EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 15-13410-F

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,

Appellant,

v.

DANCING $, LLC,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

INITIAL BRIEF OF APPELLANT BURTON W. WIAND, AS RECEIVER

Gianluca Morello, FBN 034997
gmorello@wiandlaw.com
WIAND GUERRA KING P.A.
5505 West Gray Street
Tampa, FL 33609
Tel.: (813) 347-5100
Fax: (813) 347-5198

Attorney for Appellant Receiver, Burton W. Wiand

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant 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. (the "**Hedge Funds**"), by and through his undersigned counsel and pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, certifies that no publicly held corporation owns 10% or more of the Hedge Funds. Further, the Receiver submits this Certificate of Interested Persons:

1. Bleil, Joshua
2. Dancing $, LLC
3. Kovachevich, Elizabeth A. (District Judge, Middle District of Florida)
4. Lamont, Michael S.
5. Lazzara, Richard A. (District Judge, Middle District of Florida)
6. Levenson, Robert
7. Masel, Scott A.
8. McCoun, III, Thomas B. (Magistrate Judge, Middle District of Florida)
9. Morello, Gianluca
10. Nadel, Arthur (Deceased)
11. Perez, Jared J.
12. Pizzo, Mark A. (Magistrate Judge, Middle District of Florida)

13. Scoop Capital, LLC
14. Scoop Management, Inc.
15. Scoop Real Estate, L.P.
16. Securities and Exchange Commission
17. Stillman, Philip H.
18. Stillman & Associates
19. The Ticktin Law Group, P.A.
20. Valhalla Investment Partners, L.P.
21. Valhalla Management, Inc.
22. Victory Fund, Ltd.
23. Victory IRA Fund, Ltd.
24. Viking Fund, LLC
25. Viking IRA Fund, LLC
26. Viking Management, LLC
27. Wiand, Burton
28. Wiand Guerra King P.A.
29. Yip, Maria M.
30. YIPCPA, LLC d/b/a Yip Associates
31. Zamorano, Andre

STATEMENT REGARDING ORAL ARGUMENT

Appellant Burton W. Wiand, as Receiver, requests oral argument, as the appeal concerns precedential matters regarding prejudgment interest that will impact this and future equity receiverships in this Circuit.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

SUBJECT MATTER AND APPELLATE JURISDICTION

This is a direct appeal from a civil case. On January 23, 2013, the United States District Court for the Middle District of Florida (the "**District Court**") adopted (Doc.[1] 128) a Report and Recommendation (Doc. 121), recommending that Burton W. Wiand as Receiver's (the "**Receiver**") motions for summary judgment be granted. A final judgment was entered against Appellee Dancing $, LLC ("**Dancing $**"), on January 24, 2013 (Doc. 129). The District Court had subject matter jurisdiction pursuant to 15 U.S.C. § 78aa, 28 U.S.C. §§ 754 and 1692, and principles of ancillary or supplemental jurisdiction under 28 U.S.C. § 1367.

On February 22, 2013, Dancing $ filed a notice of appeal (Doc. 131), and the Receiver filed a notice of cross-appeal (Doc. 132). Pursuant to pertinent law, the Receiver then moved for permission from the District Court in *S.E.C. v. Nadel et al.*, Case No. 8:09-cv-87-T-26TBM (M.D. Fla.) (the "**SEC Action**") – the action in which the Receiver was appointed – to prosecute the cross-appeal, and the District Court granted the Receiver's motion (SEC Action Docs.[2] 981, 982).

On August 27, 2014, this Court affirmed the portion of the District Court's order which ruled in favor of the Receiver on his fraudulent transfer claims, but it

---

[1] "Doc." refers to the docket number of filings in the District Court in this case.

[2] "SEC Action Doc." refers to the docket number of filings in the District Court in the SEC Action.

reversed and remanded the District Court regarding its refusal to award the Receiver prejudgment interest. On remand, the District Court adopted a second Report and Recommendation (Docs. 147, 150) which only awarded the Receiver prejudgment interest from the date he filed his complaint in this action (as opposed to the earlier dates of the pertinent fraudulent transfers). A final judgment was entered against Dancing $ on July 14, 2015 (Doc. 151) in the amount of $17,724.12, and the Receiver filed a timely notice of appeal on July 28, 2015 (Doc. 152).

