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.
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THE RECEIVER'S OPPOSITION TO NON-PARTY'S OBJECTIONS AND MOTION TO QUASH SUBPOENA SERVED ON SUNTRUST BANK, INC. (DOC. 416)

On June 4, 2010, Burton W. Wiand, as Receiver (the "Receiver"), served a subpoena for documents on non-party SunTrust Bank, Inc. ("SunTrust") for certain financial information relating to Donald H. Rowe ("Rowe"), his wife Joyce Rowe, and several entities owned and controlled by Rowe (the "Subpoena"). *See* Subpoena (Doc. 416-1). On June 16, 2010, Rowe, on behalf of himself and his wife and his entities, the Wall Street Digest Defined Benefit Plan and Carnegie Asset Management, Inc. (collectively, the "Rowe Non-Parties"), filed Non-Party's Objections And Motion To Quash Subpoena Served On SunTrust Bank, Inc. (the "Motion") (Doc. 416). Rowe played a key role in Nadel's scheme, and was also a major financial beneficiary as he, his wife, and his entities received a total of approximately $9.4 million of investor funds. The Court has charged the Receiver with tracing and recapturing those funds, and the Subpoena is part of the Receiver's efforts to trace Rowe's ill-gotten gains and to take necessary actions to protect defrauded investors.

The Motion should be denied because:

(1) it is designed to and will impede the Receiver's efforts to trace and recover proceeds of Arthur Nadel's fraudulent scheme (the "scheme") from one of its key components;

(2) it ignores Rowe's critical role in the scheme, including his active solicitation of the majority of investors on behalf of the Hedge Funds;

(3) it ignores that Rowe violated federal and state securities laws in connection with those solicitations;

(4) it ignores that Rowe solicited investors even though he knew or should have known that Nadel and Neil Moody ("Moody"), the principles of various Receivership Entities, were violating those laws as well in connection with their role in Receivership Entities Valhalla Investment Partners, L.P.; Viking Fund, LLC; Viking IRA Fund, LLC; Victory Fund, Ltd.; Victory IRA Fund, Ltd.; and Scoop Real Estate, L.P. (collectively, the "Hedge Funds");

(5) the Subpoena (or any of the Receiver's other efforts) does not violate Rules 26 and 45 of the Federal Rules of Civil Procedure;

(6) it is based on a mistaken factual assumption that the Receiver issued the Subpoena to obtain discovery for another case; and

(7) it ignores that Rowe himself failed to produce the information sought by the Subpoena.

BACKGROUND

The Rowe Non-Parties are defendants in a separate "clawback" case filed by the Receiver to recover transfers to them of the Hedge Funds' (and ultimately, defrauded investors') money in the form of "commissions" or "fees" and of purported investment "returns" and "redemptions" (the "clawback case"). *See generally Wiand, as Receiver v. Rowe et al.*, Case No. 8:10-cv-245-T-17MAP (M.D. Fla.). The Motion contends the Subpoena is an "end run around" the Federal Rules of Civil Procedure in violation of Rule 45's notice requirement and Rule 26's prohibition on discovery in that case pending Rule 16 conferences (scheduled for that case and most of the other clawback cases filed by the Receiver).

That contention relies on a mistaken belief that the Subpoena is "an attempt to obtain early discovery" of information relating to the Rowe Non-Parties for use in the clawback case. *See* Mot. at 2, 3. In reality, the information sought by the Subpoena is intended for use with a motion for equitable relief the Receiver expects to file in this case. More importantly, that contention relies on Rowe's mistaken belief that he should be treated like the innocent investors who form the bulk of defendants in clawback actions. As discussed in detail below and supported by the Declaration of Burton W. Wiand, as Receiver, In Support Of The Receiver's Opposition To Non-Party's Objections And Motion To Quash Subpoena Served On SunTrust Bank, Inc. (the "Receiver's Declaration"), which is being filed with this

opposition, Rowe played a major role in the scheme by soliciting a large number of investors in violation of federal and state securities laws, and he should not be allowed to impede and delay the Receiver's efforts to advance the best interests of the Receivership Estate and defrauded investors.[1]

ARGUMENT

I. ROWE'S UNLAWFUL CONDUCT FUELED THE SCHEME

Although Rowe has portrayed himself as someone who merely "invested in certain of the defendant funds" and who "published a generalized newsletter that at times included references to the defendants" (*see* Rowe's Mot. for Protective Order at 2 (Doc. 250)), that portrayal falls far short of representing the full truth. As an initial matter, as "investors" in the Hedge Funds, the Rowe Non-Parties received approximately $6.71 million in distributions of proceeds of the scheme. Wiand Decl. ¶ 16. But more importantly, as shown below, Rowe did a lot more than merely "include[] references" to the Hedge Funds in his investment newsletters.

