UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No. 8:09-cv-87-T-26TBM

ARTHUR NADEL;
SCOOP CAPITAL, LLC;
SCOOP MANAGEMENT, INC.

Defendants,

SCOOP REAL ESTATE, L.P.;
VALHALLA INVESTMENT PARTNERS, L.P.;
VALHALLA MANAGEMENT, INC.;
VICTORY IRA FUND, LTD.;
VICTORY FUND, LTD.;
VIKING IRA FUND, LLC;
VIKING FUND, LLC; AND
VIKING MANAGEMENT, LLC,

Relief Defendants.
_____/

RECEIVER'S UNOPPOSED MOTION FOR PERMISSION TO APPEAL ORDER GRANTING SUMMARY JUDGMENT REGARDING GARNISHED ANNUITY

Burton W. Wiand (the "**Receiver**"), as Receiver for Valhalla Investment Partners, L.P.; Viking Fund, LLC; Viking IRA Fund, LLC; Victory Fund, Ltd.; Victory IRA Fund, Ltd.; and Scoop Real Estate, LP (collectively, the "**Hedge Funds**"), moves the Court for permission to appeal an order entered in *Wiand, as Receiver v. Rowe*, Case No. 8:10-cv-245-T-17MAP (M.D. Fla.) (R. Doc.[1] 383), (the "**Order**") (1) denying the Receiver's motion for

[1] "R. Doc." refers to the docket in *Rowe*.

summary judgment (R. Doc. 367) and granting defendant Joyce Rowe's ("**J. Rowe**" and, collectively with Donald Rowe ("**D. Rowe**"), the "**Rowes**") cross-motion for summary judgment (R. Doc. 369) regarding the Receiver's garnishment of an annuity issued to the Rowes by MetLife Investors USA Insurance Company ("**MetLife**" and the "**MetLife Annuity**") and (2) dissolving the writ of garnishment targeting that annuity. A copy of the Order is attached as **Exhibit A**. Dissolution of the writ to MetLife has been stayed pending appeal. R. Doc. 393.

BACKGROUND

The Rowes purchased the MetLife Annuity in an attempt to shelter their assets from litigation creditors, including primarily the Receiver, arising from D. Rowe's involvement as the single largest promoter of Arthur Nadel's Ponzi scheme. D. Rowe's pertinent activities and violations of federal and state securities laws were detailed in earlier filings by the Receiver in this case. *See, e.g.*, Doc. 420. As explained below, the Receiver reached a settlement with the Rowes after years of litigation that exempted the MetLife Annuity from the Receiver's efforts to collect the settlement amount under two – and only two – limited conditions. The Rowes, however, did not comply with those conditions, and thus they forfeited the protection granted the MetLife Annuity under the settlement agreement. As explained in the Argument section below, the Order's contrary conclusion that the Rowes, in fact, complied with the plain language of the settlement agreement is clear error for two independent reasons, and the Receiver seeks authorization to pursue an appeal to primarily argue these two critical errors.

The Receiver Sued The Rowes To Recover Fraudulent Transfers

D. Rowe made investment recommendations to "clients" and purported subscribers of his "investment" newsletter through the Wall Street Digest and other entities he controlled. He touted Nadel as "America's Top-Ranked Money Manager" and single-handedly solicited the majority of investors in the Hedge Funds for a number of years. On January 20, 2010, the Receiver filed a clawback lawsuit against D. Rowe individually and as Trustee of the Wall Street Digest Defined Benefit Pension Plan, J. Rowe, and one of the Rowes' entities, Carnegie Asset Management (collectively, "**Rowe Defendants**"), seeking the return of over $9 million in various "fees," "commissions," and other transfers the Rowe Defendants received from Nadel's scheme (R. Doc. 1).

The Rowes Purchased The MetLife Annuity After The Receiver Sued Them

In July 2011, the Rowes used $400,000 in profits from an entity they owned, Carnegie Marketing Associates ("**CMA**"), to purchase the MetLife Annuity. *See* R. Doc. 368-27, Feb. 6, 2014, J. Rowe Dep. Tr. ("**J. Rowe Tr.**") 30:23-31:8 ("Q. What money did you use to purchase the annuity? A. I believe it was money out of Carnegie, my share of profits out of Carnegie Management. Q. And when you say "Carnegie," you're referring to Carnegie Marketing Associates? A. In California. Yes.").