ISSUE PRESENTED

1. On remand, did the District Court comply with Florida law and this Court's instructions in *Wiand v. Dancing $, LLC*, 578 Fed. App'x 938, 947 (11th Cir. 2014), to "identify and apply the [*Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1297 (11th Cir. 2002)] factors in order to determine whether equitable considerations justify a denial or reduction of prejudgment interest to the Receiver in light of Florida's general rule that prejudgment interest is an element of pecuniary damages" ?

STATEMENT OF THE CASE

Relevant Procedural History

This is one of numerous "clawback" cases brought by the Receiver against recipients of fraudulent transfers in the aftermath of a massive Ponzi scheme perpetrated by Arthur Nadel ("**Nadel**"). *See generally S.E.C. v. A. Nadel et al.*, Case No. 8:09-cv-87-T-26TBM (M.D. Fla.); *United States v. A. Nadel.*, Case No. 1:09-cr-00433-JGK (S.D.N.Y.). The majority of clawback defendants, like Dancing $, were investors who received from the scheme more money than they "invested" (*i.e.*, they enjoyed "false profits").

The Receiver brought this case in his capacity as court-appointed Receiver for the Hedge Funds. The Receiver filed a partial summary judgment motion (Doc. 30) in the District Court on March 23, 2012, seeking to establish that Nadel perpetrated a Ponzi scheme through the Hedge Funds. Because of the case's procedural posture, on September 28, 2012, the Receiver filed a second summary judgment motion (Doc. 97) seeking to avoid the fraudulent transfers Dancing $ received from the scheme under the Florida Uniform Fraudulent Transfer Act ("**FUFTA**") or claims for unjust enrichment and also seeking prejudgment interest (*id.* at 20-21).

On December 13, 2012, Magistrate Judge Mark A. Pizzo issued a Report and Recommendation (Doc. 121) (the "**First R&R**") recommending the District Court grant the Receiver's summary judgment motions with respect to (1) the existence of

"a massive Ponzi scheme" perpetrated through the Hedge Funds, and (2) the Receiver's FUFTA claim under Section 726.105(1)(a).[3] (The R&R explains the procedural history of the Receiver's motions at pages 4 through 9.) Of relevance to this appeal, the First R&R also recommended that the District Court deny in full the Receiver's request for prejudgment interest on his successful FUFTA claim. *Id.* at 30-31. Specifically, it "balance[ed] the equities at hand" and concluded they weighed in favor of Dancing $ and against an award of prejudgment interest because, although Dancing $ was a "net winner" compared to hundreds of investors who lost approximately $168 million in Nadel's Ponzi scheme, it had "suffered enough." *Id.* at 30-31.

The parties filed objections to the R&R and responses to those objections (*see* Docs. 123, 124, 126, 127), but the District Court adopted the R&R on January 23, 2013, and incorporated the R&R's reasoning into its order (Doc. 128). A final judgment (Doc. 129) was entered against Dancing $ on January 23, 2013, in the amount of $107,172.11, which did not include any prejudgment interest. Dancing $ appealed the summary judgment (Doc. 131), and the Receiver cross-appealed the prejudgment interest determination (Doc. 132).

[3] The District Court had referred the Receiver's summary judgment motions to the Magistrate Judge for report and recommendation (*see* Docs. 121, 128).

On appeal, the Receiver explained that prejudgment interest is "merely another element of pecuniary damages" in Florida. *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 214 (Fla. 1985). Under this "loss theory," "the loss itself is a wrongful deprivation by the defendant of the plaintiff's property." *Id.* at 215. Accordingly, "it is well settled that a plaintiff is entitled to prejudgment interest when it is determined that the plaintiff has suffered an actual, out-of-pocket loss at some date prior to the entry of judgment." *Alvarado v. Rice*, 614 So. 2d 498, 499 (Fla. 1993). Because Florida does not follow the "penalty theory" of prejudgment interest, Dancing $'s purported suffering was irrelevant to the Receiver's entitlement to prejudgment interest. The Receiver further explained that the equitable factors set forth in *Blasland* are the sole equitable factors that justify departure from Florida's general rule in favor of prejudgment interest, and they either did not apply here or they favored the Receiver.

