

**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, by and through undersigned counsel and pursuant to Federal Rules of Civil Procedure 26 and 45, moves for the entry of a protective order relative to Burton Wiand's ("Wiand") second subpoena to Mr. Rowe (the "Subpoena"). See Subpoena, **Exhibit 1**. Specifically, Mr. Rowe seeks an Order protecting from discovery all documents and information protected by the attorney-client or work product privileges, and prohibiting Wiand from obtaining pre-judgment asset discovery from Mr. Rowe or the Rowe non-parties.

BACKGROUND

1. On January 21, 2009, the Securities and Exchange Commission commenced the Enforcement Action against Arthur Nadel and the Receivership Entities and appointed 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 authorized Wiand as Receiver to

commence legal proceedings seeking disgorgement of profits and the recovery and/or avoidance of fraudulent transfers under.

2. On January 20, 2010, Wiand instituted a case captioned Wiand v. Rowe, Case No.: 8:10-cv-00245-EAK-MAP (the “Recovery Action”) against Mr. Rowe, his wife, and two entities (the “Rowe Defendants”).¹

3. In the Recovery Action, Wiand alleges that certain transfers to Mr. Rowe and the Rowe Defendants by the Receivership Entities should either be disgorged to on the theory of unjust enrichment or avoided as fraudulent transfers under Florida Statute § 726.101, et seq.

4. On August 18, 2010, this Court entered a judgment against Arthur Nadel in the Enforcement Action. (Doc. # 460.)

5. Although the Recovery Action filed by Wiand against Mr. Rowe and the Rowe Defendants is pending, Wiand has repeatedly sought and been permitted discovery in this Enforcement Action against Arthur Nadel.

6. In the instant Supboena to Mr. Rowe, Wiand seeks Mr. Rowe’s personal financial information and information protected by the attorney/client and work product privileges.

7. Mr. Rowe and certain of the Rowe non-parties are currently being sued by individual investors in lawsuits pending in Sarasota County, Florida (Case No.: 2009 CA 004925 NC) and the United States District Court for the District of New Jersey (Case No.: 2:10-cv-00921-PGS-ES).

8. The investors in these suits seek to recover from the same funds sought by Wiand in his Recovery Action against the Rowes (Case No.: 8:10-cv-00245-EAK-MAP).

¹ Formal discovery has not yet commenced in the Recovery Action and the Rowes’ response to the amended complaint is due on December 13, 2010.

9. Both sets of plaintiffs have requested copies of any documents provided to Wiand in this Enforcement Action. See Composite **Exhibit 2**.

10. Mr. Rowe seeks protection from the Subpoena, and protection is necessary both to prevent Wiand from obtaining such documents, and to prevent other investors who have sued Mr. Rowe individually from obtaining these documents, which otherwise would not be discoverable in those actions, from Wiand.

11. Counsel for Mr. Rowe has informed counsel for Wiand that defense of the investor suits represent a significant drain on any resources that may be available to satisfy a judgment that might be obtained by the Receivership and has requested that Wiand request a stay from this Court for that reason. See **Exhibit 3**.

12. Wiand has indicated that he will not move to stay the investor actions even though he does not dispute that the defense of those actions continues to dissipate Mr. Rowe's assets. Wiand instead has insisted that prior to entertaining the idea of filing a motion to stay, Mr. Rowe and his wife must lay their personal finances bare for his perusal.

MEMORANDUM OF LAW

In this motion, and without waiving any previous objection,² Mr. Rowe objects to the Subpoena to the extent that it seeks pre-judgment asset discovery and documents or information protected by the attorney/client and work product privileges.

First, Mr. Rowe seeks an order protecting from disclosure any documents or information which are protected by the attorney/client and/or work product privileges. Wiand does not dispute that an attorney/client or work product privilege may exist with respect to documents

² The Rowes have previously objected to Wiand's attempts to obtain asset or financial discovery related to them in secret, and have argued that once Wiand filed a complaint against the Rowes, then that action is the appropriate case in which he should carry out any duty to identify and recover purported assets of the Receivership that are alleged to be in the Rowes' possession.

sought by this Subpoena. Mr. Rowe has indicated his intent to provide Wiand with a privilege log, and raises this objection to production of attorney client or work product privileged documents or information in an abundance of caution should Wiand later seek disclosure of documents notwithstanding Mr. Rowe's assertion of such a privilege.

Second, Mr. Rowe seeks an Order protecting him from improper pre-judgment asset discovery. The instant Subpoena contains numerous requests for documents that would reveal the present state of Mr. Rowe's finances. Several of the requests are exclusively targeted to pre-judgment asset discovery. For example, the requests seek documents "evidencing, reflecting, or relating to"

- "Any asset or anything else of value owned by you, Joyce Rowe, or any other member of your household, directly or indirectly, and any asset which is subject to your or Joyce Rowe's possession, enjoyment, or control, regardless of whether legal title or ownership is held by a relative, trustee, lessor, or any other intermediary." Request "f".
- "Any 401(k) plan, pension plan, Keogh plan, individual retirement account, profit sharing plans, thrift plan, or similar plan or account in which you or any of the Rowe Entities has an interest, vested or otherwise." Request "h".
- "Any 401(k) plan, pension plan, Keogh plan, profit sharing plan, thrift plan, or similar plan associated with any of the Rowe Entities." Request "j".
- "Any transfer of any asset or other item of value, or transfer of any interest in any asset or item of value, from you, any of the Rowe Entities, or anyone else at the direction of you or any of the Rowe Entities to Joyce Rowe or any entity, trust, or anything else controlled by Joyce Rowe or in which Joyce Rowe has any interest." Request "d".

