EXHIBIT J

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BURTON W. WIAND, as Receiver for VALHALLA INVESTMENT PARTNERS, L.P.; VIKING FUND, LLC; VIKING IRA FUND, LLC; VICTORY FUND, LTD.; VICTORY IRA FUND, LTD.; and SCOOP REAL ESTATE, L.P.,

Plaintiff,

v.

BRIAN L. MEEKER, as Trustee for the BRIAN L. MEEKER TRUST dtd 12/06/1991

Case No.: 8:10-cv-166-T-17MAP

Defendant.

BURTON W. WIAND, as Receiver for VALHALLA INVESTMENT PARTNERS, L.P.; VIKING FUND, LLC; VIKING IRA FUND, LLC; VICTORY FUND, LTD.; VICTORY IRA FUND, LTD.; SCOOP REAL ESTATE, L.P.; and TRADERS INVESTMENT CLUB,

Plaintiff,

v.

SAMUEL ROSS MORGAN III,

Case No.: 8:10-cv-205-T-17MAP

Defendant.

VERNON M. LEE, individually and as Trustee of the VERNON M. LEE TRUST,

Case No.: 8:10-cv-210-T-17MAP

Defendant.

MARK MASON and CLARISSE MASON,

Case No.: 8-10-cv-2146-T-17MAP

Defendants.

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AMENDED RESPONSE IN OPPOSITION TO THE RECEIVER'S RENEWED AND SUPPLEMENTED OMNIBUS MOTION FOR PARTIAL SUMMARY JUDGMENT

"Not all securities frauds are Ponzi schemes."
- Edith H. Jones, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, *American Cancer Society v. Cook*, 675 F.3d 524, 526 (5th Cir. 2012).

Defendants[1], through undersigned counsel, oppose the Receiver's 25-page Renewed Omnibus Motion for Partial Summary Judgment as supplemented (the "Motion")[2], for which the Court need only address four straightforward issues:

1. **Arthur Nadel's Statements Do Not Prove a Ponzi Scheme.**

2. **Ms. Yip's Declaration Does Not Prove a Ponzi Scheme.**

3. **Mr. McFarland's Report Shows a Ponzi Scheme Cannot Be Proven for Several Early Years of the Hedge Funds and Traders Club.**

4. **Arthur Nadel's Statements Do Not Prove a Blanket FUFTA violation.**

ARGUMENT

The Receiver's primary argument is that (1) Arthur Nadel ("Nadel") operated a Ponzi scheme (a "Ponzi"), therefore: (2) all the Hedge Funds' transfers were made with actual intent to hinder, delay or defraud any creditor, and (3) the Hedge Funds were insolvent. However, because Nadel's plea (the "Plea") and Maria A. Yip ("Yip") fail to establish a Ponzi, and Harold McFarland ("McFarland") reveals the absence of Ponzi proof, the Receiver's entire Ponzi-based argument collapses. The Receiver's alternative argument that Nadel's "scheme to defraud" establishes actual fraud regardless of a Ponzi is a complete distortion of the facts because nothing in Nadel's Plea specifies how many of the Hedge Funds his fraud initially impacted, to what extent and what times the fraud spread, and when that fraud actually came to impact each transfer at issue in these cases.

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[1] Vernon M. Lee, individually and as Trustee of the Vernon M. Lee Trust, Samuel Ross Morgan, Brian Meeker as Trustee for the Brian Meeker Trust, and Mark and Clarisse Mason (collectively the "Defendants").

[2] (Doc. 61) in Case No.: 8-10-cv-210-T-17MAP, Samuel Ross Morgan III, as supplemented by Supplemental Declaration by Morello (Doc 65); Declaration by Moody (Doc 66), Supplemental Declaration by Yip (Doc 69), and further revisions to Yip Declaration (Doc 82)

1. **Nadel's Statements Not Only Fail to Prove the Receiver's Ponzi Claim But Actually Disprove It.**

The Receiver's reliance on the Plea is misplaced because the Plea not only fails to articulate the facts necessary to satisfy the Eleventh Circuit's required elements of a Ponzi but instead those facts actually contradict the elements the Receiver must establish. "In the Eleventh Circuit, to prove the existence of a Ponzi scheme, the [Receiver] must establish that:

"(1) deposits were made by investors;

(2) the [Receivership Entities] conducted little or no legitimate business operations as represented to investors;

(3) the purported business operations of the [Receivership Entities] produced little or no profits or earnings; and

(4) the source of payments to investors was from cash infused by new investors." *In re Pearlman*, 440 B.R. 900, 904 (Bankr. M.D. Fla. 2010) (citing *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299, 1312 (M.D. Fla. 2009) (denying summary judgment for failure to prove the above four elements)).

