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 REPLY TO OBJECTIONS TO MOTION TO APPROVE SETTLEMENT (DOC. 679) WITH GOLDMAN SACHS EXECUTION & CLEARING, L.P.

On December 14, 2011, Burton W. Wiand, as Receiver (the "**Receiver**"), moved for approval (the "**Motion**") of a settlement (the "**Settlement**") with Goldman Sachs Execution & Clearing, L.P. ("**GSEC**") (Doc. 679). In accordance with the procedures set forth in the Motion and in the related Receiver's Motion To Approve Notice Of Settlement (Doc. 681), the Receiver mailed settlement notices and published notice as specified in those filings. (*See* Docs. 686, 699.) Overall, more than 700 notices were mailed to investors in the scheme

underlying this case, to potential joint tortfeasors, and to other interested parties whose rights may be affected by the Settlement. *See* Aff. of B. Wiand in Support of Receiver's Reply to Objs. to Mot. to Approve Settlement with GSEC ¶ 4 ("**Second Wiand Aff.**"), being filed with this reply. Notice was also published in the Wall Street Journal national edition and in the Sarasota Herald Tribune and posted on the Receivership website. The notices advised recipients of their right to object to the Settlement, of the procedure for objecting, and of the January 17, 2012, deadline for filing objections. In response to the more than 700 notices mailed by the Receiver, only 7 objections (the "**Objections**") were filed (on behalf of 8 individuals in their individual capacity and/or in their capacity as trustees of trusts (the "**Objectors**")). (Docs. 707-11, 715, 716.)[1] Notably, all of the Objections were filed by three investors who are defendants in "clawback" cases brought by the Receiver to recover their "**false profits**" (*i.e.*, the amount they received from the scheme underlying this case which exceeded the amount they invested) or their relatives.[2] To a large extent, rather than addressing relevant matters, the Objections attack the Receiver's pursuit of clawback claims

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[1] The Objection at docket 707 was lodged by Barbara Meeker (the "**Barbara Meeker Objection**"); the identical ones at docket 708 and 709 were lodged by Kelvin Lee in his individual capacity and in his capacity as trustee of the Nancy E. Lee Trust, respectively (collectively, the "**K. Lee Objection**"); the one at docket 710 was lodged by Diane Pezick (the "**Pezick Objection**"); the one at docket 711 was lodged by Tyna Gaylor (the "**Gaylor Objection**"); the one at docket 715 was lodged by Vernon Lee, Brian Meeker, and Samuel Ross Morgan III (the "**Clawback Defendants' Objection**"); and the one at docket 716 was lodged by Martin Huppert (the "**Huppert Objection**").

[2] The clawback defendants are Objectors Brian Meeker, Vernon Lee ("**V. Lee**"), and Samuel Ross Morgan III. Objector Barbara Meeker is Objector Brian Meeker's wife; Objectors Pezick, Gaylor, and K. Lee are Objector V. Lee's children; and Objector Huppert appears to be V. Lee's son-in-law.

against the three Objector-defendants. For the reasons discussed below, the Objections should be overruled and the Settlement should be approved.

I. OBJECTIONS ARE PREMISED ON A FUNDAMENTAL MISUNDERSTANDING OF THE RECEIVER'S ROLE

Some Objections should be overruled because they are premised on a misunderstanding of the Receiver's role. Objectors assume it is the Receiver's role to punish and deter potential wrongdoers, and they complain the $9,850,000 GSEC would pay to the Receivership estate under the Settlement would not achieve this. *See, e.g.*, Clawback Defs.' Obj. at 3, 6 (asserting "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."); Pezick Obj. ("This settlement is so puny that it will have no effect on a corporation the size of GSEC."). But punishing and deterring securities industry firms is not the responsibility of court-appointed equity receivers; it is the responsibility of government regulators. Here, the Receiver acts on behalf of private Receivership Entities and must protect the best interests of the Receivership estate and defrauded investors. *See, e.g.*, *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) ("[I]n a case involving a Ponzi scheme, the interests of the [r]eceiver are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy.").

