UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No. 8:09-cv-87-T-26TBM

ARTHUR NADEL;
SCOOP CAPITAL, LLC;
SCOOP MANAGEMENT, INC.

Defendants,

SCOOP REAL ESTATE, L.P.;
VALHALLA INVESTMENT PARTNERS, L.P.;
VALHALLA MANAGEMENT, INC.;
VICTORY IRA FUND, LTD.;
VICTORY FUND, LTD.;
VIKING IRA FUND, LLC;
VIKING FUND, LLC; AND
VIKING MANAGEMENT, LLC,

Relief Defendants.
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RECEIVER'S UNOPPOSED MOTION TO (1) APPROVE DETERMINATION AND PRIORITY OF CLAIMS, (2) POOL RECEIVERSHIP ASSETS AND LIABILITIES, (3) APPROVE PLAN OF DISTRIBUTION, AND (4) ESTABLISH OBJECTION PROCEDURE

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Burton W. Wiand, as Receiver (the "**Receiver**"), respectfully moves this Court for an Order: (1) approving his determination and priority of claims as set forth in this Motion and attached **Exhibits B** through **J**; (2) pooling all assets and liabilities of the receivership entities into one consolidated Receivership estate; (3) approving a plan of distribution; and (4) establishing a procedure for objections to the Receiver's determination of claims and claim priority and plan of distribution.

It is worth emphasizing the last prong of the relief sought by this Motion: the Receiver seeks to establish an objection procedure which will allow the Receiver and the Court to efficiently address any objections to claim determinations, claim priority, and the plan of distribution in an orderly and fair process. This process will allow the Receiver to attempt to resolve objections before they are submitted to the Court for consideration, which will avoid inefficient piecemeal adjudication of objections and conserve both the Court's and the Receivership's time and resources. Accordingly, any objection to claim determinations, claim priority, or the plan of distribution directly filed in Court in response to this Motion should be denied without prejudice to its submission to the Receiver in accordance with the pertinent parameters set forth in Section V. of this Motion.

BACKGROUND

On January 21, 2009, the Securities and Exchange Commission (the "**Commission**") initiated this action to prevent the defendants from further defrauding investors of hedge funds managed by them. That same day, the Court entered an order appointing Burton W. Wiand as Receiver for Defendants Scoop Capital, LLC ("**Scoop Capital**") and Scoop Management, Inc. ("**Scoop Management**") and Relief Defendants Scoop Real Estate, L.P.

("**Scoop Real Estate**"); Valhalla Investment Partners, L.P. ("**Valhalla Investment Partners**"); Valhalla Management, Inc. ("**Valhalla Management**"); Victory Fund, Ltd. ("**Victory Fund**"); Victory IRA Fund, Ltd. ("**Victory IRA Fund**"); Viking IRA Fund, LLC ("**Viking IRA Fund**"); Viking Fund, LLC ("**Viking Fund**"); and Viking Management, LLC ("**Viking Management**").[1] (*See generally* Order Appointing Receiver (Doc. 8).)

The Court subsequently granted seven motions to expand the scope of the Receivership and appointed the Receiver as receiver over the following:

- Venice Jet Center, LLC, and Tradewind, LLC (Order, Jan. 27, 2009 (Doc. 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. (Order, Feb. 11, 2009 (Doc. 44));
- The Guy-Nadel Foundation, Inc. (Order, Mar. 9, 2009 (Doc. 68));
- Lime Avenue Enterprises, LLC, and A Victorian Garden Florist, LLC (Amended Order, Mar. 17, 2009 (Doc. 81));
- Viking Oil & Gas, LLC (Order, July 15, 2009 (Doc. 153));
- Home Front Homes, LLC (Order, Aug. 10, 2009 (Doc. 172)); and
- Traders Investment Club (Order, Aug. 9, 2010 (Doc. 454)).

