

**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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**INVESTORS' OBJECTION TO SETTLEMENT AND
OPPOSITION TO RECEIVER'S MOTION TO APPROVE SETTLEMENT**

Comes now, Investors, Vernon M. Lee, individually and as trustee of the Vernon M. Lee Trust, Brian L. Meeker, as Trustee for the Brian L. Meeker Trust dtd 12/06/1991, and Samuel Ross Morgan III, by and through undersigned counsel, and hereby object to the proposed settlement (the "Settlement") with Goldman Sachs Execution and Clearing, L.P. ("GSEC") and

oppose Burton W. Wiand's, as Receiver (the "Receiver"), Motion to Approve Settlement (the "Motion") and in support thereof state:

SUMMARY

(I) The Motion severely fails to provide sufficient explanation to support the Court's approval of the Settlement. (II) This Court should examine the Settlement by standards of fairness, reasonableness, adequacy and service of the public interest. (III) Facially, the Settlement is unfair because the limited recovery fails to account for GSEC's culpability and greater liability when a far greater ratio of recovery is sought from innocent transferees. (IV) The Settlement is unreasonable because it forfeits individual claims without providing sufficient analysis to support such forfeiture. (V) The adequacy of the Settlement is unascertainable because the Motion fails to apply its generic legal analysis to the specific facts of this case. (VI) Finally, the Settlement fails to serve the public interest because it squanders an opportunity to promote accountability and deterrence with respect to GSEC by failing to recover damages which better reflect GSEC's culpability, liability and ability to pay.

I. The Motion Provides Insufficient Support for the Settlement

The Motion barely attempts to provide factual, legal or explanatory support for the Settlement. The Honorable Jed S. Rakoff recently criticized a motion for a similar lack of support because it did not "provide the Court with a sufficient evidentiary basis to know whether the requested relief is justified . . ." Opinion and Order at 8, *S.E.C. v. Citigroup*, No. 11-cv-07387-JSR (S.D.N.Y. Nov. 28, 2011), ECF No. 33.¹ Similarly, the Honorable Rudolph T. Randa demanded the damages in a proposed settlement be supported by a supplementary factual predicate sufficient to "assess their fairness and the extent to which they serve the purpose of

¹ Notably, Judge Rakoff's analysis for the necessity of such information as applied to a consent judgment and injunction applies equally to entering a bar order.

disgorgement which is to deprive the violator of unjust enrichment and thereby further the deterrence objectives of the securities laws.” Court Letter to Counsel, *S.E.C. v. Koss*, No. 11-cv-00991-RTR (E. D. Wis. Dec. 20, 2011), ECF No. 5 (citing *S.E.C. v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 406-07 (S.D.N.Y. 2009)).

Likewise, the Motion suffers from a dearth of support with which the Court might justify approval of the Settlement. The Motion provides a simple recitation of allegations against GSEC and follows this with a superficial memorandum of case law. Unfortunately, the Motion does not perform a legal analysis of how the cited cases apply to the facts of GSEC’s involvement in this case. Indeed, the Motion only provides a single specific detail of GSEC’s involvement, that GSEC knowingly made deposits to Arthur Nadel’s “shadow” accounts. Mot. 4.² The Motion proclaims that GSEC “produced a large volume of documents” and that the Receiver fully investigated these matters. Mot. 3. However, the Motion does not provide any of the Receiver’s findings from what appears to be a substantial investigation. In addition to the absence of satisfactory legal and factual analysis, the Motion avoids any mention of the expected per victim distribution from this recovery and the percentage retained by the Receiver to aid the Court in evaluating the propriety of the Settlement. Ultimately, the Motion’s anemic support and vague analysis fail to provide the Court with the foundation necessary to approve the Settlement.

II. The Standard of Fairness, Reasonableness, Adequacy, and Public Interest

This Court should apply the same standard for settlement approval as that advanced by Judge Rakoff in *S.E.C. v. Citigroup*, i.e., the settlement must be fair, reasonable, adequate and in the public interest. Opinion and Order at 4, *S.E.C. v. Citigroup*, No. 11-cv-07387-JSR (S.D.N.Y.

² This detail was likely discovered without the benefit of and well before any document production from GSEC.

Nov. 28, 2011), ECF No. 33. Judge Rakoff’s reasoning³ for this standard applies with equal propriety to this case and is consistent with, while more precisely rendering, the “fair, equitable, and good faith” standard applied in the Motion. Mot. 17.

III. The Settlement is Unfair Because Its Recovery Is Disproportionate to Culpability

The Settlement is unfair because even though GSEC is exposed to culpability and far greater liability the Settlement is more favorable than those offered to innocent transferees. Both the Motion and the Affidavit of Burton W. Wiand in Support of Receiver’s Motion to Approve Settlement (the “Affidavit”) allege that GSEC “may have failed to appropriately respond to certain “red flags” that could, upon further inquiry, have revealed Nadel’s scheme.” Mot. 4; Wiand Aff. 3⁴. This assertion infers that GSEC was on inquiry notice of Nadel’s fraud but failed to take any action. Furthermore, the Motion and Affidavit claim “GSEC did not follow relevant guidelines and internal policies and procedures applicable to third-party transfers.” Mot. 8; Wiand Aff. 5⁵. The fairness of the Settlement should consider that GSEC facilitated Nadel’s fraud with seemingly reckless disregard for guidelines, policies, procedures and “red flags.” Consequently, fairness requires that GSEC’s damages, as compared to full liability, exceed those damages demanded from completely innocent transferees. In short, the higher culpability of GSEC should require more severe damages than those innocent transferees with no culpability. However, the Settlement is a small fraction of the \$168 million loss facilitated by GSEC’s malfeasance. Yet, the Receiver typically demands no less than 90% of the full liability of

³ The principles behind this standard are the very same principles behind settlement approval in this case. Judge Rakoff cites cases which consider settlement approvals similar to that before this Court to support the standard applied in his opinion and order.