A. Rowe Touted The Hedge Funds

In his investment newsletter, "The Wall Street Digest,"[2] and in "reports" Rowe repeatedly touted and recommended the Hedge Funds as managed by "America's Top-

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[1] Rowe is so intent on impeding and delaying the Receiver's efforts, that on June 21, 2010, he moved the Court in the clawback case for a protective order seeking, in part, the same relief he seeks in the Motion here. *See* Doc. 419. Magistrate Judge Pizzo denied the relief sought on June 23, 2010. *See* Clawback Case, Order (Doc. 17).

[2] "The Wall Street Digest" was a monthly newsletter which contained Rowe's investment recommendations and was sent to paying subscribers. More information about the newsletter is provided by Rowe in The Wall Street Digest "Investor Briefing" retrieved from Rowe's website and attached as Exhibit A to the Wiand Declaration.

Ranked Money Manager" or with similar praise.

For example, his October 2003 newsletter, like many other editions, included a half-page promotion of two Hedge Funds and was headlined with, "America's Top-Ranked Money Manager." *See* The Wall St. Digest, Oct. 2003 at 15, attached as Ex. B to Wiand Decl. The promotion then lists the purported returns of Hedge Funds Valhalla Investment Partners, L.P. (identified as "Fund A") and Victory Fund (identified as "Fund B"), the gains for years before 2002, and a comparison to the performance of the S&P 500 stock index. *See id.* It underscores that over the "past 68 months" "America's Top-Ranked Money Manager" was "down fractionally two months and flat once" while the S&P 500 was "down 33 months out of 68." *Id.* Although the newsletter does not identify the name of "America's Top-Ranked Money Manager" – presumably in an attempt to skirt securities laws – it informs subscribers to call a toll free number "[f]or additional information or a brochure." *Id.* That number is for one of Rowe's entities.

To further tout and recommend the Hedge Funds, Rowe created "reports" that were sent to his customers and sometimes available on his website. Wiand Decl. ¶ 11 & Comp. Ex. C. The statement on a fax cover sheet sent on behalf of Rowe to Moody accompanying a draft of one report succinctly explained the purpose of the reports: "Following is the two-page article we are mailing to generate new customers for your program." Bates No. NDL-145-000830 included in Wiand Decl. Comp. Ex. C.

These reports consisted of multiple pages headlined by attention-getting statements in conspicuous typeface, such as "America's Top Ranked Money Manager," "Did Your Money Manager Return 55% in 2000 and 19.8% in 2001?," "The Best Track Record I've Ever

Seen," and "Market Beating Performance in 2003." *See* Wiand Decl. Comp. Ex. C. These reports contained extremely glowing accounts of Nadel and Moody and Hedge Funds' purported returns in comparison to the S&P 500 stock index, and they otherwise touted Nadel and Moody's supposed talents as investment managers. *See generally id.* They also expressed Rowe's strong endorsement of the Hedge Funds and instructed interested recipients to contact him for additional information and offering documents. *See id.* When investors called him, Rowe repeated his recommendations of the Hedge Funds and that Nadel and Moody were "top-ranked" money managers. *See* Wiand Decl. ¶ 12.

In touting the Hedge Funds, Rowe also represented that he had personally conducted a "due diligence visit to the offices of Nadel & Moody" and that "[a]fter 26 years of reviewing the track records of over 11,000 mutual funds, 6,000 money managers and 5,800 hedge funds, Nadel's computerized investment program has produced the best track records and most consistent returns I have ever seen." *See* Bates No. NDL-030-000876 included in Wiand Decl. Comp. Ex C.