A) **Nadel's Plea Does Not Support the Receiver's Ponzi Claim.**

Nadel's Plea does not admit the facts necessary to establish the elements of a Ponzi, especially with regard to the requisite paucity of business operations and profits, and that payments to investors came directly from the contributions of new investors. The Motion fails to make any direct comparison from the statements made in Nadel's Plea hearing (the "Plea Hearing") to each of the requisite elements of a Ponzi in the Eleventh Circuit. Instead of explaining how exactly these facts satisfy the elements of a Ponzi, the Motion makes a sweeping conclusion that a Ponzi is established without providing this Court the benefit of any analysis to substantiate this claim. The first statement the Motion

uses is that Nadel "knowingly and fraudulently obtained money from investors in connection with the operation of the Hedge Funds." (Mot. at 14) At best, this is the only statement that is probative of a Ponzi, but it only relates to the first element: deposits were made by investors.

Second, the Receiver uses the fact that Nadel "converted investors' money for his own use." (Id.) This fact is wholly unrelated to a Ponzi and contributes less to the elements of a Ponzi than it would the elements of theft or conversion. The Motion's third section references that Nadel "fabricated the Hedge Funds' high rates of return and net asset values." (Id.) Again, this is not one of the elements of a Ponzi in the Eleventh Circuit. This may be a method for promoting a Ponzi that did (i) no legitimate business, (ii) never made any actual gains and (iii) paid old investors with money from new investors. However, there is nothing in the Plea that indicates this was done.

Fourth, the Motion cites the communication of fabricated results to induce "investors to invest and keep their money in the funds." (Id.) Yet, this is still nothing other than the basic premise for all standard frauds that promise something valuable to entice participants. But, not all frauds are Ponzis. The Motion further cites to Nadel's wiring of transfers between accounts to "facilitat[e] and conceal[ ] the scheme to defraud" that he described above. (Id.) Again, this statement is not directly tied to any of the four Ponzi elements required in the Eleventh Circuit. Instead, this act is more uniquely tied to wire fraud, in which the "accused (1) participated in a scheme to defraud; and (2) used the wires to further the scheme." (18 U.S.C.A. § 1342). However, the elements of wire fraud are not the elements of a Ponzi. All the statements relied upon by the Receiver

establish nothing more than general fraud and fail to make any progress towards proving three of the four requisite elements of a Ponzi.

The Receiver appears to be falling victim to a common logical fallacy in which one mistakenly believes that by identifying a particular group they have also identified a specific member of that group. An analogous flaw would be if the Receiver identified an animal as possessing the characteristics shared by all dogs and by doing so believes he has specifically identified a poodle. This unjustifiably excludes all other species of dog that equally possess the same characteristics identified. Likewise, by identifying the characteristics of a fraudulent scheme, the Receiver believes he has identified a specific species of fraud, a Ponzi. However, like the dog example, the Receiver has unjustifiably excluded all other species of fraud and has failed to show the unique characteristics necessary to establish a Ponzi. *See Smith v. Quintiles Transactional Corp.*, 509 F. Supp. 2d 1193, 1201 (M. D. Fla. 2007) ("conclusory allegations and unwarranted deductions of fact are not accepted as true" on summary judgment.) (citing Judge Kovachevich's order in *Edison v. Arenas*, 837 F. Supp. 1158, 1160 (M. D. Fla. 1993)).

B) <u>Nadel's Plea Actually Disproves the Receiver's Ponzi Claim.</u>

Nadel's Plea not only fails to prove the Receiver's Ponzi claim but actually directly disproves it because Nadel specifically states the fraud began years later than when the Receiver alleges, and that Nadel conducted legitimate business operations in which substantial profits were made. *In re Dwek*, 2011 WL 182847, *2 (Bankr. D.N.J. 2011) (Denying summary judgment because "[t]he Court must draw all inferences in favor of the nonmoving party and that means that even if it must infer that if a Ponzi

scheme existed, it is not clear when it commenced." This finding was based upon conflicts between timing established by plea and other statements of perpetrator.)

The Receiver alleges the Plea establishes that Nadel operated a Ponzi from 1999 to 2009, (Mot. at 12, I.B.), but in his Plea, Nadel actually states that his fraud began in 2002 (WD[3] Ex. O, p. 30-31) (Attached as Exhibit A). Nadel described his fraud as "[b]eginning in about 2002 . . ." (Id.) Yet, the Receiver, without reason or even attempting an explanation, alleges that this statement supports the existence of a Ponzi from 1999 to 2009. (Mot. at 12)

It is impossible to reconcile Nadel's above contradiction of the Receiver's claim that the fraudulent scheme began in 1999, much less a Ponzi. *Lucas v. Paige*, 435 F. Supp. 2d 165, 171-172 (D.D.C. 2006) ("[t]hat a statement admits of more than one interpretation in itself suggests that there is a genuine issue of material fact as to its meaning . . . . the question must be presented to the jury for final resolution.")

The Court is without recourse other than to deny the Receiver's request for summary judgment on this matter. It is not the Court's place to "weigh" or "evaluate" the evidence in an attempt to dissect the Receiver's summary judgment request or refashion it to match the evidence he mistakenly characterizes as support. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2511 (1986) (". . . at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial); *Mize v. Jefferson City Bd. of Educ.*, 93 F. 3d 739, 743 (11th Cir. 1996) (at summary judgment "[i]t is not the court's role to weigh conflicting evidence or to make credibility determinations.") On

[3] Declaration of Burton W. Wiand as Receiver, Doc. 62 in 8:10-cv-205.

this basis alone, it is clear that the Plea not only fails to support the elements of a Ponzi but also creates a critical fact issue as to Nadel's general fraud - in what year did it begin?