All of the entities and the trust in receivership are referred to collectively as the "**Receivership Entities**." The Receiver was reappointed as Receiver for the Receivership

[1] Relief Defendants Scoop Real Estate, Valhalla Investment Partners, Victory IRA Fund, Victory Fund, Viking IRA Fund, and Viking Fund are collectively referred to as the "**Hedge Funds**." Defendants Scoop Capital and Scoop Management and Relief Defendants Valhalla Management and Viking Management are collectively referred to as the "**Fund Managers**."

Entities by Orders dated June 3, 2009 (Doc. 140), January 19, 2010 (Doc. 316), and September 23, 2010 (Doc. 493). (All Orders appointing and reappointing Receiver are collectively referred to as "**Order Appointing Receiver**").

The Defendants and Relief Defendants purported to engage in the sale of securities in the form of hedge fund interests with high levels of return to investors throughout the United States and overseas. In reality, Arthur Nadel ("**Nadel**") and the other Defendants, through Relief Defendants, engaged in a Ponzi scheme (the "**scheme**") in which money raised from new investors and additional money raised from existing investors was used to: (1) pay fictitious returns to existing investors; (2) pay substantial management, advisory, and/or incentive fees to Nadel and others; and (3) purchase and/or fund additional businesses and other endeavors controlled by Nadel. While some investors received funds from Receivership Entities, others did not.

Pursuant to the Order Appointing Receiver, the Receiver was obligated to take possession of the Receivership Entities' assets for the benefit of defrauded investors. The Receiver's goal has been to marshal, liquidate, and then distribute Receivership assets to investors (and other creditors) with allowed claims in a fair and equitable manner.

PROCEDURAL BACKGROUND

On April 20, 2010, the Receiver filed an Unopposed Motion to (1) Approve Procedure to Administer Claims and Proof of Claim Form, (2) Establish Deadline for Filing Proofs of Claim, and (3) Permit Notice by Mail and Publication (the "**Claims Form Motion**") (Doc. 390). On April 21, 2010, the Court granted the Receiver's motion in its entirety (Doc. 391). The Court established a Claim Bar Date of the later of 90 days from the

date of the Order granting the Claims Form Motion or the mailing of Proof of Claim Forms to all known investors and other potential creditors (as the term Claim Bar Date is defined in the Claims Form Motion). Pursuant to the Court's Order, any person or entity who failed to submit a proof of claim to the Receiver so that it was actually received by the Receiver on or before the Claim Bar Date is barred and precluded from asserting any claim against the Receivership or any Receivership Entity.

The Court's Order further provided that sufficient and reasonable notice would be given by the Receiver if made (1) by mail to the last known addresses of all known potential claimants, (2) by global publication on one day in The Wall Street Journal and publication on one day in the Sarasota-Herald Tribune, and (3) by publication on the Receiver's website (www.nadelreceivership.com). In compliance with the Court's Order, on June 4, 2010, the Receiver mailed 1,256 packages to the last known addresses of known investors and their attorneys, if any, and any other known potential creditors of the Receivership estate, thereby establishing September 2, 2010, as the Claim Bar Date. Each package included a cover letter, the Notice of Deadline Requiring Filing of Proofs of Claim (the "**Notice**"), and a Proof of Claim Form (collectively, the "**Claims Package**"). The Receiver also published the Notice in the global edition of The Wall Street Journal and in the Sarasota Herald-Tribune on June 15, 2010, and posted the Notice and a Proof of Claim Form on his website.

Following investors' and other potential creditors' submission of Proof of Claim Forms (the "**Claimants**"), over time the Receiver sent approximately 134 letters to pertinent Claimants notifying them of deficiencies in their respective Proof of Claim Forms. The Receiver sent these letters to give Claimants an opportunity to correct deficiencies in their

claim filings which might ultimately affect the recognition of their claim. The Claimants were given thirty days from the date of the notice of deficiency to return a corrected Proof of Claim Form.

The Receiver received 504 claims (the "**Claims**").[2] Of the 504 claims, 478 claims were submitted in connection with 473 investor "accounts"[3] (the "**Investor Claimants**" or "**Investor Claims**"), which represent approximately 60% of all currently known Investor Accounts.[4] The Receiver also received 26 claims from other purported creditors (the "**Non-Investor Claimants**" or "**Non-Investor Claims**"), including two claims from taxing authorities (the "**Tax Lien Claimants**" or "**Tax Lien Claims**"). Fourteen of the 504 claims were received after the Claim Bar Date.