B. Rowe Was Responsible For Soliciting The Majority Of Investors

Rowe's actions were of critical importance to the scheme as he single-handedly solicited the majority of investors for a number of years. One insider of the Hedge Funds estimated that Rowe was responsible for soliciting approximately 80% of investors. Wiand Decl. ¶ 14. Over 100 investors in the Hedge Funds received Rowe's newsletters and reports. *Id.* ¶ 13.

C. Rowe Was Paid Large Fees For His Efforts With Scheme Proceeds

His motive for promoting the Hedge Funds was clear: Nadel and Moody had agreed

to pay Rowe a percentage of fees earned from investors solicited by Rowe to the Hedge Funds. *See* Wiand Decl. ¶ 17. Beginning in late 1999, Rowe and his entities received "commissions" and other fees tied to the purported performance of the investors that he had solicited for the Hedge Funds (*i.e.*, performance-based fees). *Id.* ¶ 18. From 1999 through 2004, he and his entities reaped approximately $1.7 million in such fees, all of which were proceeds of the scheme. *Id.* & Ex. D.

D. Rowe Was Paid Off With Scheme Proceeds

In 2004, a dispute arose between Rowe on the one hand and Nadel and Moody on the other concerning the amount of fees that Rowe should be paid for soliciting investors for the Hedge Funds. In an attempt to resolve it, Rowe and Nadel and Moody negotiated a draft "Service Agreement." *See* Service Agrmnt. attached as Ex. E to Wiand Decl. That draft agreement provided that Receivership Entities would pay "a quarterly fee to Rowe at the end of each calendar quarter in an amount equal to ¼ of 1% of the dollar amount of [investment assets belonging to investors solicited by Rowe] . . . from March 31, 2005 that remains in the [Hedge] Funds on such future claendar (sic) quarter end." *See id.* at ¶ 2. Those payments would last through 2006. *See id.* According to Rowe and his counsel, the investment assets of investors solicited to the Hedge Funds by Rowe were likely worth more than $60 million. *See* Mar. 25, 2005, email from J. Lessinger, counsel for Rowe, to S. MacLeod, counsel for Nadel & Moody attached as Ex. G to Wiand Decl. In exchange for the payments, Rowe would not solicit Hedge Fund investors away from the Hedge Funds and into other investments. *See* Wiand Decl. Ex. E ¶ 1 & Ex. G ("In return [Rowe] . . . will make no efforts to . . . solicit [Hedge Fund investors] . . . on behalf of any new securities/funds . . . .").

While Rowe and Nadel and Moody were negotiating the "Service Agreement," Nadel's lawyers informed Rowe's lawyer that Rowe's solicitation of investors for the Hedge Funds and the fees he had received were unlawful as neither Rowe nor the interests in the Hedge Funds that investors purchased were registered under securities laws. *See* Feb. 2, 2005, letter from J. Chapman to J. Lessinger attached as Ex. F to Wiand Decl. To circumvent the misconduct, the "Service Agreement" was re-characterized as a "Non-Solicitation Agreement" and the payout to Rowe was converted from being performance-based to a flat $125,000 per quarter for two years, or a total of $1 million. *See, e.g.*, Apr. 29, 2005, email from J. Chapman to Nadel et al. attached as Ex. I to Wiand Decl.; Non-Solicitation Agrmnt. attached as Ex. H to Wiand Decl. The "Non-Solicitation Agreement" was finalized, and Rowe and his entities were paid another $1 million through April 2007. *See generally* Wiand Decl. Exs. D & H. In total, Rowe and his entities received approximately $2.7 million in commissions and other fees for soliciting investors for the Hedge Funds. Wiand Decl. Ex. D. All of that money was proceeds of the scheme.

II. ROWE VIOLATED STATE AND FEDERAL SECURITIES LAW

In connection with his role in the scheme, Rowe violated various state and federal securities laws. Those violations included: (1) Rowe's receipt of purportedly performance-based fees and commissions for soliciting investors even though neither he nor his entities were registered with the State of Florida and the SEC as a broker/dealer, associated person of a broker/dealer, or an investment adviser; (2) Rowe's violation of antifraud provisions through material omissions and misrepresentations; and (3) Rowe's general solicitation of investors for the Hedge Funds.