In full compliance with his responsibilities, in managing potential claims against GSEC the Receiver properly balanced the costs and risks of proceeding to litigation with the considerable savings and the certain and substantial benefit to the Receivership estate that would result from the Settlement. Each of the legal and factual considerations relevant to that balancing process is discussed in the Motion and in the Affidavit of Burton W. Wiand in

Support of Receiver's Motion to Approve Settlement (Doc. 680) (the "**First Wiand Affidavit**"). Contrary to contentions in the Clawback Defendants' Objection, the Motion and First Wiand Affidavit provide sufficient detail about each of the factors that are directly relevant to the Court's review of the Settlement. That the Settlement is in the best interest of the Receivership estate and defrauded investors as a whole perhaps is best reflected by the fact that although the Receiver mailed over 700 notices of the Settlement, not one investor or other creditor with a claim that should be allowed objected or otherwise expressed to the Receiver any opposition to it. *See* Second Wiand Aff. ¶ 5, being filed with this reply. In fact, the only feedback from investors who should receive distributions from the Receivership estate has been in favor of the Settlement.[3] *See id.* This is a much more reliable indicator of the Settlement's fairness and benefit than the handful of Objections lodged by clawback defendants or their families.

II. NONE OF THE OBJECTORS HAS STANDING TO OBJECT TO THE SETTLEMENT

The Objections also should be overruled because the Objectors lack standing to object to the Settlement since none of them has a right to any assets from the Receivership estate. Specifically, seven of the eight Objectors did not file a claim in the claims process established in this case and thus have no standing to object.[4] *See Callahan v. Moneta Capital*

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[3] For example, an attorney for a number of investors with claims which should be allowed was quoted as follows in an article reporting the Settlement: "That is fantastic .... My hat is off to Burt Wiand. This is a big success, well done." *Goldman Sachs to Pay $10 Million to Settle Nadel-related Claims*, Sarasota Herald Tribune, Dec. 14, 2011, available at www.heraldtribune.com/article/20111214/article/111219805.

[4] Objector K. Lee not only failed to file a claim, but he explicitly waived any claim against the Receivership estate when he settled a clawback suit brought against him by the

Corp., 415 F.3d 114, 117-18 (1st Cir. 2005) (potential claimants that did not submit claims by bar date lacked "standing to object to the adjudication of a pending claim in the Claims Disposition Order"); *see also Fryer v. Enterprise Bank*, 2006 WL 3052165, *9 n.10 (W.D. Pa. 2006) (following *Callahan*). And the only Objector who filed a claim (V. Lee) also lacks standing because he received false profits and consequently is not a creditor of the Receivership estate or otherwise entitled to distributions from it. *See, e.g., In re Patriot Co.*, 303 B.R. 811, 815 (8th Cir. BAP 2004) (holding that objector lacked standing to challenge a settlement in which the objector had no financial stake); *In re Southern Medical Arts Cos., Inc.*, 343 B.R. 258, 263 (10th Cir. BAP 2006) ("Being neither a party to the [settlement] Agreement, a creditor, nor adversely effected by the Agreement, [objector] lacked standing to object to its approval."); *In re Huggins*, 460 B.R. 714, 718 (E.D. Tenn. Bankr. 2011) (Objector "argues that the terms of the settlement are not in the best interests of the estate. However, he is not a creditor and he will receive no distribution from the estate.").

III. THE OBJECTIONS ARE PREMISED ON INCORRECT OR IRRELEVANT CONTENTIONS

The Objections are premised on incorrect or irrelevant contentions. For example, the Barbara Meeker Objection complains the Settlement is inconsistent with the Receiver's characterization of Nadel's scheme as a Ponzi, that investors' IRA accounts have not been adequately addressed, the Receiver should not pursue his clawback case against her husband, and a purportedly improper relationship exists between the Receiver and GSEC. The

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Receiver to recover (i) his false profits and (ii) unlawful commissions he received for referring investors to Receivership Entities. *See generally* Doc. 506, Ex. A. Objector Huppert never invested in the scheme.

Objection, however, does not explain how the first three complaints are relevant to the Court's approval of the Settlement, and in fact they are not. The fourth complaint is unsupported by any factual support and is simply not true. Similarly, the Pezick Objection and the Gaylor Objection complain about the Receiver's investor clawback lawsuits or his purported stance on settlement negotiations.[5] But these Objections also fail to explain how either of these complaints, even if accurate, which they are not, impacts the Receiver's settlement of potential claims against GSEC, which claims would differ from those asserted against investors. Further, all of the Objections complain the settlement amount is inadequate. However, the Motion and First Wiand Affidavit detail the relevant considerations, including various methods for calculating GSEC's potential liability, and the Objections do not discuss any of these considerations, let alone why they should be discarded simply because the Objectors claim GSEC should pay more.