The Receiver Reached A Settlement Agreement With The Rowes

In January 2013, the Receiver reached a settlement with the Rowe Defendants, which provided *inter alia* for: (1) the immediate payment to the Receiver of $250,000 (the "**$250,000 Payment**") and (2) the entry of a judgment against all Rowe Defendants, jointly and severally, in the amount of $4,028,385.00. R. Doc. 368-3, Settlement Agreement (the

"**Settlement Agreement**"). The Rowes represented to the Receiver that they were willing to consent to the judgment because they had no assets. In truth, they had spent years hiding their assets and were willing to bet the Receiver would not reach them.

The Settlement Agreement contains the following provisions regarding the MetLife Annuity:

> The Receiver and Defendants agree that the **Payment** will be made from one of the following: (1) conversion of an annuity issued by MetLife bearing number ****0039 into cash (the "Annuity"), in which case the Receiver will treat the balance of the cash resulting from the conversion of the Annuity up to $150,000 minus reasonable fees associated with the conversion process as exempt from his collection efforts on the Judgment; or (2) proceeds of a loan collateralized or otherwise secured by the Annuity, in which case the Receiver will treat the Annuity, up to a value of $400,000, as exempt from his collection efforts on the Judgment. The parties to this agreement acknowledge and agree the Receiver's commitment to treat any item as exempt from his collection efforts on the Judgment is limited only to the extent set forth in this paragraph, and that in all other respects the Receiver is free to pursue all collection efforts authorized by applicable laws.

Settlement Agreement at 3 (emphasis added). The Settlement Agreement defines "Payment" as "Payment of $250,000 by Defendants to the Receiver (the "Payment") in accordance with the procedure set forth below" – *i.e.*, the procedure in the preceding, excerpted paragraph. *Id.* As such, the Settlement Agreement renders the MetLife Annuity exempt from the Receiver's collection efforts only if it was the direct or indirect source of the $250,000 payment – not a penny more and not a penny less. This was a material provision of the Settlement Agreement because annuities are typically exempt from collection efforts, so requiring the Rowes to make the $250,000 payment from the MetLife Annuity would not diminish the assets from which the Receiver could collect on the judgment entered against the Rowe Defendants.

J. Rowe Failed To Use The MetLife Annuity To Make The $250,000 Payment

It is undisputed the Rowes did not use the MetLife Annuity – directly or indirectly – to make the $250,000 payment. Instead, $100,000 came from money the Rowes had transferred to Band Weintraub's trust account. J. Rowe admits this. J. Rowe Tr. 8:16-9:5 ("Q. And where did you get the other hundred thousand? A. I believe it came out of a trust account, out of the David Band Trust Account, or Band Weintraub at the time. I don't remember. I think it was [the] Band Weintraub account.").

The remaining $150,000 of that payment came from a loan J. Rowe obtained from a friend of hers, Marianne Siegal ("**M. Siegal**"), which was documented by a Promissory Note (the "**Note**"), a Security and Pledge Agreement (the "**Pledge Agreement**"), and an Assignment of LLC Membership Interest Agreement (the "**Assignment**") (the Note, Pledge Agreement, and Assignment are collectively referred to as the "**Loan Documents**"). R. Doc. 368-7, Loan Documents. The plain language of the Loan Documents show J. Rowe collateralized the $150,000 loan with her 33.33% ownership interest in SRB Associates, LLC ("**SRB**") – a Florida limited liability company created in November 2012. *See id.*; R. Doc. 368-8, SRB Art. Of Organization. There is no mention in the Loan Documents of the MetLife Annuity or of any effort to securitize the $150,000 loan with the MetLife Annuity serving as collateral. *See generally* Loan Docs.

Indeed, J. Rowe admits the majority of the money she used to make the $250,000 payment came from M. Siegal and not the MetLife Annuity. J. Rowe Tr. 8:16-9:5 ("Q. Do you know where you got the money to make the $250,000 payment? A. I borrowed it from – when I was told that we could not pledge the annuity, which I believe is what – then I

borrowed it from Marianne Siegal. Or I borrowed [$]150,000 of it from Marianne Siegal."); *see also* R. Doc. 368-28, Feb. 6, 2014, M. Siegal Dep. Tr. ("**M. Siegal Tr.**") 19:15-20:6 (admitting making a loan "to provide the Rowes with money for a legal settlement, or to provide part of it. I understand the settlement was $250,000. Initially, I offered to help with a hundred, and they asked if I could do more. And I said I could do 50, I couldn't do the 250.").