A. Rowe Violated Registration Requirements

Rowe and his entities were not registered broker/dealers, associated persons of a registered broker/dealer, or registered investment advisers. *See* Wiand Decl. ¶ 19. In relevant part, Florida law prohibits anyone who is not registered in such a capacity from selling or offering for sale a security. *See* Fla. Stat. §§ 517.12(1), (4); *Edwards v. Tulis*, 212 So. 2d 893, 895 (Fla. 1st DCA 1968) (contract awarding commission for sale of stock by person who failed to register as a dealer pursuant to Florida law was contrary to public policy and void).

Similarly, Section 15(a)(1) of the Securities Exchange Act of 1934 (the "Exchange Act") prohibits anyone from "mak[ing] use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of any security" without registering with the SEC as a broker/dealer. 15 U.S.C. § 78o(a)(1); *see United States v. Dahlstrom*, 180 F.3d 677, 681 (5th Cir. 1999) (affirming defendant's conviction for acting as unregistered broker/dealer). Section 203 of the Investment Advisers Act of 1940 similarly prohibits any "investment adviser . . . [from] us[ing] . . . the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser." 15 U.S.C. § 80b-3.

Aside from violating those provisions through his solicitation of investors, Rowe also violated them by receiving purportedly performance-based fees for his efforts. Section 15(a) of the Securities Act, 15 U.S.C. § 78o(a), prohibits the payment of performance-based fees to anyone that is not registered as a broker/dealer or an associated person of a broker/dealer. *See, e.g.*, SEC Denial of No-Action Request of Brumberg, Mackey & Wall, P.L.C. (May 17,

2010).[3] Similarly, Section 205(a)(1) of the Investment Advisers Act prohibits the payment of fees based on the performance of clients' investments. *See* 15 U.S.C. § 80b-5(a)(1).

B. Rowe Violated Antifraud Provisions

Rowe repeatedly made material misrepresentations and omissions when recommending the Hedge Funds to investors in newsletters, in reports, and in direct communications with investors in violation of the antifraud provisions of federal and state securities laws. Those material misrepresentations or omissions included (1) failing to disclose his fee arrangement with Nadel and Moody; (2) misrepresenting that Nadel, Moody, or the "Nadel-Moody Group" were registered investment advisers; and (3) misrepresenting that he had conducted diligence on the Hedge Funds.

1. Rowe Omitted Disclosing His Fee Arrangement With Nadel And Moody

Rowe never disclosed to prospective investors his fee arrangement with Nadel and Moody for soliciting investors for the Hedge Funds. That failure to disclose constituted fraud in violation of Sections 17(a) and 17(b) of the Securities Act of 1933 ("Securities

[3] Available at http://www.sec.gov/divisions/marketreg/mr-noaction/2010/brumbergmackey051710.pdf. The SEC Denial of No-Action Request of Brumberg, Mackey & Wall, P.L.C. (May 17, 2010), states: "Section 3(a)(4)(A) of the Exchange Act generally defines the term 'broker' as any person engaged in the business of effecting transactions in securities for the account of others. Section 15(a)(l) of the Exchange Act generally provides that any broker effecting transactions in securities, or inducing or attempting to induce the purchase or sale of securities, must be registered with the Commission pursuant to Section 15(b) of the Exchange Act. A person's receipt of transaction-based compensation in connection with these activities is a hallmark of broker-dealer activity. Accordingly, any person receiving transaction-based compensation in connection with another person's purchase or sale of securities typically must register as a broker-dealer or be an associated person of a registered broker-dealer . . . ."

Act"), 15 U.S.C. §§ 77q(a), (b);[4] of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b); and of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. *See SEC v. Huttoe*, 1998 WL 34078092, *5-6 (D.D.C. 1998) (newsletters that author presented as objective reports but which were promotions paid for by featured company were inherently misleading); *SEC v. Corporate Relations Group, Inc.*, 2003 WL 25570113, *7 (M.D. Fla. 2003) (defendants who touted securities in magazines and newsletters in exchange for monetary compensation or stock violated federal securities antifraud provisions by failing to disclose they were paid for promotions); *SEC v. Gorsek*, 222 F. Supp. 2d. 1099, 1109 (C.D. Ill. 2001) (antifraud provisions violated when disclaimer contained in investment "research profiles" failed to disclose publisher stood to gain if price of profiled stock rose); *United States v. Wegner*, 427 F.3d 840, 850 (10th Cir. 2005) ("A publicist who fails to disclose that he has an interest in the companies he promotes will almost always mislead his audience into thinking that his advice is disinterested."). Rowe's failure to disclose his fee arrangement also constituted fraud in violation of Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act, 15 U.S.C. §§ 80b-6(1), (2), (4); SEC Rule 206(4)-1(a), 17 C.F.R. § 275.206(4)-1(a); and Florida Statutes Sections 517.301(1)(a)(1), (1)(a)(2), (1)(a)(3), (1)(b), and (1)(c).

