

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ZEYNEL A. KARCIOGLU, M.D. * **CIVIL ACTION NO. 07-3352**
*
VERSUS * **SECTION A**
*
THE ADMINISTRATORS OF * **MAGISTRATE 4**
THE TULANE *
EDUCATIONAL FUND *
*

MEMORANDUM IN OPPOSITION TO DEFENDANT’S
MOTION FOR PROTECTIVE ORDER WITH RESPECT TO DEUTSCHE
BANK SUBPOENA

MAY IT PLEASE THE COURT:

PLAINTIFF, Zeynel A. Karcioglu, through undersigned counsel, submits the following memorandum in opposition to Defendant’s Motion for Protective Order With Respect to Deutsche Bank:

The Issuing Court must Quash or Modify a Subpoena

Rule 45(c)(3) of the Fed. R. Civ. P. states that the **issuing** (emphasis added) court must quash or modify a subpoena that: (1) fails to allow a reasonable time for compliance; (2) requires a person who is not a party to travel more than 100 miles from where the person resides; (3) requires disclosure of privileged or protected matter; or (4) subjects a person to undue burden.

The issuing court for the Deutsche Bank subpoena is the Southern District of

New York, and not this court. In addition to the motion at bar, Defendant has filed a Motion to Quash in the Southern District of New York. That motion is set for hearing on August 19, 2008.

Defendant cites the case of *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431 (M.D.N.C. 2001) for the proposition that the nonissuing court may decide whether a subpoena may be quashed, contrary to the clear language of Rule 45. However, this district court decision from North Carolina, which is not binding precedent for this court, states a reason why in its particular case, the issuing court need not decide the merits of the motion to quash. In *Static Control Components* in footnote five, the court points out that

“Only the court issuing the subpoena normally has jurisdiction over all of the persons, including persons served with the subpoena. In this case, however, the Court has jurisdiction over all of the involved persons, inasmuch as they are either parties or a party's attorney, who has been admitted *pro hac vice* in this Court. Nevertheless, this fact does not permit the Court to usurp the Colorado court's authority to quash or modify the subpoena. Rather, the Court enters the fray only because a party has filed a broad motion for a Rule 26(c) protective order that discovery not be had or else be conducted on limited terms. This issue extends well beyond the matter of a specific subpoena.”

The *Static Control Components* case is easily distinguished from the case at bar. This Court does not have jurisdiction over Deutsche Bank, located in New York. The Southern District of New York does have jurisdiction over Deutsche Bank. Also, unlike the situation in *Static Control Components*, Tulane has not filed a broad motion for a protective order, but rather two specific narrow motions for protective orders: one involving the documents sought under the Deutsche Bank subpoena, and the other relating to the documents sought from PriceWaterhouseCoopers pursuant to that subpoena.

The Deutsche Bank is not Subject to Undue Burden in Responding to this Subpoena.

Although it is not clear from Tulane's Motion for Protective Order, it apparently is proposing to quash the subpoena under Fed R. Civ. P. 45 (c)(3)(4), which states that the issuing court must quash or modify the subpoena that subjects a person to undue burden. It is well established that the party moving to quash a civil subpoena issued in New York under Rule 45 bears the burden of persuasion. *U.S. v. International Business Machines Corp.* 83 F.R.D. 97, 104 (D.C.N.Y., 1979).

Tulane has not met its burden of proving that this subpoena subjects Deutsche Bank to undue burden.

The Fifth Circuit in *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812 (5th Cir. 12/07/2004) stated:

“The moving party has the burden of proof to demonstrate "that compliance with the subpoena would be 'unreasonable and oppressive.'" "Whether a burdensome subpoena is reasonable 'must be determined according to the facts of the case,' such as the party's need for the documents and the nature and importance of the litigation." To determine whether the subpoena presents an undue burden, we consider the following factors: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed. Further, if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party. A court may find that a subpoena presents an undue burden when the subpoena is facially overbroad.”

Tulane has not met its burden of proof in demonstrating that compliance with the subpoena would be unreasonable and oppressive.

Here, the subpoena is neither unduly broad or burdensome. The time frame of these requests is narrow: essentially it seeks documents from Deutsche Bank from August 29th until December 9, 2005 – the day after Defendant declared

Financial Exigency. Moreover, counsel has contacted Deutsche Bank to discuss efficient and economic production.

