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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1570

Private Bank Minnesota,
Respondent,

vs.

Robert M. Anderson,
Appellant.

Filed April 7, 2014
Affirmed
Cleary, Chief Judge
Concurring specially, Johnson, Judge

Hennepin County District Court
File No. 27-CV-11-24162

Steven T. Hetland, Richard L. Leighton, Leighton Hetland PLLP, Minneapolis, Minnesota (for respondent)

Kenneth Hertz, Hertz Law Office, P.A., Columbia Heights, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Halbrooks, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

CLEARY, Chief Judge

Appellant Robert M. Anderson appeals a district court order granting respondent Private Bank Minnesota's motion to compel compliance with respondent's postjudgment

discovery and denying appellant's motion for a protective order. Appellant challenges the district court's determination that he failed to timely respond to respondent's postjudgment discovery requests. Appellant also argues that the district court erred in granting respondent's motion to compel postjudgment discovery and in adopting respondent's discovery definition of appellant. Lastly, appellant asserts that the district court erred in denying his request for a protective order. We affirm.

FACTS

Appellant obtained a $250,000 line-of-credit loan from respondent through a written promissory note dated June 17, 2010. Appellant defaulted by failing to repay the loan when the note matured, and respondent brought an action to recover the balance of the loan. In a June 11, 2012 order, the district court granted summary judgment in favor of respondent, and judgment was later entered in the amount of $271,259.86.

Pursuant to Minn. R. Civ. P. 69, respondent served interrogatories and requests for production of documents on appellant. Appellant was personally served with the discovery requests on October 7, 2012, and served by mail on October 9, 2012. Respondent's requests for production of documents and interrogatories defined appellant as including his "attorneys, representatives, agents, and assigns." The requests for document production included requests for documents from all business entities in which appellant has or had an ownership, option, managerial, or employment interest or with which he has or had a business relationship since July 30, 2011.[1] Respondent specifically

[1] Specifically, respondent requested production of tax records and all corporate documents including those related to resolutions, meeting minutes, paid compensation,

listed eight business entities, at least one of which, Twin Town Properties, LLC (Twin Town), appellant has admitted he is a member. By affidavit, respondent has alleged that the state registered office address of Twin Town is appellant's residence, that appellant is the state registered manager of Twin Town, and that appellant is the named taxpayer for Twin Town. Respondent also sought documents related to trusts for which appellant is or was a donor, trustee, or beneficiary, and specifically named a trust called the "Robert M. Anderson Trust" (Anderson Trust).[2] Appellant has admitted to being the grantor and trustee of the Anderson Trust.

A number of respondent's requests for document production and interrogatories related to specific real-estate parcels. By affidavit, respondent has asserted that prior to bringing suit to enforce appellant's repayment obligation on the loan, appellant disclosed that he owned more than thirty real-estate parcels. According to respondent, one of the properties originally disclosed as being owned by appellant is actually owned by Twin Town. Respondent has additionally alleged that, after respondent brought suit and prior to its success on summary judgment, appellant transferred a number of properties to the Anderson Trust, each for consideration of less than $500. Appellant has asserted that he

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option rights, ownership, and corporate filings. Respondent also requested "documents evidencing title ownership or equitable ownership interests and rights" that any of the related business entities have or had in real estate and improvements since July 30, 2011. Lastly, respondent sought documents evidencing transactions since July 30, 2011, in which the listed business entities were parties and in which ownership interests and rights in real estate and improvements were sold, transferred, gifted, or conveyed.

[2] With respect to the trust, respondent requested tax documents, governing documents, and documents evidencing ownership interests and rights in real estate and improvements since July 30, 2011, as well as documents evidencing transactions in which the trust was a party and in which ownership interests and rights in real estate and improvements were sold, transferred, gifted, or conveyed.

has no personal ownership interest in any real estate and that he transferred properties to the Anderson Trust for estate-planning purposes.

The district court determined that appellant was required to respond to respondent's discovery requests by November 12, 2012, and that appellant did not respond or seek an extension by that deadline. On December 3, 2012, appellant served combined written responses to the interrogatories and document requests but did not produce responsive documents.

