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.
_____/

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 *pro bono* of an order (Doc. 150) (the "**Order**") entered by the Honorable Elizabeth A. Kovachevich on June 23, 2015, incorporating and adopting a report and recommendation (Doc. 147) (the "**Second R&R**") issued by Magistrate Judge

Mark A. Pizzo in *Wiand, as Receiver v. Dancing $*, Case No. 8:10-cv-92-T-17MAP (M.D. Fla.). The Order awarded the Receiver prejudgment interest from the date of his Complaint against Dancing $ instead of from the dates of the pertinent fraudulent transfers to Dancing $ as the Receiver had requested in accordance with Florida law. The Second R&R and Order are attached as **Exhibits A** and **B**.

"It is a well-established rule that as an officer of the court, 'a receiver may not ordinarily appeal without first obtaining authority from his creator, the court appointing him." *Holland v. Sterling Enters., Inc.*, 777 F.2d 1288, 1291-92 (7th Cir. 1985) (quoting *Hatten v. Vose,* 156 F.2d 464, 468 (10th Cir. 1946)). The Receiver requests the Court authorize him to proceed with this appeal because his arguments are meritorious. Instead of restating them at length here, however, the Receiver has attached his initial appellate brief to this motion as **Exhibit C**. As set forth in that Exhibit, this Court previously authorized the Receiver's earlier cross-appeal of the Court's earlier denial of any prejudgment interest to the Receiver. The Receiver prevailed on that appeal (both on his cross-appeal relating to prejudgment interest and on Dancing $'s appeal). *See Wiand v. Dancing $, LLC,* 578 Fed. App'x 938, 947 (11th Cir. 2014), a copy of which is attached as **Exhibit D**. The Eleventh Circuit found the District Court abused its discretion by denying the Receiver any prejudgment interest.

On remand, the District Court awarded prejudgment interest to the Receiver but only from the date of the Receiver's complaint rather than from the date of the fraudulent transfers. As Exhibit C explains, the Receiver believes the Second R&R and Order commit the same reversible error as the initial R&R and order because the default rule under Florida

law awards prejudgment interest from the date of loss (here, the date of the fraudulent transfers) and a court may vary from the default rule only if it finds the circumstances of the case fall within one of the enumerated exceptions identified in *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1297 (11th Cir. 2002). Here, the Second R&R acknowledges that none of the *Blasland* exceptions apply, yet it nevertheless strayed from the default Florida rule of awarding prejudgment interest from the date of loss. The Receiver believes this was reversible error.

If the Court grants this motion, the Receiver will proceed with the appeal. If the Court denies this motion, the Receiver will dismiss the appeal. The Receiver and his counsel will prosecute this appeal *pro bono* because the dollar amount at issue is relatively small, but they believe the partially unfavorable precedent set by the Order is significant and warrants appellate review. A receiver's ability to recover prejudgment interest in "clawback" cases from the date of the pertinent fraudulent transfer is important because not only is it consistent with Florida law, but also because it incentivizes settlement and conserves receivership resources, ultimately resulting in a more favorable recovery for defrauded, losing investors. For example, before the Receiver filed any lawsuits here, he afforded potential clawback defendants the opportunity to settle by returning 90% of their false profits – *i.e.*, a 10% discount on their false profits – and by not having to pay prejudgment interest. Depending on the timing of the pertinent fraudulent transfers, not requiring a potential clawback defendant to pay prejudgment interest is a significant concession and a strong incentive for settlement. Many potential defendants accepted the Receiver's offer. Many others did not, resulting in extensive litigation and the depletion of Receivership resources. By limiting the

amount of prejudgment interest the Receiver can collect to the amount that accrues only after the filing of a complaint, the Order sets a precedent that in many instances will greatly reduce potential defendants' incentive to settle in future equity receiverships and result in smaller recoveries for defrauded, losing investors.

CONCLUSION

For the foregoing reasons, the Receiver respectfully asks the Court to grant him permission to prosecute *pro bono* an appeal of the Order.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 28, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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