Although later editions of the newsletters contained a general disclosure in small font at the bottom of a page that Carnegie Asset Management, one of Rowe's entities, "makes

[4] In relevant part, Securities Act Section 17(b) specifically prohibits anyone from "publish[ing], giv[ing] publicity to, or circulat[ing] any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer . . . without fully disclosing the receipt, whether past or present, of such consideration and the amount thereof." 15 U.S.C. § 77q(b).

referrals" to various investment-related entities for which it "receives monetary compensation," including "Nadel-Moody," that disclosure was insufficient. *See, e.g.*, Wiand Decl. Ex. B at NDL-074-001448. It did not satisfy the statutes addressed in this section because it failed to specifically identify the fee arrangements and the amounts of fees received, and as a matter of law still constituted a material misrepresentation or omission. *See Huttoe*, 1998 WL 34078092 at *5 (disclaimer in footnote that stated personnel of publisher "may own shares" or "may act as consultants for compensation" but which did not disclose that staff received stock in return for promoting issuer was ineffective); *Gorsek*, 222 F. Supp. 2d at 1109 (vague disclaimers did not protect defendant from liability because they did not disclose that: (1) publisher stood to gain if stock appreciated and (2) no independent research was undertaken on touted securities).[5]

Indeed, Section 17(b) requires "full" disclosure of the receipt of consideration, past or prospective, including the amount.[6] 15 U.S.C. § 77q(b); *see Gorsek*, 222 F. Supp. 2d at 1106 ("Section 17(b) calls for the disclosure of the receipt of compensation *and* the amount. It is

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[5] The disclaimer considered in *Gorsek* stated: "[defendant] receives compensation for providing shareholder and broker communication." 222 F. Supp. 2d at 1107. The court also found the disclaimer published in earlier promotional materials, which stated in part, "[defendant] receives compensation from [issuer] for providing shareholder and broker communication," also were insufficient. *Id.*

[6] To the extent Rowe acted as a broker/dealer, Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78o(c)(1)(A) and SEC Rule 15c-1-6, 17 C.F.R. § 240.15c-1-6, identify as fraudulent "any act of any broker who is acting for a customer or for both such customer and some other person . . . designed to effect with or for the account of such customer any transaction in, or to induce the purchase or sale by such customer of, any security in the primary or secondary market distribution of which such broker . . . at or before the completion of each such transaction gives or sends to such customer written notification of the existence of such participation or interest."

undisputed that the Defendants did not disclose the amount of compensation in their written or verbal communications concerning their issuer-clients."); *Wegner*, 427 F.3d at 850 (upholding constitutionality of Section 17(b)'s requirement for disclosure of amount of consideration). Florida Statutes Section 517.301(1)(b) is similar and prohibits anyone from "publish[ing], giv[ing] publicity to, or circulat[ing] any notice, circular, advertisement, newspaper, article, letter, investment service, communication, or broadcast which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received directly or indirectly from an issuer . . . or from an agent or employee of an issuer . . . without fully disclosing the receipt, whether past or prospective, of such consideration and the amount of the consideration."

2. Rowe Misrepresented That Nadel And Moody Were Registered Investment Advisers

Rowe also violated the antifraud provisions of the federal securities laws by publishing that the "Nadel Moody Group" was a registered investment adviser. *See* Bates No. RW3 included in Wiand Decl. Comp. Ex. C. Whether an investment adviser is registered with securities regulators is a material event for an investor because of the in-depth reporting requirements and greater regulatory scrutiny that accompanies registration, thus significantly lowering risk to the investor. As such, Rowe's representations that Nadel and Moody were registered investment advisers constituted material misrepresentations.