Respondent brought a motion to compel postjudgment discovery and filed affidavits and a memorandum of law in support of the motion. Along with appellant's memorandum of law in opposition to respondent's motion, appellant filed a motion for a protective order.

On July 17, 2013, the district court issued an order granting respondent's motion to compel compliance with postjudgment discovery and denying appellant's motion for a protective order. The court concluded that appellant's failure to timely respond to respondent's postjudgment discovery resulted in a waiver of all nonprivileged objections to that discovery. The court also found that respondent's definition of appellant as including his attorneys, representatives, agents, and assigns is reasonable. This appeal follows.

D E C I S I O N

Minn. R. Civ. P. 69 provides that "[i]n aid of [a] judgment or execution, [a] judgment creditor . . . may obtain discovery from any person, including the judgment debtor, in the manner provided by these rules." Rules 33 and 34 govern interrogatories

and document production requests. *See* Minn. R. Civ. P. 33, 34.[3] If a party fails to respond to a discovery request, the party seeking discovery may move for an order compelling a response. Minn. R. Civ. P. 37.01(b).

A district court "has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed." *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007) (quotation omitted). "We review a district court's order for an abuse of discretion by determining whether the district court made findings unsupported by the evidence or by improperly applying the law." *Id.* A ruling on a request for a protective order is also subject to an abuse-of-discretion standard on review. *See In re Paul W. Abbott Co.*, 767 N.W.2d 14, 17-18 (Minn. 2009).

1. The district court did not err in finding that appellant failed to timely respond to respondent's interrogatories.

The district court held that appellant's failure to timely respond to respondent's postjudgment interrogatories resulted in a waiver of appellant's nonprivileged objections to those questions. In support of this conclusion, the district court cited *Garrity v. Kemper Motor Sales*, 280 Minn. 202, 159 N.W.2d 103 (1968). In *Garrity*, the court held that a party's failure to timely respond to interrogatories or make objections waives "all objections except those related to privilege, work product, and experts' conclusions." 280 Minn. at 206, 159 N.W.2d at 106-07; *see also State by Mattson v. Boening*, 276

[3] As the 1975 advisory committee note explains, "The change provided in this rule is to make available to the judgment creditor all of the discovery procedures, not merely the procedure of depositions. In particular the rule will now permit application of the amended Rule 34." Minn. R. Civ. P. 69 1975 advisory comm. note.

Minn. 151, 154, 149 N.W.2d 87, 90 (1967) (holding that a "failure to object to interrogatories in the manner prescribed in Rule 33 is a waiver of all defects and objections except those relating to privilege, work product, and experts' conclusions"). On appeal, appellant makes two arguments against waiver of his defenses: (1) the *Garrity* waiver is no longer applicable under the new version of rule 33, and (2) his arguments against being compelled to answer respondent's interrogatories are not "objections" under the *Garrity* waiver.

When *Garrity* was decided, rule 33 required service of a notice of hearing for objections to interrogatories "at the earliest practicable time." Minn. R. Civ. P. 33(3) (1967).[4] Appellant argues that because of this language, the *Garrity* decision reflected a previous desire for prompt resolution of discovery issues and immediate hearings on discovery objections so as not to unduly delay the initial fact-finding phase. Appellant also points to the amendment of rule 33 requiring objections to be made within 30 days instead of 5 days. *Compare* Minn. R. Civ. P. 33(2) (1967), *with* Minn. R. Civ. P. 33.01(b) (2013). Appellant contends that these changes to rule 33 undermine the holding in *Garrity* and that it should be overruled.

Appellant's argument that *Garrity* is no longer applicable because of amendments to rule 33 is unpersuasive. The *Garrity* court did not explicitly state that it was relying on any of the reasons that appellant suggests it was relying on in holding that nonprivileged objections are waived by failure to timely respond. *See* 280 Minn. at 206, 159 N.W.2d at

[4] The rule stated, "Within 5 days after service of objections to interrogatories, the party proposing the interrogatory shall serve notice of hearing on the objections at the earliest practicable time." Minn. R. Civ. P. 33(3) (1967).