Tulane has not shown that the information requested is irrelevant because it is highly relevant. Deposition testimony has shown that Deutsche Bank lent the University \$150 million dollars a matter of weeks before the school claimed that it was in a state of Financial Exigency such that its very survival as an institution was threatened. What Tulane represented to Deutsche Bank about its financial condition shortly before it presented to the Board of Administrators that its condition was so dire that the continued existence of the institution was in doubt is highly relevant. Dr. Karcioglu needs the information to prove that Tulane was not in a state of *bona fide* financial exigency. There was no justification for breaking his tenure contract with the university without the safeguards that the faculty handbook gives for the protection of tenured faculty. Furthermore the subpoena is for specific documents for the specific period of time when Tulane was requesting financing from Deutsche Bank.

In fact, the Defendant have even admitted to this Court that these documents are relevant to the matter at hand. In its Opposition to Plaintiff's Motion to Compel, dated March 18, 2008, Defendant indicated that: "The Only Financial Evidence Relevant to Examining the Bona Fides of a University's Declaration of

Financial Exigency Are the University's Operating Assets at the time of the Declaration. Def.'s Mem. in Opp. to Pltf's Mot. To Compel p. 13 (emphasis added). Discovery led to the existence of this loan , which was uncontrovertedly made *at the time* of the Declaration of Financial Exigency, and now it is clear that these documents (which Defendant has admitted are relevant) will lead to discoverable evidence in connection with Dr. Karcioğlu's claims and Defendant's defenses.

Moreover, Defendant represented to this Court that it had already produced all documents with respect to loan and public debt information prior to December 2005; Defendant stated that "to the extent that this information was available at the time of the financial exigency declaration, *it has already been produced.*" *Id.* at 16 (emphasis added). The documents relating to Deutsche Bank were, of course, available at the time of the declaration, and were dated before December 2005, but Defendant did not produce them despite its representations to the contrary.

Tulane simply cannot meet the Fifth Circuit standard for quashing the subpoena for Deutsche Bank and attempts to "end run" the subpoena quashing requirements by applying for a specific protective order that covers this specific subpoena.

This subpoena to Deutsche Bank is not contrary to the Order issued by this Honorable Court in its ruling on the Motion to Compel.

There was no specific mention of the Deutsche Bank loan in the Motion to Compel. This Honorable Court did not restrict Dr. Karcioglu for obtaining documents from Deutsche Bank. In fact, Dr. Karcioglu did not learn of the Deutsche Bank loan until weeks after the motion to compel was filed and argued. He did not find out about the Deutsche Bank loan until the depositions of Defendant's top executives were taken months later.

Defendant's initial production in response to Plaintiff's discovery demands was woefully deficient, so much so, in fact, that Plaintiff was unable to garner even the most basic information at the time its Motion to Compel was filed March 18, 2008. Since that time, however, Defendant has supplemented its responses by order of the Court, and Plaintiff has taken several depositions of upper-level University administrators who have first-hand knowledge regarding not only the school's declaration of financial exigency, but also Deutsche Bank's role in financing the school.

During these depositions, Plaintiff learned for the first time that Tulane borrowed \$150 million from Deutsche Bank in November 2005 – less than three months after the Hurricane, and a matter of weeks (or perhaps even days) before

declaring financial exigency December 7, 2005. *See* Lorino Dep. 58:2-15.¹ Mr. Anthony Lorino, the Chief Financial Officer of the University, indicated that not only was Tulane deemed credit worthy by knowledgeable, sophisticated investors, but that just months after the storm, Tulane's credit rating was an A1 according to third party rating agency Moody's, and A+ according to Standard & Poor's. *Id.* at 59:5-25, 60:1-3.

The deposition testimony of Dr. Scott Cowen, Tulane's President ("Cowen"), yielded the same stark disparity in the characterizations of Tulane's financial condition. On one hand, professional, sophisticated third parties characterized the Defendant as a credit-worthy, financially solvent institution in good standing that could issue A+ bonds; on the other hand, Tulane's administration portrayed to its PFAC and Board of Administrators that the school was in such a dire financial crisis, that its very survival as an institution was threatened.

Dr. Cowen was aware of the \$150 million bond issue, and was further aware that the University's credit rating indicated that the University was in good standing; however he tellingly refused to opine as to whether Deutsche Bank

¹ For ease of reference, citations to deposition transcripts will separate page and line numbers by a ":". In the footnoted example, 58:2-15 shall mean page 58, lines 2-15. Due to volume, cost, and the confidentiality of certain materials, only the pages of deposition testimony referred to herein are attached. Should the Court seek the entire deposition transcript, it will be made available by counsel.

believed that Tulane presented any credit risk.

