

FILED

To: United States District Court
 Middle District of Florida
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 TAMPA, FLORIDA 33602

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 CLERK US DISTRICT COURT
 MIDDLE DISTRICT OF FLORIDA
 TAMPA FLORIDA

Case File: Security and Exchange Commission,
~~26TBM~~

Case No: 8:09-cv-87-T- 26TBM

Plaintiff

v.

Arthur Nadel; Scoop Capital, LLC, and 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.

Claimant, Vernon M. Lee (“Mr. Lee”), now proceeding *pro se*, moves for an Order overruling the Declaration of Gianluca Morello in Support of Attorney Fees and Costs (Doc. 1119) in the amount of \$6,477.30. The objections are based on (1) the failure of the Receiver’s Motion, Document 1118 filed 5/30/2014, to contain a full, true and accurate exhibit of Mr. Lee’s Proof of Claims (POCs) to which the Receiver falsely attests to accuracy, (2) the failure of the Receiver to establish that Mr. Lee is re-litigating an issue decided in *Wiand, as Receiver v. Vernon M. Lee, et al.*, Case No. 8:10-cv-210-T-17MAP (the “*Lee Clawback Action*”/“*Wiand v. Lee*”) and that the issue is identical to that previously litigated, and (3) the failure of the Receiver to prove that Mr. Lee had a fair and full opportunity to litigate the pertinent issue.

Background

Between 1999 and 2004, Mr. Lee invested a total of \$1,873,262.10, earned investment income of \$1,978,140.98 and withdrew \$2,942,264.75. As a result, Mr. Lee lost \$909,138.23 in the scheme while the summary judgment is for false profits of \$1,069,002.60. Early on and as documented since December 14, 2009, Mr. Lee has sought to avoid litigation, but rather to establish his investment activity in the hedge funds by using the actual and available facts. He expressed willingness from the onset to openly discuss and share his calculations and the source of the facts and information contained therein with the intention that resolution would then follow. The Receiver's duties include administering & managing fund assets, marshalling assets and investigating the underlying transactions in his efforts to garner assets for the Receivership. The Receiver is directed to "[I]nvestigate the manner in which the affairs of the Defendants and Relief Defendants were conducted." (Doc. 8). The Receiver affirms this responsibility in the First Interim Report – "To this end, the Court directed the Receiver to engage in the following activities: ... Investigating Receivership Affairs." (Doc.103) The Receiver has sought to expeditiously garner Receivership assets at the expense of investigation. First MOTION for attorney fees for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals; Unopposed MOTION for attorney fees SECOND Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs; Unopposed MOTION for attorney fees Third Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and his Professionals; Unopposed MOTION for attorney fees Fourth Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals; Unopposed Fifth Interim MOTION for order awarding attorney fees, costs and reimbursement of

costs to receiver and his professional[s]; Unopposed MOTION for attorney fees Receiver's Unopposed Sixth Interim MOTION for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals; Unopposed MOTION for attorney fees Receiver's Unopposed Seventh Interim MOTION for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals; Unopposed MOTION for attorney fees Receiver's Unopposed Eighth Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals; Unopposed MOTION for attorney fees Receiver's Unopposed Ninth Interim Motion for Order Awarding Fees, Costs and Reimbursement of Costs to Receiver and His Professionals; Unopposed MOTION for attorney fees Receiver's Unopposed Tenth Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals; Unopposed MOTION for attorney fees Receiver's Eleventh Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals; Unopposed MOTION for attorney fees Receiver's Twelfth Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs To Receiver and His Professionals; Unopposed MOTION for attorney fees Receiver's Thirteenth Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals; Unopposed MOTION for Attorney Fees Receiver's Fourteenth Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals; Unopposed MOTION for Attorney Fees Receiver's Fifteenth Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs To Receiver and His Professionals; Unopposed MOTION for Attorney Fees Receiver's Sixteenth Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals (September 1, 2013 through January 31, 2014) (Docs. 129, 164, 200, 259, 392, 496, 577, 645, 652, 697, 859, 897,