To make the process less burdensome for investors, the Court approved the Receiver's proposal to include in Proof of Claim Forms distributed to investors his calculation for the applicable Investor Account's "**Net Investment Amount**" where sufficient information existed. The Net Investment Amount for an account was calculated by adding all amounts contributed by the pertinent investor(s) to an account and subtracting all

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[2] Overall, the Receiver received and reviewed 631 Proof of Claim Forms. This number includes corrected and supplemented Proof of Claim Forms that were received in response to deficiency letters sent by the Receiver. As noted above, these 631 Proof of Claims Forms relate to 504 total claims.

[3] Although Nadel and the Receivership Entities did not maintain separate investor accounts, the purported statements they created and distributed referred to fictitious "accounts" in the Hedge Funds (the "**Investor Accounts**"). For ease of reference, this Motion and its Exhibits use the term "account" even though no such accounts actually existed.

[4] Multiple claims were submitted for five accounts.

distributions made to that accountholder(s), regardless of whether those distributions were characterized as interest, earnings, returns of principal, or by any other terminology. In other words, the Net Investment Amount reflects dollars an investor actually deposited in the scheme minus dollars that investor actually received from the scheme.

If the Investor Claimant agreed with the numbers provided by the Receiver, it did not have to provide any documentation supporting its claim. The Investor Claimant, however, was required to sign under penalty of perjury and return the completed Proof of Claim Form by the Claim Bar Date.[5] Of the 478 Investor Claims submitted, 392 claims agreed with the Receiver's calculations; 63 claims disagreed; 4 claims did not indicate whether they agreed; and the remaining 19 claims were not provided calculations by the Receiver for various reasons. To date, the Receiver has received claims from Investor Claimants totaling approximately $149,033,449.32 and claims from Non-Investor Claimants totaling approximately $9,205,581.14, for a total claim amount of approximately $158,239,030.46.[6]

After the filing of this Motion, the Receiver will promptly mail a letter giving notice of this Motion to all Claimants to the mailing address provided on each of their respective submitted Proof of Claim Forms, and to their attorneys, if any were identified. The letter will inform the Claimants that this Motion is available on the Receiver's website or, upon request,

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[5] For the Court's ease of reference, a copy of a blank Proof of Claim Form is attached as **Exhibit A**.

[6] The amount indicated for Non-Investor Claimants may not include all claimed interest, fees, or penalties which may be sought by them. Importantly, these numbers reflect the amount Claimants are claiming they are owed, and not the amount the Receiver has determined is the value of allowable claims.

from the Receiver's office. The letter will also advise each Claimant of his, her, or its respective claim number.[7]

THE RECEIVER'S DETERMINATIONS AND FURTHER PLANS FOR ADMINISTERING THE CLAIMS PROCESS

I. OVERVIEW OF THE RECEIVER'S DETERMINATION OF CLAIMS AND CLAIM PRIORITY

As set forth in the Receiver's Claims Form Motion, any properly completed and timely filed proof of claim should be allowed if it is established that: (1) the claim arises out of any Receivership Entity's activities; (2) losses resulted from such activities; (3) any alleged claim and losses are consistent with the books and records gathered by the Receiver; and (4) no other ground exists for denying the claim. The Receiver has carefully and thoroughly reviewed and considered all 504 submitted claims. The Receiver has determined that each claim falls within one of five categories:

(1) Investor Claims and Tax Lien Claims which should be allowed and should receive the highest priority among claims;

(2) Investor Claims which should be allowed in part and also should receive the highest priority among claims;

(3) secured Non-Investor Claims (the "**Non-Investor Secured Claims**") which should be allowed in part, but should be paid only from the proceeds of the sale of the collateral securing the claims, less certain fees and costs;

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[7] To minimize public disclosure of Claimants' financial affairs, the Receiver has assigned each claim a number. As permitted by Court order (Doc. 674), by separate sealed filing, the Receiver will file with the Court a list disclosing the identity of each Claimant associated with each claim identified by number in **Exhibits B** through **J**.