The Eleventh Circuit agreed and, citing another clawback case in which the Receiver prevailed on appeal, determined the Magistrate Judge abused his discretion:

> In [*Wiand v. Lee*, 753 F.3d 1194 (11th Cir. 2014)], the Magistrate Judge in the report and recommendation adopted by the District Court "stated that Florida law considers prejudgment interest an element of pecuniary damages and stated the equitable factors in *Blasland* that would warrant a court in departing from the general rule that prejudgment interest is to be awarded." *Id.* at 1204. But the rationale the Magistrate Judge set out "fail[ed] to identify and apply the equitable factors considered in *Blasland* to the decision to deny prejudgment interest" and thus

> committed an abuse of discretion. *Id.* at 1205. We noted several cases indicating that Florida courts award prejudgment interest "as a matter of course." *Id.* (citations omitted). Accordingly, we reversed the District Court's judgment denying prejudgment interest and instructed that, "[u]pon remand, the magistrate judge must cite specific equitable considerations recognized under Florida law that would result in a different outcome than the cases" that routinely award prejudgment interest on FUFTA and unjust enrichment claims. *Id.*
>
> Here, the Magistrate Judge's R & R, which the District Court adopted, 'recommends denying prejudgment interest in virtually identical language to that the Magistrate Judge used in recommending a denial of prejudgment interest in *Lee*—only the defendants' names differ. Thus, following *Lee*, we must reverse the District Court's judgment denying prejudgment interest and remand. Upon remand, the District Court must identify and apply the equitable factors set forth in *Blasland* in order to explain why a denial of prejudgment interest is warranted in light of cases which indicate that Florida courts award it routinely.

Dancing $, 578 Fed. App'x at 947 (emphasis added). In short, the Eleventh Circuit expressly directed the District Court to "identify and apply the equitable factors set forth in *Blasland* in order to explain why a denial of prejudgment interest is warranted" (*id.* (emphasis added)), but as explained below, the Magistrate Judge's Report and Recommendation on remand (Doc. 147) (the "**Second R&R**") admittedly identified and applied equitable factors outside those set forth in *Blasland* to improperly reduce the Receiver's prejudgment interest award.

Specifically, after remand and additional briefing, the Magistrate Judge issued the Second R&R, recommending the Court award the Receiver prejudgment interest from the date of the complaint as opposed to the dates of the fraudulent transfers to Dancing $. Doc. 147 at 12. In making that recommendation, the Second R&R

described this Court's instruction to "identify and apply the equitable factors set forth in *Blasland* in order to explain why a denial of prejudgment interest is warranted" (578 Fed. App'x at 947 (emphasis added)) as "enigmatic," "uninformative," and "an impossible exercise" (*id.* at 9, 8, 3 (respectively)). The Second R&R recognized the facts of this case do not fall within the *Blasland* factors for departing from Florida's general rule of awarding prejudgment interest from the date of loss, yet it nevertheless did not apply the general rule. Instead, in direct conflict with this Court's remand instructions and Florida law, the Second R&R concluded that "*Blasland* clearly did not limit the equitable factors a court can consider to just those *Blasland* identified" (*Id.* at 3), and that "[a]t most, *Blasland's* list presents illustrative examples where courts have considered particular circumstances for deciding if the equities outweigh the proposition that money over time creates value and that value should be a compensable feature of the winning party's pecuniary damages." *Id.* at 4. Based on factors admittedly not contemplated in *Blasland*, the Second R&R recommended limiting the Receiver to prejudgment interest from the date of the complaint instead of from the date of the fraudulent transfers.

The Receiver filed an objection to the Second R&R, but the District Court adopted its recommendation in full. As a result, a final judgment was entered against Dancing $ on July 14, 2015 (Doc. 151) in the amount of $17,724.12, representing

prejudgment interest only from the date of the complaint, and the Receiver filed a timely notice of appeal on July 28, 2015 (Doc. 152).

