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, LLC,

Relief Defendants.
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THE RECEIVER'S UNOPPOSED MOTION FOR PERMISSION TO PROSECUTE APPEAL

Burton W. Wiand, as Receiver (the "**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. (collectively, the "**Hedge Funds**"), moves this Court for permission to proceed with an appeal of two orders entered by the Honorable Elizabeth A. Kovachevich in *Wiand, as Receiver v. R. Schneiderman, et al.*, Case No. 8:10-cv-181-T-17MAP (M.D. Fla.) (the "**Schneiderman Action**" and the "**Schneiderman defendants**").

The first order was entered on September 29, 2011, and it compelled the Receiver to arbitrate his fraudulent transfer and unjust enrichment claims against numerous "clawback" defendants, including the Schneiderman defendants (the "**Arbitration Order**"). *See* Sch. Doc.[1] 47. As explained in more detail below, this Court authorized the Receiver to appeal the Arbitration Order shortly after it was entered (*see* Docs. 668, 669), but the Eleventh Circuit determined the Arbitration Order was interlocutory and dismissed the Receiver's appeal (Sch. Doc. 57) and Judge Kovachevich denied the Receiver's motion for certification of an interlocutory appeal (Sch. Doc. 60). The second order was entered on February 21, 2014, and it denied the Receiver's motion to vacate an arbitration award erroneously rendered in favor of the Schneiderman defendants based on certain probate statutes (the "**Vacatur Order**"). *See* Sch. Doc. 73. Copies of the Arbitration Order, the Vacatur Order, and their associated reports and recommendations from Magistrate Judge Mark Pizzo are attached hereto as **Exhibits 1 and 2**, respectively.

After entry of the Vacatur Order, both it and the Arbitration Order became appealable, and the Receiver proceeded with an appeal. Although this Court previously authorized an appeal of the Arbitration Order, out of an abundance of caution, the Receiver seeks to renew that authorization and he also seeks to expand it to cover an appeal of the Vacatur Order. Given the procedural posture of this matter, the unfortunate reality that it is difficult to vacate an arbitration award, and the amount of money at issue in the Schneiderman Action ($163,660), the Receiver would pursue the appeal on the reduced flat

[1] "Sch. Doc." refers to docket entries in the Schneiderman Action.

fee arrangement discussed below, which would confer considerable savings to the Receivership estate.

BACKGROUND

The Schneiderman Action is one of numerous "clawback" cases brought by the Receiver under the Florida Uniform Fraudulent Transfer Act, Fla. Stats. §§ 726.101 *et seq.* ("**FUFTA**"), and specifically under Fla. Stats. § 726.105(1)(a), against recipients of fraudulent transfers following the collapse of Arthur Nadel's ("**Nadel**") Ponzi scheme. On January 14, 2011, the defendants in the Schneiderman Action (and those in several other of the Receiver's clawback cases) moved to compel arbitration based on purported arbitration clauses in a "Limited Partnership Agreement" and a "Subscription Agreement" that ostensibly governed investments in Victory Fund, Ltd. ("**Victory**") (collectively, the "**Scheme Offering Documents**"). *See* Sch. Docs. 20, 21. The Receiver opposed that motion and argued *inter alia* that the Scheme Offering Documents did not reflect contracts that came into existence because, among other reasons, they were used at all times to perpetrate and perpetuate a Ponzi scheme. *See* Sch. Docs. 25, 35. He also argued Judge Kovachevich should not compel arbitration because of the congressional command against arbitration under these circumstances reflected in the inherent conflict between arbitration and 28 U.S.C. §§ 754, 1692 (the "**Receivership Statutes**"). *Id.*

On September 29, 2011, however, Judge Kovachevich granted the motion to compel arbitration, concluding that *inter alia* (1) contracts reflected in the Scheme Offering Documents came into existence and (2) there was no inherent conflict between arbitration and the Receivership Statutes. *See* Sch. Docs. 42, 47; *In re Wiand*, 2011 WL 4530203, *10

(M.D. Fla. 2011). The Receiver moved this Court for permission to appeal the Arbitration Order (Doc. 668), and the Court authorized the Receiver to proceed (*see* Doc 669). The Receiver filed an appeal, but the Eleventh Circuit dismissed the matter *sua sponte* as interlocutory (*see* Sch. Doc. 57; 11th Cir. Case No. 11-15195-GG), and Judge Kovachevich denied the Receiver's motion for leave to pursue an interlocutory appeal (Sch. Doc. 60).