3. Rowe Misrepresented That He Had Conducted Due Diligence

As noted in Section I.A above, Rowe represented in his reports that he had conducted due diligence on Nadel and Moody. In reality, however, Rowe could not have done any reasonable diligence. Nadel was a disbarred lawyer whose disbarment order was publicly

available from New York State and through a simple search on Westlaw. Similarly, a review of any monthly trading account statement of any of the Hedge Funds would have revealed that the trading activity, yields, and balances in those accounts significantly differed from the information disclosed to investors. *See* Wiand Decl. ¶ 7. Further, early offering documents for the sole Hedge Fund in existence for the first few years of Rowe's involvement in the scheme misrepresented that the Hedge Fund had a Certified Public Accountant. *Id* ¶ 8. In reality, that supposed accountant's C.P.A. license had been "null and void" for at least 10 years, and that information was in Florida public records. *Id.*

Indeed, Rowe's misrepresentation that Nadel and Moody were registered investment advisers is clear proof of Rowe's failure to conduct due diligence. The identity of investment advisers that are registered with securities regulators is public information that is easily retrievable from the SEC or state regulators. It is also instantly available through a publicly accessible portal on the SEC's website. Had Rowe conducted even a basic level of diligence, he immediately would have learned that neither Nadel, Moody, or the "Nadel-Moody Group" was a registered investment adviser.

C. Rowe Violated Prohibitions On General Solicitations For Sale Of Unregistered Securities

Rowe also violated securities laws by referring investors to the Hedge Funds with unlawful "general solicitations." Section 5 of the Securities Act prohibits the use of interstate commerce and mails in connection with the offer or sale of an unregistered security. *See* 15 U.S.C. §§ 77e(a)(1), (a)(2), (c). Indeed, SEC Rule 502(d) specifically prohibits the offer or sale of unregistered securities "by any form of general solicitation or general advertising, including, but not limited to, the following . . . (d) [a]ny advertisement,

article, notice or other communication published in any newspaper, magazine, or similar media . . . ." 17 C.F.R. § 230.502(d). This prohibition is typically referred to as a prohibition on "general solicitation" for the sale of unregistered securities. Such securities, like the interests in the Hedge Funds sold to investors, may only be sold in a private placement to accredited investors.

Although the interests in Hedge Funds sold to investors were unregistered securities, Rowe engaged in general solicitations for the sale of those interests by soliciting investors through his newsletters, which his own counsel has characterized as a "generalized newsletter." *See* Rowe's Mot. for Protective Order at 2 (Doc. 250). He also engaged in general solicitations by soliciting investors through his reports. *See* Wiand Decl. Comp. Ex. C at Bates No. NDL-145-000830 (noting that report would be "mail[ed] to generate new customers" for the Hedge Funds). Through the newsletters and reports, the solicitation of sales of interests in the Hedge Funds were conducted nationwide to subscribers,[7] and without regard to whether the subscriber receiving the solicitation satisfied the specific thresholds required by federal securities laws for investing in unregistered securities. Rowe's efforts proved wildly successful as the majority of investors in the Hedge Funds for a number of years were obtained through his solicitations. Wiand Decl. ¶¶ 13, 14.

III. ROWE KNEW OR SHOULD HAVE KNOWN THAT NADEL AND MOODY WERE VIOLATING FEDERAL AND STATE SECURITIES LAWS

Aside from violating federal and state securities laws through his own conduct, Rowe

[7] While the Receiver does not know the volume of the newsletters' and reports' circulation, the newsletter states that it is "WALL STREET'S MOST WIDELY READ INVESTMENT AND FINANCIAL SERVICE." *See, e.g.*, Wiand Decl. Ex. B at 3, 5, 7, 10, 12, 14, 15 (emphasis in original).

also knew or should have known that Nadel and Moody were violating those laws. Specifically, Rowe knew or should have known that Nadel and Moody were aware that Rowe was soliciting investors through general solicitations and was being paid purportedly performance-based fees for those solicitations. *See* Wiand Decl. ¶¶ 17, 18. Despite that Rowe was soliciting investors for the Hedge Funds in an unlawful manner, the practice was not stopped or otherwise remedied. Nadel and Moody were fine with proceeding in this unlawful manner, and thus were violating, and aiding and abetting violations of, those laws themselves.

