

**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, ET AL.,

Defendants.

**NON-PARTY DONALD H. ROWE'S
MOTION FOR PROTECTIVE ORDER AND MEMORANDUM OF LAW**

Donald H. Rowe, a non-party to the above-referenced action, on behalf of himself, his wife Joyce A. Rowe, and entities under their ownership and control (collectively, the “**Rowes**”), by and through the undersigned counsel and pursuant to Federal Rules of Civil Procedure 26 and 45, moves for the entry of a protective order that (1) prevents Wiand from obtaining discovery as to Rowes’ business activities and financial affairs in the instant case (the “**Enforcement Action**”) (including financial information from Managed Capital, LLC (“**Managed Capital**”)); (2) requires that Wiand enter a non-disclosure/confidentiality agreement with regard to document produced from third parties that disclose the Rowes’ financial information obtained during discovery in the Enforcement Action which requires that such information not be disclosed to non-parties to the Enforcement Action; and (3) directs Wiand to provide timely notice to the Rowes of any subpoenas directed to third parties in the Enforcement Action for the Rowes’ financial information.

This is the third motion directed to curtail the Receiver’s efforts in the Enforcement Action to discover the Rowe’s personal financial information. The first motion was filed prior to

the Receiver bringing any claims against the Rowes or their entities. The second motion was filed after the Receiver commenced an action against the Rowes, styled *Wiand v. Rowe, et al.*, Case No. 8:10-cv-245 (the “**Recovery Action**”) but prior to the entry of a judgment in the Enforcement Action. Now that a consent judgment has been entered in the Enforcement Action, the Rowes again urge the Court to enter a protective order relating to the Receiver’s on-going demands for the Rowe’s personal financial information. Good cause exists for the entry of the protective order sought in this motion.

BACKGROUND

1. On January 21, 2009, the Securities and Exchange Commission commenced the Enforcement Action against Arthur Nadal and the Receivership Entities and appointed Burton W. Wiand as Receiver. (Docs. 1 and 8.) The Court authorized Wiand to “institute such actions and legal proceedings for the benefit or on the behalf of the [Receivership Entities] and their investors and other creditors” that he claimed misappropriated or wrongfully transferred assets from the Receivership Entities’ investors. (Doc. 8 at 3). The Court empowered Wiand as Receiver to commence legal proceedings seeking disgorgement of profits and the recovery and/or avoidance of fraudulent transfers under (*Id.*)

2. On May 12, 2009, the Court entered the Case Management and Scheduling Order directing the terms and time limits for the completion of discovery in the Enforcement Action. (Doc. 128.) The Case Management and Scheduling Order required discovery be completed by July 31, 2010. (*Id.*)

3. On December 7, 2009, Mr. Rowe filed a motion for a protective order from Wiand’s subpoena for production of the Mr. and Mrs. Rowe’s tax returns. (Doc. 250.) In the motion, Mr. Rowe sought the Court’s intervention to ensure that Mr. Wiand employed

reasonable measures to preserve the confidential nature of Mr. and Mrs. Rowe's personal financial information. (*Id.* at 2.) Wiand opposed the motion and asserted that the requirements of Federal Rule of Civil Procedure 5.2 together with his process for the protection of sensitive personal information, including social security numbers and taxpayer-identification numbers, rendered the relief requested unnecessary.¹ (*Id.* at 4.) Pursuant to Wiand's process, confidential personal financial information is produced in response to a discovery request made in future litigation by a non-party to the Enforcement Action upon execution of a confidentiality agreement. (Doc. 262-1.) Wiand's confidentiality agreement protects disclosure of social security numbers and bank account numbers, but does not preserve the confidentiality of prohibit any subsequent disclosure of the underlying personal financial information. (*Id.*) Wiand's confidentiality agreement vests the decision of whether any objection should be lodged to the disclosure of Confidential Information, as that term is defined in the agreement, solely with Wiand and does not require that Wiand make any effort to notify the individual that disclosure of their Confidential Information is sought. (*Id.*) The Court denied the motion for a protective order. (Doc. 267.)

4. On January 20, 2010, Wiand exercised his authority as Receiver to institute legal proceedings against individuals and entities that have wrongfully or improperly received funds or other proceeds from investors in the Hedge Funds, and commenced the Recovery Action against Mr. and Mrs. Rowe and two entities alleged to be under their ownership or control.² In the Recovery Action, Wiand alleges that the principal redemption by the Rowses of their investments

¹ Despite this assurance, Wiand disclosed the Rowses' social security numbers and taxpayer-identification numbers in connection with his motion to compel information from Managed Capital.

² Formal discovery has not yet commenced in the Recovery Action and the Rowses' response to the amended complaint is not due until October.

in the Hedge Funds, the distributions to the Rows of Hedge Fund trading gains, and the profits, and the money earned by Rowe for services rendered to the Hedge Funds should be disgorged to on the theory of unjust enrichment or avoided as fraudulent transfers under Florida Statute § 726.101, et seq.

5. In the Enforcement Action, Wiand issued subpoenas to SunTrust Banks, Inc. and Northern Trust, NA requesting financial records of the Rows and indicated that he intended to conduct a discovery deposition of Mr. Rowe. As non-parties to the Enforcement Action, the Rows filed a motion to quash the subpoena served on SunTrust. (Doc. 416.) The Rows contended that as non-parties to the Enforcement Action, Wiand did not give them notice of the subpoena in an apparent attempt to impermissibly circumvent the applicable rules of discovery and to prematurely obtain confidential financial information to further his claims in the Recovery Action.

6. On June 24, 2010 this Court denied the motion to quash, ruling that the SunTrust subpoena was no more than a routine discovery tool.

7. On August 18, 2010, this Court entered a judgment disposing of the Security and Exchange Act's claims against Arthur Nadel in the Enforcement Action. (Doc. 460.)

