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,

Relief Defendants.
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RECEIVER'S MOTION TO APPROVE SETTLEMENT

Burton W. Wiand, as Receiver (the "**Receiver**"), moves the Court for an order approving settlement of claims he intended to assert against Goldman Sachs Execution & Clearing, L.P. ("**GSEC**") on the basis of the Settlement Agreement attached as **Exhibit A** (the "**Settlement Agreement**"), which, among other things, contemplates entry of a bar order as described below. Contemporaneously with this motion, the Receiver is also filing (1) the Affidavit Of Burton W. Wiand In Support Of Receiver's Motion To Approve Settlement (the "**Receiver's Affidavit**"), which sets forth the facts and conclusions on which this motion

relies, and (2) a Motion To Approve Proposed Notice Of Settlement (the "**Notice Motion**"). The Receiver respectfully requests that the Court first address the Notice Motion and, if that motion is granted, that it continue a decision on this motion until after the deadline set forth in the Notice Motion for objections or other responses to the relief requested in this motion.

ARGUMENT

The Securities and Exchange Commission (the "**Commission**" or "**SEC**") instituted this action (the "**SEC Receivership Action**") to "halt [an] ongoing fraud, maintain the status quo, and preserve investor assets . . . ." (Dkt. 1, Compl. ¶ 7.) Mr. Wiand was appointed by this Court as the Receiver for Defendants other than Arthur Nadel ("**Nadel**") and for Relief Defendants. (*See* Order Appointing Receiver (Dkt. 8).) Additionally, the Receivership was expanded to include Venice Jet Center, LLC and Tradewind, LLC (Dkt. 17); Laurel Mountain Preserve, LLC, Laurel Preserve, LLC, the Marguerite J. Nadel Revocable Trust UAD 8/2/07, and the Laurel Mountain Preserve Homeowners Association, Inc. (Dkt. 44); The Guy-Nadel Foundation, Inc. (Dkt. 68); Lime Avenue Enterprises, LLC, and A Victorian Garden Florist, LLC (Dkt. 79); Viking Oil & Gas, LLC (Dkt. 153); Home Front Homes, LLC (Dkt. 172); and Traders Investment Club (Dkt. 454). All of the entities in receivership are collectively referred to as the "**Receivership Entities,**" and Receivership Entities 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. are collectively referred to as the "**Hedge Funds**".

Pursuant to the Order Appointing Receiver (Dkt. 8), in relevant part the Receiver has the duty and authority to:

> 2. Investigate the manner in which the affairs of the Receivership Entities were conducted and institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Entities and their investors and other creditors as the Receiver deems necessary . . . against any transfers of money or other proceeds directly or indirectly traceable from investors in the Receivership Entities; provided such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement or profits, recovery and/or avoidance of fraudulent transfers under Florida Statute § 726.101, et. seq. or otherwise, rescission and restitution, the collection of debts, and such orders from this Court as may be necessary to enforce this Order.

Further, the Order Appointing Receiver (at paragraph 6) authorizes the Receiver to "[d]efend, compromise or settle legal actions . . . in which the Receivership Entities or the Receiver is a party . . . with authorization of this Court . . . ."

The Receiver's Investigation Of Nadel And GSEC

The Receiver's investigation has revealed that Nadel used certain financial institutions in connection with his Ponzi scheme. One such institution, GSEC (formerly known as Spear, Leeds & Kellogg, L.P.), provided clearing services for Shoreline Trading Group LLC ("**Shoreline**"), an introducing Broker/Dealer that dealt directly with Nadel's and certain Receivership Entities' securities transactions. The Receiver gathered information relating to these transactions and contacted GSEC to discuss its role in providing such services to Nadel and Receivership Entities. From the beginning, GSEC cooperated with the Receiver and, in fact, produced a large volume of documents and was responsive to all requests for documents made by the Receiver over time. Further, in November 2010, GSEC entered into a tolling agreement, at the Receiver's request, so the parties could fully investigate matters and work to resolve them in an amicable fashion without concern for applicable statutes of limitation.

