

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ALYSSON MILLS, IN HER CAPACITY AS
RECEIVER FOR ARTHUR LAMAR
ADAMS AND MADISON TIMBER
PROPERTIES, LLC,

Plaintiffs,

v.

THE UPS STORE, INC.; HERRING
VENTURES, LLC d/b/a/ THE UPS STORE;
AUSTIN ELSÉN; TAMMIE ELSÉN;
COURTNEY HERRING; DIANE LOFTON;
CHANDLER WESTOVER; RAWLINGS &
MACINNNIS, PA; TAMMY VINSON; and
JEANNIE CHISHOLM,

Defendants.

Case No. 3:19-cv-364-CWR-FKB

Arising out of Case No. 3:18-cv-252,
*Securities and Exchange Commission v.
Arthur Lamar Adams and Madison Timber
Properties, LLC*

Hon. Carlton W. Reeves, District Judge

**THE UPS STORE, INC.'S OPPOSITION TO PLAINTIFF'S
MOTION TO QUASH SUBPOENAS SERVED ON NON-PARTY INVESTORS OR,
ALTERNATIVELY, FOR A PROTECTIVE ORDER**

I. INTRODUCTION

Plaintiff's Motion to Quash Subpoenas or, Alternatively, Motion for a Protective Order seems to seek an order from this Court advising each of thirty-two witnesses ("Investors") subpoenaed by TUPSS, Inc. that they do not need to produce any documents responsive to TUPSS, Inc.'s subpoenas ("Subpoenas") or appear for deposition. Plaintiff's Motion does not come close to showing grounds for such an order. Although Plaintiff asserts that she seeks such an order to protect Investors, she does not provide a whit of evidence from even one Investor who objects to any aspect of the Subpoenas. Counsel for TUPSS, Inc. have been contacted by several of the Investors or their counsel and none of them have raised any objection to producing the requested documents. (McDonald Decl. ¶ 2; Merritt Decl, ¶ 2.) Over and over in this action, Plaintiff baldly asserts how Investors "feel" or what they want, without Plaintiff submitting any evidence to support those assertions. Plaintiff's factual assertions unsupported by evidence should be disregarded. *See United States ex rel. Fisher v. Homeward Residential, Inc.*, No. 4:12-CV-461, 2016 U.S. Dist. LEXIS 7480, *10, 12 (E.D. Tex. Jan. 22, 2016) (denying motion for protective order to prohibit plaintiff from contacting defendants' borrowers absent leave of court, finding "Defendants have not met their burden to show a 'particular and specific demonstration of fact' as to why a protective order is necessary" because "Defendants have only offered conclusory statements regarding how 'the proposed contacts are likely to leave the borrowers feeling that their privacy has been compromised'" and how "'confusion could result in borrowers feeling pressure to discuss private information.'").

Plaintiff's Motion should be seen for what it is — just like any other attempt by a plaintiff looking to extract a settlement or hit the jackpot at trial who wants to prevent a defendant from discovering the facts that dispel the plaintiff's claims. Plaintiff's Motion is not about protecting the Investors, it is all about thwarting TUPSS, Inc.'s efforts to defend itself

against Plaintiff's absurd \$100,000,000 claims in this case. It is absolutely essential to TUPSS, Inc.'s defense that it obtain the documents and testimony of the investors on whose behalf this action is purportedly brought — particularly since Plaintiff herself refuses to produce even basic documents to TUPSS, Inc. and the other defendants in this and related cases.

The discovery cut-off date in this action is October 22, 2021. Plaintiff steadfastly refuses to agree to any continuance of the deadlines in this case. It is imperative that Plaintiff's Motion be denied, and denied promptly.

II. THERE ARE NO GROUNDS TO QUASH TUPSS, INC.'S SUBPOENAS

Plaintiff's request that the Court quash all the Subpoenas in their entirety should be rejected out of hand.

Plaintiff has standing only to seek to quash subpoenas served on witnesses if the subpoena seeks documents that are protected by a privilege belonging to the Plaintiff. Plaintiff's own cited authorities make that clear. *Total Rx Care, LLC v. Great Northern Ins. Co.*, 318 F.R.D. 587, 594, 2017 U.S. Dist. LEXIS 31904, *16 (N.D. Tex. Mar. 7, 2017) ("The Court finds — and Total Rx does not dispute — that Great Northern has a sufficient interest to confer standing here where it alleges that documents protected from disclosure by the attorney-client privilege and work-product protection are among those responsive to the Subpoena served on HSNO."). Plaintiff is not counsel for the Investors. Plaintiff's Motion does not argue, much less establish, that *any*, much less all, of the documents that TUPSS, Inc. seeks from Investors are protected from disclosure by Plaintiff's attorney-client privilege or work product of Plaintiff's counsel. And even if the Investors were in possession of such documents (and there is no evidence of that in Plaintiff's Motion), any privilege or work product protection would have been waived. Plaintiff does not have standing even to seek to quash the Subpoenas.