Furthermore, Nadel's Plea represents that Nadel actually performed legitimate business operations and made substantial profit from those operations, in direct contradiction to two of the required elements of a Ponzi. In his Plea, Nadel states:

> Acting as a trader I purchased and sold securities for the funds. Most of the trades were made through the New York, New York offices of Shoreline Trading Company, an affiliate of Goldman Sachs. Most of my trades involved buying and selling an exchange traded fund listed on the National Association of Securities Dealers Automated Quotations that was intended to track the NASDAQ index. (Exh. A: WD Ex. O, p. 30)
>
> I fabricated inflated rates of return from my trading activities and fabricated the net asset value of each of the funds. (Id.)

Nadel provided a detailed account of his trading activities and represented that he "inflated" his rates of return. First, Nadel recounts with specificity a substantial amount of actual and legitimate trading, in direct contrast to the Ponzi element of "little to no legitimate business operations." *See In re Slatkin*, 310 B.R. 740, 746-47 (C.D. Cal. 2004) (Slatkin "did not invest the vast majority of investor funds he received during this time . . . "). Whereas here, Nadel did invest all the monies he received except the amounts paid in fees. Second, Nadel declared that he "inflated" rates of return. He did not say there were not any rates of return only that they were "inflated." This further demonstrates the presence of legitimate business operations and defeats the third Ponzi element of "little or no profits." In order to be a Ponzi, Nadel's fraud cannot bear the above counter-Ponzi

characteristics of legitimate business operations in substantial trading and the actual return of significant real profits from those trades.[4]

Indeed, it is remarkable that even though Nadel worked with the Receiver and met with his attorneys to assist in the Receiver's lawsuits, Nadel still did not plead to facts necessary to establish a Ponzi. In Nadel's sentencing hearing it was noted that:

> As soon as counsel satisfied themselves that this was a case that needed ... a guilty plea, Mr. Nadel has actively aided the receiver in identifying and pursuing assets . . .[;] Mr. Nadel has also met on a number of occasions with the receiver and his lawyers and come here [sic] New York and met with him . . . and he has discussed with them, helped them with their lawsuits against other parties . . . he remains committed to continue to help the receiver do whatever he can to recover funds for the investors. Mr. Wiand, the receiver, has recognized Mr. Nadel's help. He sent a letter to the Court which details various . . . factual ground work for the help that Nadel has provided the receiver.

(WD Ex. R, p.10:5-11:17) (Attached as Exhibit B) Nadel conferenced with the Receiver and his attorneys on a "number of occasions" to provide all the help he could to "recover funds for the investors." (Id.) If Nadel had run a Ponzi, it is reasonable to conclude that the Receiver would have made certain that Nadel clearly and unambiguously articulated the requisite elements of a Ponzi in the very Plea that the Receiver now desperately clings to as his chief evidence of a Ponzi. Yet, Nadel's plea stands in stark contrast to that in *In re Slatkin*, in which Slatkin specifically admitted a "Ponzi" and articulated a primary distinguishing characteristic of a Ponzi - "he defrauded his investors by paying them returns largely with funds raised from other investors." 310 B.R. at 746-47. Not only does Nadel's Plea never use the word "Ponzi," but he never even articulates facts that describe any of the characteristics unique to a Ponzi. Indeed, almost nothing in Nadel's

[4] The Receiver may attempt to argue that simply establishing some legitimate business and profits is not inconsistent with a Ponzi; however, the situation here is that there was a very large amount of legitimate business operations and substantial profit gained from that business, which is inconsistent with a Ponzi.

Plea supports the requisite Ponzi elements. The safest interpretation of this evidence is that the elements of a Ponzi simply did not exist or else Nadel would have aided the Receiver by describing them in the Plea.

Moreover, despite Nadel working with the Receiver, the Receiver was not able to get Nadel to sign a civil affidavit attesting to the facts the Receiver needed to establish the guilty plea. The Receiver does not have any direct testimony from Nadel admitting to the Ponzi scheme.

Therefore, nothing in the Plea establishes a Ponzi, and the Receiver's reliance on numerous cases to support this proposition is misapplied. The Receiver attempts to bootstrap his argument by blending the admitted facts in the Plea to include the facts in the Indictment. However, this contradicts statements at the Plea Hearing and the law. *United States v. Morales-Martinez*, 496 F.3d 356, 359 (5th Cir. 2007) (the effect of the guilty plea is determined by the jurisdiction in which the plea was entered); *United States v. Bloom*, 945 F.2d 14 (2d Cir. 1991) (only those facts essential for conviction of the crime subject to the plea are admitted by the plea).

C) Cases Cited by the Receiver in Support of a Plea Establishing a Ponzi Are All Obviously Distinguishable.