The Huppert Objection focuses on GSEC's purported conduct or omissions, but in large part it is based on an assumption that Shoreline Trading Group, LLC ("**Shoreline**") – the introducing broker used by Nadel whose trades were cleared through GSEC – is a "subsidiary" of GSEC. That assumption, however, is wrong, and Huppert cites nothing to support it. In any event, the substantive contentions in the Huppert Objection about GSEC's and Shoreline's conduct, and the conduct of Shoreline representatives Matt Ventura and

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[5] The Pezick Objection inaccurately portrays the Receiver's stance on clawback settlements. Contrary to its contentions, the Receiver has treated V. Lee and all other clawback defendants in the same fair and consistent manner, and V. Lee has had the same opportunities to resolve his case as all other clawback defendants have had. Consistent with the Receiver's practices for similarly situated clawback defendants, on multiple occasions the Receiver's counsel asked V. Lee to provide certain documents to enable the Receiver to evaluate V. Lee's contentions relating to settlement, but he has not provided them.

Mike Murray, have been investigated by the Receiver and, to the extent applicable, have been considered by the Receiver in negotiating and recommending the Settlement.

Finally, the Clawback Defendants' Objection also is premised on additional incorrect or irrelevant contentions. Those based upon recent judicial actions in *S.E.C. v. Citigroup Global Markets Inc.* 2011 WL 5903733 (S.D.N.Y. Nov. 28, 2011), and in *S.E.C. v. Koss Corp.*, Case No. 2:11-C-991-RTR, Doc. 5 (E.D. Wi. Dec. 20, 2011) (letter from the Hon. R. Randa to A. Wood and J. Davidson of the S.E.C.), are addressed in the next Section. Others are addressed above in Section I.

IV. *CITIGROUP* AND *KOSS* ARE LEGALLY AND FACTUALLY DISTINGUISHABLE FROM THIS CASE

The Clawback Defendants' Objection attempts to capitalize on recent judicial actions involving proposed settlements submitted by the S.E.C. in two of its enforcement actions: (i) the Honorable Jed S. Rakoff's order denying the proposed settlement in *Citigroup* (which the Second Circuit U.S. Court of Appeals has accepted for interlocutory appeal) and (ii) the Honorable Rudolph T. Randa's letter requesting additional information before ruling on the proposed settlement in *Koss*. These matters, however, are factually and legally distinguishable from the one here, including because of the different role held by equity receivers and the S.E.C. as discussed above in Section I.

Judge Rakoff's decision (upon which Judge Randa relied in part) is predicated in large part on the broad public interest in ensuring the S.E.C. appropriately polices the securities industry and punishes and deters misconduct with meaningful settlements of its enforcement actions. Although the public interest plays a prominent role in evaluating S.E.C. settlements, ordinarily it plays no role in evaluating a receiver's settlement. For

receiver settlements, courts typically focus on whether the settlements are fair and in the receivership estate's best interest. *Sterling v. Stewart,* 158 F.3d 1199, 1202 (11th Cir.1998) ("Determining the fairness of the settlement [in an equity receivership] is left to the sound discretion of the trial court and we will not overturn the court's decision absent a clear showing of abuse of that discretion."); *Gordon v. Dadante*, 336 Fed. Appx. 540, 549 (6th Cir. 2009) ("[N]o federal rules prescribe a particular standard for approving settlements in the context of an equity receivership; instead, a district court has wide discretion to determine what relief is appropriate."); *Gordon v. Dadante*, 2008 WL 4625157, *4-5 (N.D. Ohio 2008) (approving settlement as "fair and equitable to the Receivership estate"); *C.F.T.C. v. Equity Fin. Group*, 2007 WL 2139399 (D.N.J. 2007) (approving "settlement [that] is in the best interest of the Receivership estate"); *S.E.C. v. Princeton Econ. Int'l, Ltd.*, 2002 WL 206990, *1 (S.D.N.Y. 2002) ("A settlement proposed by a temporary or permanent receiver warrants approval if the district court finds that the proposed settlement is fair.").