106-07. Even if the *Garrity* court considered the reasons appellant suggests, the present language in rule 33 does not evidence a desire to eliminate the requirement for timely objections to interrogatories when compared with the language in rule 33 at the time of *Garrity*. The current version of rule 33 gives the party serving interrogatories more time to consider the responding party's interrogatory objections without necessitating an immediate hearing.[5] This rule change does not relate to the objecting party's obligation to timely object. Additionally, although the objection time has been extended to 30 days since *Garrity*, the extension was made to allow "[s]ufficient time for defendants to secure the services of counsel and to respond." Minn. R. Civ. P. 33.01 1975 advisory comm. note. This extension does not demonstrate an intent to eliminate the *Garrity* waiver. Appellant has not presented a persuasive reason for holding that *Garrity* has been superseded by amendments to rule 33.

Appellant also maintains that his arguments against being compelled to answer interrogatories do not constitute objections under the *Garrity* waiver. Appellant likens the present situation to the district court compelling disclosure of a patient's private medical records by a failure to object under *Garrity*. This example is not analogous. The *Garrity* waiver does not encompass objections based on privilege. *See Garrity*, 280 Minn. at 206, 159 N.W.2d at 106-07. The physician-patient privilege is recognized in

[5] The 1996 advisory committee stated, "The existing provision requiring a party receiving objections to interrogatories to move within 15 days to have the objections determined by the court . . . has not worked well. There is no reason to require such prompt action, and much to commend more orderly consideration of the objections. . . . [The new language] permits the party receiving objections to determine their validity, attempt to resolve any dispute, consider the eventual importance of the information, and possibly to take the matter up with the court . . . ." Minn. R. Civ. P. 33.01 1996 advisory comm. note.

Minnesota and would therefore not be waived under *Garrity*. *See* Minn. Stat. § 595.02, subd. 1(d) (2012). Appellant has not presented a privilege that is presently applicable. *Black's Law Dictionary* 1178 (9th ed. 2009), defines "objection" as "[a] formal statement opposing something that has occurred, or is about to occur, in court and seeking the judge's immediate ruling on the point." Appellant's arguments constitute statements opposing the requirement that he respond to interrogatories and are therefore nonprivileged objections under *Garrity*. The district court did not abuse its discretion in holding that appellant's objections to respondent's interrogaties were waived under *Garrity*.

2. The district court did not err in granting respondent's motion to compel postjudgment discovery.

Minn. R. Civ. P. 34.01 provides that a party may request that any other party produce documents "that are in the possession, custody or control of the party upon whom the request is served." Appellant asserts that respondent's discovery requests sought documents that are in the control of separate legal entities and therefore not in appellant's "possession, custody or control" as required by rule 34.01. Respondent's discovery requests specifically sought document production related to Twin Town and the Anderson Trust. In support of his position, appellant presents legal authority addressing the legal relationship between a trust and the grantor of a trust, and the legal relationship between an owner or employee of a corporation and the corporation itself.

Twin Town

Respondent requested tax records, corporate documents, and documents evidencing ownership of real estate from appellant's related corporate entities, specifically Twin Town. This information is most likely only accessible by appellant through his status as a member of Twin Town. Generally, a corporation operates in a separate capacity, distinct from shareholders. *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.* 779 N.W.2d 865, 872 n.5 (Minn. App. 2010), *aff'd,* 795 N.W.2d 855 (Minn. 2011). However, there is no caselaw in Minnesota that directly addresses whether a party served with discovery must produce information and documents related to a corporate entity only available to that party as a shareholder of the corporate entity. Appellant does not dispute that he is able to obtain the requested documents. Instead, he argues that he is not entitled to disclose this information if it is only accessible to him in his fiduciary capacity.

The federal equivalent of rule 34 contains similar language allowing a party to request documents in the responding party's "possession, custody, or control." Fed. R. Civ. P. 34(a)(1); *see Johnson v. Soo Line R.R. Co.*, 463 N.W.2d 894, 899 n.7 (Minn. 1990) (stating that when interpreting Minnesota rules of practice that are modeled after federal rules, federal cases are "helpful and instructive but not necessarily controlling"). Under the federal rule, "documents are deemed to be within the possession, custody or control" of a party "if the party has actual possession, custody or control, or has the legal right to obtain the documents on demand." *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 636 (D. Minn. 2000) (quotations omitted). Control is further defined as the

"legal right, authority, or ability to obtain upon demand documents in the possession of another." *Id.* (quotation omitted).