Left with no alternative, the Receiver filed a demand for arbitration against the Schneiderman defendants with the American Arbitration Association. The Schneiderman defendants then filed a summary judgment motion in the arbitration proceeding (the "**Probate Motion**"), which argued that the Receiver's claims were barred by Florida Statutes Sections 733.702 and 733.710 (the "**Probate Statutes**") because they were not filed within two years of nonparty Herbert Schneiderman's ("**Mr. Schneiderman**") death. *See* Sch. Doc. 62, Ex. B. In opposition to the Probate Motion, the Receiver explained the straightforward legal rule that, under governing Florida law, claims that arise after a decedent's death are not subject to the Probate Statutes, and the Receiver's claims here arose after Mr. Schneiderman's death when the defendants received from Victory the single fraudulent transfer underlying this case. *See id.*, Ex. C; *Wiand v. Lee*, 2012 WL 6923664, *5, *13 (M.D. Fla. 2012), *adopted* 2013 WL 247361 (M.D. Fla. 2013) (The Court concluded in the Receiver's related clawback cases with respect to the existence of a fraudulent transfer claim, "the relevant period is the time of the transfers" or, in other words, "the beginning and ending dates of ... distributions" to the defendant.). Nevertheless, relying on unsubstantiated allegations, the arbitrator erroneously granted the Probate Motion and dismissed the

Receiver's claims (the "**Award**"). *See id.,* Ex. A. The Receiver filed a motion for reconsideration, but the arbitrator denied the motion. *See id.*, Exs. D & E.

On August 1, 2013, the Receiver filed a motion to vacate the Award (Sch. Doc. 61), and the Schneiderman defendants filed an opposition (Sch. Doc. 68). On January 10, 2014, Magistrate Judge Mark Pizzo recommended denial of the Receiver's motion to vacate. *See* Sch. Doc. 70. The Receiver objected to the recommendation (Sch. Doc. 71), and the defendants responded to the Receiver's objection (Sch. Doc. 72). On February 21, 2014, Judge Kovachevich adopted the Report and Recommendation in full. Sch. Doc. 73.

On March 19, 2014, the Receiver filed a timely notice of appeal of both the Arbitration Order and the Vacatur Order. *See* Sch. Doc. 74. On May 29, 2014, the Receiver filed his principal brief with the Eleventh Circuit. A copy of that brief is attached hereto as **Exhibit 3**.

ARGUMENT

This Court should allow the Receiver to proceed with his appeal because, while it is difficult to vacate an arbitration award, the Receiver believes his arguments are meritorious and, to avoid restating them here, refers the Court to Section V of his appellate brief. *See* Ex. 3 § V. As the Court is aware, Nadel's massive Ponzi scheme left hundreds of investors with losses of over $160 million – and many of those investors were financially and physically devastated by it. Over 150 other investors, however, profited from the scheme as they were fortunate enough to receive transfers of money from the scheme that exceeded the amounts "invested"; the amounts received in excess of the amounts "invested" were "false profits." Notably, the false profits were funded with money stolen from losing investors. *See*

In re Slatkin, 525 F.3d 805, 815 (9th Cir. 2008) (noting source of transfers paid to Ponzi scheme investor "was a theft from the other investors"). Approximately 50 profiteers voluntarily returned false profits before the Receiver filed a single lawsuit. Over 100 other profiteers were sued by the Receiver in substantively identical "clawback" cases to the Schneiderman Action, but almost all of them subsequently settled with the Receiver and returned false profits.[2] All of the sued profiteers who litigated in the U.S. District Court to judgment lost on summary judgment and were subjected to judgments in the amount of their false profits. The Schneiderman Action represents the **first and only** time out of well over 100 instances the Receiver was barred from recovering false profits. Put differently, the Court should authorize this appeal because, of all the clawback cases that have been resolved in one way or another, the Award represents the **first and only** time the Receiver has been precluded from recovering money stolen from losing investors by Nadel to perpetrate his scheme. The Receiver notes that he recently obtained a decision from the Eleventh Circuit in another of his clawback cases, which held that the Magistrate Judge abused his discretion by the manner in which he refused to award the Receiver prejudgment interest on his successful FUFTA claims. *See* Doc. 1120. As such, the Receiver has previously been successful appealing difficult issues under demanding standards of review.