Factual Background

As the District Court correctly determined based on the Receiver's "overwhelming" record evidence, Nadel operated a "massive Ponzi scheme" through the Hedge Funds. Doc. 121 at 1; *see* Doc. 128; *Dancing $*, 578 Fed. App'x at 945-46. As part of that scheme, Nadel caused the Hedge Funds to transfer money to investors "with the actual intent to hinder, delay, or defraud [any creditor] as required by Fla. Stat[s]. § 726.105(1)(a)." Doc. 121 at 31. On January 21, 2009, the District Court appointed the Receiver in the SEC Action and charged him with, among other things, recovering those fraudulent transfers for the benefit of the Hedge Funds and their creditors, including defrauded investors who collectively lost approximately $168 million in the scheme. *See* SEC Action Doc. 8 (initial order appointing Receiver). Pursuant to this mandate, the Receiver identified "winning" investors like Dancing $ who enjoyed false profits, or "**profiteers**" – *i.e.*, those that received more money from the scheme than they "invested" in it – and demanded they return their false profits. Numerous profiteers settled with the Receiver pre-suit and returned the vast majority of their false profits.[4] The Receiver then sued in the

[4] *See generally* orders approving settlements at SEC Action Docs. 106, 110, 114, 126, 134, 136, 138, 143, 150, 159, 187, 197, 203, 210, 212, 219, 220, 221, 222, 226,

District Court profiteers who refused to settle, like Dancing $ (which totaled approximately 150 cases), and the vast majority of those actions were settled.[5] The money the Receiver recovered through the settlements (and from other sources) is being distributed *pro rata* to the hundreds of investors who lost money in the scheme (the "**losing investors**") through a claims process established in the SEC Action. SEC Action Docs. 675, 776. To date, as a result of the Receiver's efforts, those losing investors have recovered approximately 44.37% of their losses through the claims process, but they almost certainly will never be made whole. *See* SEC Action Docs. 945, 946.

As previously noted, Dancing $ was among the profiteers the Receiver sued. Specifically, Dancing $ "invested" a total of $675,000 in the scheme in 2006 and 2007 by "investing" in Hedge Funds Valhalla Investment Partners, L.P. ("**Valhalla**"), and Scoop Real Estate, L.P. ("**Scoop Real Estate**"). Doc. 97 at 9-11; *see* Doc. 121 at 3. It received purported "distributions" from those Hedge Funds in

---

228, 243, 261, 270, 283, 285, 290, 295, 306, 307, 308, 310, 318, 319, 334, 336, 349, 364, 373, 385, 394, 397, 415, 452, 634, 656, and 885.

[5] *See generally* orders approving settlements at SEC Action Docs. 339, 340, 347, 348, 359, 361, 366, 368, 375, 377, 379, 381, 383, 389, 399, 401, 404, 405, 407, 409, 412, 413, 428, 429, 442, 444, 447, 469, 488, 489, 504, 508, 514, 515, 517, 525, 526, 527, 528, 529, 530, 531, 533, 550, 551, 552, 559, 560, 561, 573, 574, 579, 584, 586, 590, 592, 594, 596, 598, 602, 604, 606, 611, 613, 624, 628, 636, 638, 642, 644, 649, 654, 661, 808, 830, 865, 881, 889, 896, 918, 923, 957, 962, 963, 1014, 1015, and 1032.

2008 totaling $782,172.11. *Id.* As such, Dancing $ received from the scheme $107,172.11 more than it "invested," which represents its false profits. *Id.* Because Dancing $ received those transfers in 2008, it enjoyed the use of money that did not rightfully belong to it for more than 7 years (and counting). The Receiver obtained a judgment in the amount of Dancing $'s false profits, but so far the District Court has only awarded him $17,724.12 of the $37,967.48 in prejudgment interest to which he is entitled. Regardless of the amount of prejudgment interest due, Dancing $ has made no attempt to satisfy the judgment against it.

Standard of Review

De novo review for legal error applies to the legal issue of whether the District Court complied with this Court's instructions in *Wiand v. Dancing $, LLC,* 578 Fed. App'x 938, 947 (11th Cir. 2014), to "identify and apply the *Blasland*, factors in order to determine whether equitable considerations justify a denial or reduction of prejudgment interest to the Receiver in light of Florida's general rule that prejudgment interest is an element of pecuniary damages." *See KH Outdoor, LLC v. City of Trussville,* 458 F.3d 1261, 1266 (11th Cir. 2006). Abuse of discretion review applies to whether the District Court erred in weighing the equities and concluding the Receiver was only entitled to prejudgment interest on his successful fraudulent transfer claim from the date of the complaint. *Blasland, Bouck & Lee, Inc. v. City of N. Miami*, 283 F.3d 1286, 1298 (11th Cir. 2002).