A number of federal district courts have held that control, under the federal equivalent of rule 34, "does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action." *See Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146 (S.D.N.Y. 1997); *see also Prokosch*, 193 F.R.D. at 636 (citing *Bank of N.Y.* for the above-stated proposition); *Gen. Envtl. Sci. Corp. v. Horsfall*, 136 F.R.D. 130, 133-34 (N.D. Ohio 1991) (reviewing relevant caselaw from other federal districts and concluding that "[a]n individual party to a lawsuit can be compelled to produce relevant information and documents relating to a non-party corporation of which it is an officer, director or shareholder"). *But see Noaimi v. Zaid*, 283 F.R.D. 639, 642 (D. Kan. 2012) (stating that "merely being a stockholder or officer of a corporation" does not satisfy the "control" standard in rule 34) (emphasis omitted); *Am. Maplan Corp. v. Heilmayr*, 203 F.R.D. 499, 501-502 (D. Kan. 2001) (holding that a discovery order directing document production from a nonparty corporation was improper in a suit against the president and minority shareholder in his personal capacity, when there was no evidence or allegation that the president was the alter ego of the nonparty corporation or that they were "essentially one and the same").

The limited evidence available to this court indicates that Twin Town is controlled by appellant. Respondent has alleged, and appellant has not refuted, that prior to

bringing suit to enforce appellant's repayment obligations on the loan, appellant disclosed that he owned more than thirty real-estate parcels. According to respondent, one of the properties originally disclosed as being owned by appellant is owned by Twin Town. Respondent has alleged that appellant is both a member and manager of Twin Town, that the state registered office address of Twin Town is also appellant's residence, and that appellant is the named taxpayer for Twin Town. As applied to these facts, the district court did not abuse its discretion in its order to compel document production from appellant with respect to Twin Town.

Anderson Trust

Appellant's argument against being compelled to produce documents related to the Anderson Trust mirrors his argument addressing Twin Town. Appellant stresses the separate legal identities of a trust and the trustee to that trust. In reviewing the interrogatories and document requests related to the Anderson Trust, it appears that at least some of respondent's requests may not require appellant to produce documents that appellant alleges are in the possession of the trust. For example, respondent requests documents evidencing real-estate transactions since July 30, 2011, to which the Anderson Trust was a party. If appellant was a party to a real-estate transaction with Anderson Trust, appellant would have access to documents evidencing the transaction irrespective of appellant's status as the trustee of Anderson Trust. This would not require appellant to produce documents that he claims are outside of his control.

There is no Minnesota caselaw directly addressing whether a trustee may be compelled to produce information and documents of a trust when the trust is a nonparty.

However, the above-cited caselaw addressing control and discovery from nonparties is also persuasive as applied to the Anderson Trust. Respondent asserts that many of the properties previously disclosed as being owned by appellant were transferred to the Anderson Trust after respondent filed suit and months prior to the district court granting respondent's summary-judgment motion on the underlying action. Appellant does not deny the ability to obtain the records requested, and the information and documents are available to him as trustee. Appellant has the "right, authority, or practical ability to obtain the documents" from the Anderson Trust. *See Bank of N.Y.*, 171 F.R.D. at 146. For these reasons, the district court did not abuse its discretion in granting respondent's motion to compel with respect to documents related to Anderson Trust.

The concurrence cites *Baskerville v. Baskerville*, 246 Minn. 496, 506 n.16, 75 N.W.2d 762, 769 n.16 (1956) and *Hickman v. Taylor*, 329 U.S. 495, 504-05, 67 S. Ct. 385, 390-91 (1947) to support holding that it was reversible error for respondent to have used rule 34 instead of rule 45 to conduct discovery related to Twin Town and Anderson Trust. The footnote the concurrence cites in *Baskerville* falls far short of announcing a rule prohibiting the discovery, through rule 34, of documents that a party has the "right, authority, or practical ability to obtain," when those documents are in the possession of a nonparty. The previously cited definition of control, as adopted from federal caselaw, does not eliminate the distinction between discovery under rule 34 and discovery under rule 45.