8. Despite the resolution of the Enforcement Action claims, Wiand seeks to compel production of additional financial information pertaining to the Rows from Managed Capital.

MEMORANDUM OF LAW

The Rowses have previously objected to Wiand's attempts to obtain asset or financial discovery related to them in secret. Their contention has been that once Wiand chose the Recovery Action as the vehicle to carry out his duty to identify and recover purported assets of the Receivership that are alleged to be in the Rowses' possession, then his discovery on those issues belongs in the Recovery Action. The Rowses' argument is not, and never has been, that Wiand should never be permitted to seek discovery that relates to transfers allegedly made by Arthur Nadel to them. Rather, the Rowses have argued that once the Receiver filed the Recovery Action against the Rowe Defendants, it is in that action and that action alone that he should be permitted to seek discovery as to them. This Court has previously overruled their objections and Wiand has been permitted to conduct extensive discovery in the Enforcement Action relating to the Rowses and Wiand's claims against the Rowses in the Recovery Action.

In this motion, and without waiving any previous objection, the Rowses submit that the Subpoena is improper on a new basis; judgment has been entered against Arthur Nadel in this Enforcement Action. Wiand's claims for recovery of what he characterizes as "Rowe's ill-gotten gains" (Doc. 473 at 2) are the subject of the Recovery Action, the only action filed by Wiand to which the Rowses are parties. Discovery should not continue to proceed in this action except as permitted by the Order of Permanent Injunction. The Order of Permanent Injunction permits discovery, including discovery from "appropriate" non-parties, as it relates to any motion by the Commission for disgorgement as to Arthur Nadel.

The subpoena to Managed Capital was served prior to the entry of Arthur Nadel's consent judgment. The subpoena does not seek records of Arthur Nadel's assets. It is, and was plainly intended to be, pre-trial discovery for use in the Recovery Action against the Rowe

Defendants. That the Receiver is seeking to compel compliance with the subpoena from Managed Capital even when there is now to be no trial in the Enforcement Action further lends itself to this conclusion.

Federal Rule of Civil Procedure 26(c)(1), provides that the 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 entirely or be revealed only in a specified way. The rule permits the entry of a protective order specifying the terms for disclosure, 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).

Federal Rule of Civil Procedure 45 provides that upon timely motion, the Court must quash or modify a subpoena if it requires disclosure of privileged or other protected matter and no exception or waiver applies or if it subjects a person to undue burden. Fed. R. Civ. P. 45(c)(3)(A)(iii) and (iv). This Rule is intended to prevent abuse of the subpoena power and requires that a district court protect the property rights of the person subject to the subpoena. *Klay v. All Defendants*, 425 F.3d 977, 982 (11th Cir. 2005).

Good Cause exists to support the entry of a protective order. Discovery of personal financial information prior to a judgment having been entered is not permitted by the Federal Rules of Civil Procedure. See e.g. *Ranney-Brown Distributors, Inc. V.E.T. Barwick Industries, Inc.*, 75 F.R.D. 3, 4 (S.D. Ohio 1977); *Renshaw v. Ravert*, 82 F.R.D. 361, 363 (E.D.Pa. 1979) (inquiry into defendant’s personal financial status is not ordinarily permitted); *Bogosian v. Gulf*

Oil Corp., 337 F.Supp. 1228 (E.D.Pa. 1971) (deposition questions with respect to antitrust plaintiff's net worth and his ability to satisfy judgment for costs in the event defendants prevailed were not relevant to the subject matter of the lawsuit; *U.S. v. General Electric Co.*, 158 F.R.D. 161, 163 (D.Oregon 1994) (corporate tax returns and financial condition was not relevant to issue of whether contractor was fully compensated for work it performed).

The Receiver seeks to compel from Managed Capital the production of documents of the Rowe's personal financial information and financial information of entities owned by Rowe. In connection with the request for the production, the Receiver represented to Manage Capital that "the request was time sensitive and that it was part of his investigation into Rowe's receipt of fraudulent funds." (Doc. 473 at 2). With the Enforcement Action's resolution, Wiand's attempt to compel production from Managed Capital is, in essence, discovery in aid of execution before a judgment has been obtained (or a response to the Amended Complaint in the Enforcement Action even having been filed). The transfers from Nadel to the Rows are documented. The discovery is directed to financial accounts of the Rows other than the accounts in which the transfers from the Hedge Funds were initially deposited prior to having established any liability by the Rows for the return of funds to the Receivership Entities. In other words, as it has always been contemplated, the recovery of monies paid by the Hedge Funds to individuals and entities, such as the Rows, may be had through law suits brought against the recipients of the monies and after proof that the Receivership Entities' entitlement to the return of the monies. The Recovery Action is such an action. Wiand's efforts for information regarding the Rows' financial condition would be objectionable if made in the Recovery Action. He should not be permitted to continue to obtain such information in this case especially now that a judgment has been entered.

WHEREFORE, non-party Donald H. Rowe, moves for the entry of a protective order that (1) prevents Wiand from obtaining discovery as to Rowes' business activities and financial affairs in the instant case (including financial information from Managed Capital); (2) requires that Wiand enter a non-disclosure/confidentiality agreement with regard to document produced from third parties that disclose the Rowes' financial information obtained during discovery in the Enforcement Action which requires that such information not be disclosed to non-parties to the Enforcement Action; (3) directs Wiand to provide timely notice to the Rowes of any subpoenas directed to third parties in the Enforcement Action for the Rowes' financial information; and (4) grants any other relief as is just and appropriate..

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 that she has conferred with the counsel for Wiand and has been informed that the Wiand opposes the relief sought herein.

DATED: September 3, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 3, 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/ Karen Cox

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