SUMMARY OF THE ARGUMENT

The Second R&R failed to follow Florida law and this Court's instructions on remand. Instead of considering only the factors set forth in *Blasland*, it admittedly considered other factors and evaluated the purported equitable underpinnings of clawback cases arising from Ponzi scheme enforcement actions, and concluded the Receiver is only entitled to prejudgment interest from the date of the complaint. As explained below, because, as the Second R&R acknowledges, the *Blasland* factors do not apply here, Florida law requires the District Court apply Florida's general rule awarding the Receiver prejudgment interest from the date of loss – *i.e.*, the dates of the fraudulent transfers to Dancing $.

ARGUMENT

I. THIS COURT DIRECTED THE DISTRICT COURT TO "IDENTIFY AND APPLY THE *BLASLAND* FACTORS" ON REMAND

In both *Lee* and *Dancing $*, this Court was clear that "Florida endorses the 'loss theory' of prejudgment interest according to which prejudgment interest is 'merely another element of pecuniary damages.'" *Lee*, 753 F.3d at 1204 (quoting *Argonaut Ins. Co.*, 474 So. 2d at 214). "'[W]hen a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss.'" *Id.* (quoting *Argonaut*, 474 So. 2d at 215); *see Dancing $*, 578 Fed. App'x at 946. "In

determining whether to award prejudgment interest or to reduce the amount of prejudgment interest awarded, a court must consider three factors:

> (1) in matters concerning government entities, whether it would be equitable to put the burden of paying interest on the public in choosing between innocent victims; (2) whether it is equitable to allow an award of prejudgment interest when the delay between injury and judgment is the fault of the prevailing party; (3) whether it is equitable to award prejudgment interest to a party who could have, but failed to, mitigate its damages.

Dancing $, 578 Fed. App'x at 946 (citing *Blasland*, 283 F.3d at 1297).

This Court was clear in both *Lee* and *Dancing $* that, in deciding whether to depart from Florida's general rule, the Court's equitable inquiry is limited to the three exceptions set forth in *Blasland*:

- In *Blasland*, "this court considered three factors that should guide a court's discretion in deciding whether to award prejudgment interest on equitable grounds.… Upon a consideration of these factors, a district court may decide not to award prejudgment interest or to reduce the amount of interest." *Lee*, 753 F.3d at 1204 (emphasis added).

- "The court finds the magistrate judge's rationale to be an abuse of discretion because it fails to identify and apply the equitable factors considered in *Blasland* to the decision to deny prejudgment interest." *Id.* at 1205 (emphasis added).

- We "**REVERSE** and **REMAND** with instructions for the court to apply the factors in *Blasland* to determine whether equitable considerations justify denying or reducing a prejudgment interest award in light of Florida's general rule that prejudgment interest is an element of pecuniary damages." *Id.* at 1205 (underlined emphasis added; bold in original).

- "But the rationale the Magistrate Judge set out 'failed to identify and apply the equitable factors considered in *Blasland* to the decision to

deny prejudgment interest' and thus committed an abuse of discretion." *Dancing $*, 578 Fed. App'x at 947 (quotation omitted; emphasis added).

- "Upon remand, the District Court must identify and apply the equitable factors set forth in *Blasland* in order to explain why a denial of prejudgment interest is warranted in light of cases which indicate that Florida courts award it routinely." *Id.* (emphasis added).

- We "REVERSE and REMAND the denial of prejudgment interest with instructions that the District Court identify and apply the *Blasland* factors in order to determine whether equitable considerations justify a denial or reduction of prejudgment interest to the Receiver in light of Florida's general rule that prejudgment interest is an element of pecuniary damages." *Id.* at 947-48 (emphasis added).

In direct conflict with this Court's unequivocal and repeated[6] statements limiting pertinent considerations to the three equitable factors identified in *Blasland*, the Second R&R more broadly concluded that "*Blasland* clearly implied that its list was not exhaustive as it considered a fourth factor that its Florida survey of cases had not uncovered (*i.e.*, the [defendant] … had a well-founded malpractice claim against Blasland which precipitated the [defendant's] … breach)." Doc. 147 at 4. But the Second R&R failed to appreciate that *Blasland* only considered the malpractice claim because it overlapped two recognized factors: failure to mitigate damages and unwarranted procedural delay. 283 F.3d at 1299. This Court explained