The Receiver also cites a number of cases to support his argument that the Plea establishes a Ponzi, but all these cases are distinguishable because, unlike Nadel, their pleas either expressly state a Ponzi existed or admit to specific facts so uniquely identifiable with a Ponzi that a Ponzi is described in detail even if not named. *See In re Slatkin*, 310 B.R. at 746-47 (Slatkin's plea explicitly admitted a "Ponzi" and described the unique characteristics of a Ponzi); *In re McCarn's Allstate Fin., Inc.*, 326 B.R. 843, 851 (Bankr. M. D. Fla. 2005) (Because McCarn pled directly to the indictment, the court was

able to use the uniquely Ponzi characteristic identified in the indictment: "investors' funds were used to make interest and principal payments on promissory notes previously issued to other investors."); *In re Financial Federated Title and Trust, Inc.*, 347 F.3d 880, 882 (11th Cir. 2003) ("However, the solicitations from investors was part of an elaborate Ponzi scheme to defraud, whereby investors were paid solely from the funds received from other investors and not from the proceeds of viatical settlements . . ."); *In re Bayou Group, LLC*, 439 B.R. 284, 306-07 (S.D.N.Y. 2010) (Ponzi found because the plea's facts established "the use of new investors' money to pay off redeemers" which was not "contradicted in any fashion by Appellants."). As discussed above, that is clearly not the case with Nadel.

D) Nadel's Writings Do Not Support But Contradict the Receiver's Ponzi Claim.

The additional writings of Nadel submitted by the Receiver in a supplemental filing not only fail to support the Receiver's Ponzi claim but actually contradict it.

In *The Shredded Letter*, Nadel claims that he believed he could trade his way out of this mess and only in 2008 did he accept that he could not. (Moody Decl. Ex. 2 at 2, ¶2) (Attached as Exhibit C) If Nadel was trying to trade his way out through 2008, this directly conflicts with other evidence presented by the Receiver, and that alone prevents summary judgment. First, the fact that Nadel was trading so heavily to achieve these gains again demonstrates he was engaged in substantial legitimate business operations. Second, the fact that Nadel believed he could trade his way out of losses indicates that he must have made significant gains or he would never have had this hope. This evidence of gains again defeats the third Ponzi element, that no profit was being made.

In the *Letter to Family*, Nadel claims that he believed he could trade his way out of his situation, and this again indicates that he has engaged in trading, proving legitimate business operations, and he was making enough that he hoped to making up his losses, proving that gains were being made. (Id. Ex. 3 at 2) While this may demonstrate a fraud, it does not demonstrate a Ponzi. Nadel also claims that he put all his "remaining money" towards covering redemptions. This statement establishes that some redemptions were not being covered by new investors but Nadel's own money, in direct conflict with the fourth element of a Ponzi. (Id.)

In the *Confidential Memo*, Nadel claims that at first moderate profits were made, his fraud "started in a small way," that he "would make some advances and then take more losses," and that he used money from his personal trading accounts to cover withdrawals. (Id. Ex. 4 at 3) These statements again show that legitimate trades and gains were being made and that withdrawals were covered by Nadel's personal money not new investors. Finally, Nadel describes his fraud as starting "small" which calls into question: how small? And how long did it take for the fraud to impact all the Hedge Funds? Not only do these statements by Nadel defeat the Receiver's Ponzi claim, but they even create more questions that require this Court deny the Motion.

Because Nadel's writings only generate conflicts in evidence and differing interpretations as to their meaning, the Court must deny the Motion and allow this evidence to be evaluated by a jury.[5] *Lucas,* 435 F. Supp. 2d at 171 ("[t]hat a statement

[5] Even if a Ponzi was established, the Receiver completely ignores the necessity that each transfer must be individually proven to have been in furtherance of the Ponzi. *See In re World Vision Entertainment, Inc.*, 275 B.R. 641 (Bankr. M. D. Fla. 2002) (finding that transfers in a Ponzi were only avoidable to the extent they were in furtherance of the Ponzi); *In re Phoenix Diversified Investment Corp.*, 2011 WL 2182881, *4 (Bankr. S.D.Fla. 2011) (summary judgment denied because "the Court cannot find that the purchase of items from the defendant was in furtherance of the alleged Ponzi scheme."); *see also In re Manhattan Investment Fund, Ltd., et al.*, 397 B.R. 1 (S.D.N.Y. 2007); *In re ATM Financial Svcs, LLC*, 2011 WL

admits of more than one interpretation in itself suggests there is a genuine issue of material fact as to its meaning, for summary judgment purposes.")

2. Yip's Declaration is Not Only Unreliable But Fails to Prove a Ponzi Regardless.

Yip's declaration filed in support of the Motion ("Yip's Declaration" or "YD")(attached as Exhibit D) is unreliable because she lacks the requisite expertise in hedge funds to provide a useable opinion. Further, her declaration fails to prove a Ponzi regardless. The Receiver relies on Yip to bolster the Ponzi arguments he makes in reliance upon the Plea. However, because Yip is insufficiently qualified in this area and her declaration defeats a Ponzi anyway, the Receiver's already shattered Plea-based arguments cannot be restored by Yip.