The Receiver's investigation revealed information indicating to the Receiver that while GSEC had no actual knowledge of Nadel's scheme and provided only customary prime brokerage services at the request of Shoreline, GSEC may have failed to appropriately respond to certain "red flags" that could, upon further inquiry, have revealed Nadel's scheme. In addition, the Receiver determined that GSEC may have failed to raise certain questions with respect to accounts controlled by Nadel. Based upon those findings, the Receiver concluded that it was appropriate to seek compensation for the Receivership estate from GSEC. While the Receiver determined that some amount of compensation was due from GSEC to the Receivership, he was presented with various possibilities for calculating the actual value of his claims. For example, in negotiating the Settlement Agreement the Receiver considered the following variations for determining damages:

- **Apportioned Loss Amount:** Hundreds of investors lost approximately $168 million in connection with Nadel's scheme. The Receiver could have attempted to hold GSEC responsible for a portion of all such losses (according to GSEC's comparative liability and minus the amount recovered by the Receiver through "clawback" lawsuits and related litigation) on the theory that GSEC should have detected and prevented (or at least terminated) the Ponzi scheme. As discussed in more detail below, however, GSEC is a clearing firm, and clearing firms typically possess formidable legal defenses to recovery. The Receiver is unaware of any case in which a clearing firm has been held responsible for all losses arising from a Ponzi scheme.

- **Unauthorized External Transfers:** The Receiver's investigation determined that Nadel used "shadow" accounts at Wachovia Bank, N.A. ("**Wachovia**") to perpetrate and perpetuate his scheme. Specifically, Nadel opened accounts in a "doing business as" capacity to mimic the names of Hedge Funds Valhalla Investment Partners, Viking Fund, and Viking IRA Fund (the shadow accounts included one in the name of "Arthur Nadel dba Valhalla Investments" and another one in the name of "Arthur Nadel dba Viking Fund"). Nadel was not an officer, director, or principal of these three Hedge Funds and otherwise did not have authority to open accounts on their behalf. Nevertheless, GSEC followed Nadel's instructions, as provided to GSEC by Shoreline, to transfer money from the Hedge Funds' "official" trading accounts at GSEC to Nadel's imposter accounts

at Wachovia. During the course of the scheme, such transfers totaled approximately $10 million.

- **GSEC's Fees & Interest:** The Hedge Funds were charged certain fees for services provided to them and were charged interest for margin credit extended to the Hedge Funds. These amounts represent GSEC's and Shoreline's revenues in connection with the scheme. Collectively, GSEC and Shoreline received approximately $13.5 million in fees and interest, and the majority of that money went to Shoreline rather than GSEC.

Given these various possibilities for calculating damages to the Receivership Entities, the ultimate determination of the value of the Receiver's claims following a trial or similar proceeding could vary significantly, depending on the applicable legal theory, the fact finder's view of causation, the relative apportionment of losses between GSEC and other potential tortfeasors, and the strength of GSEC's defenses.

GSEC has maintained, and continues to maintain, that its conduct was in no way inappropriate, that it did not fail to comply with its duties and obligations, and that its position as a clearing broker limits any liability the Receiver might assert against it. However, due to practical concerns and a desire to resolve what could be a protracted dispute resolution process, GSEC determined early on to attempt to negotiate a resolution to the Receiver's claims in order to avoid the obvious expense and disruption that would be caused by protracted litigation.

The Receiver's Negotiations With GSEC

Once the Receiver and GSEC had exchanged significant amounts of information and had communicated their various views with respect to GSEC's potential liability, the Receiver and GSEC's counsel engaged in negotiations with respect to the specifics of a

potential resolution of their dispute. These negotiations focused on potential liability, defenses, and risk to the parties, as well as the potential valuation of the Receiver's claims.

As a result of these negotiations, an agreement has been reached between the Receiver and GSEC to be presented through this motion to the Court which includes a resolution of all claims the Receiver and Receivership estate may have against GSEC that in any way relate to any matters arising out of Nadel's conduct, including any of the account relationships with respect to which GSEC had any involvement. It is the intention of the Receiver and GSEC to resolve through GSEC's payment to the Receivership estate of $9,850,000 (the "**Settlement Amount**") any claims of investment losses or other damages that might be asserted against GSEC.