Hickman also is not dispositive. In *Hickman*, the issue was whether federal rules 33 and 34 could be used for discovery of materials gathered by an opposing party's

attorney in preparation for possible litigation. 329 U.S. at 504-05, 67 S. Ct. at 390-91. As the concurrence points out, the Supreme Court referred to the use of rules 33 and 34 in that instance as a "procedural irregularity" and also stated that the petitioner "may have used the wrong method." *Id.* at 505, 67 S. Ct. at 391. However, the court also went on to state that "[i]t would be inconsistent with the liberal atmosphere surrounding [the] rules to insist that petitioner now go through the empty formality of pursuing the right procedural device," and determined that the irregularity was not material. *Id.* at 505-06, 67 S. Ct. at 391. The court, in describing the discovery method the petitioner employed as a "procedural irregularity," did not articulate a rule that documents in the possession of a nonparty are never discoverable under rule 34 even when the adverse party has the "right, authority, or practical ability to obtain" the documents.

The concurrence also cites *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, for the proposition that a party "need not seek [] documents from third parties if compulsory process against the third parties is available to the party seeking the documents." 490 F.3d 130, 138 (2d Cir. 2007). However, the court went on to state that "if a party has access and the practical ability to possess documents not available to the party seeking them, production may be required." *Id.* (citing *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 530 (S.D.N.Y. 1996), in which the court acknowledged that courts have required production from a party if the party has the practical ability to obtain documents from a nonparty, regardless of legal entitlement). The court in *Shcherbakovskiy* also indicated that production of documents in the possession of a nonparty could be supported by evidence that the party is the alter ego of the nonparty.

490 F.3d at 139. This requirement has not been employed by all federal courts addressing this issue. *See, e.g.*, *Gen. Envtl. Sci. Corp.*, 136 F.R.D. at 133-34 (finding that individual defendants exercised control over documents in the possession of a corporate nonparty without expressly finding that the defendants were alter egos of the corporate nonparty). We do not find it necessary to adopt such a requirement at this time. Furthermore, even if we were to adopt such a requirement, as the district court noted, respondent seeks information related to claims for relief under the Minnesota Uniform Fraudulent Transfer Act and under the piercing-the-corporate-veil and alter-ego-status doctrines.

3. The district court did not err in adopting respondent's discovery definition of appellant to include his attorneys, representatives, agents, and assigns.

Appellant argues that the district court erred by finding that respondent's discovery definition of appellant, which includes his attorneys, representatives, agents, and assigns, is reasonable. Appellant's arguments here are the same as his arguments against the district court granting respondent's motion to compel discovery directed towards documents of Twin Town and the Anderson Trust. Appellant is mistaken in conflating the district court's conclusion as to the definition of appellant in respondent's discovery motion with the court's order to grant respondent's entire motion to compel discovery and deny appellant's motion for a protective order. In its order the court concluded:

> [T]he definition of [appellant] as encompassing his attorneys, representatives, agents and assigns is reasonable. This governing definition of [appellant] imposes an obligation on

> [appellant] not only to provide the information and documents known by him and/or in his personal possession, but also to provide the information and documents known by and/or in possession of these related individuals and entities.

On its face, this holding does not direct that the corporate entities and trusts named in respondent's discovery requests should be considered to fall within the discovery definition of appellant's attorneys, representatives, agents, and assigns. Appellant's arguments here are properly addressed as attacks on the district court compelling appellant to respond to the specific discovery requests directed towards information related to Twin Town and Anderson Trust.

Appellant also finds error in the district court's citation of *Anchor Gas, Inc. v. Border Black Top, Inc.*, 381 N.W.2d 96 (Minn. App. 1986). He claims that the district court cited *Anchor Gas* in support of granting respondent's discovery requests as to the corporate entities and trusts. Appellant misreads the district court's opinion. *Anchor Gas* involved this court affirming a district court's order requiring a nonparty corporate officer to appear for a postjudgment deposition in a suit against the corporation. 381 N.W.2d at 98. The district court cited *Anchor Gas* for the proposition that "person," under rule 69, includes third-party entities. The district court proceeded to hold that the discovery definition of appellant is reasonable.

