

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

Case No.: 8:09-cv-00087-RAL-TBM

v.

**ARTHUR NADEL, SCOOP
CAPITAL, LLC, SCOOP
MANAGEMENT, INC., 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,
VIKING MANAGEMENT, LLC,**

Defendants.

**NON-PARTY'S OBJECTIONS AND MOTION TO QUASH SUBPOENA SERVED ON
SUNTRUST BANKS, INC. AND MEMORANDUM OF LAW**

Donald H. Rowe, a non-party to the above-referenced action,¹ on behalf of himself and non-parties Joyce A. Rowe (collectively, "Mr. and Mrs. Rowe"), Wall Street Digest Defined Benefit Pension Plan, and Carnegie Asset Management, Inc., (collectively, "the Rowe Defendants"),² by and through their undersigned counsel and pursuant to Federal Rules of Civil

¹ As noted herein, Mr. Rowe and the Rowe Defendants are not parties to the above-captioned case; however, they are named defendants in a related "claw back" action filed by the Receiver, captioned *Wiand v. Rowe, et al.*, 8:10-CV-245-EAK-MAP.

² The Subpoena seeks documents from various other entities in addition to the Rowe Defendants. The Rowe Defendants reserve the right to amend this motion to be brought on behalf of any or all of these other entities once there has been a sufficient opportunity to fully evaluate the Subpoena.

Procedure 26 and 45, object to and move to quash the subpoena served by the Receiver on non-party SunTrust Banks, Inc., a copy of which is attached hereto as Exhibit 1 (the “**Subpoena**”).

On January 20, 2010, the Receiver brought suit against Mr. Rowe, individually and as Trustee of the Wall Street Defined Benefit Pension Plan, Mrs. Rowe, and Carnegie Asset Management, Inc. (the “Rowe Defendants”). The Receiver’s action is styled *Wiand v. Rowe, et al.*, Case No. 8:10-cv-245. The Court stayed the deadline for the Rowe Defendants to respond to the Receiver’s complaint until after a preliminary scheduling conference could be held. No Rule 26(f) conference has taken place as of the date of this filing.

Notwithstanding the fact that the Rowe Defendants are currently parties to *Wiand v. Rowe*, on June 4, 2010, the Receiver, without notice to the Rowe Defendants, caused a Subpoena to be issued on SunTrust Banks, Inc. for bank records and other documents related to accounts held by the Rowe Defendants and others.³ The *Wiand v. Rowe* suit was brought by the Receiver to “claw back” funds that the Receiver alleges the Rowe Defendants received in connection with the scheme perpetrated by Arthur Nadel. The Receiver elected not to cause the Subpoena to be issued through *Wiand v. Rowe*. Instead, he chose to subpoena the Rowe Defendants’ bank information through the *SEC v. Nadel* suit, apparently in an attempt to obtain early discovery of confidential financial information relating to the Rowe Defendants without their knowledge and without providing them an opportunity to object.

³ This is the second time the Receiver has sought confidential financial information from Mr. Rowe and the Rowe entities. Before filing suit against the Rowe Defendants, the Receiver served them with a subpoena seeking, *inter alia*, income tax returns. When counsel for Mr. Rowe contacted the Receiver initially, the Receiver’s counsel refused to acknowledge the confidentiality of tax return documents, much less provide any assurance that such documents would be maintained in a confidential manner. After exhaustive attempts by the undersigned’s firm to secure assurance that the returns would be maintained confidentially failed, Mr. Rowe filed a motion for protective order. In his response to that motion, the Receiver relented and acknowledged the confidentiality of personal financial information to the Court. Specifically, in his December 17, 2009 response to Mr. Rowe’s motion for protective order, the Receiver noted that he “fully appreciates the confidential nature of tax returns . . . and the risks associated with public disclosure of sensitive personal information.”

Rule 45(b)(1) of the Federal Rules of Civil Procedure requires that when a subpoena commands the production of documents or things before trial, “before it is served, a notice must be served on each party.” The Receiver did not serve any notice of the Subpoena on the Rowe Defendants, although they are clearly a party to the suit in which the information sought under the Subpoena will be used. The Receiver should not be permitted to make an end run around the Federal Rules by using the *SEC v. Nadel* caption on a subpoena for bank records of parties in *Wiand v. Rowe*, a suit that the Receiver has filed in this very court.