In certain instances, however, where the Claimant's identity is important to the determination of a claim, this Motion discloses that information.

(4) unsecured Non-Investor Claims (the "**Non-Investor Unsecured Claims**") which should be allowed (in whole or in part), but should be paid only after defrauded investors' allowed claims have been paid in full; and

(5) claims which should be denied.

As detailed in **Exhibits B** through **J**, the Receiver has proposed an Allowed Amount[8] for each claim. The Receiver's determination of a Claimant's Allowed Amount is not indicative of the amount the Claimant will receive through distributions of Receivership assets. Rather, each Claimant holding an allowed claim with a positive Allowed Amount will be eligible for distributions on a *pro rata* basis depending on the priority of the claim (unless otherwise discussed in this Motion), and ultimately will likely only receive a percentage of its Allowed Amount. For example, claims submitted by Non-Investor Unsecured Claimants, such as unsecured trade creditors, may receive no distributions despite having a positive Allowed Amount because, as discussed below in Section II. A., those claims are subject to a lower priority than defrauded investors' claims.

As of November 29, 2011, the Receiver had approximately $21,882,616.97 in cash and certificates of deposits in all Receivership accounts. The Receiver believes that he has sufficient funds to warrant the expense inherent in making an interim distribution. As discussed in more detail below, the Receiver recommends making an interim distribution as

[8] "**Allowed Amount**" is the amount of a claim to which the Receiver has determined the Claimant is entitled. The Allowed Amount will serve as the basis for determining a Claimant's ultimate distribution of Receivership assets.

soon as practicable after Claimants have had the opportunity to object as provided in Section V. of this Motion.

The Receiver considered each submitted claim to determine its claim category, with the goal that distribution of the Receivership's assets be equitable and fair among all Claimants. Various types of Claimants submitted claims, including individual investors, institutional investors, service providers, and mortgage lenders. Some Claimants had no reason to know of Nadel's scheme while others were more sophisticated and, at a minimum, should have recognized at least some of the numerous "red flags." A subsequent reasonable and diligent inquiry would have revealed fraud or, at a minimum, failed to ameliorate suspicions. It is through the Receiver's review and assessment of information each Claimant provided, the books and records of the Receivership Entities, and information obtained from non-parties that the Receiver established the categories of Claimants discussed in this Motion to assure fair and equitable treatment.

The Receiver asks the Court to approve his recommended claim determinations as set forth in **Exhibits B** through **J** and, in certain instances, discussed in more detail below. Further, as the Claim Bar Date has passed and all Claimants and other potential creditors have had ample notice of the claims process and an opportunity to file claims and to seek enforcement of any liens or other asserted rights or interests in Receivership property, the Receiver asks the Court to issue an order (1) confirming that no further claims will be considered and (2) barring any future claims against Receivership Entities, Receivership property, the Receivership estate, or the Receiver, and any proceedings or other efforts to enforce or otherwise collect on any lien, debt, or other asserted interest in or against

Receivership Entities, Receivership property, or the Receivership Estate. Such an order is important to bring finality and to allow distributions to proceed, and is warranted in light of the ample time that has been available to address such matters.

A. Allowed Investor Claims And Tax Lien Claims, Which Should Receive Highest Priority

1. Allowed Investor Claims

Highest priority should be given to claims submitted by investors who were victimized by the scheme and who did not have reason to recognize "red flags." Specifically, these investors invested a principal amount in the scheme which exceeded any distributions they received from the scheme. The Receiver has determined that 345 Investor Claims should be allowed. These claims are identified in **Exhibit B** and are consistent with the Receivership Entities' books and records and other documents recovered by the Receiver (collectively, the "**Receivership Records**"). Accordingly, the Court should allow each of these claims in the Allowed Amounts as set forth in **Exhibit B**.

