

**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,

Relief Defendants.

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**RECEIVER'S MOTION TO COMPEL PRODUCTION  
OF DOCUMENTS IN COMPLIANCE WITH NON-PARTY SUBPOENA**

Pursuant to Rule 45, Federal Rules of Civil Procedure, Burton W. Wiand, as Receiver, respectfully moves (the "Motion") the Court for an order compelling the production of documents subpoenaed from Managed Capital, LLC ("Managed Capital") and to award the Receivership Estate its reasonable costs and fees associated with having prepared and filed this Motion. In support, the Receiver states:

On June 24, 2010, the Receiver issued a subpoena for documents on non-party Managed Capital (the “Subpoena”). By the Subpoena, the Receiver sought the production of financial information relating to Donald H. Rowe (“Rowe”) and several entities owned and controlled by Rowe.<sup>1</sup> A copy of the Subpoena is attached as **Exhibit A**. 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.

Managed Capital’s counsel, Gregory Brown of Hill Ward Henderson, accepted service of the Subpoena. After service, Managed Capital did not object to the Subpoena nor did it file a motion for protective order. Its deadline to comply was July 8, 2010. Despite representations from counsel that documents would be produced, Managed Capital failed to comply with the Subpoena.

On at least two separate occasions, counsel for the Receiver informed Managed Capital’s counsel that the production of documents was late and overdue. In fact, the Receiver’s counsel explained that the request was time sensitive and that it was part of his investigation into Rowe’s receipt of fraudulent funds. Again, Managed Capital has yet to reply. Accordingly, the Receiver files this Motion and respectfully requests this Court to compel Managed Capital to produce the subpoenaed documents and to pay reasonable fees and costs to the Receivership Estate.

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<sup>1</sup> 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.

## MEMORANDUM IN SUPPORT

Rule 45 governs discovery of non-parties by subpoena. Rule 45(c)(2)(B) provides in relevant part:

A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises-or to producing electronically stored information in the form or forms requested.

That rule further provides that “the serving party may move the issuing court for an order compelling production or inspection.” Fed.R.Civ.P. 45(c)(2)(B)(I). Here, there are no contested issues regarding the Subpoena. The Receiver issued a valid subpoena seeking relevant information concerning the whereabouts of certain funds fraudulently transferred from the Receivership Entities. Accordingly, the Court should compel Managed Capital to comply with the Subpoena and produce responsive documents immediately.<sup>2</sup>

The Court should also award the reasonable fees and costs to the Receiver for having to prepare and file this Motion, which could have been avoided. Here, Managed Capital’s response was due in early July, but Receiver’s counsel unilaterally extended the deadline based upon counsel’s representations that documents would be forthcoming. Despite the fact that the Receiver was extremely accommodating to Managed Capital, it is apparent it will not comply with the Subpoena absent a Court order.

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<sup>2</sup> Even if Managed Capital were to contest the Subpoena, it had 14 days from service to raise any objections. Fed.R.Civ.P. 45(c)(2)(B). Failure to timely raise objections results in waiver. *Madeline LLC v. Street*, 2009 WL 1563526, \*1 (S.D. Fla. June 3, 2009) (*citing* 9A Wright & Miller, *supra* § 2463 (noting that “failure to object within the fourteen-day period usually results in waiver of the contested issue”) (footnote omitted)).

Rule 45(e) provides that the issuing court “may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena.” Given Managed Capital’s disregard for the Subpoena, the Receiver’s fees and costs for bringing this Motion is an appropriate sanction. Indeed, a subpoena issued on behalf of the court should be treated as a court order. *DeVolk v. JBC Legal Group PC*, 2008 WL 1777740 (M.D. Fla. Apr. 18, 2008) (*citing* Fed.R.Civ.P. 45(a) advisory committee note (1991 amend.) (“Although the subpoena is in a sense the command of the attorney who completes the form, defiance of a subpoena is nevertheless an act in defiance of a court order and exposes the defiant witness to contempt sanctions.”)). Here, despite service of the Subpoena and multiple informal requests to comply, Managed Capital has simply ignored the Subpoena, which in turn, means it ignored an order from the Court. *See id.* Managed Capital had ample opportunity to timely object, move for relief, or request an extension of time. Instead, it ignored the Subpoena, which necessitated the filing of this Motion. Managed Capital should bear the reasonable costs of this Motion, not the defrauded investors from the Receivership Estate. *See Wouters v. Martin County*, 9 F.3d 924, 933 (11th Cir.1993).

WHEREFORE, the Receiver respectfully requests the entry of an order compelling non-party Managed Capital to comply with the Subpoena, awarding the Receiver the reasonable costs and fees in bringing this Motion, and any other relief as the Court deems just and necessary. If the Court is inclined to award fees and costs, the Receiver respectfully requests that he be allowed 10 days to submit the necessary documents supporting the fees and costs incurred.

**LOCAL RULE 3.01(g) CERTIFICATE OF COUNSEL**

The undersigned counsel for the Receiver is authorized to represent to the Court that the SEC has no objection to the Court's granting this motion. The undersigned counsel also communicated with Managed Capital's counsel on August 20, 2010 regarding the Subpoena. The undersigned informed Managed Capital's counsel that if it did not respond by August 25, 2010, the Receiver would seek relief, including sanctions, from the Court. As of the filing of this Motion, Managed Capital has not responded to the Subpoena or responded to the undersigned's latest correspondence.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on August 31, 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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