Despite the foregoing, the Rowes claimed (and the Order found) that they complied with the Settlement Agreement because J. Rowe and M. Siegal had a "verbal" or "gentleman's agreement" that, should J. Rowe's interest in SRB prove insufficient to satisfy the Note, she would use the MetLife Annuity to repay M. Siegal. *See* J. Rowe Tr. 13:20-23 ("Well, I pledged [my interest in SRB Associates] on the paper. Yes. But verbally I said to her, 'And if this doesn't cover it, I will pay you out of the annuity.'"); M. Siegal Tr. 33:10-17 ("It was a gentleman's agreement. And I had faith that my friend would, since she had an annuity should the other thing fail, pay me my money back."). As discussed below in the Argument Section, however, J. Rowe's purported "gentleman's agreement" was insufficient to protect the MetLife Annuity from the Receiver's collection efforts under the terms of the Settlement Agreement for two independent reasons.

M. Siegal Foreclosed The Note And Took J. Rowe's Interest in SRB

J. Rowe failed to make any payments due under the Note. R. Doc. 368-9, M. Siegal Decl. ("**M. Siegal Decl.**") ¶ 8. As a result, M. Siegal exercised her rights under the Pledge Agreement by executing the Assignment and assuming J. Rowe's interest in SRB. *Id.* ¶ 9. That interest was worth more than enough to satisfy the Note. M. Siegal Tr. 32:5-10 ("I was

given [J. Rowe's] entire interest in SRB as security. Her finances were shaky. And I thought that rather than just getting the $150,000 security in SRB for the loan I made to her for the settlement, that if I had additional security it would be an incentive."); J. Rowe Tr. 14:22-25 ("Q. You never had to pay Miss Siegal anything out of the MetLife [A]nnuity, did you? A. No. Because the interest in SRB was enough to cover it. The SRB had made money, not lost money. And, therefore, there was enough to satisfy the loan."). M. Siegal took no action whatsoever against the MetLife Annuity.

The Receiver Garnished The MetLife Annuity

Because the Rowes did not comply with the terms of the Settlement Agreement that would have exempted the MetLife Annuity from the Receiver's collection efforts, on October 11, 2013, the Receiver obtained a Writ of Garnishment (the "**Writ**"). *See* R. Doc. 311. The Receiver served the Writ on MetLife on October 15, 2013. R. Doc. 368, Lamont Decl. ¶ 25; Fla. Stats. § 77.041(2); Doc. 316. On November 5, 2013, MetLife filed an Answer to the Writ indicating it had "placed a restraint" on the MetLife Annuity, which had a surrender value of $342,484.86.

The Rowes Filed Meritless Notices of Exemptions

On November 5, 2013, the Rowes each filed a Notice of Filing Claim of Exemption and Request for Hearing (R. Docs. 332, 333) (the "**Notices of Exemption**"), asserting that the MetLife Annuity is exempt from garnishment because (1) of the parties' Settlement Agreement; (2) it purportedly constitutes "head of family wages" (*see* Fla. Stats. § 222.11); and (3) it purportedly constitutes the proceeds of an annuity contract, which are generally

exempt from garnishment (*see* Fla. Stats. § 222.14).[2] The parties filed cross-motions for summary judgment regarding the Receiver's entitlement to garnish the MetLife Annuity. *See* R. Docs. 367, 369. On July, 11, 2011, the Court granted J. Rowe's motion and denied the Receiver's motion, finding that the Rowes complied with the pertinent language of the Settlement Agreement. *See* R. Doc. 383. On July 15, 2014, the Receiver filed an emergency motion to stay dissolution of the Writ (R. Doc. 384), and on July 16, 2014, the Court entered a preliminary order granting the emergency motion pending briefing and a final decision on that motion (R. Doc. 386). On July 24, 2011, pursuant to a stipulation between the parties resolving the emergency stay motion, the Court entered a final order staying the dissolution of the writ of garnishment pending the Receiver's appeal of the Order. R. Doc. 393. The Receiver filed his notice of appeal that same day. R. Doc. 394.