Settlement Considerations

In deciding to accept $9,850,000 from GSEC in resolution of all claims against that entity, the Receiver considered a number of significant factors. First, the Receiver considered the risks associated with litigating his claims. Primary among those risks is the fact that GSEC is a clearing firm and not an introducing broker (here, the introducing broker is Shoreline). "Generally, clearing brokers execute, clear, and settle trades for the introducing brokers who have direct relationships with the client." *SFM Holdings, Ltd. v. Banc of America Securities, LLC*, 600 F.3d 1334, 1338 (11th Cir. 2010). Because introducing brokers serve as intermediaries between clients and clearing firms, courts have held that, absent special circumstances, clearing firms are generally insulated from many potential claims. *See, e.g., id.* at 1338-39 (noting that "clearing brokers ordinarily owe no fiduciary duty to the customers of introducing brokers"); *Stander v. Fin. Clearing & Servs.*

Corp., 730 F. Supp. 1282 (S.D.N.Y. 1990) (dismissing claim for aiding and abetting securities law violation against clearing firm after observing that a "clearing broker normally has no direct contact with the individual customer"); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 472 (S.D.N.Y. 2001) ("A clearing broker does not provide 'substantial assistance' to or 'participate' in a fraud when it merely clears trades.").

As discussed below, however, clearing firms are not completely protected from liability for their actions or omissions. *See, e.g., Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Group, LLC,* 2010 WL 4877847 (S.D.N.Y. Nov. 30, 2010) (refusing to vacate arbitration award against GSEC in the amount of fraudulent transfers into hedge fund accounts), *appeal pending*; *In re Manhattan Inv. Fund Ltd. (Gredd)*, 397 B.R. 1 (S.D.N.Y. 2007) (rejecting clearing firm's argument that it acted as a "mere conduit" in connection with fraudulent transfers).[1] The Receiver believes the Settlement Amount represents an equitable and good faith balance between the advantages afforded to clearing firms by relevant authorities and GSEC's potential liability in connection with Nadel's scheme. In addition, the Receiver recognizes that GSEC is financially able to vigorously defend itself against the Receiver's claims. Consequently, litigation would likely require expenditure of substantial Receivership resources and would not be without significant risks. If litigation is unsuccessful, defrauded investors would recover nothing instead of the $9,850,000 set forth in the Settlement Agreement.

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[1] The *Gredd* ruling was presented to, but not reviewed by, the Second Circuit following a jury verdict finding the clearing firm received the fraudulent transfers in good faith. 328 Fed. Appx. 709, 2009 WL 1528764 (2d Cir. June 2, 2009).

Second, the Receiver considered the potential value of his claims against GSEC. As noted above, under principles of comparative fault, the Receiver could have attempted to hold GSEC responsible for its portion of all investor losses arising from Nadel's scheme, which losses total approximately $168 million. However, the Receiver is unaware of any case in which a clearing firm has been held responsible for all losses arising from a Ponzi scheme. In addition, the Receiver considered the amount of money that Nadel transferred from the Hedge Funds' official accounts at GSEC to Nadel's imposter accounts at Wachovia Bank. As noted above, that amount is approximately $10 million. These transfers allowed Nadel to perpetrate and perpetuate his Ponzi scheme because it enabled him to move money to fund payments to investors for purported profits and principal. The Receiver contends that such transfers were improper and that GSEC did not follow relevant guidelines and internal policies and procedures applicable to third-party transfers. Courts have imposed liability on clearing firms and banks (which often occupy a similar position to clearing firms) in analogous circumstances. *See, e.g., Neilson v. Union Bank of Ca., N.A.,* 290 F. Supp. 2d 1101, 1120-21, 1143 (C.D. Ca. 2003) (holding that use of "atypical banking procedures" in connection with Ponzi scheme can demonstrate sufficient knowledge to support claim of aiding and abetting fraud; upholding negligence claim for failure to ensure "accuracy, legitimacy, and existence" of certain assets); *In re Lloyds Secs., Inc.* 1992 WL 318588, *11, 14 (Bankr. E.D. Pa. 1992) (holding that clearing firm "at all times maintained a duty to safeguard the funds and securities of the individual customers" and that firm breached that duty by failing to "put into practice the minimal checkpoint procedures which it has itself established to protect the customers"); *RPR Clearing, a Div. of Rauscher Pierce Refsnes, Inc.*

v. Glass, 1997 WL 460717, *2 (S.D.N.Y. 1997) (refusing to vacate arbitration award against clearing firm for "breach of ordinary care").

