsel for Receiver limited their efforts to reach Mr. Rosenblatt to e-mails only and Wachovia was unaware of such e-mails.

14. Thereafter, Receiver filed his Motion to Compel on April 13, 2010.

15. The Receiver's certification regarding attempts to confer states that counsel for the Receiver "attempted to confer and have conferred in good faith with counsel for Wachovia in an effort to obtain the documents requested without court action but have been unable to do so." In fact, the only efforts made were by e-mail to an undeliverable mailbox (because more than thirty (30) days had elapsed after Mr. Rosenblatt's departure from Wachovia) despite the fact that counsel for the Receiver knew the telephone number of Mr. Rosenblatt and had previously communicated with him by telephone.

16. The certificate of service for the Receiver's Motion to Compel indicates that it was not initially served on Wachovia. Thereafter, the Receiver filed an Amended Certificate of Service [D.E. #235] indicating the that Motion to Compel was served by U.S. Mail on Wachovia by sending same to Mr. Rosenblatt. As previously explained, Mr. Rosenblatt was no longer employed by Wachovia. Despite the fact that the Receiver sent the Motion to Compel to Wachovia by U.S. Mail, Wachovia has no record of receipt of the Motion to Compel and

assumes it was lost in transit since Wachovia had a procedure in place for the redirection of mail addressed to Mr. Rosenblatt to Ms. Pearson and she never received the Motion to Compel or the Amended Certificate of Service.

17. Accordingly, Wachovia was not aware of the Motion to Compel and therefore did not respond prior to this Court's Order granting the Motion to Compel and requiring Wachovia to produce certain documents based on the fact that Wachovia had not responded to the Motion. *See* D.E. # 241. Wachovia would have opposed the Motion to Compel if it had received a service copy or was otherwise aware of it.

18. On May 4, 2010, subsequent to the receipt of the Order granting the Motion to Compel, counsel for Receiver attempted to telephone Mr. Rosenblatt and was connected to his former assistant who directed the inquiry to Wachovia in-house counsel Ms. Pearson pursuant to the procedures Wachovia had in place subsequent to Mr. Rosenblatt's resignation. Upon learning of the Order granting the Motion to Compel, Wachovia promptly contacted the below undersigned counsel for Wachovia who immediately contacted counsel for the Receiver and has been working with her to provide documents that the Receiver is requesting.

19. Specifically, Wachovia has been working with the Receiver to confirm that they have either previously provided, will provide, do not possess, or are unable to locate the following documents: (1) the signature cards for the four (4) Creative Capital Wachovia accounts; (2) corporate resolutions for Creative Capital, United Investment Club, Dream Makers Investment of Georgia and Dream Makers Investment of New York; (3) correspondence between Wachovia and the four (4) referenced entities; and (4) Wachovia's non-privileged investigation file regarding the four (4) referenced entities and certain related third-party clubs.

20. Wachovia, on May 14, 2010, produced additional documents to counsel for the Receiver and is preparing additional documents to be produced this week.

21. Wachovia had planned to file this Motion to Vacate on Friday, May 14, 2010, but in an effort to comply with S.D. Local Rule 7.1.A.3, counsel for Wachovia provided a copy of a draft Motion to Vacate to counsel for the Receiver on Friday afternoon. Due to the fact that the Southern District of Florida ECF system went down as of 5:00 p.m. on Friday, May 14, 2010 for technological upgrades, counsel for the Receiver and counsel for Wachovia did not have sufficient time to reach an agreement regarding the draft Motion to Vacate. However, counsel for the Receiver advised that she believed she would be able to agree to a revised Motion to Vacate on Monday, May 17, 2010 and saw no need for the filing of the Motion to Vacate on May 14<sup>th</sup>. Counsel for Wachovia provided an updated draft of this Motion to Vacate to counsel for Receiver on Monday, May 17, 2010, and late Monday was advised that there was no form of this Motion that the Receiver would agree to despite the parties continued efforts to agree upon document production in accordance with federal and state law.