950, 1037, 1086, 1124) (collectively the “**Billing Records**”) reflect that while numerous “clawback” demands commenced January 19, 2010, forensic fact finding did not commence until September 28, 2011, nineteen months later, and only after Mr. Lee and other “clawback” defendants objected to the Receiver’s unsubstantiated demands. While the Receiver states that “the vast majority of the clawback defendants promptly settled with the Receiver” this does not establish that they agreed with the Receiver’s demands (Doc. 1118).

Mr. Lee has evidence not previously considered by the courts that proves that substantial trading and investment earnings occurred in the early years of the Hedge Funds. The Receiver is in possession of this data and has elected to suppress it. This information is pertinent to the issue of Mr. Lee’s Proof of Claims and the Receiver’s demand for the return of “false profits.” Without consideration of these facts, Mr. Lee is denied justice and access to a fair and full opportunity to litigate the pertinent issues, which use all available information to establish Mr. Lee’s POCs rather than the selective use of information by the Receiver to develop his demands

Rather than address Mr. Lee’s actual concern, which is to use the available facts to mathematically establish the demand or claim, the Receiver elects to attack Mr. Lee’s character, refuses to consider true and accurate documents, and aggressively pursues costly litigation against Mr. Lee. Facts are required to formulate accurate demands and claims and these facts are available and remain unconsidered by the Receiver while he continues to seek unsubstantiated demands, engages in protracted litigation and now seeks Attorney fees and costs for actions of his own making.

Mr. Lee is most assuredly a victim of Nadel's scheme. He is an 83 year old retiree who worked, saved, and invested for retirement. He was taken advantage of by Nadel's dishonesty and relies on the courts for justice. He has invested countless hours poring over data to mathematically & quantifiably establish his claims and it is appropriate that the Receiver and Court provide him due consideration, a review of the documented facts relative to his POCs, and a fair and full opportunity for them to be discussed and litigated before judgment is rendered.

ARGUMENT

I. The Receiver failed to include and address Mr. Lee's Proof of Claims in the Receiver's Motion, Document 1118 filed 5/30/2014, which did not contain a true and accurate exhibit of Mr. Lee's POCs.

The Receiver's duty includes an investigation of the Receivership entities, which would involve the actual transactions to establish an accurate amount of the claim against Mr. Lee and other clawback defendants. Rather than undertaking this task, the Receiver selectively used data, while selectively omitting data, to calculate the demand against Mr. Lee. As previously noted, the Receiver did not begin to investigate the hedge fund transactions until nineteen months after he filed the clawback action against Mr. Lee. As a result, the demand was not calculated using all factual and available information, but was based upon the convenient assumption that all Hedge Funds were operated as Ponzi schemes at all times, even while the evidence refutes this. At the very heart of this issue and of significant relevance to Mr. Lee is not the question of whether Nadel's scheme was a Ponzi, but rather when.

The consideration of accurate data is essential for fair and just resolution of Mr. Lee's Proof of Claims and defense against clawback action and the presumption of fraudulent transfer. Despite possession and knowledge of evidence to the contrary, the Receiver's demand excludes earnings in the Hedge Funds that are *substantiated by documentation* provided to Mr. Lee during discovery. Mr. Lee has painstakingly invested hours into researching and identifying documents to generate his claim calculations. Inexplicably, the Receiver is unwilling to engage in discussion on the actual facts, but prefers to litigate rather than to calculate.