Finally, the Receiver considered the fees and margin interest that GSEC earned for providing clearing services to the Hedge Funds. As noted above, the Hedge Funds paid approximately $13.5 million in fees and interest to GSEC and Shoreline, collectively, and the majority of that went to Shoreline rather than to GSEC. Courts have allowed the recovery of fees, commissions, and similar payments as fraudulent transfers from individuals or entities that provided brokerage services in connection with Ponzi schemes. *In re Evergreen Sec., Ltd.,* 319 B.R. 245, 255 (Bankr. M.D. Fla. 2003) (allowing recovery of commissions as fraudulent transfers because broker "did not perform the minimal due diligence required to demonstrate good faith"); *In re World Vision Entertainment, Inc.,* 275 B.R. 641, 660 (Bankr. M.D. Fla. 2003) (same); *In re Randy*, 189 B.R. 425, 440 (Bankr. N.D. Ill. 1995) ("These brokers were also paid commissions for inducing persons who had already invested in the scheme to keep their principal investments in place so that the Ponzi scheme would not collapse. The underlying reasoning that courts have used to find that profits paid in a Ponzi scheme to innocent investors are fraudulent transfers applies equally well to commissions paid to brokers who promoted or aided the investment scheme, whether or not they had any culpable intent."). Courts are not, however, unanimous on this issue, as some defendants have successfully argued that they acted in good faith and provided reasonably equivalent value for the fees or commissions they received, which is a defense against the recovery of fraudulent transfers. *See, e.g., In re Fin. Fed. Title & Trust, Inc.*, 309 F.3d 1325, 1331-33 (11th Cir. 2002) (disagreeing with *Randy* and examining related cases).

In deciding to recommend the resolution reflected in the Settlement Agreement, the Receiver also found the following considerations significant:

(1) based on the information reviewed by the Receiver, this settlement constitutes a recovery by the Receivership of an amount well in excess of all revenues earned by GSEC as a result of its indirect dealings with Nadel;

(2) litigation of claims against GSEC could easily cost the Receivership in excess of $1 million and would in no way guarantee the significant benefit to the Receivership estate that will occur as a result of the settlement reached with GSEC; and

(3) it is the Receiver's opinion that the amount of this settlement constitutes a fair valuation of any potential liability that GSEC might have as a result of its involvement with any accounts controlled by Nadel, given the applicable claims, defenses, and risks.

As a result of GSEC's cooperative and good-faith approach to resolving matters with the Receiver, the Receiver and GSEC were able to reach an agreement before the filing of any action. This provided a considerable cost savings to the Receivership. As noted above and in the Settlement Agreement, the Receiver and GSEC, subject to the approval of this Court, have agreed to settle for, among other things, payment by GSEC to the Receiver of $9,850,000 and a broad release of liability. Also as part the Settlement Agreement, the Receiver and GSEC agreed to seek entry of a bar order precluding any claims against GSEC by investors in the Receivership Entities or by potential joint tortfeasors, including claims for contribution or indemnity, which relate in any way to Nadel's Ponzi scheme (the "**Bar Order**").

The Bar Order Is Appropriate

Federal Rule of Civil Procedure 16 provides the Court authority to use special procedures, including bar orders, to assist parties in reaching a settlement. *See* Fed. R. Civ. P. 16(c)(9). Relying on Rule 16 and the Bankruptcy Code, the Eleventh Circuit has explicitly authorized the use of bar orders in bankruptcy proceedings. *See In re Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996). According to the Eleventh Circuit, "[s]everal justifications for entering bar orders in bankruptcy cases exist" (*id.*):

> First, public policy strongly favors pretrial settlement in all types of litigation because such cases, depending on their complexity, can occupy a court's docket for years on end, depleting the resources of parties and the taxpayers while rendering meaningful relief increasingly elusive. Second, litigation costs are particularly burdensome on a bankrupt estate given the financial instability of the estate. Third, bar orders play an integral role in facilitating settlement. This is because defendants buy little peace through settlement unless they are assured that they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation.