Appellant has not presented any other arguments that the district court abused its discretion in concluding that respondent's discovery definition of appellant is reasonable. The district court did not abuse its discretion in holding that respondent's discovery definition of appellant is reasonable.

4. The district court did not err in denying appellant's request for a protective order.

Minn. R. Civ. P. 26.03 states:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (a) that the discovery not be had . . . .

"Generally, the burden of demonstrating good cause rests with the party seeking a protective order." *Star Tribune v. Minn. Twins P'ship*, 659 N.W.2d 287, 293 (Minn. App. 2003). Again, appellant's arguments mirror those presented as to other issues on appeal. Appellant asserts that the separate legal identities of Twin Town and Anderson Trust constitute good cause for issuance of a protective order.

In support of his argument, appellant cites *Minnesota Twins Partnership v. State by Hatch*, 592 N.W.2d 847 (Minn. 1999). Appellant maintains that *Minnesota Twins Partnership* stands for the proposition that a protective order is appropriate under rule 26.03(a), when information sought through discovery is precluded as a matter of law. In *Minnesota Twins Partnership*, the court held that enforcement of civil investigative demands served by the Minnesota Attorney General on the Twins was precluded as a matter of law because there was no actionable underlying cause of action. 592 N.W.2d at 856. This holding is not applicable. Here, the district court specifically found that "the requested information and documents are reasonably calculated to lead to the discovery

of admissible evidence regarding apparent claims [respondent] could bring against [appellant] and his related business entities and trust in this matter." This includes claims under the Minnesota Uniform Fraudulent Transfer Act and under the piercing-the-corporate-veil and alter-ego-status doctrines. Additionally, postjudgment discovery is available to a judgment creditor in aid of judgment or execution. Minn. R. Civ. P. 69. Respondent succeeded on the underlying claim and is a judgment creditor. The concerns that were present in *Minnesota Twins Partnership* are not present here. Considering that the burden was on appellant to establish good cause and the discretion given a district court ruling on a request for a protective order, the district court did not abuse its discretion in denying appellant's motion for a protective order.

Affirmed.

JOHNSON, Judge (concurring specially)

I agree with the analysis in parts 1, 3, and 4 of the opinion of the court, but I respectfully disagree with the analysis in part 2. Because part 1 is a sufficient basis for affirmance, I concur in part 1 and in the result.

With respect to part 2, I have no quarrel with the general notion that Private Bank should be allowed to discover facts and obtain documents possessed by the non-parties with which Anderson is affiliated. The only question is how. In my view, Private Bank should be required to conduct non-party discovery against those business entities pursuant to rule 45 of the Minnesota Rules of Civil Procedure.

Private Bank seeks discovery in aid of executing on a judgment. Accordingly, Private Bank may conduct discovery "in the manner provided by" the Minnesota Rules of Civil Procedure. *See* Minn. R. Civ. P. 69; *Anchor Gas, Inc. v. Border Black Top, Inc.*, 381 N.W.2d 96, 98 (Minn. App. 1986). It is elementary that a party may discover facts known and documents possessed by "any other party" pursuant to rules 33 and 34. *See* Minn. R. Civ. P. 33.01, 34.01. It also is elementary that a party may discover facts known and documents possessed by non-parties pursuant to rule 45. *See* Minn. R. Civ. P. 45.03, .05. Moreover, "A clear distinction is to be drawn between discovery under Rule 34 and the issuance of a subpoena duces tecum under Rule 45." *Baskerville v. Baskerville*, 246 Minn. 496, 506 n.16, 75 N.W.2d 762, 769 n.17 (1956); *see also Hickman v. Taylor*, 329 U.S. 495, 505, 67 S. Ct. 385, 390-91 (1947) (describing attempt

to use federal rules 33 and 34 to conduct non-party discovery as "procedural irregularity" and "wrong method").[6]