ARGUMENT

At this time, the Receiver intends to appeal the Order on at least two grounds. First, the Order concludes that J. Rowe's actions with respect to the purported collateralization of the MetLife Annuity were consistent with the plain language of the Settlement Agreement because "[t]he agreement did not specify that the annuity must be the sole source of collateral." R. Doc. 368-3 at 7 (emphasis added). In other words, "the terms of the settlement agreement do not say that *all* of the $250,000 payment be made from proceeds of a loan collateralized or otherwise secured *only* with the annuity." *Id.* at 8 (original

[2] The Order concerns only the purported exemption based on the Settlement Agreement. As such, if the Receiver is successful on appeal, additional proceedings in the District Court will be required to resolve the remaining purported exemptions. As detailed in the Receiver's summary judgment motion filed against the Rowe Defendants (R. Doc. 367), however, the Receiver firmly believes that none of the other exemptions should apply based on applicable caselaw.

emphasis). That conclusion, however, is inconsistent with the plain language of the Settlement Agreement because as noted above "Payment" is a defined term. *See* Settlement Agreement ¶ (1) ("Payment of $250,000 by Defendants to the Receiver (the "Payment") in accordance with the procedure set forth below"). Adding the definition of Payment to the paragraph regarding the MetLife Annuity makes clear J. Rowe was required to use the Annuity to collateralize the entire $250,000 amount:

> The Receiver and Defendants agree that the Payment ["of $250,000 by Defendants to the Receiver"] will be made from … proceeds of a loan collateralized or otherwise secured by the Annuity, in which case the Receiver will treat the Annuity, up to a value of $400,000, as exempt from his collection efforts on the Judgment.

Settlement Agreement at 4. By concluding "[t]he fact that Joyce obtained only $150,000 of the total $250,000 paid to the Receiver by securing a loan with the annuity does not run afoul to the plain language of the agreement," the Order was inconsistent with the definition of Payment in paragraph (1) of the Settlement Agreement. Because Payment was defined as an amount equal to $250,000 (and not a portion thereof), there was no need to specify that "all" of the Payment be collateralized by the MetLife Annuity.

Indeed, by the Order's reasoning, J. Rowe could have complied with the Settlement Agreement by collateralizing only $1 of the Annuity (which had a cash surrender value of $342,484.86 at the time of MetLife's answer to the writ of garnishment (R. Doc. 383 at 4)), and paying the remaining $249,999 of the $250,000 payment with otherwise collectible assets – *i.e.*, by paying the Receiver with money he likely would have collected in any event. That result would be unreasonable and thus inconsistent with a proper reading of the Settlement Agreement. *See James v. Gulf Life Ins. Co.*, 66 So.2d 62, 63 (Fla. 1953) ("The

words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other. So that interpretation which evolves the more reasonable and probable contract should be adopted, and a construction leading to an absurd result should be avoided."). As the Order recognized, J. Rowe had two options: she could have liquidated the MetLife Annuity or she could have collateralized it by obtaining a loan to make the "Payment," which was defined as $250,000 (and not as any portion thereof). However, the Order created a third option: purport to collateralize some arbitrary portion of the MetLife Annuity but actually make the "Payment" from other, non-exempt assets subject to collection. That option is not in the Settlement Agreement, and by endorsing it, the Order rewrote the parties' contract, allowing the Rowes to proceed with their admitted (*see* R. Doc. 376 at 10) scheme to conceal assets.

Second, the Order assumes that J. Rowe actually collateralized some portion of the MetLife Annuity, but as previously explained in the Receiver's motion for summary judgment filed against Rowe Defendants (R. Doc. 367), as a matter of law that collateralization never occurred. It never occurred because there was no written security agreement designating the Metlife Annuity as collateral, and Florida law requires such a written agreement to create a security interest.[3] *See* Fla. Stats. § 679.2031 (secured party

[3] As noted above, the Rowes did execute written agreements relating to the $150,000 loan (*i.e.*, the Loan Documents), but those agreements state the loan was secured by J. Rowe's interest in SRB and make no mention whatsoever of the MetLife Annuity. *See* R. Doc. 368-7.

must possess collateral or have "authenticated a security agreement that provides a description of the collateral"). The only "writing" relating to purported collateralization of the MetLife Annuity was a UCC filing statement based on the purported "gentleman's agreement," but that does not create a security interest under Florida Statutes § 679.2031. *See In re N. Redington Beach Assocs., Ltd.*, 97 B.R. 90, 92 (Bankr. M.D. Fla. 1989) (holding the UCC requires a written instrument, and "a standard form financing statement alone does not constitute a security agreement without any reference to any other documents"). Without a writing creating a security interest in the MetLife Annuity, as a matter of Florida law there was no collateralization whatsoever of the MetLife Annuity. Without such collateralization, the MetLife Annuity was not exempt from the Receiver's collection efforts under the plain language of the Settlement Agreement irrespective of whether the Settlement Agreement required all or only a portion of the $250,000 payment to be secured by the Metlife Annuity.