A) Yip Has No Expertise in Relation to Hedge Funds

The determination of a Ponzi in this case requires analysis of the movement of money in the Hedge Funds which obviously requires *expertise* in the movement of money in hedge funds. Yet, as reflected in the transcript attached as Exhibit E, Yip conceded in her deposition that she does not "have any background or experience in the operation of hedge funds" or "training in the operation of investment funds." (Yip Tr. 81:8-16) Because the Court may not consider facts that "cannot be presented in a form that would be admissible evidence" and Yip's opinion lacks the requisite expertise for admissible expert evidence, the Court should exclude her declaration from consideration of the Motion. Fed. R. Civ. P. 56(c)(2); Fed. R. Evid. 702 ("Testimony By Experts"); *Fedor v. Freightliner, Inc.*, 193 F. Supp. 2d 820, 828 (E.D. Penn. 2002) ("Specialized knowledge alone, however, is not sufficient to satisfy Rule 702. The Rule also requires

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2580763 (Bankr. M.D.Fla. 2011). Because the Receiver presents absolutely no evidence on this point, the Motion should be denied even if this Court finds a Ponzi is proven.

the witness to have specialized knowledge relating to the area of testimony. In other words, the specialized knowledge must be relevant to the area of inquiry") (internal quotes omitted) (citing *Elcock v. Kmart Corp.*, 233 F. 3d 734, 741 (3d Cir. 2000)); *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

It is impossible to separate the value of Yip's analysis from its inherent unreliability created by her lack of expertise. The ability to exercise a sophisticated analysis of hedge fund operations is inextricably intertwined with any Ponzi analysis that might be performed on the Hedge Funds. According to the Securities and Exchange Commission ("SEC"), hedge funds "pool investors' money and invest those funds in financial instruments in an effort to make a positive return. Many hedge funds seek profit in all kinds of markets by pursuing leveraging ... " SEC (Sept. 11, 2012) http://www.sec.gov/answers/hedge.htm. Similarly, Yip's declaration states that

> Nadel pooled and commingled investors' monies regardless of with which Hedge Fund the monies had been invested. Nadel not only comingled the monies in these accounts, he would also transfer funds into brokerage accounts as necessary in order to have sufficient funds from which to pay redemptions. These funds would be transferred from the Hedge Fund brokerage account to the Hedge Fund bank account from which the investor would receive his or her redemption.

(YD p. 19, ¶58) It is impossible to question Yip on whether and to what extent the behavior she describes in her declaration is a legitimate operation of hedge funds versus a Ponzi operation because she simply does not know. Furthermore, Yip's description also sounds similar to the SEC description of a "family of funds" as a legitimate "group of mutual funds that share administrative and distribution systems." SEC (Sept. 11, 2012) http://www.sec.gov/investor/pubs/inwsmf.htm. "Each fund in a family may have different investment objectives and follow different strategies." (Id.)(*See also* McFarland

Transcript 233:6-234:18 attached as Exhibit I) However, Yip is completely without the ability to distinguish aspects of the Hedge Funds' operations which may indeed be legitimate, legal and normal from those aspects which were abnormal or even illegal. What she perceives to be abnormal, i.e. indicative of a Ponzi, may in fact be a usual and common practice typically exercised by hedge funds. By her own admission, Yip would not know the difference because she does not possess sufficient expertise to recognize those differences.

Furthermore, Yip not only lacked expertise in but simply could not define the concepts of leverage and mark-to-market practices, which are central to the operation and accounting of hedge funds. When asked if she was familiar with the term mark-to-market Yip replied: "I have heard the term, but I'm not familiar with it." (Yip Tr. 149:17-22) When asked if she was familiar with leveraging Yip replied: "I'm not familiar with that, with leveraging." (Yip Tr. 89:13-20) Leverage is "defined in balance-sheet terms" as a "ratio of assets to net worth" and "in terms of risk" as "a measure of economic risk relative to capital." *Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management* [LTCM], Report of the President's Working Group on Financial Markets (April 28, 1999), p. 4, available at http://www.treasury.gov/resource-center/fin-mkts/Documents/hedgfund.pdf. The typical hedge fund will use margin to obtain leverage. The practice of margining is "borrowing money from your broker to buy a stock and using your investment as collateral." SEC (Sept. 11, 2012) http://www.sec.gov/investor/pubs/margin.htm. Hedge funds will also "obtain . . . leverage through the use of repurchase agreements, short positions, and derivative contracts." LTCM at 4. In addition, hedge funds use mark-to-market practices, that is "periodically valuing

positions at current market prices" which when used to manage "collateral and variation margin to mitigate credit risk can impose cash flow and liquidity strains." LTCM at 4. This situation may make it difficult to cover an investors' distribution from a fund which will require the distribution to be covered by a more liquid asset which may be held in another fund within the fund family. The debit against that account would be repaid when the margined or otherwise leveraged assets become useable.