The Receiver and Mr. Lee have relied on the IRS K-1's for investments and withdrawals. Mr. Lee's claim also includes investment earnings documented on the same K-1's and supplements this inclusion with copies of Hedge Fund checks and documents which substantiate significant investment activity and earnings during the period of his investment. Attached as EXHIBIT A are checks from 2000 which total approximately \$942,000 and reflect purchased of equities into Valhalla. These amounts are not included in the calculations prepared by the Receiver's expert, Riverside Financial Group (RFG). The omission and exclusion of these and other transactions from 2000 – 2003 which account for millions of dollars, dramatically misrepresent and understate the performance of the Hedge Funds. Since Mr. Lee withdrew his funds from these accounts in 2003, his investment earnings would add to his balance and could not be characterized as "false profits" thus the Receiver's demand relative to this fund would be stricken and consideration of Mr. Lee's Proof of Claims undertaken. This information has been ignored and suppressed by the Receiver and it refutes the assumption that the Hedge Funds were operated as a Ponzi from inception. Inclusion of this actual data reverses the losses miscalculated

by Riverside Financial Group from 1999 – 2002 and returns investment gains. It is unjust and bewildering that the Court denies inclusion of actual and documented facts and the Receiver continues to pursue litigation without regard to the facts provided during discovery.

As noted, Document 1119, EXHIBIT E, contrary to the assertion by the Receiver, is not true and accurate as Exhibit E is incomplete and fails to include a complete copy of Mr. Lee's outstanding Proof of Claims 462, 463, 464, 465, 466 and 467 (EXHIBIT B)

II. The Receiver fails to establish that Mr. Lee is re-litigating an issue decided in the Lee Clawback Action and that the issue is identical to that previously litigated.

The Receiver fails to establish that the issue is identical to the one litigated in an earlier case because the Receiver did not consider all of the factual and documented evidence that was obtained during discovery. Inclusion of the omitted material including documentation of substantial trading in the early years of the Hedge Funds not considered by the RFG analysis (EXHIBIT C) has a substantial bearing on Mr. Lee's claim.

The issue was never previously litigated as litigation would include a trial, evidence, expert testimony, and cross-examination before an impartial jury. The standard of litigation was not met as the Receiver sought Summary Judgment even though there remains genuine dispute of material facts and ample documented evidence readily establishes that the dispute is material in the outcome to Mr. Lee. The dispute on facts is so blatant and damning that the Receiver sought to strike the report of Mr. Lee's expert, Harold McFarland, from the record (*Wiand v Lee Doc*

136) so that the information contained therein would be rendered undiscoverable. Mr. McFarland's report is included in EXHIBIT D. While Summary Judgment may be expedient, it is wrongly applied when the parties disagree on the underlying facts of the matter and the facts are available for review and litigation. Summary Judgment does not prove based upon facts that a Ponzi existed during the years pertinent to Mr. Lee's claims and ample documented evidence exists to refute the Receiver's unsubstantiated claim that it did.

Mr. Lee offers hours of researched calculations substantiated by documents provided through discovery for consideration in adjudicating his claim. This information as provided in POCs has not been considered by the Receiver or the Courts and the complete and actual facts have not been litigated. Mr. Lee seeks justice through honest consideration of all of the facts and numerical data as documented through discovery. Identification of all relevant facts and reliance on the factual information will inform the outcome and resolution of this matter. Mr. Lee continues in his willingness to settle this matter based upon the evidence and related calculations.

III. The Receiver fails to prove that Mr. Lee had a fair and full opportunity to litigate the pertinent issue.

The Receiver has unfairly mischaracterized and abused Mr. Lee, who is a victim of Nadel's scheme, during the course of these proceedings. The Receiver seeks to disparage him when he opines that the Claimant "has sought to appeal to the Court's sympathy by *portraying* himself as an elderly and infirm investor who purportedly was devastated by "losses in the wake of the

Nadel collapse” (Doc. 1118) as though he is not elderly, infirm, an investor, nor devastated by financial and emotional losses as a result of the loss of his retirement security.