The Receiver is aware of what individuals and entities he has sued, and is certainly aware that the Rowe Defendants are represented by counsel; nonetheless, he made no attempt to notify counsel for the Rowe Defendants that he had served a Subpoena on SunTrust Banks seeking documentation of any bank accounts the Rowe Defendants have with SunTrust. Instead, his Subpoena demanded compliance from SunTrust Banks, Inc. by 9:30 a.m. on June 15, 2010, effectively providing less than eleven full days from the date the Subpoena was dated and signed by the Receiver’s counsel. As a result, the undersigned had not even received a copy of the Subpoena until after the time for compliance had passed.

The Subpoena is also improper under Rule 26 of the Federal Rules of Civil Procedure. Rule 26(d)(1) notes that “a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f).” Rule 26, Fed. R. Civ. P. Any discovery related to the Rowe Defendants is improper and premature because the Rowe Defendants have not even responded to the complaint in *Wiand v. Rowe*,⁴ much less participated in a Rule 26(f) conference. The Receiver cannot circumvent Rule 26 by having the Subpoena issued through another case in

⁴ The Rowe Defendants have been specifically instructed not to answer the complaint or otherwise file any motions under a February 10, 2010 Order entered by the Honorable Elizabeth A. Kovachevich. Judge Kovachevich’s Order indicated that the *Wiand v. Rowe* case had been referred to the Honorable Mark A. Pizzo for the purposes of scheduling and conducting Rule 16 conferences as he deems appropriate. Judge Kovachevich further stated that any deadlines to respond to the complaint were continued until after the pretrial and scheduling conferences.

which the Rowe Defendants are not parties. Until the Rule 26(f) conference has been conducted, the Receiver may not seek discovery “from any source.” Rule 26(d), Fed. R. Civ. P. (emphasis added).

The Rowe Defendants anticipate the possibility that the Receiver will protest that the records sought pursuant to this Subpoena are for the *SEC v. Nadel* action and that the Receiver has a duty to marshal the assets of the Receivership. Nonetheless, in purported furtherance of that duty, the Receiver has sued the Rowe Defendants in *Wiand v. Rowe*. To the extent the Receiver is interested in the Rowe Defendants’ bank records, it is for the purposes of attempting to recover those funds from the Rowe Defendants in the *Wiand v. Rowe* case.

The Rowe Defendants anticipate that they will need to make other substantive objections to the Subpoena; however, because the Rowe Defendants’ counsel was not provided with notice of the Subpoena until after the expiration of time to respond to it, the Rowe Defendants have not had adequate time to draft a memorandum of law relating to those substantive objections. For that reason, if the Subpoena is not quashed on these procedural grounds then the Rowe Defendants request an additional ten days from the date of any Order on this motion to file a memorandum of law addressing substantive objections to the Subpoena.

Memorandum of Law

According to Federal Rule of Civil Procedure 26(c)(1), a court “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Pursuant to this rule, the court may control the scope and manner of discovery to protect sensitive, private information and ensure that certain information either not be revealed or be revealed only in a specified way. The rule permits the entry of a protective order specifying the terms for disclosure of forbidding inquiry into certain matters or limiting the

scope of disclosure or discovery. Fed. R. Civ. P. 26(c)(1)(B), (D). The Court may issue a protective order in its discretion. *Estate of Trentadue v. U.S.*, 397 F.3d 840, 865 (10th Cir. 2005).

WHEREFORE, non-party Donald Rowe, on behalf of himself and the Rowe Defendants named by the Receiver in *Wiand v. Rowe*, moves for the entry of an order quashing the Receiver's Subpoena or, in the alternative, granting the Rowe Defendants an additional ten days to submit a memorandum of law addressing substantive grounds for quashing the Subpoena.

Certificate of Compliance with Local Rule 3.01(g)

Pursuant to Local Rule 3.01(g) and Federal Rule of Civil Procedure 26(c)(1), the undersigned certifies she has attempted to confer in good faith with counsel for the Receiver and counsel for the Receiver has conveyed his objection to the motion.

DATED: June 16, 2010.

s/ Anne-Leigh Gaylord Moe
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on June 16, 2010, I electronically filed the foregoing with the Clerk of the court by using the CM/ECF system. I **FURTHER CERTIFY** that I mailed the foregoing document and the notice of electronic filing by first-class U.S. Mail to the following non-CM/ECF participant: Arthur Nadel, #50690-018, Metropolitan Correctional Center, New York, 150 Park Row, New York, New York 10007.

s/ Anne-Leigh Gaylord Moe
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