IN THE UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE:	)	**Chapter 11**
	)	
SMALL LOANS, INC., *et al.*[1]	)	**Case No.: 11-12254 (WRS)**
	)	
	)	
Debtor.	)	
	)	

RESPONSE OF THE DEBTORS IN OPPOSITION TO EMERGENCY MOTION FOR PROTECTIVE ORDER REGARDING NOTICE OF DEPOSITION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO BANKRUPTCY RULE 7030(B)(6) AND FEDERAL RULE OF CIVIL PROCEDURE RULE 30(B)(6)

The above captioned Debtors and Debtors in Possession (the "Debtors") file the following Response In Opposition to the Committee's Emergency Motion for Protective Order (the "Response" and the "Motion"). In support of its Response, the Debtors state as follows:

I. Jurisdiction and Notice

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (M) and (O).

2. Venue of this chapter 11 case in this District is proper under 28 U.S.C. §§ 1408 and 1409.

II. Background

3. On December 16, 2011, (the "Petition Date"), the Debtors filed for relief under chapter 11 of the Bankruptcy Code. The Debtors intend to continue to operate their businesses

[1] The related Debtors along with the last four digits of each Debtors' federal tax identification number and respective case numbers are Small Loans, Inc. (3224) Case No. 11-12254, The Money Tree Inc. (1386) Case No. 11-12255, The Money Tree of Georgia Inc. (9228) Case No. 11-12258, The Money Tree of Florida Inc. (5315) Case No. 11-12257, and The Money Tree of Louisiana, Inc. (2592) Case No. 11-12256. Case information and the Debtors' respective addresses can be found at the dedicated website for these cases: http://www.kccllc.net/SmallLoansInc.

and manage their properties as debtors in possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code.

4. The Debtors' chapter 11 cases are jointly administered and consolidated for procedural purposes only.

5. On April 9, 2012, the Committee filed Emergency Motion For Protective Order Regarding Notice of Deposition of the Official Committee of Unsecured Creditors.

III. Argument

6. Rule 26(b)(1) permits discovery of "any non-privileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Further, the party resisting discovery has the burden to establish facts justifying its objections by showing that the requested information is either not relevant within the meaning of 26(b)(1) or that such information is of such prejudicial nature as to outweigh the presumption in favor of broad disclosure. American Federation of State, County, and Municipal Employees Council 79 v. Scott, 277 F.R.D. 474, 477 (S.D. Fla. 2011). Motions for a protective order are governed by Federal Rules of Civil Procedure Rule 26(c)(1) which states: "A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken…"

7. The burden is on the party who seeks a protective order to show good cause. To establish good cause for a protective order, federal courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements. See Edwards v. Accredited Home Lenders, Inc., 2008 WL 1756364, (S.D. Ala. 2008).

8. Underlying the Federal Rules of Civil Procedure is the concept that the defendant must be given adequate notice of claims against it and opportunity to prepare an adequate

defense, and the burden is on the "plaintiff" to prove up his own case. What the Committee is effectively attempting is to push onto the Debtors the burden of *disproving* the case against them and the need for a trustee. This concept, if accepted, would turn the rules on its head.

A. The Committee Made No Objection To the Location of the Deposition

9. The Committee first argues that "[h]aving a representative of the Committee deposed in Birmingham, Alabama (a location which has no nexus to these cases other than it happens to be the location of Debtors' counsel) regarding subject matter largely, if not completely, unknown to the Committee members is oppressive and unduly burdensome…" The background of the scheduling of depositions provides important context on this issue. First, the Committee has at no time noted any objection to the location of the noticed deposition to the Debtors prior to the filing of its Motion. The Debtors originally agreed to make their President and their CFO available for examination prior to the Committee's filing of the Motion To Appoint Trustee. Shortly before those depositions were to be held, the Committee abruptly cancelled them, and shortly thereafter filed the Motion To Appoint Trustee. After a scheduling conference with the Committee's professionals again in early April, the Debtors agreed to make available their President, and their CFO for deposition on April 10th and 11th in Birmingham, and the parties discussed examination of the Debtors' financial consultants and a Committee representative the following week. At the request of the Committee the Debtors agreed to move the deposition dates of their President and CFO to April 17 and April 18. Because depositions scheduled for Birmingham were moved at the Committee's request to the same week discussed for the deposition of the Committee member, the Debtors noticed that deposition for the same location. During numerous discussions with Committee counsel, no requirement for a different

location was mentioned, and at no time prior to the filing of the motion for a protective order did Committee counsel inform the Debtors of any objection to its location in Birmingham.