Mr. Lee is indisputably elderly as he is 83 years old. A reasonable person likely would term Mr. Lee “infirm” due to his health conditions: heart disease exacerbated by stress, two hip replacements during this ordeal, and nine doctor and hospital visits within the past 6 months. Mr. Lee, although no longer an investor due to the loss of his assets, was an investor and this can be established factually if necessary to refute the implications of the Receiver. Again, Mr. Lee’s claim is true. Mr. Lee’s losses financially devastated him as he is a retiree who is unable to offset the loss of savings, hard-earned over a lifetime. And, unlike “losers”, Mr. Lee has endured over 4 years of harassment and litigation initiated and perpetuated by a relentlessly aggressive Receiver appearing to be more interested in benefitting from his appointment than in service, truth, fairness and justice.

The Receiver often opines that Mr. Lee’s investment returns were “too good to be true” which implies Mr. Lee is greedy, foolish, or somehow deficient in character or judgment. However, the Nadel fund gains reported to investors when examined in the context of the times are reasonable and day trading successes were highly publicized. Looking at Nadel’s monthly statements and comparing those gains with market gains occurring during that decade would not give Nadel investors reason to suppose or suspect that fraud was occurring.

In 2009 the AMG Yacktman Focused Fund had a total return of 62.76% (EXHIBIT E). Should an investor be pleased or disturbed because the success was “too good to be true”?

This historical data also lends credence to McFarland's conclusion that a Ponzi scheme did not begin until about 2006 and supports the importance of recalculating the returns using ALL the data available for the time periods in question.

Best Asset Category Return data from Focus Wealth Management (Investment Returns by Class, 2010).

(EXHIBIT F)

Year	Nadel Funds				Best Asset Category Return
	Victory Fund	Victory IRA Fund	Scapp Real Estate	Vallialla Investment Partners	
1999					66.41%
2000				12.02%	31.04%
2001				14.85%	40.59%
2002	16.73%			16.4%	9.82%
2003	30.79%	23.86%		37.75%	74.48%
2004	22.13%	23.49%	26.36%	24.10%	33.16%
2005	19.00%	20.01%	23.47%	20.11%	34.54%
2006	13.97%	13.46%	15.57%	14.73%	35.97%
2007	14.48%	14.72%	16.22%	13.67%	39.78%
2008	8.78%	8.70%	9.73	4.86%	5.08%

Like other investors, Mr. Lee invested in the Hedge Funds assuming their legitimacy. That he did so early in the funds history was entirely serendipitous. Had he been younger, he would have retired in later years and would now be standing in line with the net losers rather than fighting for his returns, earned prior to the existence of a Ponzi scheme. Mr. Lee is most certainly not a winner by most definitions.

The Receiver continues his mischaracterization and abuse by implying Mr. Lee either stole the money (purported "false profits") or believes the money is stolen when he states that Mr. Lee "chose to retain stolen funds" (*Wiand v Lee* Doc 164). Mr. Lee is entirely innocent and a victim of Nadel's fraud, lost substantial assets in the scheme, and has legitimate disagreements with the calculation of the Receiver's demand and the assumption that he has received false profits. The

repeated and false allegations of the Receiver intend to prejudice the Courts against Mr. Lee and deny him his Constitutional rights of due process.

Mr. Lee through no fault of his was victimized by Nadel's collapse. Mr. Lee did not steal. He is not a thief. **Mr. Lee is a victim who would be unable to pay the Receiver's demand *even if the demand was true and accurate.*** Mr. Lee's litigation of this issue is principled and based upon documented facts which the Receiver has chosen to ignore with his attempts to discredit Mr. Lee.

The Receiver further attacks the character of Mr. Lee by his repeated use of the adjective, "frivolous", to describe Mr. Lee's sincere attempts to exercise his Constitutional rights and to mitigate the damages caused by the collapse of the scheme in 2008.