All these techniques impact the accounting analysis of a hedge fund and especially multiple hedge funds. These techniques will impact the stated value of funds versus the actual amount of money in accounts. Hedge funds may move money between the funds to employ their creative trading strategies. However, all this is entirely beyond the expertise of Yip. Consequently, it is impossible to know whether her analysis is accurate because her perception of these various activities is likely to be incorrect due to her lack of knowledge on these issues.

Additionally, even though the Hedge Funds were partnerships and the partnership interest is held in a capital account, Yip was unable to provide a definition of "capital account" as applied to this case. For example, Valhalla Investment Partners, L.P. issued statements of partnership capital, a copy of one such statement is attached as Exhibit F. This document reflects that Valhalla was indeed a partnership. The IRS's Audit Technique Guide for partnerships ("ATG") advises that when accounting for partnerships "[e]ach partner's equity in the partnership is reflected in a capital account." (Available at http://www.irs.gov/Businesses/Partnerships/Partnership---Audit-Technique-Guide---Chapter-1---Basic-Principles-(Rev.-3-2008) under the heading "Capital Accounts")

The relevance and necessity of expert accounting of capital accounts is obvious in this context. However, when Yip was asked: "[w]hat is your definition or understanding of what a capital account is?" she replied: "I just have a -- I have a layman's understanding of what -- again, I'm not a stock specialist, but I have a general understanding that it is an account in which there's capital to be invested." (Yip Tr. 80:12-18) Not only does she admit that she possesses nothing more than a layman understanding, but Yip also provides a definition which fails to consider the basic necessity of capital accounts in the very Hedge Funds she has been charged with analyzing.

The fact that the Receiver's expert analysis is performed by someone without the requisite expertise in hedge funds, leverage, mark-to-market practices, and capital accounts demonstrates Yip's expertise does not qualify for this case under Rule 702, is consequently inadmissible, and cannot be considered by this Court for the Motion.

B) Yip's Analysis Relies Upon the Unverified Findings of a Third Party

Yip's analysis is also inadmissible and cannot be considered by this Court because it blindly relies on the findings of a third party analyst retained by the Receiver for litigation. Experts may rely on otherwise inadmissible facts and opinions reasonably relied on by experts in that particular field, including other experts "so long as it does not involve the wholesale adoption of another expert's opinions without attempting to assess the validity of the opinions relied on." *Mooring Capital Fund, LLC v. Phoenix Cent., Inc.*, 2009 WL 4263359, *5 (W.D. Okla. 2009) (citing *In re TMI Litig.*, 193 F. 3d 613, 715-16 (3d. Cir. 1999) (concluding blind reliance by expert on other expert's opinion was flawed methodology under *Daubert*); and *TK-7 Corp. v. Estate of Barbouti*, 993 F. 2d 722, 732-

33 (10th Cir. 1993) (expert opinion that relied on another expert's report was excluded when the testifying expert showed no familiarity with the methods and reasons underlying the hearsay report and no basis for the other report's reliability was demonstrated)).

Yip testified that she relied on the report generated by Riverside Financial Group ("RFG") to develop her "general understanding of the actual performance that funds had" and "to know specifically fund by fund what the actual performance was." (Exh E: Yip Tr. 35:7-12) When asked to confirm that she "didn't do anything to verify the findings of Riverside Financial Group," Yip replied: "[T]hat's correct." (Yip Tr. 34:23-35:1). Yip's Declaration is the basis for the Motion's claim that, "[b]ecause the Hedge Funds had no funding other than investor's principal contributions, Nadel required a continuous infusion of money from investors." (Mot. at 18, citing YD at ¶87) However, this statement is based on an analysis that comes directly from her reliance on RFG, without her own review or verification. It is impossible for Yip to provide an expert analysis on the source of funding when her entire basis of knowledge for the Hedge Funds' performance is blindly based on RFG's report. Because Yip's analysis is based on the unverified findings of RFG, her testimony, and by extension her declaration, is inadmissible under *Daubert* and pursuant to Fed. R. Civ. P. 56(c)(2) cannot be considered by this Court to decide the Motion.

C) <u>Yip's Analysis Unjustifiably Excluded Pertinent Evidence</u>

Yip's analysis is further unreliable because she completely excluded critical evidence of trades performed by Trader's Investment Club ("Traders") without any reasonable explanation for this exclusion. In promoting her finding in favor of a Ponzi,

Yip stated that "[t]here is no evidence that any trading was conducted by Nadel on behalf of Traders in any account during the period July 1999 through June 2003." (Exh. D: YD p.23, ¶71) However, attached to Traders' tax returns for 1999, 2000 and 2001 are detailed schedules of trades (the "Trade Schedules"), performed those respective years for the investment club. (A composite of the Trade Schedules is attached as Exhibit G). This creates a two-fold basis for excluding Yip's analysis. First, the direct misrepresentation by Yip that "no evidence" existed calls into question her reliability in evaluating the existence or non-existence of evidence. Second, because her analysis is necessarily based on the non-existence of the trades in the Trade Schedules, the evidence of those trades renders her entire analysis flawed and unreliable. *Finestone v. Florida Power & Light Co.*, 272 Fed. Appx. 761, 766-768 (11th Cir. 2008)(upholding district court's exclusion of expert testimony because the methodology employed by the expert was unreliable based on a *Daubert* analysis)

Because Yip lacks any expertise in relation to hedge funds she is legally unqualified to render an opinion related to the accounting and proper management of the Hedge Funds. Yip's wholesale and unquestioning reliance on the report by RFG renders her opinion and findings unreliable because they are based on unverified analyses in violation of *Daubert* standards. Finally, Yip's analysis is unreliable because her methodology excluded critical material evidence and in so doing misrepresented that the evidence did not even exist. Therefore, the Court should not consider Yip's declaration in deciding on the Motion.

