

**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.

**THE RECEIVER'S RESPONSE TO MOTION FOR
INSTRUCTIONS AND EX PARTE HEARING (DOC. 456)**

On August 17, 2010, non-parties Norton, Hammersley, Lopez & Skokos, P.A. and E. John Lopez (collectively, "Movants") filed a Motion for Instructions and Ex Parte Hearing (the "Motion") (Doc. 456). The Motion seeks an *ex parte* hearing to obtain instructions relating to Movants' obligation to disclose to the Receiver a purportedly privileged "communication" received by them (the "Communication"). The only "substance" in the Motion is that Movants "recently . . . received a communication . . . which may be required

to be disclosed to the Receiver” (Mot. ¶ 1 (emphasis in original)) and that they “believe” the “communication is protected by the attorney-client privilege, and therefore, cannot be disclosed to any party, without the consent of the client” (*id.* ¶ 2). On August 18, 2010, the Court set a hearing on the Motion for August 27, 2010 (Docs. 458, 459).

In the abstract, and if warranted, the Receiver does not object to a non-party’s request for Court intervention when faced with a conflict between the non-party’s obligations under the ethical rules governing lawyers and obligations imposed by the orders appointing receiver entered in this case. However, the Receiver objects to such non-party’s refusal to provide to the Receiver or the Securities and Exchange Commission (the “Commission”) certain limited non-privileged information to allow the Receiver and the Commission to determine an appropriate response.

That is precisely the situation here: the Receiver objects to the Motion because Movants have refused to disclose to the Receiver (or to the Commission) pertinent non-privileged information concerning the Communication and the circumstances surrounding the Motion. Movants have refused to do so despite no justified basis for their position. Because of the dearth of information in the Motion and Movants’ refusal to provide any additional details, the Receiver (and the Commission) has no way of assessing how he should respond to the substantive request in the Motion and, more importantly, whether he needs to take additional steps to protect the receivership estate.

Putting aside the Movants’ failure to confer with the Receiver or the Commission in accordance with Local Rule 3.01(g) before filing the Motion, since the filing of the Motion the Receiver’s counsel and the Commission’s counsel have independently sought from

Movants non-privileged information which would allow the Receiver and the Commission to determine their response to the Motion and any additional steps that may be warranted. *See* email communications between G. Morello or M. Lamont, counsel for the Receiver, and J. Chapman, attached hereto as Composite Exhibit A; email communications between S. Masel, counsel for the Commission, and J. Chapman, attached hereto as Composite Exhibit B. Movants have unjustifiably refused to provide any information whatsoever, including information that is indisputably non-privileged.

- The Receiver’s counsel asked Movants’ counsel to identify (1) the person holding the privilege and (2) information concerning the Communication which would normally be disclosed in a privilege log. *See* Comp. Ex. A at 3. Movants refused to provide the information. *See id.* at 2.
- In response, the Receiver’s counsel asked Movants’ counsel if (1) the Communication in any way involved proceeds of the scheme underlying this case and (2) whether he had asked the purported relevant client for consent to disclose the Communication. *See id.* at 2. Movants refused to provide this information too. *See id.* at 1.
- Subsequently, the Commission’s counsel asked Movants’ counsel (1) to identify the sections of the orders appointing receiver which Movants believe may require disclosure of the Communication and (2) for the same information requested by the Receiver’s counsel. *See* Comp. Ex. B at 2. Movants also refused to provide this information too. *See id.* at 1.

In short, both the Receiver and the Commission have requested from Movants reasonable and non-privileged information, but Movants have unjustifiably refused to provide it.

Movants’ refusal to cooperate is particularly troubling because of their apparent misunderstanding of the scope of the attorney-client privilege. Referring to the Receiver’s recent motion concerning approximately \$1.3 million of Ponzi scheme proceeds held by Defendant Arthur Nadel’s wife (“Mrs. Nadel”) in the form of tax refund checks (Doc. 434), Movants’ counsel characterized Movant E. John Lopez’s knowledge of Mrs. Nadel

possession of those checks as being obtained “through a privileged communication.” *See* Comp. Ex. B at 1. But as is clear from that motion and its exhibits (*see* Doc. 434, Ex. B), Mr. Lopez was openly copied on correspondence between Mrs. Nadel and Mr. Zucker on the one hand and the Internal Revenue Service on the other. There is no possible argument that information contained in those communications with the Internal Revenue Service – including Mrs. Nadel’s possession of the refund checks – is privileged. The Receiver is concerned that Movants’ “belief” that the Communication is privileged is similarly misplaced, and they have not identified any cognizable basis for refusing to disclose sufficient non-privileged information to enable the Receiver to assess the basis of their “belief.” *See, e.g.* Fed. R. Civ. P. 26(b)(5)(A).

Similarly, the Receiver cannot simply rely on Movants’ counsel’s unsupported representation that he “believe[s] this will all turn out to be much ado about nothing.” *See* Comp. Ex. A at 1. Only recently, Movant E. John Lopez felt that Mrs. Nadel’s possession of approximately \$1.3 million of Ponzi scheme proceeds was not sufficiently important to notify anyone connected to this receivership. And now, aside from refusing to provide information normally contained in a privilege log, Movants inexplicably refuse to identify (i) whether the Communication involves information about Ponzi scheme proceeds, (ii) which provisions in the orders appointing receiver potentially require disclosure of the Communication, (iii) whether the purported client holding the privilege has been asked to waive it, or (iv) any other information that would allow the Receiver to assess this matter.

Although the Court will be able to assess all these matters at next week’s hearing, the Receiver is concerned that between now and the hearing, the receivership estate could be

adversely affected by Movants' failure to disclose the substance of the Communication. As a result, the Receiver respectfully believes that Movants should be required to immediately disclose to the Receiver and to the Commission the information requested by the Receiver and the Commission so that they can promptly assess Movants' "belief" of privilege and determine appropriate next steps. Movants have not provided any reason – let alone a cognizable one – for refusing to provide the requested information and for requiring the Court and the Receiver (and the Commission) to go through the expense of this process without first giving the Receiver (or the Commission) non-privileged information to allow him to assess the claim of privilege and determine whether additional steps are warranted to protect the receivership estate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 18, 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:

Arthur G. Nadel
Register No. 50690-018
MCC New York
Metropolitan Correctional Center
150 Park Row
New York, NY 10007

s/ Gianluca Morello

Gianluca Morello, FBN 034997

gmorello@wiandlaw.com

Michael S. Lamont, FBN 527122

mlamont@wiandlaw.com

WIAND GUERRA KING P.L

3000 Bayport Drive

Suite 600

Tampa, FL 33607

Tel: 813-347-5100

Fax: 813-347-5199

Attorneys for the Receiver, Burton W. Wiand