Under Judge Rakoff's analysis, the most the public interest could be relevant to is the limited matter of evaluating the request for a bar order (*see Citigroup*, 2011 WL 5903733, *2), although, unlike the wide-ranging enforcement injunction at issue in *Citigroup*, the requested bar order here simply makes clear that, consistent with applicable law, the Settlement resolves all potential claims against GSEC arising from the transactions and occurrences at issue. And this raises a second important distinction between this matter and *Citigroup* and *Koss*. Specifically, the Motion and the First Wiand Affidavit include far more detail about why the Settlement and bar order here are appropriate than the S.E.C.'s pertinent filings in those cases. The S.E.C.'s supporting papers in *Citigroup* included only superficial,

unsubstantiated beliefs, such as that "[t]he Commission believes that the proposed settlement in this case represents a fair and reasonable resolution of the Commission's claims" and that the proposed disgorgement was "appropriate." *Citigroup*, Mem. by Pl. S.E.C. in Supp. of Proposed Settlement at 6 (S.D.N.Y. Oct. 19, 2011), attached as **Exhibit A**. In *Koss*, the S.E.C. said even less. *See Koss*, Mot. for Entry of Final Judgments as to Defs. Koss Corp. & M.J. Koss (E.D. Wis. Oct. 14, 2011), attached as **Exhibit B**. In contrast, here the Receiver set forth in the Motion and an affidavit all of the factors for establishing the fairness and best interests of the Settlement. For example, the Receiver explained that GSEC's role as a clearing firm presents an additional potential barrier to successful claims[6] (First Wiand Aff. ¶ 9; Mot. at 6–7); that litigation would likely cost the Receivership more than $1 million in legal expenses (First Wiand Aff. ¶¶ 10, 14); that the settlement amount approximates the full value of money transferred from Nadel-controlled accounts at GSEC serviced through Shoreline to "shadow" accounts at Wachovia Bank (*see id.* ¶¶ 9, 12) and exceeds the total fees that GSEC earned in connection with those accounts (*id.* ¶ 13; Mot. at 9); and that the settlement amount will compensate Nadel's victims with allowed claims (First Wiand Aff. ¶ 16).

Notably, none of the Objections except the Clawback Defendants' Objection even addresses the requested bar order. And the Clawback Defendants' Objection merely argues

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[6] Citing *SFM Holdings, Ltd. v. Banc of America Securities, LLC*, 600 F.3d 1334, 1338–39 (11th Cir. 2010), the Clawback Defendants' Objection complains the Motion does not adequately discuss the terms of the clearing agreement between GSEC and Shoreline. That agreement, however, contains language which, under *SFM Holdings*, supports the argument that GSEC had no fiduciary responsibility to any Receivership Entity or investors in Nadel's scheme. *See* Second Wiand Aff. ¶¶ 6-8.

the record is insufficient for the Court to properly evaluate that request. But as described above, that is not true because the Motion and the First Wiand Affidavit discuss each of the legal and factual considerations relevant to determining whether the Settlement and the requested bar order are appropriate. Further, none of the Objectors even hints that it is considering a lawsuit against GSEC, let alone that any steps have been taken towards filing such a case. They also do not address the points raised in the Motion for why the likelihood of success of any such claim would be low (Mot. at 15-16), or the additional difficulty the individuals lodging the Clawback Defendants' Objection would have in pursuing such claims in light of the fact they received more money than they actually invested.

CONCLUSION

For these reasons, the Objections should be overruled and the Receiver's Motion to Approve Settlement (Doc. 679) should be granted. Although the Receiver will of course appear at a hearing if one is set and provide any additional information that may be requested by the Court, the Receiver believes the delay and expense of a hearing is unnecessary in light of the significant shortcomings in the Objections discussed above. In sum, rather than being lodged by individuals with standing to object and articulating legitimate arguments for denying the Receivership estate the substantial benefit that will flow from the Settlement, the Objections are lodged by individuals without standing to object and, to a large extent, focus on matters that are not relevant to resolving the Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 2, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on February 2, 2012, I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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