22. Accordingly, because (1) Wachovia previously responded to the Receiver's subpoena; (2) former in-house counsel for Wachovia had previously been in communications with counsel for the Receiver regarding the documents; (3) Wachovia was unaware that counsel for the Receiver was seeking documents because the Receiver's e-mail to Mr. Rosenblatt was not received by anyone at Wachovia as he had previously left Wachovia; (4) Wachovia did not receive the U.S. Mail service copy of the Motion to Compel, (5) Wachovia has been working diligently since learning of the Order directing Wachovia to produce certain documents and to reach an agreement with counsel for Receiver insofar as the production of these documents and

has in fact already produced documents on May 14, 2010; Wachovia respectfully requests that this Court vacate and/or modify its prior May 4, 2010 Order.

## II. MEMORANDUM OF LAW

Pursuant to Federal Rules of Civil Procedure 59 and 60, the Court is authorized to reconsider and grant relief from the Order. Additionally, Federal Rule of Civil Procedure 45 (c) requires that a “party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” FED. R. CIV. P. 45 (c).

Here, after Mr. Rosenblatt left the bank, Wachovia was not aware that the Receiver was seeking additional documents pursuant to the subpoena because communications by the Receiver were, upon information and belief, limited to e-mails. Respectfully, the Receiver’s efforts to meet and confer, especially with a non-party, could have included a telephone call to Mr. Rosenblatt which would have alerted Wachovia to the fact that the Receiver, after months of silence, was seeking to revisit the issue of additional documents from Wachovia. St. Johns Ins. Co. v. Nautilus Ins. Co., 2008 WL 2090730 (M.D. Fla. 2008) (Court denied motion(s) to compel directed to non-parties where it did not appear that the motions were served on the non-parties and where it did not appear that the movant had engaged in a good faith effort to secure compliance before the filing of the motion.)

Because Wachovia did not have an opportunity to advise the Court of its earlier productions, its earlier communications with counsel for Receiver in Wachovia’s ongoing efforts to cooperation with Receiver’s subpoena, and since Wachovia did not have an opportunity to work out its issues with the subject negotiation or present its opposition to the Motion to

Compel, and the Court did not have the benefit thereof, the Court should reconsider or grant relief from the Order.

Wachovia respectfully requests that this Court vacate its May 4, 2010 Order and permit Wachovia to continue working with counsel for Receiver to provide the documents discussed above without waiving its right to make certain objections, including attorney-client and work product privilege objections. Wachovia produced documents on May 14, 2010, pursuant to the May 4<sup>th</sup> Order, and has agreed to produce the specific additional documents that this Court has ordered it to produce, other than those protected by federal and state law, but respectfully requests that the prior May 4<sup>th</sup> Order be vacated or modified such that Wachovia has the opportunity to object to specific documents based on attorney-client, work product or the Bank Secrecy Act. Wachovia will promptly provide a privilege log for attorney client and work product documents to the extent necessary and is willing to provide these documents to the Court for an in camera review and ruling regarding production.

**CERTIFICATE OF COMPLIANCE WITH S.D. FLA. L.R. 7.1.A.3**

I HEREBY CERTIFY that, in accordance with S.D. Fla. L.R. 7.1.A.3, the undersigned has conferred with counsel for the Receiver, on multiple occasions, regarding the issues raised in this Motion and has provided two drafts of this Motion to Vacate to counsel for the Receiver in an effort to reach agreement on this issues raised herein. Counsel for the Receiver has indicated that the Receiver is unwilling to agree to any form of this Motion.



Respectfully submitted,

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*Counsel for Wachovia Bank, N.A.*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of May, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ Amy S. Rubin  
Amy S. Rubin

**SERVICE LIST**

*United States District Court  
Southern District of Florida*

CASE NO.: 9:08-cv-81565-DTKH

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