The Order, however, rejected this argument because "[t]he settlement agreement does not require that the pledge of the annuity be in writing" (R. Doc. 383 at 7). But that holding was incorrect because, in relevant part, the Settlement Agreement required the MetLife Annuity to serve as collateral, and under Florida law a security interest is not created unless it is in writing – without a written document creating a security interest, under Florida law the MetLife Annuity never became collateral. Florida law governs this determination for at least two independent reasons: first, because the Settlement Agreement expressly adopted Florida law (*see* R. Doc. 368-3 at 5 ("The Receiver and Defendants agree this Agreement shall be governed by and enforceable under Florida law …"); and second, because Florida law governing collateralization was impliedly part of the Settlement Agreement. *See Shavers v.*

Duval County, 73 So.2d 684, 689 (Fla. 1954) ("[T]he laws existing at the time and place of the making of the contract ... which may affect its validity, construction, discharge and enforcement, enter into and become a part of the contract as if they were expressly referred to or actually copied or incorporated therein."); *Von Hoffman v. City of Quincy*, 71 U.S. 535, 549 (1866) ("[T]he laws which subsist at the time and place of making of a contract, ... enter into and form a part of it as if they were expressly referred to and incorporated in its terms."). The Order essentially concludes that the Receiver waived his right to rely on Florida Statutes § 679.2031 by not explicitly including its requirements in the Settlement Agreement, but in doing so, the Order is inconsistent with governing contract law. And more broadly, the Order failed to appreciate that whether or not the Settlement Agreement included language that the pledge of the annuity be in writing, that agreement required the MetLife Annuity to act as "collateral" or "security," and as a matter of Florida law the only way it could have acted in that capacity was if that security interest had been memorialized in writing.

An appeal is particularly appropriate here because of the prominent role played by the Rowe Defendants in Nadel's scheme and their conduct since the scheme collapsed. As mentioned above, D. Rowe was by far the largest promoter of Nadel's scheme, touting Nadel for years as "America's Best Money Manager" through his investment newsletters despite having done no legitimate due diligence. For his efforts, D. Rowe and his entities received millions of dollars in the form of "commissions" and "fees", all of which payments were made with scheme proceeds and, separately, violated state and federal securities laws (*see generally* Doc. 420). Many investors specifically mentioned their reliance on D. Rowe in the victim impact statements they submitted in the criminal case against Nadel and wondered

why he was not prosecuted as well. Both D. Rowe and J. Rowe have repeatedly invoked their Fifth Amendment privilege against self-incrimination during the course of this Receivership.

Further, the Rowes still owe the Receivership estate over $1 million under the judgment against them, and in his motion for summary judgment, the Receiver set forth the numerous, elaborate steps the Rowes have taken to conceal their assets since the Receiver sued them. *See* R. Doc. 367 at 22-25. D. Rowe has even admitted in email communications that he and J. Rowe have engaged in years of "financial planning" to protect their assets from "attack" by creditors:

> I am very sorry that you are hurt by the way I handled all the legal paperwork. Joy and I have been doing financial planning for our future for the past few years. I fear that I have become insensitive to all the legal work that goes with financial planning. Joy and I are simply trying to protect you and CMA from whatever may come from any further actions that could come in the future. Consequently, any legal entity with my name or Joy's name on it may come under attack in the future.

Doc. 368, Lamont Decl. Ex. 18 (emphasis added). As such, in addition to the Receiver having meritorious legal arguments to make to the Eleventh Circuit and the MetLife Annuity representing a significant asset to be applied to the outstanding judgment amount, the equities of this matter also call strongly for pursuit of the appeal.

CONCLUSION

For the foregoing reasons, the Receiver respectfully asks the Court to grant him permission to prosecute his appeal of the Rowe Action.

LOCAL RULE 3.01(g) CERTIFICATE OF COUNSEL

Counsel for the Receiver has conferred with counsel for the Securities and Exchange Commission, and the Commission has no objection to the requested relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 15, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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