

**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.

**RECEIVER'S OPPOSITION TO NON-PARTY DONALD
H. ROWE'S MOTION FOR PROTECTIVE ORDER (DOC. 544)**

On December 2, 2010, Donald H. Rowe ("Rowe") filed a Motion for Protective Order (the "Motion") (Doc. 544) relating to a subpoena issued by the Receiver to Rowe's counsel on November 3, 2010 (the "Subpoena"). (A copy of the Subpoena is attached as Exhibit 1). The Motion represents the sixth time (*see* Docs. 250, 279, 287, 416, 475) Rowe has sought to limit or prevent the Receiver's proper discovery efforts. The latest effort should be rejected like each of the previous ones. (*See* Docs. 267, 284, 301, 424, 481.)

BACKGROUND

The Subpoena essentially seeks five categories of information: (i) ownership, employees, and service-providers for Rowe's entities; (ii) transfers of Rowe's or his entities' assets to Rowe's wife; (iii) Rowe's and his wife's assets; (iv) the defined benefit pension plan for one of Rowe's entities (the Wall Street Digest) which Rowe controlled, and any other similar retirement plans; and (v) the transfers of funds received from Receivership Entities. The information sought by the Subpoena is discoverable by the Receiver and is necessary to protect the Receivership Estate and investors victimized by the Ponzi scheme underlying this case, many of whom were also defrauded by Rowe. Indeed, the information sought by the Subpoena is critical in light of Rowe's refusal to answer any substantive questions at his deposition on August 31, 2010, based on an asserted right against self-incrimination afforded by the Fifth Amendment to the U.S. Constitution (the few questions he answered related to his identity and mental capacity to testify).

The Motion requests a protective order barring production of (1) information protected by the attorney-client privilege and the Attorney Work Product doctrine and (2) information relating to Rowe's and his entities' assets, discovery which he wrongly contends constitutes "pre-judgment asset discovery." (Mot. at 4.) With respect to the first request, as the Motion concedes (*id.* at 3-4), the Receiver does not seek information that is privileged or otherwise protected from discovery.¹ With respect to the second request, the Motion

¹ Contrary to the Motion's representation, the Receiver has never indicated to Rowe that he "does not dispute that an attorney/client or work product privilege may exist with respect to documents sought by this Subpoena." (Mot. at 3-4.) In this regard, the Receiver's counsel merely informed Rowe's counsel that to the extent Rowe claims any privilege or

contends a protective order is warranted because (a) the Receiver is not entitled to that information and (b) investor-plaintiffs who filed two lawsuits against Rowe also are not entitled to it and they should not be allowed to obtain them with subpoenas to the Receiver. (*See Mot.* ¶¶ 7-10.)

Those arguments have been previously made, and rejected. Like the earlier efforts to frustrate the Receiver's discovery, the latest one also ignores the Receiver's obligations and duties, the nature and importance of Rowe's role in the Ponzi scheme underlying this action, and the fact that the Rowe Non-Parties received approximately \$9.4 million of Ponzi scheme proceeds. The financial information sought by the Subpoena is necessary to allow the Receiver to trace the Ponzi scheme proceeds transferred to Rowe, his wife (Joyce Rowe), an entity of his (Carnegie Asset Management, Inc.), and another of his entities' benefit plans (the Wall Street Digest Defined Benefit Plan) (collectively, the "Rowe Non-Parties"), to locate those funds, and to seek to freeze and recapture them.

As detailed in the Receiver's Opposition to Non-Party's Objections and Motion to Quash Subpoena Served on SunTrust Bank, Inc. (Doc. 420 at 3-14), Rowe solicited on behalf of Receivership Entities a large number of investors with material misrepresentations and omissions that amounted to securities fraud and by otherwise violating federal and state securities laws. The results of Rowe's fraudulent and otherwise unlawful conduct were devastating as many investors relied on Rowe's purported due diligence and consistently glowing recommendations of Nadel and Neil and Christopher Moody (the "Moody's"), which

other protection from disclosure for responsive documents, such documents must be entered on a privilege log.

were intentionally made to steer investors to Nadel and the Moodys. Indeed, the following excerpts of a very small sample of victim impact statements submitted in *United States v. Arthur Nadel*, Case No. 1:09-cr-433-JGK (S.D.N.Y.), provide an indication of the effects of Rowe's unlawful conduct:

- A 76-year old widower who worked from the age of 11 and invested in the scheme at the recommendation of Rowe wrote, in relevant part: "I also took comfort in the recommendation of . . . Rowe, who had strongly recommended the Viking Funds and vouched for the veracity of the Viking Funds operation."
- Husband and wife investors in their late 70s who were counting on their investment with Receivership Entities to supplement their social security and "limited pension" wrote, in relevant part: "[we] were introduced to [Nadel] . . . by Don Rowe [O]n 6/20/03 we called his office to hear from him that 'after 26 years of reviewing the track records of over 11,000 mutual funds, 6000 money managers and 5,800 hedge funds, Nadel's computerized investment program has produced the best track record and most consistent returns I have ever seen.' What he had introduced us to was still enthusiastically recommended by him."
- Another tandem of husband and wife investors in their mid- and late-70s who suffer from a number of health issues wrote: "when [the husband] realized that Mr. Donald Rowe . . . had recommended [Nadel] as the #1 investing group in the USA, he felt safe in [investing]." The statement ends by noting, "As for our last few years, the word is SURVIVAL, NOT ENJOYMENT!!!!" (Emphasis in original.)

For those unlawful activities, Rowe Non-Parties received approximately \$2.7 million in Ponzi scheme proceeds. They also received another approximately \$6.7 million of Ponzi scheme proceeds in connection with their investment in the scheme.² The information sought

² With respect to Ponzi scheme proceeds received by Rowe Non-Parties, the Motion states the Receiver "alleges that certain transfers to Mr. Rowe and the Rowe Defendants by the Receivership Entities should" be recovered. (See Mot. ¶ 2 (emphasis added).) This statement is wrong. In light of Rowe's unlawful conduct, the Receiver seeks every transfer of Ponzi scheme proceeds to him and the rest of the Rowe Non-Parties.

by the Subpoena is directly relevant to the Receiver's Court-imposed duties to recover those funds, and the protective order sought by Rowe would significantly interfere with those efforts to the detriment of the Receivership Estate. Indeed, possible harm to the Receivership Estate is underscored by the privilege log submitted by the Rowe Non-Parties *in camera* on December 6, 2010, which reflects a significant amount of "estate planning" and what appear to be other asset-preservation activities which could very well be directed at hiding Ponzi scheme proceeds received by the Rowe Non-Parties.

ARGUMENT

I. INFORMATION SOUGHT BY THE SUBPOENA IS PROPERLY DISCOVERABLE BY THE RECEIVER

As noted above, the Subpoena essentially seeks information falling in the following five categories: (i) ownership, employees, and service-providers for Rowe's entities; (ii) transfers of Rowe's or his entities' assets to Rowe's wife; (iii) Rowe's and his wife's assets; (iv) the defined benefit pension plan for one of Rowe's entities (the Wall Street Digest) which Rowe controlled, and any other similar retirement plans; and (v) the transfers of funds received from Receivership Entities. The Motion only seeks a protective order with respect to information regarding the Rowe Non-Parties' financial information, which the Motion broadly characterizes as "pre-judgment asset discovery."³ That characterization is wrong

³ Although the Rowe Non-Parties recently produced other information responsive to the Subpoena, that production revealed another disturbing problem. Specifically, a large quantity of information that was recently produced was unquestionably responsive to a subpoena served on Rowe by the Receiver in March 2009. In response to that subpoena, Rowe produced a very limited quantity of information and represented that other responsive documents were "purged" in 2003 or "thrown away" in 2006. His recent production shows those representations were, at best, misleading.

because the financial information sought by the Receiver is directly relevant to his court-imposed efforts to trace and recover Ponzi scheme proceeds which are under the Rowe Non-Parties' control. As the cases cited in the Motion show, the Receiver is entitled to all relevant discovery even if it involves information about the Rowe Non-Parties' financial condition.

A. The Information Sought By The Receiver Is Directly Relevant To His Court-Imposed Obligation To Trace And Recover Ponzi Scheme Proceeds

The Rowe Non-Parties received approximately \$9.4 million of Ponzi scheme proceeds under circumstances that involved unlawful conduct. *See generally* Doc. 420 at 6. The Order Reappointing Receiver (Doc. 493) authorizes and, indeed, directs the Receiver to trace those funds to the Rowe Non-Parties' accounts and to where ever else they may have been moved. In relevant part, aside from directing the Receiver to “marshal and safeguard all of the assets” of the Receivership Entities and “take whatever actions are necessary for the protection of the investors” (Doc. 493 at 1), the Order Reappointing Receiver imposes on the Receiver a duty to “institute such . . . legal proceedings, for the benefit and on behalf of the Receivership Entities and their investors and other creditors as the Receiver deems necessary . . . against any transfers of money or other proceeds directly or indirectly traceable from investors in the Receivership Entities . . .” *Id.* ¶ 2. It also directs the Receiver to “apply to this Court for an Order giving the Receiver possession of” funds of “persons who have invested in the Receivership Entities [that] have been transferred to other persons or entities.” *Id.* ¶ 23.