3. Mr. McFarland's Findings Show a Ponzi Scheme Cannot Be Proven for Several Early Years of the Hedge Funds and Traders Club.

Mr. McFarland's ("McFarland") statements in his expert report and deposition critique the Receiver's and Yip's failure to identify the very aspects of their findings that conflict with a Ponzi and Yip's fundamental misunderstanding of customary investment practices as leading to her misinterpretation of the evidence.

A) McFarland's Findings Demonstrate the Receiver's Own Evidence Conflicts With The Elements of a Ponzi.

In his expert report ("McFarland's Report" or "McF") and deposition ("McF Tr."), attached as Exhibits H and I, respectively, McFarland demonstrates his finding that for the early years of the Hedge Funds and Traders, the Receiver's evidence conflicts with three of the four elements of a Ponzi because: Nadel (i) engaged in a high volume of trading activity which (ii) generated substantial profits and (iii) all withdrawals were either paid by profits or the investors' original capital investment.

Based on the findings presented in the Receiver's Seventh Interim Report[6], attached as Exhibit J, even the Receiver acknowledges trade profits of $28,147,422 from 2002 to 2005. McFarland found that those profits actually amounted to $40,087,897.91, and even when netted against the losses from earlier years, the profits were still $38,357,746.96. (McF p.3, ¶8) McFarland points out that despite a difference in amount, he and the Receiver "agree that during the years in question . . . [the] hedge funds earned a significant net profit on trades." (Id.) Like Nadel's statements, this evidence directly conflicts with the second and third required elements of a Ponzi, of "little or no legitimate business operations" and "little or no profits." Even accepting the Receiver's smaller

[6] This data was repeated in the Receiver's Eighth and Ninth Interim Reports. The subsequent interim reports did not include this data, but these findings were never retracted or modified by the Receiver.

amount of profits, over $28 million of profits cannot be considered "little or no" profit from any perspective within this case. Furthermore, generating over $28 million in trade profits requires far more than "little or no legitimate business operations." Based on this evidence McFarland makes the obvious conclusion that there was "a substantial underlying investment business between 1999 and 2005." (Id. at 4, ¶9) (*Accord* McF Tr. 165:21-166:1) Consequently, McFarland declares that there is "significant doubt as to whether these hedge funds were in fact a Ponzi-scheme from the beginning or simply a legitimate business enterprise that at some point became a Ponzi-scheme." (McF at 4, ¶10)

McFarland rebuts Yip's conclusion that investor redemptions were paid by new investor contributions because the "amounts paid to investors from the bank account were significantly less than the principal investments." (Id. at 8, ¶8) This demonstrates that any withdrawals in the earlier years were not paid by new investor money because those withdrawals did not exceed the amount of the original investments made by the withdrawing investor. Whether the investor believed this withdrawal was exclusively from profit is not dispositive of a Ponzi. The critical truth preventing the finding of a Ponzi is that during this time paying the withdrawals never required the use of another investor's money. (McF Tr. 226:4-228:9)

B) <u>Yip's Fundamental Misunderstanding of Investment Practices Leads Her to Misinterpret the Evidence.</u>

McFarland analyzes how Yip's misunderstanding of investment practices leads her to misinterpret evidence when opining on the significance of pooling monies in the context of funds, reasons why Victory might make transfers to Traders, miscalculating

liabilities due to ignorance of capital accounts, and her mistaken belief that the final quality of the Hedge Funds defines their quality at every point in their entire history.

McFarland reveals that when Yip uses the pooling of investors' money as an indicator of a Ponzi, this is a flawed analysis created by her ignorance of customary investment practices. McFarland responds:

> ". . . I have found this to be a common practice. Individual investors in mutual funds have an interest in the fund and once their money is deposited into the fund it is comingled with all other investors. The individual investor receives their share of profits based on their ownership percentage of the mutual fund. . . . Hedge funds operate similarly. . . . A normal reconciliation process would . . . show the amount of the funds belonging to each investor. Monies are entirely fungible . . . "

(McF at 6, ¶5) (*Accord* McF Tr. 185:7-186:4) Likewise, because Yip misunderstands customary practices of related investment vehicles, she does not comprehend the likelihood that transfers from Victory to Traders are returns of investment funds transferred to Victory from Traders earlier. McFarland points out that Yip identifies over $3.8 million of transfers to Victory from "unknown" sources "that parallel the contributions made by investors into Traders." (McF at 9, ¶9) This likely corresponds with the $2.8 million transfer from Victory to Traders between 2003 and 2006 as a return of previous transfers from Traders for investment by Victory. (Id. at 9, ¶10) (*Accord* McF Tr. 187:6-23) Here again, it is clear that Yip's misunderstanding of fundamental investment practices leads her to misinterpret the evidence before her.