Those violations were raised with Rowe's counsel in early 2005 in connection with his dispute with Nadel and Moody discussed above in Section I.D. While Rowe knew or should have known that both the purported performance-based fees that he was receiving and his general solicitation of investors were unlawful, he did not report it to securities regulators, to any investors (let alone the investors he solicited for the Hedge Funds), or to anyone else. Rowe also did not walk away. Instead, he insisted on being paid more money and eventually secured for himself payment of solicitation fees into 2007 in the amount of $1 million.

IV. THE SUBPOENAED DOCUMENTS ARE FOR USE IN THIS CASE

In part, the Motion relies on a contention that the Subpoena represents an "attempt to obtain early discovery of confidential information" for use in the clawback action. *See* Mot. at 2. That contention is wrong. As discussed below, the Subpoena is necessary to discover information for seeking equitable relief against the Rowe Non-Parties in this case. That contention also ignores the Receiver's obligations under the Order Reappointing Receiver.

A. The Subpoena Is Authorized By The Order Reappointing Receiver

Unquestionably, the Order Reappointing Receiver (Doc. 316) authorizes and, indeed, directs the Receiver to trace investor funds to the Rowe Non-Parties' accounts. Aside from directing the Receiver to "marshal and safeguard all of the assets" of the Receivership Entities and "take whatever actions are necessary for the protection of the investors" (Order Reappointing Receiver at 1), the Order Reappointing Receiver imposes on the Receiver a duty to "institute such . . . legal proceedings, for the benefit and on behalf of the Receivership Entities and their investors and other creditors as the Receiver deems necessary . . . against any transfers of money or other proceeds directly or indirectly traceable from investors in the Receivership Entities . . ." *Id.* ¶ 2. It also directs the Receiver to "apply to this Court for an Order giving the Receiver possession of" funds of "persons who have invested in the Receivership Entities [that] have been transferred to other persons or entities." *Id.* ¶ 23.

This case has provided and continues to provide the appropriate means for the Receiver to conduct his investigations in a manner that is efficient and imposes the least amount of burden on the Receivership Estate. The Receiver has gathered documents through subpoenas served in connection with this case on over 85 non-parties, and that information, along with information obtained from investors, from documents and other information retrieved directly from the files and IT systems of the Receivership Entities, and from other sources, has allowed the Receiver to comply with his obligations under the Order Reappointing Receiver. Because of the serious nature of Rowe's actions, the Receiver has investigated and evaluated them in depth before proceeding towards an asset freeze or other equitable relief. That process has taken time and involved the review of a large quantity of

documents and information from investors.

B. The Subpoena Is Intended To Discover Information To Support A Motion For Equitable Relief In This Case

Contrary to the Rowe Non-Parties' guess that the Subpoena represents an "attempt to obtain early discovery of confidential information" for use in the clawback case, the Subpoena is necessary to discover the location of investors' money received by the Rowe Non-Parties. *See* Mot. at 2. The Receiver seeks that information so he can move in this case to freeze those assets and prevent the Rowe Non-Parties from dissipating and hiding them.

A defendant's assets cannot be frozen simply to establish a fund with which to satisfy a potential money judgment. *See Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1527 (11th Cir. 1994). Rather, typically assets in a defendant's possession are subject to a freeze when the assets are (1) the subject of litigation, (2) are specifically identified, and (3) the freeze would preserve the *status quo*. *See id.* Here, the Subpoena was issued to retrieve additional information to satisfy the second requirement: to specifically identify the location of investors' money.

The Receiver knows the bulk of the money was deposited into certain accounts at Orion Bank (n/k/a Iberia Bank), Northern Trust Bank, SunTrust Bank, and Fidelity Investments. *See* Wiand Decl. ¶ 24. As a result, the Receiver subpoenaed financial records from those institutions to determine the current location of those funds. The results of those subpoenas and, if necessary, additional subpoenas will be used by the Receiver to determine whether it is appropriate to move to freeze the funds.