Contrary to Rowe’ assertions, the Receiver does not seek “pre-judgment asset discovery” or “attempt to obtain early discovery of confidential information” for use in the clawback case against the Rowe Non-Parties. Rather, the pertinent financial information sought by the Subpoena is necessary to discover the location of large amounts of Ponzi scheme proceeds received by the Rowe Non-Parties so the Receiver can try to freeze those funds and preserve them for the Receivership Estate. *See, e.g., Rosen v. Cascade Int’l, Inc.*, 21 F.3d 1520, 1527 (11th Cir. 1994) (noting that assets in defendant’s possession are subject to freeze when they are the subject of litigation, are specifically identified, and the freeze would preserve the *status quo*). Such efforts are especially warranted here because information previously obtained by the Receiver from financial institutions shows suspicious transfers of money between Rowe, his wife, and his entities’ accounts. For example, Rowe and his wife deposited \$4,488,384.97 from the Hedge Funds into accounts at Fidelity Investments. (*See* Doc. 421 ¶ 24.) In April 2009, only three months after the scheme collapsed, Rowe transferred over \$1 million from his Fidelity account to his wife’s Fidelity account. (*Id.*) The following month, Mrs. Rowe moved \$1.2 million from her Fidelity account. (*Id.*) More recent information obtained by the Receiver from those financial institutions also shows significant transfers between Rowe, his wife and his entities throughout 2010. And as noted above, suspicious activities with respect to those funds are also reflected in the Rowe Non-Parties’ privilege log.

B. Rowe Has Admitted That He Is In Possession Of Ponzi Scheme Proceeds

Effectively, Rowe admitted in an action brought against him and some of his entities by certain Ponzi scheme investors in federal court in the District of New Jersey that he is in

possession of Ponzi scheme proceeds. One of the arguments raised in Rowe and his entities' motion to dismiss that action was for improper venue, in support of which they argued that this Court is the appropriate forum for that action. *See* Br. in Support of Defs' Mot. to Dismiss Am. Compl. at 29-30, attached as Ex. 2. Significantly, in considering that argument, Rowe and his entities asserted the court should consider "the fact that under [the Order Appointing Receiver] . . . , Mr. Rowe and CAM are likely unable to satisfy any judgment without risk of being held in contempt of court by Judge Lazzara [sic], or being subject to expansion of the Receivership" Ex. 2 at 29. They also asserted that case should be stayed pending resolution of the cases in this Court. (*See* Ex. 2 at 30-31.) Citing the Order Appointing Receiver, that motion explained that the Order Appointing Receiver (*id.*):

enjoined "all persons" from "prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Defendants or Relief Defendants," and prohibited "any person or entity" from exercising "any form of self-help whatsoever." . . . Furthermore, Judge Lazzara prohibited any investor from transferring funds to other persons or entities. . . . If an investor transfers funds that may belong to the receivership, then the Order appears to permit the receiver to take possession of those funds and seek expansion of the receivership over those investors. . . .

All of the parties to this case face the potential of being held in contempt of court, having the funds seized from plaintiffs, or having the receivership expanded over defendants and plaintiffs if defendants were to attempt to resolve payment of plaintiffs' claims here, or if they attempted to satisfy any judgment rendered by this court.

. . . . Accordingly, if this case is not dismissed or transferred, then a stay is necessary to ensure compliance with Judge Lazzara's Order.

All of these arguments are premised on Rowe and his entities' current possession of Ponzi scheme proceeds. *See, e.g.*, Doc. 493 ¶ 23.

CONCLUSION

For these reasons, Non-Party Donald H. Rowe's Motion for Protective Order (Doc. 544) should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 9, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that a copy of the the foregoing document and the notice of electronic filing will be mailed by first-class mail on December 10, 2010, to the following non-CM/ECF participants:

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