“Q: Well, give you me your best understanding of what an A-plus rating means.”

A: That we were in good standing.

Q: So Deutsche Bank didn't think that your very survival was at stake when they made that loan, did they?”

MR. MALLERY (Defendant's Counsel) : Object to the form of the question, asking the witness what Deutsche Bank thought.

THE WITNESS: That would be my answer. *Go talk to Deutsche Bank.”*
See Cowen Dep. 76:4-15 (emphasis added).

President Cowen has opened the door for Dr. Karcioğlu to obtain Deutsche Bank's assessment of Tulane's financial condition directly from Deutsche Bank. That is exactly what Dr. Karcioğlu is doing.

Wherefore, Plaintiff requests that this Honorable Court deny Defendant's Motion for Protective Order with Respect to Deutsche Bank Subpoena.

Respectfully submitted,

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ATTORNEYS FOR THE
PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served electronically through CM/ECF on counsel of record this 13th day of August, 2008.

(s)Victor R. Farrugia

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF LOUISIANA

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5 ZEYNEL A. KARCIOGLU, MD * CIVIL ACTION * NO. 07-3352

6 * * SECTION A

7 VERSUS * * MAGISTRATE 4

8 THE ADMINISTRATORS OF THE *

TULANE EDUCATIONAL FUND *

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20 Deposition of SCOTT S. COWEN, taken

21 on Thursday, May 22, 2008, commencing at 9:02

22 a.m., in the offices of Tulane University,

23 Gibson Hall, President's Conference Room, 6823

24 St. Charles Avenue, New Orleans, Louisiana,

25 70118.

1 A I don't recall who else was there.

2 Q Were there any efforts made to
3 convene the university senate to address the
4 issue of financial exigency?

5 A That was achieved through the PFAC.

6 Q And how was that -- could you read
7 the question back again?

8 (Court reporter reads back question.)

9 EXAMINATION BY MR. FARRUGIA:

10 Q Okay. I would appreciate an answer
11 to the question.

12 A The university said it was not here .
13 because the university was closed. In a time
14 of emergency, the PFAC stands instead of the
15 senate. We therefore conferred with the PFAC
16 on financial exigency.

17 Q Okay. Could you read the question
18 back again, please?

19 (Court reporter reads back question.)

20 EXAMINATION BY MR. FARRUGIA:

21 Q Could you answer that question with a
22 "yes" or "no"?

23 MR. MALLERY:

24 I object to the form of the question.

25 MR. FARRUGIA:

1 Q Now, isn't it true that the
2 university bond rating with Standard & Poor's
3 was an A-plus at this time?

4 A You know, I can't remember.

5 Q Okay. Now, if an institution is
6 failing, are they able to issue bonds?

7 A I don't know. You'd have to ask the
8 experts on that. I'm not an expert on that.

9 Q What's your educational background?

10 A I have an undergraduate degree in
11 management, I have an MBA, and I have a
12 doctorate.

13 Q You have an MBA?

14 A Uh-huh (affirmative response).

15 Q What is the doctorate?

16 A Doctor in corporate finance.

17 Q And so you're not able with that
18 educational background to answer the question
19 of whether or not a failing institution is
20 able to issue bonds?

21 A I'm not a banker and that's not my
22 field of expertise, in the bond market, so I
23 try not to offer opinions on something I don't
24 know the answer to.

25 Q Okay, and explain what an A-plus

1 rating at Standard & Poor's means?

2 A I don't know the specific definition

3 they have for it as an A-plus.

4 Q Well, give you me your best

5 understanding of what an A-plus rating means.

6 A That we were in good standing.

7 Q So Deutsche Bank didn't think that

8 your very survival was at stake when they made

9 that loan, did they?

10 MR. MALLERY:

11 Object to the form of the question,

12 asking the witness what Deutsche Bank thought.

13 THE WITNESS:

14 That would be my answer. Go talk to

15 Deutsche Bank.

16 EXAMINATION BY MR. FARRUGIA:

17 Q Did Deutsche Bank communicate to

18 Tulane that it did not want to make a loan,

19 because you're an institution whose survival

20 is at stake?

21 A I don't remember one way or another

22 whether they said that to us.

23 Q Did Tulane use any consultants or

24 investment bankers to help issue the bonds?