[6] *See also Wiand v. Meeker*, 572 Fed. App'x 689 (11th Cir. 2014) ("For the reasons set forth in Section II.B of this Court's *Lee* opinion, we find that the district court abused its discretion in denying Wiand's request for prejudgment interest in the instant case and, therefore, reverse and remand for the lower court to apply the factors in *Blasland* to determine whether equitable considerations justify denying or reducing a prejudgment interest award in this case.").

that like the malpractice that caused the *Blasland* defendant to breach its contract, "those two factors focus on the fault of the victim in either creating the damages or causing delay in recovering them." *Id.* In other words, the Court's consideration of the malpractice claim in *Blasland* was encompassed by the three factors recognized by Florida law as possible bases for departing from the general rule awarding prejudgment interest from the date of loss. In contrast, the Second R&R not only failed to explain how the factors it relied upon overlapped any of the *Blasland* factors, but it effectively acknowledged there was no overlap. Doc. 147 at 3 (finding *Blasland* factors "uninformative" because "our circumstances are unlike those Florida courts see when deciding awards of prejudgment interest"). *Blasland* and this Court's repeated statements in *Lee* and *Dancing $* are clear that in the absence of any of the three factors excerpted above, "[t]he general rule is that prejudgment interest is an element of pecuniary damages, and Florida courts have awarded prejudgment interest on FUFTA claims and on unjust enrichment claims as a matter of course." *Lee*, 753 F.3d at 1205.

II. THE SECOND R&R'S INTERPRETATION OF *BLASLAND* IS INCORRECT

In concluding that *Blasland*'s equitable factors were not exhaustive, for several reasons the Second R&R found this Court could not have meant what it (repeatedly and unequivocally) held. None of those reasons, however, support the Second R&R's conclusion.

A. The Second R&R Incorrectly Found The *Blasland* Factors Are Merely "Illustrative"

The Second R&R concluded this Court could not have meant what it held because the *Blasland* exceptions to Florida's general rule are merely an "illustrative list" of "examples." Doc. 147 at 3, 4. But that theory was the lynchpin of the First R&R's conclusion that the District Court could deviate from the general rule entitling the Receiver to prejudgment interest from the date of each pertinent fraudulent transfer (s*ee generally* Doc. 121 at 30-31), and this Court reversed that conclusion. In fact, the Second R&R reused the exact language this Court quoted in holding the District Court abused its discretion by denying prejudgment interest:

> Here, the magistrate judge stated that Florida law considers prejudgment interest an element of pecuniary damages and stated the equitable factors in *Blasland* that would warrant a court in departing from the general rule that prejudgment interest is to be awarded. However, the magistrate judge then stated "[t]he list is obviously illustrative as each case is different" ….
>
> The court finds the magistrate judge's rationale to be an abuse of discretion because it fails to identify and apply the equitable factors considered in *Blasland* to the decision to deny prejudgment interest.

Lee, 753 F.3d at 1204-05 (emphasis added). This Court's instructions were clear: the District Court was required to apply only the *Blasland* factors, and any departure from those factors is an abuse of discretion. As discussed below in Section III, if none of the *Blasland* factors applies, there is no discretion to depart from Florida's general rule requiring an award of prejudgment interest from the date of loss.

B. The Second R&R Incorrectly Found That If The *Blasland* Factors Were Not Merely "Illustrative," Then This Court Would Have "Simply Instructed The [District] Court To Compute The Sum" Of Pre-Judgment Interest To Award To The Receiver

According to the Second R&R, "[t]he Eleventh Circuit's remand cannot be read to say that the general rule is anything other than general, or to say that this Court must rigidly adhere to the general rule thereby entitling the Receiver to the interest calculated from the date of the clawed-back transfers. If so, the remand would have simply instructed the Court to compute the sum." Doc. 147 at 8; *see id.* at 9 ("But, if the Eleventh Circuit had determined as much, it would have so stated in its opinion and remanded the matter solely for the Court's computation."). That conclusion, however, is not supported by this Court's decision, which remanded so the District Court could specifically consider and explain whether any of the *Blasland* factors applied since the First R&R did not do so.