The Receiver termed Mr. Lee's bankruptcy filing "frivolous" and then mischaracterized his action as one to "gain a several month stay from the Receiver's collection effort." (*Wiand v Lee* Doc. 1118) However, the Receiver delayed from December 11, 2013 to May 31, 2014 (*Wiand v Lee* Doc. 1119 Ex. I), a full six months, to file his objection and delayed more than nineteen months to address Mr. Lee's POCs so the accusation rings hollow. Mr. Lee's assets include his modest home valued at approximately \$312,769 (EXHIBIT G) and subject to Florida's homestead provisions and minimal balances in protected retirement accounts. He is living primarily on social security as his other assets were invested in Nadel's scheme. Facing the Receiver's false demand of \$1,069,002.60 against him, he was advised and sought bankruptcy protection. Describing Mr. Lee's attempts to protect himself against the ruthless deep pocket of

the Receiver by filing bankruptcy to protect his remaining modest assets is far from frivolous, but rather a fight for his life. Further, the description of Mr. Lee's offer to pay \$5,400 (Doc. 1118) (in addition to the amount improperly taken from his son of \$133,371.09 and against his deceased wife's trust of approximately \$222,973) is insultingly termed "frivolous" when the payment of any amount is unfair, unproven, and imposes further hardship in light of Mr. Lee's losses. The total amount taken from Mr. Lee of \$356,344 (improperly demanded of his son, Kelvin Lee) is approximately 33% of the demand, which *exceeds* the Receiver's settlements with Shoreline (18.5% of demand), Holland and Knight (14.8% of demand) and Goldman Sachs (5.8% of demand.) These entities *helped* Nadel perpetrate the crime against Mr. Lee and the other victims. Seeking a greater settlement from Mr. Lee, an innocent investor, who would be harmed to a greater extent than these Wall Street entities is punitive and without merit.

The Receiver's assertion that Mr. Lee seeks to "drive up unnecessary expenses" (Doc. 1118) is preposterous and a continued mischaracterization of Mr. Lee who derives no benefit from legal fees on the Receiver's ledger. Rather, the Receiver benefits from continued litigation, building his law firm and his personal wealth. (EXHIBIT I)

\$25,000 to collect \$0

Of little weight or importance to the recovery of assets to benefit the victims, the Receiver greedily garnished Mr. Lee's \$206.48 JPMorgan Chase bank account and protected TD Ameritrade Roth IRA account. According to the Billing Record, the Receiver billed over \$25,000 and returned \$0, for victims. The Receiver also billed for research regarding errors made in the attempt to garnish Mr. Lee's Roth IRA (source: the Billing Record). The action to garnish

the remaining retirement funds from Mr. Lee who was victimized in this scheme also reduced funds available to distribute to "losers" in direct opposition to the Receiver's duties.

\$400,000 earned by Receiver and billed to Receivership

The Receiver has chosen to litigate rather than to calculate. From August 2009 to January 2014, the Receiver has billed nearly \$400,000 pursuing Mr. Lee rather than constructively considering the complete, true and actual facts of his investment activities. (The billing records from February 2014 to July 2014 have not yet been made public.) **The false demand of \$1,069,002.60 is not recoverable from Mr. Lee nor is it accurate which POCs substantiate.** His assets include his modest home and minimal remaining retirement accounts. Bankruptcy documents reflect total assets of a few hundred dollars. Further action against Mr. Lee, including the proposed Attorney cost sanctions of \$6,477.30 will not add value to the Receivership, rather revenues to the Receiver's ledger. The Receiver understands this and has noted, "While the Receiver is hopeful that he will recover funds on the majority of these judgments, it is very possible that he will encounter difficulty in fully satisfying all of these judgments." (Doc 1001, 1106).