25 A I don't recall.

1 Q Do you know the interest rate on the
2 bonds?

3 A I can't remember what the specific
4 rate was at the time.

5 Q And do you know what the debt rating
6 was?

7 A Only because you just told me.

8 Q So these bonds were not classified as
9 junk bonds, were they?

10 A I don't know whether they were or
11 not.

12 Q What's your understanding of what a
13 junk bond is?

14 A One where the interest rate is high
15 because the risk is high.

16 Q Okay, and were these bonds in that
17 category?

18 A You'd have to ask the experts at
19 Deutsche Bank, and the investors who invested
20 in them.

21 Q Prior to selling the bonds, did you
22 inform Deutsche Bank that you would be making
23 changes on the renewal plan?

24 A I can't remember whether we did or
25 not.

1 Q And prior to selling the bonds, did
2 you inform Deutsche Bank that the university
3 was considering declaring a state of financial
4 exigency?

5 A I can't recall whether we did or not.
6 All this was done under the leadership of, the
7 CFO's leadership.

8 Q Did anyone at Deutsche Bank contact
9 Tulane after the declaration of financial
10 exigency to question what the financial
11 situation of Tulane was?

12 A I don't recall.

13 Q Okay. Who did you deal with at
14 Deutsche Bank?

15 A I don't remember. Tony Lorino, the
16 CFO, handled all the details. I would not be
17 able to help you with the details of this at
18 all.

19 MR. FARRUGIA:

20 Okay. May we have a short break?

21 (Brief recess.)

22 EXAMINATION BY MR. FARRUGIA:

23 Q I want to remind you, you're still
24 under oath.

25 A Okay.

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF LOUISIANA

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5 ZEYNEL A. KARCIOGLU, MD * CIVIL ACTION * NO. 07-3352

6 * * SECTION A

7 VERSUS * * MAGISTRATE 4

8 THE ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND *

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20 Deposition of ANTHONY P. LORINO,
21 taken on Wednesday, May 21, 2008, commencing
22 at 1:36 p.m., in the offices of Tulane
23 University, Gibson Hall, President's
24 Conference Room, 6823 St. Charles Avenue, New
25 Orleans, Louisiana, 70118.

1 A That was my estimate at the time.

2 Q Okay. Now, you say you borrowed \$150
3 million. Was that with a German bank?

4 A Yes.

5 Q And was that a line of credit?

6 A No, it was bonds.

7 Q Okay, and can you explain how
8 borrowing \$150 million of bonds helps you with
9 your cash flow? I don't understand how bonds
10 you take bonds to pay your bills?

11 A Well, no. The university issued
12 bonds in a \$150 million par amount. The
13 Deutsche Bank bought them all and gave us
14 \$150 million in cash, so we had \$150 million
15 of cash to put in the bank.

16 Q So your bonds had a high rating?

17 A A high rate.

18 Q Like A? Were they rated Double A,
19 Triple A?

20 A At the time they were issued, they
21 were not rated. They were subsequently rated
22 by the rating agencies, and I believe that
23 would have been around January of '06, but
24 they were issued in November of '05.

25 Q Okay, and when they were rated, what

1 were they rated at?

2 A Whatever the rating that the
3 university had at that point in time, they had
4 the same ratings.

5 Q And what was the rating the
6 university had?

7 A It's hard for me to remember
8 specifically, because both of the rating
9 agencies were reviewing the university and
10 trying to determine whether or not they were
11 going to downgrade the university, and it
12 turned out one of them did and one of them did
13 not.

14 Q So what about Moody's? Did they
15 downgrade it?

16 A Moody's downgraded us.

17 Q From what to what?

18 A I believe that they took us from an
19 A1 to an A2, and a negative outlook.

20 Q And when did they do that?

21 A Shortly after the storm. I don't
22 remember exactly; maybe 90 days.

23 Q Okay, and what was the other agency?

24 A Standard & Poor's.

25 Q And they left your rating as an A1

1 rating?

2 A They left our rating as an A-plus,
3 but changed our outlook to negative.

4 Q And what was it before that?

5 A Positive or stable. I don't remember
6 exactly.

7 Q And did your Moody's rating change
8 from the A2 since then?

9 A Since then, it has gone back to A1.

10 Q And approximately how long did Tulane
11 have an A2 rating from Moody's before it went
12 back to A1?

13 A Moody's changed the rating back
14 about, well, less than 12 months ago.

15 Q So what does it mean that most of the
16 Tulane endowment is restricted? What does
17 that mean?

18 A It means that the income that's
19 available for expenditure can only be expended
20 for specific purposes, as indicated by the
21 instrument gift or by the donor.

22 Q And what are those restricted
23 purposes for the Tulane endowment?

24 A Well, it could be whatever the donor
25 specified. It could be for financial aid. It