Id. (quotations and citations omitted). All of these factors are as applicable to equity receiverships as they are to bankruptcy proceedings.[2] Entry of a bar order here is within the Court's broad power to administer this Receivership. *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) ("The district court has broad powers and wide discretion to determine relief in an equity receivership. . . . This discretion derives from the inherent powers of an equity court to fashion relief . . . ."); *S.E.C. v. HKW Trading LLC,* 2009 WL 2499146, *2

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[2] Although receivership and bankruptcy proceedings have some important distinctions, the similarities of their goals make an analogy here particularly appropriate. *See, e.g., S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 334 (7th Cir. 2010) (goal in securities-fraud receivership and liquidation bankruptcy is identical: the fair distribution of liquidated assets).

(M.D. Fla. 2009); *see also S.E.C. v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986); *S.E.C. v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 668 (6th Cir. 2001).

In fact, courts have issued bar orders in connection with settlements proposed by equity receivers. For example, in *Commodity Futures Trading Comm'n v. Equity Fin. Group*, 2007 WL 2139399 (D.N.J 2007), the court approved a settlement between an equity receiver and a firm retained by receivership entities to perform accounting services, and entered a bar order after finding that "the Receiver established th[e] settlement is in the best interest of the Receivership estate, and that federal law and public policy favor the entry of the Bar Order to facilitate settlement of th[e] matter." *Id.* at *2. The Court also found that the bar order would not prejudice investors because of the difficulties investors would have to bring claims directly against the settling defendant. *Id.; see also S.E.C. v. Capital Consultants, LLC,* 2002 WL 31470399 (D. Or. 2002) (approving settlement and entering bar order); *Gordon v. Dadante*, 336 Fed. Appx. 540 (6th Cir. 2009) (same); *Harmelin v. Man Fin., Inc.,* 2007 WL 4571021 (E.D. Pa. 2007) (same).

Here, the Receiver has determined that the settlement reflected by the Settlement Agreement is in the best interests of the Receivership and the investors in the Hedge Funds. Specifically, the settlement avoids protracted and expensive litigation, thereby avoiding litigation risk and conserving very substantial Receivership resources, as well as judicial resources. In addition, the Settlement Amount represents an equitable and good-faith resolution, especially when it is considered in light of GSEC's potential liability as measured by either (1) the amount of transfers that Nadel improperly made from the Hedge Funds' official accounts at GSEC to Nadel's imposter accounts at Wachovia Bank and (2) the

amount of fees and interest that GSEC earned from providing clearing services to the Hedge Funds. It is also in the best interests of investors because it represents a substantial recovery to the Receivership estate – roughly 50% as much as the amount the Receiver has recovered to date through clawback lawsuits, yet without the expense and risk of litigation – which will ultimately compensate investors with approved claims through the claims process.

The Bar Order is also authorized by and appropriate under the All Writs Act. "An important feature of the All-Writs Act is its grant of authority to enjoin and bind non-parties to an action when needed to preserve the court's ability to reach or enforce its decision in a case over which it has proper jurisdiction." *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985) (citing *United States v. New York Telephone Co.,* 434 U.S. 159, 174 (1977) ("The power conferred by the Act, extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.")).[3]

Notice Will Be Provided To Investors

"[T]he requirements of the All-Writs Act are satisfied if the parties whose conduct is enjoined have actual notice of the injunction and an opportunity to seek relief from it in the district court." *Id.* at 340. Similarly, cases located by the Receiver involving equity receivers' requests for bar orders in connection with settlement of claims have included notice to investors of the request for a bar order. *See, e.g.*, *Equity Fin. Group*, 2007 WL

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[3] "The power to bind non-parties distinguishes injunctions issued under the Act from injunctions issued in situations in which the activities of the third parties do not interfere with the very conduct of the proceeding before the court." *Baldwin*, 770 F.2d at 338.