The First R&R contained only two paragraphs on prejudgment interest. *See* Doc. 121 at 30-31. Those two paragraphs recognized the *Blasland* factors – "the extent the plaintiff's conduct contributed to the delay between the injury and judgment; whether the prevailing party failed to mitigate damages; in matters involving public bodies, and in choosing between innocent victims, it is inequitable to put the burden of paying interest on the public" – but contained no analysis or findings of whether any of those factors applied. *Id.* Instead, the First R&R more generally stated that "[i]n view of these principles, I conclude that to exact

prejudgment interest from Dancing $ would be inequitable." Doc. 121 at 31. Because the First R&R did not "identify and apply the *Blasland* factors," this Court reversed and remanded so the District Court could do so. *Dancing $,* 578 Fed. App'x at 947-48. That this Court remanded for the District Court to apply those factors rather than to simply "compute the sum" of prejudgment interest, does not justify the Second R&R's conclusion that the District Court could consider factors beyond those identified in *Blasland*.

C. This Court Has Already Rejected The Evaluation Of The Equities Underlying The Second R&R's Recommendation, Which The District Court Adopted

After concluding the *Blasland* factors are "illustrative," and this Court could not have meant otherwise, the Second R&R examined "[t]he judicial evolution for dealing with massive Ponzi schemes halted by enforcement actions" and concluded that "to apply Florida's prejudgment presumption across the board to all transferees would distort the equitable goal of the enforcement action, particularly when the character of the transferee, which FUFTA takes into account, is as innocent as his losing companion investor." Doc. 147 at 5-9. Relying on that conclusion, the Second R&R recommended the District Court only award prejudgment interest from the date of the complaint. *Id.* at 10. As an initial matter, as discussed in Section III below, if none of the *Blasland* factors applies, then Florida law does not allow the District Court to deviate from the general rule of awarding prejudgment interest from

the date of loss. But putting that aside, the Second R&R's conclusion is not substantively different than the one in the First R&R, which this Court held was an abuse of discretion:

> Despite its position as a "net winner," compared to the greater number of "net losers" Nadel swindled, Dancing $ is certainly not a winning investor in the normal sense. Like the net losers, Dancing $ invested in the hedge funds assuming their legitimacy. That it received a return in excess of its investments was likely serendipitous. With the avoidance of those positive transfers (the amounts above principal invested), requiring Dancing $ to pay more out of its pocket in the form of prejudgment interest would not satisfy the goals for making the award…. Simply put, Dancing $ members (despite the LLC's legal fiction), have suffered enough.

Doc. 121 at 31. This Court already rejected the notion that an investor is not required to pay prejudgment interest because of the investor's purported innocence in the fraud: "that the Lee Defendants will be forced to pay more than the profits they received with the addition of a prejudgment interest award is not an equitable factor weighing against an award, but is a necessary consequence of the loss theory of prejudgment interest." *Lee*, 753 F.3d at 1205. Had Dancing $ (or Lee or any other clawback defendant) wished to avoid paying prejudgment interest, it could have accepted the Receiver's pre-suit offer to settle for 90% of its false profits instead of litigating for five years before losing. Put simply, just as it was an abuse of discretion to conclude the Receiver was entitled to no prejudgment interest without identifying a specific applicable *Blasland* factor, it is also an abuse of discretion to limit the

amount of prejudgment interest without identifying a specific applicable *Blasland* factor.

III. IF THE *BLASLAND* FACTORS DO NOT APPLY, THE RECEIVER IS ENTITLED TO PREJUDGMENT INTEREST FROM THE DATE OF LOSS UNDER THE GENERAL RULE

The Second R&R found applying the *Blasland* factors is "an impossible exercise" because "neither side cites a Florida case with similar facts and [the Magistrate Judge] can find none." Doc. 147 at 8. The Second R&R asked, "[i]f no Florida case speaks to similar facts, how is this Court to appropriately consider Florida's general rule in the manner Florida courts would?" *Id.* The answer is straightforward: "When a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest at the statutory rate from the date of that loss." *Lee*, 753 F.3d at 1204.[7] Thus, if there