- Request “a” asks Mr. Rowe to identify all persons who have a stake or interest in his companies, and describe the nature or scope of that interest. The majority of the entities listed as “Rowe Entities” are not alleged to have had any involvement with the Receivership Entities.

In all, ten of the eleven document requests seek records that are entirely irrelevant to whether transfers were made by Mr. Nadel to Mr. or Mrs. Rowe or any entities controlled by either of them. Only request “k” seeks documents which may tend to demonstrate transfers of money “received by you or by any of the Rowe Entities from any of the Receivership Entities, Nadel, or the Moodys . . .”

With the possible exception of request “k”, the Subpoena seeks, and was plainly intended to seek, pre-judgment asset discovery showing Mr. Rowe’s current financial worth. As has previously been argued before this Court, Wiand does not have any claims against Mr. Rowe in this enforcement action against Arthur Nadel. For that reason the Rowe non-parties have sought protection from discovery that is plainly sought for use in a separate case. Mr. Rowe recognizes that this Court has permitted discovery in the past that purported to be in furtherance of Wiand’s efforts to discover transfers from Mr. Nadel. However, without waiving his previous objection to such discovery, Mr. Rowe asserts that what Wiand seeks in this Subpoena is different. Here, the Subpoena does not seek to discover evidence of transfers from the Receivership Entities. Rather, the Subpoena seeks documents that will show Wiand what Mr. Rowe’s financial worth is today. Such information is not relevant to, necessary, or even appropriate in Wiand’s claims against Mr. Rowe. Unless and until Wiand obtains a judgment against Mr. Rowe, Mr. Rowe’s present financial condition is not a proper subject of his inquiry.

Wiand's claims against Mr. Rowe are state law claims for fraudulent transfer and unjust enrichment. In Florida, there is a "substantive legal right" not to be subject to pre-judgment asset discovery except in very limited circumstances such as when the court has made a specific finding that there is a reasonable basis for recovery of punitive damages. See Globe Newspaper Co. v. King, 658 So. 2d 518, 520 (1995) ("We read section 768.72 to create a substantive legal right not to be subject to a punitive damages claim and ensuing financial worth discovery until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages."). For that reason, discovery requiring disclosure of documents and information relevant only to personal financial worth should be denied. Gruman v. Bankers Trust Co., 379 So. 2d 658, 659 (Fla. 3d DCA 1980) (interrogatory seeking every bank account owned by defendant found to be substantially overbroad in that it sought "personal financial information of a type ordinarily discoverable only in aid of execution after judgment has been entered."); see also Capco Properties, LLC. v. Monterey Gardens of Pinecrest Condo., 982 So. 2d 1211, 1213 (Fla. 3d DCA 2008), reh'g denied (June 16, 2008), review denied, 1 So. 3d 172 (Fla. 2009) (quashing trial court's order permitting discovery of financial statements, balance sheets, profit and loss statements, bank account records, etc. as "personal financial information that is ordinarily discoverable only in aid of execution after judgment has been entered").

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 entry of judgment is not permitted. 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 Subpoena here seeks documents that would reveal Mr. Rowe's current personal financial information to Wiand. The subject of Wiand's suit against Mr. Rowe relates to transfers that occurred years ago. As evidenced by the amended complaint in the Recovery Action, the latest alleged transfer occurred in 2007, with the majority of the alleged transfers

occurring between 2000 and 2005. See Wiand v. Rowe amended complaint, **Exhibit 4**. This Court has already permitted Wiand access to Mr. Rowe's bank records during the relevant time and years beyond. There is no allegation that Mr. Rowe has received any transfer from Arthur Nadel since April of 2007. Accordingly, discovery into his financial condition today is not relevant to claims that Mr. Rowe received transfers from Arthur Nadel no later than 2007. Moreover, such discovery serves no purpose other than to satisfy Wiand's burning curiosity about Mr. Rowe's current financial situation, or to justify the tremendous legal fees generated in pursuit of Wiand's claims against him.

WHEREFORE, non-party Donald H. Rowe, moves for the entry of a protective order protecting from discovery all documents and information protected by the attorney-client or work product privileges, and prohibiting Wiand from obtaining pre-judgment asset discovery from non-parties.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 3.01(g)

Pursuant to Local Rule 3.01(g), the undersigned certifies that she has conferred with counsel for the Receiver and has been informed that the Receiver opposes the relief sought herein.

DATED: December 2, 2010.

s/ Anne-Leigh Moe
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 2, 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/ Anne-Leigh Moe

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