4571021[4]; *Harmelin*, 2007 WL 4571021 (notice of bar order provided to all investors before court approved settlement); *Gordon*, 336 Fed. Appx. at 544 (court entered order providing interested parties with opportunity to "comment" on settlement reached by equity receiver with broker/dealer and request for bar order).

Here, the Receiver intends to provide: (1) actual notice of the settlement with GSEC and the requested Bar Order to the investors in the Hedge Funds and to potential tortfeasors the Receiver believes have liability to Receivership Entities – *i.e.*, the individuals and entities who are to be enjoined and barred from asserting claims against GSEC relating to Nadel's Ponzi scheme, and (2) publication notice to all other interested parties. A copy of the proposed notice to investors and potential joint tortfeasors is attached to the Notice Motion (the "**Notice**"), and an abbreviated version for publication is contained in the text of the Notice Motion. In brief, the Notice sets forth the terms of the Settlement Agreement and advises the recipients that they may object or otherwise respond to this motion in writing by January 17, 2012, by (1) filing their objection or response with the Court by that deadline and (2) simultaneously serving a copy on the Receiver. As such, the Notice will provide investors and known potential joint tortfeasors with actual notice of the proposed Settlement Agreement and the Bar Order and an opportunity to object. Unless the Court directs otherwise, no public hearing will be held concerning this motion.

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[4] Although there is no discussion of notice to investors in this *Equity Financial Group* opinion, the receiver's motion for approval of the settlement in that case explained that such notice had been provided. *See Equity Financial Group*, Case No. 1:04-cv-01512-RBK-AMD (D. N.J.), Memorandum In Support Of Motion Of Equity Receiver To Approve Settlement With Puttman & Teague, LLP, Elaine Teague, And John Puttman (Dkt. 428-3, ¶¶ 25, 36), attached as **Exhibit B**.

Investors Will Not Be Prejudiced By Entry Of The Bar Order

Entry of the Bar Order is also appropriate because investors will not be prejudiced by it as (1) there are no pending litigations between any of them and GSEC; (2) any contemplated actions by investors may be barred by applicable statutes of limitation; and (3) the claims that investors might assert against GSEC, in the absence of the Bar Order, are more limited – and thus less valuable – than the Receiver's potential claims.

First, there are no pending litigations between investors and GSEC relating to Nadel's Ponzi scheme despite the fact that the scheme collapsed almost three years ago, in January 2009. This indicates that no investor is likely to assert any claims against GSEC. *See Harmelin,* 2007 WL 4571021 at *4 ("[I]n the two and a half years since Mr. Hodgson was appointed as Receiver and despite all the communications that have gone forth, and the website, and the absence of any Order precluding an investor from filing their own lawsuit, no investor has done so.").

Second, the Receiver has had a tolling agreement with GSEC since November 2010, yet he is unaware of any investors with similar agreements. As such, it is possible that future claims by investors would be barred by applicable statutes of limitation. *See id.* (considering statutes of limitation in entering bar order).

Third, the claims that investors might assert against GSEC, in the absence of the Bar Order, are more limited – and thus less valuable – than the Receiver's potential claims. Specifically, because GSEC had an introduced relationship (via Shoreline) with Nadel and Receivership Entities (*i.e.*, the Hedge Funds), the Receiver could potentially assert breach of contract and breach of duty claims against GSEC as well as claims for the return of

