

**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.**

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**DONALD H. ROWE'S MOTION TO QUASH  
AND MEMORANDUM OF LAW**

Donald H. Rowe, a non-party, by and through the undersigned counsel and pursuant to Federal Rules of Civil Procedure 26 and 45, moves to quash the subpoena issued by the Receiver (but not properly served until this date) on non-party Mr. Rowe, a copy of which is attached hereto as **Exhibit 1** (the "Subpoena").

Counsel for Mr. Rowe agreed to accept service of the Subpoena on the date of this filing, November 19, 2010. Counsel for Mr. Rowe has informed counsel for the Receiver that Mr. Rowe expects to be in a position to respond to the Subpoena by December 10, 2010. This motion is being filed in an abundance of caution, because counsel for the Receiver has taken the

position that service of the Subpoena was “impliedly accepted” at some point prior to November 19, 2010 because counsel for the Receiver had asked whether counsel for Mr. Rowe was authorized to accept service. Correspondence from Receiver’s counsel regarding Subpoena is attached hereto as **Exhibit 2**. Mr. Rowe did not authorize acceptance of service until November 19, 2010, and the contrary was not stated or suggested to the Receiver. During the intervening time, the Receiver did not serve Mr. Rowe with a Subpoena, and the parties continued to work towards a settlement of the Receiver’s action against Mr. Rowe, and finding dates for a deposition of Mr. Rowe’s spouse in this action.

While a non-party to this action, Mr. Rowe is currently a defendant in an action styled *Wiand v. Rowe, et al.*, Case No.: 8:10-cv-245-EAK-MAP. In that action, Mr. Rowe is actively engaged in efforts to resolve the Receiver’s claims against him.

Mr. Rowe does not seek to avoid compliance with the Subpoena. He anticipates producing certain responsive documents, subject to applicable objections. He has complied with previous non-party subpoenas from the Receiver. In this motion, Mr. Rowe seeks to quash the Subpoena to the extent that it fails to allow a reasonable time to reply, calls for disclosure of privileged or other protected matter, and subjects Mr. Rowe, a non-party, to undue burden. Fed. R. Civ. P. 45(A)(i), (iii), (iv).

The instant motion is filed in an abundance of caution in light of counsel for the Receiver’s assertion that that service of the Subpoena was “impliedly accepted.” The Receiver’s counsel has not articulated the legal basis for this assertion, and it is not clear how such service on a non-party could be effected under Rule 45. In any event, the Subpoena fails to allow a reasonable time to respond in that it purports to call for production prior to the date it was served. While Mr. Rowe has not yet had an opportunity to determine what documents he may possess

that are responsive, to the extent the Subpoena seeks documents that are protected by an applicable privilege, it should be quashed. Moreover, the Subpoena subjects Mr. Rowe to undue burden to the extent that a significant amount of time and effort will be required to be expended in response to it, and the Receiver is unwilling to accommodate Mr. Rowe's request for an adequate amount of time to respond.

Further, as counsel for the Receiver is well aware, in addition to his efforts to resolve the action brought against him by the Receiver, Mr. Rowe is currently a party in two very active suits brought by investors. As has been explained to counsel for the Receiver, those actions require dedication of extraordinary amounts of Mr. Rowe's resources and time. In light of the Receiver's refusal to seek a stay of those actions, even after being informed that the continued defense of those actions has caused and will continue to cause a tremendous dissipation of the Rowes' assets that might otherwise be available to resolve the Receiver's claims, it is unreasonable for the Receiver to insist on compliance with a subpoena in only a matter of days. See Correspondence from Anne-Leigh Gaylord Moe, Esq. to Gianluca Morello, Esq., and response thereto at **Composite Exhibit 3**.

### **Memorandum of Law**

According to Federal Rule of Civil Procedure 45(b)(3)(A), on a timely motion the court "must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- ...
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden."

The Federal Rules further allow that a court “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c)(1). 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 or 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). A minimal showing of prejudice is required by a non-party for the entry of a protective order to be appropriate relative to a subpoena demanding production of the non-party’s tax returns. *See Med. Weight Loss Clinic, Inc.*, 2008 WL 4813309, at \*1 (granting defendant’s motion for protective order and allowing defendant to produce tax returns during discovery in a confidential manner).

Under Federal Rule of Civil Procedure 45, the Court may quash a subpoena that seeks “disclosure of privileged or other protected matter” or “subjects a person to undue burden.” *See* Fed. R. Civ. P. 45; *Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc.*, No. 04-cv-74891, 2007 WL 1344183, at \*4 (E.D. Mich. May 4, 2007) (quoting Fed. R. Civ. P. 45(c)(3)(A)(iii)).

WHEREFORE, non-party Donald H. Rowe moves for the entry of a motion to quash the Subpoena and for such other relief as is just and proper.

**Certificate of Compliance with Local Rule 3.01(g)**

Pursuant to Local Rule 3.01(g), the undersigned certifies that counsel for Mr. Rowe has attempted to confer in good faith with the Receiver. Counsel for Mr. Rowe agreed to accept

service of the Subpoena on November 19, 2010, and has informed counsel for the Receiver that Mr. Rowe expects to be able to provide a response to the Subpoena by December 10, 2010.

Counsel for the Receiver has refused to accept the same.

DATED: November 19, 2010.

s/ Edward O. Savitz  
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Attorneys for Donald H. Rowe

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on November 19, 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/ Edward O. Savitz  
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