III. THERE ARE NO GROUNDS TO ISSUE A PROTECTIVE ORDER

Plaintiff vaguely asks this Court to issue a protective order under Rule 26(c). Plaintiff does not explain what exact order she wants this Court to issue but she raises three objections: TUPSS, Inc.'s Subpoenas "seek information that is private, seek information that is irrelevant, and overall are not proportional to the needs of this case." Each of Plaintiff's stated grounds for a protective order is frivolous.

A. Plaintiff's Stated Concerns About Investors' Interests Should Be Disregarded

As a threshold matter, all the objections that Plaintiff raises belong to Investors, who are advised by the Rule 45 Subpoena itself of their rights to interpose objections. Plaintiff does not argue that any of *her* rights are jeopardized or curtailed by TUPSS, Inc.'s Subpoenas. If an Investor has concerns, he or she can raise them.

B. Plaintiff's Assertion That TUPSS, Inc.'s Subpoenas Are Disproportional to the Needs of This Case Is Frivolous

Plaintiff is a moving target on what she claims the amount in controversy is, but her most recent statement of damages is more than \$100,000,000.¹ (McDonald Decl. ¶ 3.) For any plaintiff who seeks \$100,000,000 to argue that a defendant's efforts to defend itself are "disproportional" to the needs of the case is frivolous. Plaintiff cannot seriously contend that there is no need for TUPSS, Inc. to seek this discovery from the key witnesses because the "amounts at stake" in this case do not warrant it. Further, Plaintiff has no *evidence* that the volume of material requested from Investors imposes any burden at all. And, as discussed, no

¹ In her Initial Disclosures served in this case, Plaintiff stated damages were \$85 million. Why they have grown to more than \$100 million is a mystery — because Plaintiff has flouted her obligation to show how that amount was calculated and produce the back up to support those numbers.

Investor has raised any such concern. In all events, in return for \$100,000,000, Investors must expect to incur some burden.

C. Plaintiff's Contention That the Investors Do Not Possess Any Relevant Information Is Absurd

In support of her argument that TUPSS, Inc.'s Subpoenas seek irrelevant information, Plaintiff points to TUPSS, Inc.'s request for communications and documents between the Investors and Plaintiff.

Communications and materials passed between the Investors and Plaintiff are obviously potentially relevant. It is easy to imagine Plaintiff making statements to the Witnesses — or Witnesses making admissions to Plaintiff — that might be useful in cross-examination at trial. It is also easy to imagine that Witnesses provided documents to Plaintiff relevant to Plaintiff's \$100,000,000 damages claim. Relevance is broadly defined under the Federal Rules, and documents between the Investors and Plaintiff plainly could lead to admissible evidence.

Plaintiff urges the Court to issue an order precluding *any* discovery into the Investors' losses on the theory that what the Investor thinks his or her losses are is irrelevant. Plaintiff asserts that TUPSS, Inc. should just accept Plaintiff's position about Investor losses. What nonsense. Testimony from an Investor that, over the course of his or her years of transactions with Adams, the Investor actually made money obviously is not irrelevant, nor would it be considered so by jurors or courts. And TUPSS, Inc. is not just going to take the word of Plaintiff about what each Investor's gains or losses were.

Finally, Plaintiff argues that Investors' tax and accounting treatment of their Madison Timbers investments is irrelevant because the "sophistication" of the Investors is irrelevant. That may be Plaintiff's litigation position, but TUPSS, Inc. disputes it. Further, an Investor's tax

treatment of their investments may be relevant to many other issues other than the Investor's sophistication, such as their damages.

Plaintiff does not argue that any of the other requests at issue are irrelevant, and thus waives any such argument.

D. There Is No Basis for Prohibiting TUPSS, Inc.'s Subpoenas on the Ground They Seek Investors' "Private" Information

Plaintiff seeks an order prohibiting TUPSS, Inc. from obtaining certain documents on the ground that the documents are — or should be — considered "private" by the Investors. That argument should likewise be rejected for several reasons.

Had this action been filed by an Investor against TUPSS, Inc., it would be obvious that the Investor would not be able to resist all discovery on the ground that information about the Investor's investments and losses are "private." It is equally meritless for Plaintiff to make those "privacy" arguments on behalf of those Investors. By seeking \$100,000,000 on behalf of Investors, any privacy argument obviously must yield to TUPSS, Inc.'s need for discovery.

Plaintiff also mischaracterizes the documents TUPSS, Inc. seeks. For example, TUPSS, Inc.'s Subpoenas do not request all tax returns of the Investors. TUPSS, Inc. only requested documents showing the "tax treatment" of the "Madison Timber investment." (McDonald Decl. ¶ 3, Ex. B.) How Investors treated their Madison Timber investments on their taxes might reflect what the Investor believed his or her losses were, or affect the losses the Investor actually suffered — e.g., did they write off those investments as business losses? Again, not one Investor who contacted TUPSS, Inc.'s counsel about the Subpoenas stated their objection to that request. And, of course, a witness always has the right to object to a subpoena if the witness does have an objection. There is no basis for Plaintiff to obtain a protective order to assuage hypothetical privacy concerns of witnesses who have not themselves raised any issue. Further, TUPSS, Inc.

will treat any tax related documents as “Confidential” under the terms of the Protective Order this Court has entered even if Investors do not request such treatment.