An appeal could also benefit future receiverships because orders like the Arbitration Order increase costs and reduce recoveries for equity receiverships in this (and likely other)

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[2] A small number of defendants filed for bankruptcy protection. One defendant lost on summary judgment in arbitration. Another two defendants lost following a final hearing in arbitration.

districts. In originally seeking this Court's permission to appeal the Arbitration Order, the Receiver explained that arbitration would be inefficient and expensive:

> The Receiver believes an appeal of the Order is in the best interests of this Receivership as it is intended to maximize the estate for defrauded investors, who are the central focus of this Receivership and the Receiver's efforts to marshal assets. *See Marion v. TDI, Inc.*, 2006 WL 3742747, *2 (E.D. Pa. 2006) ("The whole purpose of the SEC proceeding is to remedy violations of the securities laws for the benefit of investors."). Specifically, the Order requires the Receiver to arbitrate all claims in the pertinent cases, but arbitration would be costly and inefficient. The different Hedge Funds' documents have arbitration language that would require arbitration in New York, Illinois, and Florida through either the AAA or JAMS arbitration organizations. Under the rules of those organizations, the arbitrations would require payment of (1) administrative fees that could exceed $40,000 (collectively) and (2) the arbitrators' hourly fees for work on the arbitrations, which would likely be in the six figures and could be multiple hundreds of thousands of dollars (again, collectively across all arbitrations). Both the administrative fees and arbitrators' hourly fees would not be incurred if those matters proceeded in Court rather than in arbitration. Although typically an appealing feature of arbitration is reduced costs, in this Receivership that is simply not the reality. In fact the opposite is true: the Receivership will incur significant added costs to arbitrate.

Doc. 668 at 4-5. Although this Court authorized the Receiver to appeal the Arbitration Order at the time it was entered, he was unable to do so because the Eleventh Circuit's determined it was interlocutory, and Judge Kovachevich denied the Receiver's motion for certification to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). *See* Sch. Doc. 60. As such, the Receiver was forced to file numerous arbitrations against clawback defendants, and the Receivership estate incurred filing fees of approximately $28,500.00. In addition, the Receiver was forced to compensate numerous arbitrators a total of $72,000.00 at hourly rates

as high as $700.00 an hour.[3] These fees could have been avoided had the Schneiderman Action (and the other cases where arbitration was compelled) remained in this Court, where the Receiver ultimately prevailed on summary judgment. *See, e.g., Wiand v. Lee*, 2012 WL 6923664 (M.D. Fla. 2012), *adopted* 2013 WL 247361 (M.D. Fla. 2013).

The Receiver recognizes that appealing the Arbitration Order will not recover fees that have already been paid, but a successful appeal would further (1) lead to the Receiver's possible recovery of $163,660 and (2) eliminate the inequitable advantage currently enjoyed by the Schneiderman defendants over other profiteers and, of course, losing investors by virtue of the Award in their favor, and the Arbitration Order is unfavorable precedent that will impact all future equity receiverships in this and other federal districts. If receivers are forced to chase clawback defendants all over the country based on arbitration language inserted in sham "contracts" by criminals, the utility of the equity receivership process will be greatly diminished. As explained in the Receiver's appellate brief (*see* Ex. 3 § I), arbitration under circumstances such as those present here is contrary to receivership law and Congress' expressed intent to centralize the resolution of disputes involving receivership property (including clawback actions) in a single judicial forum.

To avoid asking investors defrauded by Arthur Nadel (*i.e.*, the claimants with approved claims in this action) to bear the full cost of the appeal underlying this motion, the Receiver asks the Court to approve a reduced flat fee of $15,000 plus costs for the Receiver

[3] Fortunately, the Receiver was able to settle a number of matters without the necessity of filing a statement of claim (thus avoiding the payment of filing fees). He was able to settle additional matters after filing a statement of claim but before the appointment of a panel (thus avoiding the payment of arbitrators' fees).

and his counsel to pursue that appeal before the Eleventh Circuit. This proposed flat fee arrangement of $15,000 is less than 10% of the $163,660 the Receiver sought and still seeks to recover in the Schneiderman Action. The Receiver and his counsel have already expended more than $15,000 (of unbilled time) on the appeal to date, and that does not include a reply brief and oral argument before the Circuit Court. As such, the Receiver is willing to pursue this appeal under terms that are very favorable to the Receivership estate.[4]

CONCLUSION

For the foregoing reasons, the Receiver respectfully asks the Court to grant him permission to continue to prosecute his appeal of the Schneiderman Action for a flat fee of $15,000 plus costs for both the Receiver and his counsel.

LOCAL RULE 3.01(g) CERTIFICATE OF COUNSEL

Counsel for the Receiver has conferred with counsel for the Securities and Exchange Commission, and the Commission has no objection to the requested relief.

[4] If the Court denies the Receiver permission to pursue the appeal, the Receiver will not bill the estate for the time expended to date.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 14, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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