The Receiver's efforts related to an asset freeze are particularly important because Rowe and his wife have made suspicious transfers of money between their respective

accounts. For example, Rowe and his wife deposited $4,488,384.97 from the Hedge Funds into accounts at Fidelity Investments. *See* Wiand Decl. ¶ 24. In April 2009, only three months after the scheme collapsed, Rowe transferred over $1 million from his Fidelity account to his wife's Fidelity account. *Id.* The following month, Mrs. Rowe moved $1.2 million from her Fidelity account. *Id.* By freezing defrauded investors' money in the Rowe Non-Parties' possession, the Rowe Non-Parties would not be able to improperly use or transfer it.

Notably, Rowe's failure to produce relevant documents forced the Receiver to seek the information directly from financial institutions. In March 2009, the Receiver served a subpoena on Rowe requesting, in relevant part, documents relating to "fees, compensation, commissions or other remuneration received by [Rowe] . . . including but not limited to activities involving securing or soliciting individuals to invest in any of the entities . . . ." *See* Rowe's Mot. for Protective Order, Ex. 1 (Doc. 250-1). In response, in relevant part Rowe produced only a handful of checks and claimed not to have any other financial records. Wiand Decl. ¶ 25. The Receiver's only other source for the information is the financial institutions themselves, and thus he appropriately served the Subpoena on SunTrust Bank.

V. THE SUBPOENA DOES NOT VIOLATE ANY RULE OR LAW

The only legal arguments asserted by the Rowe Non-Parties for quashing the Subpoena are that (1) the Receiver did not provide notice in purported violation of Rule 45(b)(1); and (2) the Receiver's discovery efforts in this case should be precluded because in the clawback case the Court has stayed the Rule 26(f) process for case management conferences before discovery may be sought. These arguments do not apply here. Indeed, in

the clawback case, Rowe moved for a protective order regarding discovery issued (or to be issued) by the Receiver in this action, which, in part, sought the same relief as the Motion at hand. In his Order denying their motion, Magistrate Judge Pizzo stated, "Wiand has not abused or manipulated the discovery process or violated the Federal Rules by seeking relevant documents and depositions in the enforcement action which also pertain to the instant recovery action." *See* Clawback Case, Order (Doc. 17).

A. Rule 45 Does Not Require Notice To The Rowe Non-Parties

Rule 45(b)(1) states that "if a subpoena commands production of documents . . . then before it is served, a notice must be served on each party" (emphasis added). As the Rowe Non-Parties are not parties to this action, they were not entitled to notice of the Subpoena. Although the Rowe Non-Parties contend they should be entitled to notice because, according to them, the information sought by the Subpoena will be used in the clawback case (*see* Mot. at 3), they identify no legal support, their factual premise is wrong, and their contention is inconsistent with the plain language of Rule 45(b)(1).

B. Rule 26 Does Not Bar The Subpoena

The Rowe Non-Parties also assert the Subpoena violates Rule 26(d)(1), which prohibits discovery before parties in a lawsuit confer regarding case management. *See* Mot. at 3. However, the requirements of Rule 26 do not apply to this dispute because the Rowe Non-Parties are not parties to this case. And in any event, Rule 26(d)(1) gives a court discretion to allow discovery to proceed. Importantly, there is no reason to believe the Honorable Elizabeth A. Kovachevich's order in the clawback case, and in every other clawback case filed by the Receiver, continuing deadlines pending Rule 16 conferences was

anything more than an effort to address the clawback cases in an efficient manner. *See* Clawback Case Order (Doc. 8). The Receiver respectfully believes that goal should have no effect on the Subpoena and the other efforts of the Receiver in this case to protect the Receivership Estate and defrauded investors, especially in light of the serious nature of Rowe's conduct.

CONCLUSION

Put plainly, quashing the Subpoena would block the Receiver's efforts to protect defrauded investors by tracing their money and freezing it. That result is particularly inappropriate here because Rowe has not identified any burden that outweighs his material and critical role in the scheme and the interests of the Receivership Entities and defrauded investors. For all of the reasons in this opposition, the Motion (Doc. 416) should promptly be denied so that SunTrust can proceed with its production. To the extent the Motion seeks an Order further delaying SunTrust's production if the Motion is denied so that the Rowe Non-Parties may file substantive objections, that request also should be denied. *See* Mot. at 4.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 23, 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 mail to the following non-CM/ECF participants:

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