fraudulent transfers. On the other hand, because GSEC had no relationship with investors, they would likely be limited to asserting claims for violations of securities laws, which are difficult to prosecute and have been significantly narrowed. For example, in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008), the United States Supreme Court confirmed that there is no private right of action for aiding and abetting a violation of Section 10(b) of the Securities Exchange Act of 1934. Accordingly, an investor would have to prove, among other things, that GSEC was a primary actor engaged in securities fraud. Indeed, an investor's ability to assert against GSEC any claim other than a claim for violations of federal securities laws appears to have been significantly limited by the Honorable Elizabeth A. Kovachevich's decision in *Sullivan v. Holland & Knight LLP,* 2010 WL 1558553, *6 (M.D. Fla. 2010). In that case, which relates to Nadel's Ponzi scheme, Judge Kovachevich held that claims asserted by investors in the scheme against a law firm that represented the Hedge Funds and other receivership entities, among others, which claims included claims under the Florida Securities Investor Protection Act and related common law claims, were barred by the Securities Litigation Uniform Standards Act. In light of these matters, investors are unlikely to be able to obtain a greater recovery from GSEC than that obtained by the Receiver and reflected in the Settlement Agreement. This is another reason why the settlement with GSEC, including the Bar Order, is in the bests interests of the Receivership and, ultimately, of defrauded investors.

Joint Tortfeasors Are Not Entitled To Contribution From GSEC

Under Florida law, if the Court approves the Settlement Agreement, no joint tortfeasor will be entitled to contribution from GSEC in connection with Nadel's scheme. Specifically, under the Uniform Contribution Among Tortfeasor's Act:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and, (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Fla. Stats. § 768.31(5). Here, the terms of the Settlement Agreement do not discharge any potential tortfeasor from liability other than GSEC. Further, for the reasons discussed before and in the Receiver's Affidavit, both GSEC and the Receiver entered into the Settlement Agreement in good faith. As such, if approved the Settlement Agreement will discharge GSEC from "from all liability for contribution to any other tortfeasor," including Shoreline. Accordingly, the Bar Order – in barring potential joint tortfeasors' claims against GSEC – is consistent with Florida law.

CONCLUSION

For these reasons, the Receiver respectfully requests that this Court enter an Order granting this Motion and finding and ordering that:

1. The settlement between the Receiver and GSEC presented to the Court in this motion is a fair, equitable, and good faith settlement of all claims the Receiver, the Receivership estate, and the Receivership Entities may have against GSEC;

2. The settlement reflected in the Settlement Agreement attached as Exhibit A is approved, and the Receiver is authorized to enter into and complete the proposed settlement with GSEC in accordance with the requirements of the Settlement Agreement;

3. All individuals or entities who invested money in a Receivership Entity, as well as all persons or entities who may have liability to the Receiver, the Receivership Entities, or such investors arising or resulting from the fraudulent scheme underlying the SEC Receivership Action, together with their respective heirs, trustees, executors, administrators, legal representatives, agents, successors, and assigns, are permanently enjoined and barred from commencing or pursuing a claim, action, or proceeding of any kind and in any forum against GSEC that arises from or relates to the clearing, execution, and/or prime brokerage services that GSEC performed for Receivership Entities, or the allegations of the SEC Receivership Action; and

4. Said injunction bars all claims against GSEC for contribution, indemnity, or any other cause of action arising from the liability of any person or entity to the Receiver or to any of the Receivership Entities or their investors (including claims in which the injury is the liability to the Receiver or any of the Receivership Entities or their investors or where damages are calculated based on liability to the Receiver or any of the Receivership Entities or their investors), in whatever form and however denominated.

A proposed Order is attached as **Exhibit C**. However, as indicated at the beginning of this motion, the Receiver respectfully requests that the Court first address the Notice Motion and, if that motion is granted, that it continue a decision on this motion until after the

deadline set forth in the Notice Motion for objections or other responses to the relief requested in this motion.

LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), counsel for the Receiver has conferred with counsel for the Commission and is authorized to represent to the Court that the Commission has no objection to the relief requested in this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on December 14, 2011, I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

Arthur G. Nadel
Register No. 50690-018
Butner Low
Federal Correctional Institution
P.O. Box 999
Butner, NC 27509

s/Gianluca Morello
Gianluca Morello, FBN 034997
Email: gmorello@wiandlaw.com
Michael S. Lamont FBN 0527122
Email: mlamont@wiandlaw.com
Jared J. Perez, FBN 0085192
Email: jperez@wiandlaw.com
Wiand Guerra King P.L.
3000 Bayport Drive
Suite 600
Tampa, FL 33607
Tel: (813) 347-5100
Fax: (813) 347-5198

Attorneys for the Receiver, Burton W. Wiand