B. The Committee Should Have Knowledge Not In Possession of the Debtors Regarding the Committee's Motion To Appoint Trustee

10. The Committee relies on American Federation of State, County, and Municipal Employees Council 79 v. Scott, 277 F.R.D. 474 (S.D. Fla. 2011) for the general proposition that where the Defendant could obtain the information requested from other sources, the Plaintiff should not be required to go through the effort to turn over such publicly available information. However, in the Scott case the Court allowed discovery as to the publicly available documents, and the Court only denied discovery as unduly broad and burdensome where the defendant requested information on the prevalence of drug testing in the state. Nonetheless, unlike the Scott case, the Debtors are not requesting the turnover of publicly available documents. The Debtors Notice of Deposition is carefully tailored to notice examination solely on the factual basis of the Committee's assertions in the Motion To Appoint Trustee.

11. The Committee's reliance on SEC v. Sloan, 369 F. Supp. 994 (1973) is similarly misplaced. The Committee asserts that Sloan supports their proposition that you cannot require information from another party that is readily available. In Sloan, the defendant sought to compel the SEC to turnover a transcript of a hearing at which both parties attended, a transcript that the defendant could have simply ordered itself. This is completely inapposite to the situation here. The Debtors are seeking information and examination narrowly tailored to discover the actual facts underlying the Committee's assertions.

12. The Debtors do not now, and did not at the time the Committee filed its Motion To Appoint Trustee, possess information it believes supports many of the Committee's claims in that Motion. The Committee's position, should the Court adopt it, would allow a party to make

allegations both specific and vague against Debtors, and when questioned about those allegations merely claim that the Debtor already possesses the information that supports the allegations. Therefore, the Debtors seek to examine a representative of the Committee to determine what facts the Committee possessed at the time of the filing of the Motion and up to the date of the deposition on the specific topics listed in the Notice of Deposition.

(a) The Committee argues in the Motion that the Debtors "are, or were, effectively running a Ponzi scheme" and that this supports appointment of a Trustee. To prove a Ponzi scheme in the Eleventh Circuit, the following elements must be satisfied: (1) deposits were made by investors; (2) the debtors conducted little or no legitimate business operations as represented to investors; (3) the purported business operations of the debtors produced little or no profits or earnings; and (4) the source of payments to investors was from cash infused by new investors. Kapila v. TD Bank, N.A. (*In re Pearlman*), 440 B.R. 900, 904 (Bankr. M.D. Fla. 2010) (quoting United States v. Silvestri, 409 F.3d 1311, 1317 n. 6 (11th Cir. 2005)). The Debtors strongly disagree with the Committee's assertion that the Debtors were or are operating a Ponzi scheme. The Debtors have no information about any deposits made by investors, nor do the Debtors possess information that would support the contention that the Debtors operation of more than 90 locations with hundreds of employees and with tens of millions of dollars in loans to customers do not constitute legitimate business operations. Therefore, the Debtors do not believe they are in possession of any information that would support an assertion that the Eleventh Circuit requirements for proof of

a Ponzi scheme have been met, and the Debtors are entitled to inquire of the Committee as to what facts the Committee believes supports its contentions.