⁴ Although no factual bases for such allegations are ever provided it might be assumed that transfers to “shadow” accounts are an example of such.

⁵ Again, the Motion and Affidavit do not provide any details or examples on the guidelines or procedures violated.

innocent transferees. Without more information from the Receiver to explain the above disparity in fairness the Settlement should be rejected as unfair.

**IV. The Settlement is Unreasonable Because It Forfeits Claims Without Fully Exploring
the Value of Those Claims**

It is unreasonable for the Court to enter a bar order on the basis of the Motion's scant factual and legal explanation for the forfeiture of claims. As stated above, the Motion fails to demonstrate why the S.E.C. and the Receiver will not pursue a number of potential claims. The Motion correctly asserts that the investors' claims are heavily reliant upon prosecution by the Receiver. That being the case, the burden on the Receiver should be particularly high to satisfactorily demonstrate the reasonableness for releasing claims. However, the Motion fails to divulge any factual detail of GSEC's involvement, to which the Receiver is uniquely privy, to persuade investors or the Court of the reasonableness of this Settlement.

**V. The Settlement's Adequacy Cannot Be Evaluated Without More Factual and Analytical
Support**

The Settlement cannot be considered adequate when there is insufficient information in the Motion to evaluate adequacy. The Motion fails to explain why the Receiver or S.E.C. will not pursue claims that GSEC aided and abetted a violation of section 10(b), primary liability under section 10(b), violation of section 20(a), or fraudulent transfer liability as an "initial transferee" given that GSEC was potentially on "inquiry notice." Additionally, the Motion fails to evaluate the possibility of successful claims in arbitration. The Motion examines a number of cases, as well as more recent cases expanding liability of clearing brokers, and notes the various reasons why liability may or may not exist. However, the Motion simply fails to explain why the facts of this case apply to the analyses of the cited case law. Again, the Motion does not even divulge the

facts of this case to support the Receiver's analysis in the context of these cases.⁶ As Judge Rakoff stated, "in the absence of any facts, the Court lacks a framework for determining adequacy." Opinion and Order at 14, *S.E.C. v. Citigroup*, No. 11-cv-07387-JSR (S.D.N.Y. Nov. 28, 2011), ECF No. 33. Likewise, the Motion simply fails to substantiate any claim that the Settlement is adequate.

VI. The Settlement Fails to Serve the Public Interest Because It Does Not Promote Deterrence or Accountability

The public interest is not served by the Settlement because it does not promote deterrence and accountability of GSEC to eliminate fraud in the finance industry. GSEC is one of the largest and most significant entities in the finance industry. Due to its prominence, GSEC substantially influences other entities. Consequently, GSEC's facilitation of Nadel's fraud should be met with significant damages in relation to GSEC's culpability, liability and ability to pay.⁷ Without more information to justify such a limited recovery, the Settlement appears to simply waste an opportunity to hold GSEC accountable for allowing fraud and to deter such in the future. Therefore, the Court should reject the Settlement and require the Receiver justify any recovery from GSEC within the context of serving the public interest.

WHEREFORE, Investors, Vernon M. Lee, Individually and as Trustee of the Vernon M. Lee Trust, Brian L. Meeker, as Trustee for the Brian L. Meeker Trust dtd 12/06/1991, and Samuel Ross Morgan III, respectfully request this Court deny the Receiver's Motion to Approve

⁶ The Motion does not even discuss the terms of the clearing agreement between Shoreline and GSEC and how this might promote or defeat liability. See *SFM Holdings, Ltd. v. Banc of America Securities, LLC*, No. 07-11178, 2010 WL 1068230 (11th Cir. Mar. 25, 2010) (stating that the details of the clearing agreement will dictate liability).

⁷ Additionally, many GSEC transfers involved Individual Retirement Accounts ("IRAs") which many investors relied upon for financial support. The Settlement should, but does not, provide a plan to restore IRA losses to assist those investors left most vulnerable by this fraud.

Settlement and reject the Settlement Agreement with Goldman Sachs Execution & Clearing, L.P., and for such other relief the Court deems appropriate.

Dated: January 17, 2012

Respectfully submitted,

s/ John R. Hightower Jr.

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Samuel Ross Morgan III.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of January, 2012, the foregoing was electronically filed with the Clerk of the Court and served via the Court's CM/ECF system to: **Gianluca Morello, Esq.** (gmorello@wiandlaw.com), and **Michael S. Lamont, Esq.** (mlamont@wiandlaw.com), *Attorneys for Burton W. Wiand, as Receiver.*

s/ John R. Hightower Jr.
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