Likewise, there exists a clear distinction between business entities and the individuals who own and operate them. "[U]nlike a sole proprietorship, a corporation is a separate legal entity from its owners and shareholders." *West Bend Mut. Ins. Co. v. Allstate Ins. Co.*, 776 N.W.2d 693, 706 (Minn. 2009). The same is true of a limited liability company. Minn. Stat. §§ 322B.20, .303 (2012); *Equity Trust Co. Custodian ex rel. Eisenmenger IRA v. Cole*, 766 N.W.2d 334, 339 (Minn. App. 2009); *Krueger v. Zeman Constr. Co.*, 758 N.W.2d 881, 890 (Minn. App. 2008), *aff'd*, 781 N.W.2d 858 (Minn. 2010).

The business entities with which Anderson is affiliated are not parties to this case. The district court cited no authority for ignoring the traditional distinction between

[6]In *Hickman*, the United States Supreme Court considered the issue raised by the appeal despite the discovering party's failure to follow the rules of civil procedure, but the Supreme Court did not excuse non-compliance in other cases. The Court took pains to explain that the "procedural irregularity" in that case "was disregarded in the two courts below" and "not strongly urged upon us." 329 U.S. at 505, 67 S. Ct. at 391. The Court also noted that the issue presented by the appeal (whether documents prepared by an attorney are protected by the attorney-client privilege or the attorney work product doctrine) would need to be answered in any event, such that if the Court were to insist on compliance with rules 33, 34, and 45, it nonetheless would be faced with "precisely the same basic problem now confronting us." *Id.* The Court cautioned that the mistake should not be repeated in other cases: "We do not mean to say, however, that there may not be situations in which the failure to proceed in accordance with a specific rule would be important or decisive." *Id.* Nonetheless, the Court chose to consider the issue for which the writ of certiorari had been issued, carefully stating that, "in the present circumstances, for the purposes of this decision, the procedural irregularity is not material." *Id.* at 505-06, 67 S. Ct. at 391. The Supreme Court's opinion in *Hickman* should not be interpreted to say that any party in any case may ignore the distinctions between rules 33 and 34 and rule 45.

business entities and individuals by allowing Private Bank to conduct discovery against non-parties pursuant to rules 33 and 34 rather than rule 45. The authority cited in the opinion of this court does not justify the district court's order. Two of the cases cited are inapplicable because they are concerned with different circumstances.[7] The sole remaining case, *General Environmental Science Corp. v. Horsfall*, 136 F.R.D. 130 (N.D. Ohio 1991), is contrary to *Baskerville* and the traditional distinction between individual parties and non-party business entities. *See id.* at 133-34.

A more traditional rule of law recognizes that an individual party is not obligated by rule 34 to produce documents belonging to third parties "if compulsory process against the third parties is available to the party seeking the documents." *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2d Cir. 2007). This rule would allow for an exception if "'an action is against an officer individually, and not also against [an affiliated] corporation'" and "'there is evidence that the officer is the "alter ego" of the corporation.'" *Id.* at 139 (quoting 7 James Wm. Moore et al., *Moore's Federal Practice* § 34.14[2][c] (3d ed. 2007)). In this case, the district court did not find that Anderson is the alter ego of his companies.

Given the existing caselaw in Minnesota, I believe that the distinction between business entities and the individuals who own and operate them should be maintained and

[7]The issue in this case is whether an *individual* party to a civil action may be obligated by rules 33 and 34 to answer interrogatories and produce documents on behalf of a non-party business entity with which the individual is affiliated. In *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633 (D. Minn. 2000), and *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135 (S.D.N.Y. 1997), the courts considered the discovery obligations of *business-entity* parties, not *individual* parties. *See Prokosch*, 193 F.R.D. at 636; *Bank of New York*, 171 F.R.D. at 147.

that a party should be required to use rule 45 to conduct discovery against non-parties. If it were necessary to decide the issue in part 2, I would reverse the district court's order compelling responses to the discovery requests that seek information and documents possessed by the non-party companies, without precluding Private Bank from conducting non-party discovery pursuant to rule 45.