2. Allowed Tax Lien Claims

Under the procedures set forth in the Claims Form Motion, the Receiver sent Claims Packages to numerous state and federal taxing authorities, advising them of their opportunity to submit a claim. The Receiver selected these recipients based on information in his possession indicating ties between the Receivership and those jurisdictions. Specifically, the Receiver sent Claims Packages to the Internal Revenue Service ("**IRS**") and state and certain county taxing authorities in Florida, Delaware, Georgia, North Carolina, Mississippi, and Ohio. In Florida, the Receiver sent Claims Packages to the Florida Department of Revenue and the Sarasota County Tax Collector. In Delaware, the Receiver sent a Claims Package to

the Delaware Department of Revenue. In Georgia, the Receiver sent Claims Packages to the Georgia Department of Revenue, the Coweta County Tax Assessor, the Grady County Tax Assessor, and the Thomas County Tax Assessor. In North Carolina, the Receiver sent Claims Packages to the North Carolina Department of Revenue, the Alamance County Tax Department, the Buncombe County Tax Department, and the Wake County Revenue Department. In Mississippi, the Receiver sent Claims Packages to the Mississippi State Tax Commission and the Lee County Tax Collector. And in Ohio, the Receiver sent Claims Packages to the Ohio Department of Taxation and the Lorain County Auditor. In total, the Receiver sent Claims Packages to 23 local, state, and federal taxing authorities.

The Receiver received claims from two taxing authorities: the IRS and the Sarasota County Tax Collector. (*See* Claim Nos. 479 and 480 on **Exhibit C**, respectively.) The IRS's claim seeks $3,400 for penalties owed in connection with Receivership Entities' returns for the year ending 2007. The IRS submitted this claim on June 30, 2011, nearly ten months after the Claim Bar Date and only after repeated contact by the Receiver's accountant. Despite the IRS's late filing, given the low dollar amount of this tax claim, the Receiver does not believe it makes financial sense to contest the claim, and thus the Court should allow this claim as specified in **Exhibit C**.[9]

The Sarasota County Tax Collector's timely filed claim stems from tangible personal property taxes incurred in 2009 on property then owned by Receivership Entity Home Front

[9] Because the IRS's claim seeks a minimal amount and was received sufficiently prior to the filing of this Motion and any interim distribution, allowing this claim should not cause any appreciable prejudice to other Claimants.

Homes, LLC. The Sarasota County Tax Collector seeks $1,081.99. Given the low dollar amount of this tax claim, the Court should allow this claim as specified in **Exhibit C**.

Because the Claim Bar Date has long passed, the Court should order that the above taxing authorities are barred and precluded from asserting a claim or any further claim against the Receiver, Receivership estate, or any Receivership Entity. *See Callahan v. Moneta Capital 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"); *S.E.C. v. Princeton Econ. Int'l Ltd.*, 2008 WL 7826694, *4 (S.D.N.Y. 2008) ("All persons or entities with a claim that failed to file a proof of claim prior to the Bar Date and were not excused from filing a proof of claim under the Plan are forever barred, estopped, and permanently enjoined."); *C.F.T.C. v. Wall St. Underground, Inc.*, 2007 WL 1531856, *4 (D. Kan. 2007) (same). Enforcement of the Claim Bar Date against any future claim is necessary to allow the Receiver to proceed with his plan of distribution as discussed in Section I. E. 2. below.

B. Allowed In Part Investor Claims, Which Also Should Receive Highest Priority

The Receiver received 75 Investor Claims which, because of various factors, should not be allowed in full. These claims, and the factors impacting each claim, are set forth in

Exhibit D.[10] Sections I. B. 1. and I. B. 2. below contain general discussions of certain matters impacting the Allowed Amount of these claims. Section I. B. 3. below contains a preliminary discussion about additional matters impacting one of these claims.

1. Investor Claims Should Be Allowed Only For The Net Investment Amount

As a general matter, as detailed in Section II. B. below, an Investor Claimant is not entitled to an Allowed Amount that exceeds its Net Investment Amount. Accordingly, the Court should approve the "**Net Investment Method**" as the appropriate method for determining Allowed Amounts for Investor Claims. The Net Investment Method begins with the Net Investment Amount for each Investor Account which, as previously noted, adds all amounts contributed by the pertinent investor(s) to an account and subtracts all distributions made to that accountholder(s), regardless of whether those distributions were characterized as interest, earnings, returns of principal, or by any other terminology. The Court approved the Receiver's proposal to include this amount on the Proof of Claim Forms sent to investors where sufficient information was available.