[7] *See also See Allstate Ins. Co. v. Palterovich*, 653 F. Supp. 2d 1306, 1329 (S.D. Fla. 2009) (applying Florida law in calculating prejudgment interest from the date of each wrongful taking); *Montage Group, Ltd. v. Athle-Tech Computer Sys., Inc.*, 889 So. 2d 180, 199 (Fla. 2d DCA 2004) (calculating prejudgment interest in an unjust enrichment action from the date on which the defendant became unjustly enriched); *Greenberg v. Grossman*, 683 So. 2d 156, 157 (Fla. 3d DCA 1996) (calculating the date of loss as the date of takings in a civil theft case); *Vining v. Martyn*, 660 So. 2d 1081, 1082 (Fla. 4th DCA 1995) (awarding prejudgment interest from the date theft occurred); *Florida Farm Bureau Cas. Ins. Co. v. Patterson*, 611 So. 2d 558, 560 (Fla. 1st DCA 1992) (awarding prejudgment interest from the date conversion occurred); *Miller v. Reinhart*, 548 So. 2d 1174, 1175 (Fla. 4th DCA 1989) (awarding prejudgment interest from the date of each unauthorized taking); *Sargent v. Midlantic Nat. Bank*, 358 So. 2d 855, 856 (Fla. 2d DCA 1978) (remanding for the purpose of amending final judgment to add prejudgment interest from the date of conversion); *see also In re International Administrative Services, Inc.*, 408

is no Florida case[8] authorizing departure from the general rule under similar facts, then the Court should apply the general rule awarding prejudgment interest from the date of loss. The Second R&R briefly considers this straightforward answer (*see* Doc. 147 at 9), but rejects it because "if the Eleventh Circuit had determined as much, it would have so stated in its opinion and remanded the matter solely for the Court's computation" (*id.*). As explained above in Section II.B., however, that conclusion does not follow its premise. The First R&R's two paragraphs on prejudgment interest did not apply the specific *Blasland* factors to the facts of the case, and this Court reversed and remanded "the denial of prejudgment interest with instructions that the District Court identify and apply the *Blasland* factors in order to determine whether equitable considerations justify a denial or reduction of prejudgment interest to the Receiver in light of Florida's general rule that prejudgment interest is an element of pecuniary damages." *Dancing $*, 578 Fed. App'x at 947-48. Having concluded in the Second R&R that none of the *Blasland*

F.3d 689, 710 (11th Cir. 2005) (confirming award of pre-judgment interest "for the use of funds for the entire period of time in which they were wrongfully withheld").

[8] Outside of Florida, courts routinely award receivers prejudgment interest in Ponzi scheme clawback actions. *See, e.g., Lee*, 753 F.3d at 1205 (citing *Donell v. Kowell*, 533 F.3d 762, 772 (9th Cir. 2008) (Court can "permit the receiver to recover pre-judgment interest on the fraudulent transfers from the date each transfer was made" because "prejudgment interest should not be thought of as a windfall…; it is simply an ingredient of full compensation that corrects judgments for the time value of money.")).

factors applies, the Magistrate Judge had no basis to deviate from the general rule awarding the Receiver prejudgment interest from the dates of the fraudulent transfers to Dancing $. Because the District Court, however, has now had the opportunity to evaluate the *Blasland* factors and concluded none of them apply here, there is no more factual analysis to be done, and this Court should simply direct it to calculate and award the Receiver prejudgment interest from the dates of the pertinent fraudulent transfers.

CONCLUSION

For the reasons set forth above, the Court should direct the District Court to calculate and award the Receiver prejudgment interest from the dates of the pertinent fraudulent transfers as opposed to the date of the complaint.

CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B)(i). This brief contains 4,964 words. Times New Roman 14 is the type style and size used in this brief.

s/Gianluca Morello
Gianluca Morello, FBN 034997
gmorello@wiandlaw.com
Michael S. Lamont, FBN 0527122
mlamont@wiandlaw.com
Jared J. Perez, FBN 0085192
jperez@wiandlaw.com
WIAND GUERRA KING P.A.
5505 West Gray Street
Tampa, FL 33609
Tel.: (813) 347-5100
Fax: (813) 347-5198

Attorneys for Appellant Receiver, Burton W. Wiand

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2015, I filed the foregoing through the Court's ECF system.

Phillp H. Stillman
Stillman & Associates
2540 Manchester Ave.
Cardiff, California 92007
pstillman@stillmanassociates.com

Joshua Bleil
The Ticktin Law Group P.A.
600 W. Hillsboro Blvd.
Suite 220
Deerfield Beach, FL 33441
jbeil@legalbrains.com

s/Gianluca Morello
Gianluca Morello, FBN 034997