Further, McFarland points out that Yip's mis-accounting of the Hedge Funds' capital accounts completely misconstrues the meaning of liabilities in this context. Investor contributions are essentially purchases of equity in the fund that "assume the risk that they may not receive all, or any, of their investment back." (McF at 10, ¶13) If the

funds' value decreases due to losses in investments, "there is no obligation to repay the investor the amount of their original investment." (Id.) (*Accord* McF Tr. 197:4-12) Because Yip analyzes insolvency by incorrectly accounting for liabilities without considering the actual value of the funds, her analysis is fundamentally flawed and unreliable.

McFarland identifies another of Yip's fundamental failures: "[t]he conclusion reached by Ms. Yip [of Ponzi and insolvency] is valid only if the whole period is examined as one unit but not necessarily valid if early periods were examined apart from the later periods." (McF at 8, ¶7) Even a grade school student understands this dynamic as the difference between his final grade and his individual assignment grades. If the student receives an F for his course, this by no means proves he received F's on all his assignments. Indeed, it is possible he received A's on his earlier assignments, but later received several F's that far outweighed the earlier A assignments. Then his cumulative final course grade will be an F despite his early A's. Yet, Yip bases her entire analysis on a presumption that overlooks the truth of this very simple principle.

4. <u>Arthur Nadel's Statements Do Not Prove a Blanket FUFTA violation.</u>

It is undisputed that Nadel pleaded guilty to securities fraud, embezzlement, wire fraud and mail fraud. In the Motion, the Receiver argues that even if the guilty plea does not admit the elements of a Ponzi scheme, it nonetheless establishes the necessary intent to defraud under FUFTA because it admits to fraudulent conduct generally. More specifically, the Receiver seeks summary judgment claiming the guilty plea establishes that every transfer from the Hedge Funds between 1999 and 2009 was made with the

actual intent to hinder, delay, or defraud. (Mot at p. 1, (4)) That argument cannot prevail.

The crimes admitted in the plea do not specifically carry the intent to hinder creditors. Yet, this intent to hinder creditors must be the *raison d'être* underlying transfers avoidable under FUFTA. In other words, FUFTA only allows avoidance of a transfer that itself constitutes the fraud on the creditor. "FUFTA was intended to codify an existing but imprecise system whereby transfers that were intended to defraud creditors could be set aside." *Freeman v. First Union Nat. Bank,* 865 So. 2d 1272, 1276 (Fla. 2004)(recognizing "the narrow focus of the FUFTA and its limitations").

As discussed in detail above, Nadel himself did not admit to any fraud before 2002 and stated he still thought he could trade his way out of the losses through 2008. Clearly the Receiver cannot assert as an undisputed fact that every transfer made during 1999 and 2009 was made with the intent to hinder, delay, or defraud creditors.

Furthermore, in a FUFTA claim, the Receiver would need to prove the actual intent to defraud in each of the individual transfers. The individual transfers at issues in Defendants' four cases occurred at various times and primarily when the Hedge Funds were in varying states of positive liquidity as discussed fully above. Therefore the Receiver cannot obtain a blanket declaration of a FUFTA violation from 1999 – 2009, and this basis for summary judgment must be denied.

WHEREFORE, Defendants, respectfully request the Court completely deny the

Receiver's Renewed Omnibus Motion for Partial Summary Judgment and provide such further relief as this Court deems just and proper.

Respectfully Submitted,

/s/ Paul B. Thanasides
Paul B. Thanasides
Florida Bar No. 103039
paul@mcintyrefirm.com
John R. Hightower Jr.
Florida Bar No. 0077478
hightower@mcintyrefirm.com
McIntyre, Panzarella, Thanasides,
Bringgold & Todd, P.L.
400 North Ashley Drive, Suite 1500
Tampa, FL 33602
Tel: 813-899-6059
Fax: 813-899-6069
Attorneys for Defendants, Vernon M. Lee, individually and as Trustee of the Vernon M. Lee Trust, Samuel Ross Morgan III, Brian Meeker as Trustee for the Brian Meeker Trust, and Mark and Clarisse Mason

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of September, 2012, the foregoing was electronically filed with the Clerk of the Court and served via the Court's CM/ECF system to: **Gianluca Morello, Esq**. (gmorello@wiandlaw.com), **Michael S. Lamont, Esq**. (mlamont@wiandlaw.com), and **Jared J. Perez, Esq.**, (jperez@wiandlaw.com) Wiand Guerra King, P.L., 3000 Bayport Drive, Suite 600, Tampa, Florida 33607, ***Attorneys for Burton W. Wiand, as Receiver.***

/s/ Paul B. Thanasides
Attorney