(b) The Committee asserts in the Motion that the Debtors showed incompetence by failing to place "certain subsidiaries" into bankruptcy. The Debtors are unaware of any facts that would support such a finding and are entitled to question the Committee's basis for such a statement.

c) The Committee asserts in its Motion that "numerous conflicts of interest and incompetence on the part of management" require the appointment of a Trustee. The Debtors do not believe they possess any facts that support these claims, and should be entitled to examine the Committee as to the factual support the Committee must possess as to these claims.

d) In addition, the Committee makes numerous additional assertions that the Debtors do not believe are supported by the facts known to the Debtors. The Debtors should be entitled to examine the Committee about the basis of these allegations and the Committee's knowledge of facts it purports supports these allegations.

13. Finally, the Committee appears to concede that it has some information not in the possession of the Debtors. In paragraph 13 of its Motion for a Protective Order, the Committee states that the "Debtors seek information from the Committee's members that is readily available to the Debtors, as a **majority of the documents and testimony** supporting the Committee's Motion To Appoint Trustee are in the possession of, or derived from, the Debtors." A majority of the documents and testimony does not mean all of. Further, upon information and belief, the Committee has subpoenaed at least three non-debtor third parties as part of these proceedings

and the Debtor is not in possession of or aware of what documents the Committee has received in response.

C. The Committee's Argument That It Cannot Be Examined Concerning the Facts That It Believes Support Its Allegations Is a Distortion and Dramatic Expansion of the Attorney-Client Privilege Doctrine

14. Finally, the Committee argues that it should not be required to comply with the Debtor's Notice of Deposition based upon attorney-client privilege and work product privilege. If the Court adopts the Committee's expansion and distortion of these doctrines, parties to contested matters and other litigation would be allowed to make all manner of allegations and simply assert they spoke with their attorneys about the facts and therefore cannot be questioned concerning those facts.

15. "The attorney-client privilege 'only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.'" In re Fed. Copper of Tenn., Inc., 19 B.R. 177, 181 (Bankr. M.D. Tenn. 1982) (quoting Upjohn Co. v. United States, 101 S. Ct. 677, 685 (1981)). Further, the privilege does not extend to communications from an attorney to a client when they contain advice solely based upon public information rather than confidential information. "Information learned from other sources is not privileged." Deutscher v. Lick Fork, Ltd. (*In re S. Indus. Banking Corp.*), 35 B.R. 643, 647 (Bankr. E.D. Tenn. 1983). Therefore, documents or conferences to and from third parties, such as those resulting from third party subpoenas issued by the Committee, are also not privileged.

15. "Because it is an 'obstacle to the investigation of the truth,' the privilege must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" Deutscher v. Lick Fork, Ltd. (*In re S. Indus. Banking Corp.*), 35 B.R. 643, 647 (Bankr. E.D.

Tenn. 1983) (quoting United States v. Pipkins, 528 F.2d 559, 563 (5th Cir. 1976)). The privilege may be applied to corporations, organizations, and individuals. Reed v. Baxter, 134F.3d 351, 356 (6th Cir. 1999). Claims of attorney-client privilege should be construed narrowly since it "reduces the amount of information discoverable during the course of a lawsuit[, and it] applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice." Tenn. Laborers Health & Welfare Fund v. Columbia/HCA Healthcare Corp. (*In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*), 293 F.3d 289, 294 (6th Cir. 2002) (citations omitted).

16. Here, the Committee argues that the Debtors' request to depose a Committee member concerning the factual basis of the claims in the Motion To Appoint a Trustee are subject to attorney client privilege. However, the Debtors are entitled to question the Committee about the factual underpinnings of its claims.

17. The Committee's citation to Security Ins. Co. of Hartford v. Trustmark Ins. Co., 218 F.R.D. 29 (D.Conn. 2003) and Protective Nat'l Ins. Co. v. Commonwealth Ins. Co., 137 F.R.D. 267 (D. Neb. 1989) warrants further discussion. In Trustmark, the Court, while quoting Protective National, stated at length as follows:

> In Protective National Insurance Co., the court reasoned that attorney-client privilege would not provide a valid basis on which to refuse to divulge facts underlying the response to the allegations, *id.* at 279; see also In re Six Grand Jury Witnesses, 979 F.2d 939, 945 (2d Cir. 1992) ("[a]lthough an attorney-client communication is privileged and may not be divulged, ... the underlying information or substance of the communication is not ... so privileged"). The court reasoned that the inherent difficulty in establishing the demarcation between protected work product and unprotected, discoverable facts was "determining the degree to which a particular deposition question elicits the mental impressions of the attorney who communicated a fact to the deponent," *Protective Nat'l Ins. Co.*, 137 F.R.D. at 280. The court concluded that the deponent was obliged to provide the factual

basis for its allegations, and provided the following guidance:

> First, as I have said, [the deponent] has an obligation to be prepared as a Rule 30(b)(6) spokesperson. Second, [the deponent], to the extent that she is able, must recite the facts upon which [defendant] relied to support the allegations of its answer and counterclaim which are not purely legal, even though those facts may have been provided to her or her employer by [defendant's] lawyers. Third, [plaintiff] is directed, when formulating questions to [the deponent], to avoid asking questions of [the deponent] which are intended to elicit [defendant's] counsel's advice, [defendant's] counsel's view as to the significance or lack thereof of particular facts, or any other matter that reveals [defendant's] counsel's mental impressions concerning this case.... Finally, [the deponent] is specifically obligated to produce at the deposition such documents coming within the Rule 30(b)(6) notice and request to produce which are not privileged. In this regard, [the deponent] is obligated, as is her employer, [defendant], to comply with the Rule 30(b)(6) notice to produce, notwithstanding [defendant's] counsel's belief that it may (or may not) have already complied with similar discovery requests.

Security Ins. Co. of Hartford v. Trustmark Ins. Co., 218 F.R.D. 29 (D.Conn. 2003). In fact, the parentheticals included by the Committee relating to Trustmark and Protective National are exactly on point support the Notice of Deposition provided to the Committee. The parentheticals provided by the Committee are "(indicating that the defendant was not asked to disclose its work product but rather was required to produce a witness capable of providing facts in support of the allegations within its answer)", and "(holding that defendant had to provide the factual basis for its allegations.)" By comparison, concerning the Debtors' Notice of Deposition to the Committee, of the twelve (12) listed parameters for the scope of the examination, seven (7) begin with "[t]he factual bases for your allegation", and three (3) contain the language "[t]he identity of and factual information pertaining to…as alleged in your Motion…" Thus, the Debtors Notice of Deposition limits the scope of the examination to the factual basis of the Committee's

allegations, exactly as counseled and approved in the Trustmark and Protective National cases cited by the Committee:

> TIG was not asked to disclose its work product but was rather required to produce a witness capable of providing facts in support of the allegations within its answer. In light of the affirmative duty imposed by Rule 30(b)(6), TIG's corporate representative was obliged to gain some understanding of the underlying facts, regardless of the source identifying underlying facts, and to answer questions accordingly. It matters not that the witnesses understanding was gleaned from documents protected as work product, as the facts within those documents are not subject to protection.
> As such, TIG shall appoint a representative sufficiently familiar with the facts to respond to questions as to the pleadings.

Security Ins. Co. of Hartford v. Trustmark Ins. Co., 218 F.R.D. 29 (D.Conn. 2003).

WHEREFORE, the Committee has not met its burden for the issuance of a protective order in this action. Moreover, the Committee cannot meet its burden to show good cause why the Debtors should not be entitled to take the deposition of a Committee member, and therefore the request that the Court quash the notice of deposition is due to be denied. Finally, the Debtors request that the Court order the Committee to present its representative, properly prepared, at the offices of the Debtors' counsel in Birmingham, Alabama or other suitable location determined by the Court on April 19th at 10:00 a.m. to be examined as to the subjects listed in the Notice of Deposition previously provided to the Committee.

Dated this the 10th day of April, 2012.

/s/ Max A. Moseley
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CERTIFICATE OF SERVICE

I hereby certify that I have served the above and foregoing via electronic mail using the CM/ECF system 10th day of April, 2012 to all parties that have appeared and requested Notice as well as to the following by electronic mail:

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