Plaintiff also seeks a protective order based on privacy grounds on the theory that the *Government* might prefer that Investors not produce documents shared between the Government and the Investors. Plaintiff does not argue that Investors have a privacy interest in protecting their communications with the Government. In other words, Plaintiff wants to protect the hypothetical privacy interests of the Government without any indication that the Government itself believes such communications would be privileged, “private,” or otherwise immune from discovery. Plaintiff does not cite any legal authority to suggest a plaintiff can seek a protective order in order to protect the United States Government’s perceived “privacy” interests.

Further, not that their personal preferences matter, but Plaintiff does not even have any evidence that any Investor actually objects to their turning over responsive documents on privacy grounds. To the contrary, Investors who contacted TUPSS, Inc.’s counsel have not expressed any concerns that the documents should not be produced on privacy, or any other, ground.

E. TUPSS, Inc. Has Not Been Able to Take a Single Deposition in this Action, So It Has Not Exceeded Its Allotment

Finally, Plaintiff makes the make-weight argument that a protective order should be issued because otherwise TUPSS, Inc. will take more than the 12 depositions per party allowed per the Case Management Order. TUPSS, Inc. has not taken a single deposition, so there is no basis for finding a violation of the CMO.

IV. CONCLUSION

Plaintiff is trying to throw up every road block possible to prevent, or at minimum delay, the legitimate discovery efforts of Defendants. Their strategy is transparent and simple — to try to run out the clock on discovery due to the October 22, 2021 discovery cut-off date. Plaintiff’s

feeble Motion to Quash should be immediately denied so TUPSS, Inc. can obtain the discovery to which it is entitled.

Dated: July 1, 2021

By: s/ Mark R. McDonald
Mark R. McDonald (CA Bar No. 137001)
(*Pro Hac Vice*)
MORRISON & FOERSTER LLP
707 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: 213.892.5200
Facsimile: 213.892.5454
Email: MMcDonald@mofocom

Adam J. Hunt (NY Bar No. 4896213)
(*Pro Hac Vice*)
MORRISON & FOERSTER LLP
250 West 55th Street
New York, New York 10019
Telephone: 212.468.8000
Facsimile: 212.468.7900
Email: AdamHunt@mofocom

Reuben V. Anderson, MSB #1587
LaToya C. Merritt, MSB #100054
Mallory K. Bland, MSB #105665
PHELPS DUNBAR, LLP
4270 I-55 North Jackson
Mississippi 39211-6391
Post Office Box 16114
Jackson, Mississippi 39236-6114
Telephone: 601-352-2300
Telecopier: 601-360-9777
Email: Reuben.Anderson@phelps.com
LaToya.Merritt@phelps.com
Mallory.Bland@phelps.com

***Attorneys for Defendant
THE UPS STORE, INC.***

CERTIFICATE OF SERVICE

I, Mark R. McDonald, do hereby certify that I electronically filed the above and foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following counsel of record:

Brent B. Barriere
FISHMAN HAYGOOD, LLP
201 St. Charles Avenue, Suite
4600
New Orleans, LA 70170
(504) 586-5253
bbarriere@fishmanhaygood.com

Lilli Evans Bass
BROWN BASS & JETER
PLLC
1755 Lelia Drive, Suite 400
Jackson, MS 39216
(601) 487-8448
bass@bbjlawyers.com

Kristen D. Amond
MILLS & AMOND LLP
650 Poydras Street, Suite
1525
New Orleans, LA 70130
(504) 556-5523
kamond@millsamond.com

***ATTORNEYS FOR
PLAINTIFF***

G. Todd Burwell
Emily Kincses Lindsay
G. TODD BURWELL, PA
618 Crescent Blvd., Ste. 200
Ridgeland, MS 39157
(601) 427-4470
(601) 427-0189 (fax)
tburwell@gtbpa.com
elindsay@gtbpa.com

William Lee Guice, III
RUSHING & GUICE, PLLC
– Biloxi
P.O. Box 1925
Biloxi, MS 39533-1925
1000 Government St., Suite E
Ocean Springs, MS 39564
(228) 374-2313
(228) 875-5987
bguice@rushingguice.com

***ATTORNEYS FOR
RAWLINGS & MACINNIS,
PA, JEANNIE CHISOLM,
AND TAMMY VINSON***

***ATTORNEYS FOR
HERRING VENTURES,
LLC, AUSTIN ELSEN,
CHANDLER WESTOVER,
COURTNEY HERRING,
DIANE LOFTON, AND
TAMMIE ELSEN***

THIS, the 1st day of July, 2021.

s/ Mark R. McDonald

MARK R. MCDONALD