Receiver pursues legal action to take Mr. Lee's homestead

Mr. Lee has been victimized by the Nadel scheme. He innocently invested much of his life savings with Nadel and when the funds collapsed, lost his deceased wife's savings and retirement security. Since 2010, he has been abused and harassed by the Receiver who seeks to mischaracterize him as a thief rather than the innocent victim he is who seeks an accurate and fair settlement. Mr. Lee's remaining asset is his modest home which is protected under the

Florida homestead provisions. The Receiver is expending Receivership assets to take Mr. Lee's home and render him and his second wife, also elderly with heart issues, homeless. These actions will add additional financial, psychological and physical hardship to Mr. Lee, a victim, and he has "suffered enough" (Judge Mark A. Pizzo in *Wiand v Lee* Doc 163.) Further, the Receiver's pursuit of Mr. Lee's homestead is likely to fail and additional unrecoverable charges will be unavailable for victims, but will accrue to the benefit of the Receiver in the form of fees. Are these actions in the best interest of the Receivership?

Receivers and Courts have great latitude in cases such as Mr. Lee's as there are considerations of damage, fairness, capitalism, time value of money, opportunity costs and equivalent value for the use of investor dollars. (*Nelson, Minnesota Law Review*; EXHIBIT H). The U.S. economy is based on these financial realities, but the treatment of investor losses are treated inconsistently. For example, the publically traded stock, Enron, was artificially elevated through corporate deception and fraud. Early investors, who bought, then sold prior to the collapse profited from fictitious gains based upon investor exuberance when little or no underlying business was transacted. When this was revealed and the stock collapsed, innocent investors who bought early and realized gains were considered "lucky." Their gains were not sought to compensate for the losses of those who bought later. Criminal charges and clawbacks were sought *from perpetrators not innocent investors*.

Flying in the face of financial reality is the preposterous position that a dollar invested in 1999 is valued the same as a dollar invested in 2008. And yet this simplistic approach costs Receivership assets through litigation which financially benefits Receivers and diminishes "winner's"

remaining assets because “winners” have no recourse other than to fight their poorly calculated “false profits.” Also defying financial reality in these proceedings is the lack of consideration of opportunity cost. When the claimant invested his funds, had the Nadel entities not existed, it is presumed he would have placed his money in an alternate investment. To avoid lengthy and protracted litigation, Receivers and Courts could consider foregone opportunity costs accruing to the “winner.”

Considerations like these are at the heart of fairness in dealing with “winners” but financial realities have been ignored by the Receiver and this Court.

At issue in the full and fair opportunity is also the denial by the Court to provide Mr. Lee with additional time to prepare his response to Document 1118. In every situation in these proceedings where the Receiver has requested additional time (EXHIBIT J), it has been allowed. Mr. Lee is proceeding *pro se* and some reasonable latitude by this Court would demonstrate that it is both fair just, and diligent in its efforts to afford Mr. Lee with full opportunity to defend himself against these claims.

Mr. Lee is aware of victims who have objected to the Receiver’s denial of their claims relative to the Traders Investment Club which should reach the court in the future. There are no real facts to support a Ponzi in Traders and the RFG report commissioned by the Receiver proves this by starting their accounting in July 2003 with 11.2%, 2004 gain of 614% and a 2005 gain of 237% (EXHIBIT K). Brokerage data prior to July 2003 is not available. Data is available in the IRS 1065 Tax Returns, which shows considerable trading and positive returns for 1999, 2000, 2001,

2002 and 2003. The Receiver intentionally omits documented performance information that contradicts their desired outcome and supports their overreaching demands.

CONCLUSION

For the foregoing reasons, Mr. Lee requests the Court to (1) deny the sanction fees finding that the Receiver has not included valuable, factual and relevant data in its calculation of Mr. Lee's claims; (2) require the Receiver to examine, consider and revise their fund performance findings using the complete and accurate transactions provided during discovery; (3) require the Receiver to review and consider Mr. Lee's POCs through examination of the documentation supporting the calculations; and (4) review the billings pertaining to Mr. Lee to determine if continued action, as opposed to negotiation or other mutually agreed upon action, is in the best interest of the Receivership and its victims.

Thank You,



Vernon M. Lee

July 14, 2014