The Net Investment Amount appropriately does not include any "**False Paper Profits**." False Paper Profits represent the purported appreciation in an Investor Account from the Hedge Funds' purported investment activities as reflected in statements sent to

[10] There are seven additional claims included in **Exhibit D** for which Investor Claimants agreed to a reduction of their claim amount or potential distribution as part of resolutions of litigation brought by the Receiver. The set-off or reduced amounts are reflected in **Exhibit D**. (*See* Claim Nos. 346, 351, 363, 377, 378, 390, and 396.) **Exhibit D** also includes one additional claim for an account which transferred all of its funds to one of the aforementioned claims. (*See* Claim No. 395).

investors. These False Paper Profits were fictitious because no profits were actually earned by the Hedge Funds. Rather, the Hedge Funds were operated as a Ponzi scheme, and the reported profits were a fiction. The fictitious profits were only on "paper" because the investors associated with those accounts did not ask for distributions of those purported profits and thus did not receive any money purportedly representing those fictitious profits.

In applying the Net Investment Method, where an Investor Claimant or related Investor Claimants have multiple accounts with the Hedge Funds and one or more of those accounts received "**False Profits**," those accounts have been considered on a consolidated basis. False Profits refer to the amount of money actually received by investors associated with an Investor Account from the scheme which exceeds the amount of money those investors actually invested in the scheme. Typically, Investor Claimants would have received False Profits because of distributions they received of purported investment gains or principal redemptions.

Inconsistent with the Net Investment Method, nine Investor Claims seek False Paper Profits in addition to their Net Investment Amounts. (*See* Claim Nos. 350, 369, 397, 398, 403, 405, 407, 408, and 417.)[11] The Receiver's determination of the Allowed Amounts for each of those nine Investor Claims reflects each of their associated Investor Account's Net Investment Amount but does not include their fictitious False Paper Profits.

Also inconsistent with the Net Investment Method, the Receiver received 24 claims for Investor Accounts which had losses but which were associated with investors who

[11] Claim Number 349 is included on **Exhibit D** because the Receiver has consolidated it into Claim Number 350.

received False Profits in connection with one or more additional Investor Accounts. (*See* Claim Nos. 347, 352, 355, 358, 360, 364, 365, 367, 372, 375, 381, 383, 385, 389, 393, 396, 401, 402, 404, 409, 412, 413, 418, and 419.) In determining the Allowed Amounts for those claims, the Receiver set-off the claimed losses with the False Profits in the related accounts.[12]

Accordingly, the Court should (1) find the Net Investment Method as proposed above and as reflected in the Exhibits is the appropriate method to use in determining Allowed Amounts for investors and (2) allow all of the foregoing claims for the Allowed Amounts as set forth in **Exhibit D**. Legal authority supporting these conclusions is detailed in Sections II. B. 1. and II. B. 2. below.

2. Investor Claims For Amounts That Are Inconsistent With The Amounts Reflected In Receivership Records Should Be Allowed Only In The Appropriate Amount Reflected In Receivership Records

Nine Investor Claims have claim amounts that are inconsistent with Receivership Records and should be allowed only in the appropriate amount reflected in those records. (*See* Claim Nos. 354, 373, 374, 387, 394, 399, 406, 415, and 416.) The Receiver has

[12] For ease of the Court's and the Claimants' review, **Exhibit D** includes both the claims for losses and the related claims involving Investor Accounts with False Profits. Entries in the "Recommended Claim Determination" column in **Exhibit D** for each of these claims identifies which claims should be set-off and the amounts to be set-off. Each claim involving an Investor Account with False Profits necessarily has no loss and thus has no Allowed Amount. Those False Profits claims are only included in **Exhibit D** for purposes of set-off and otherwise would have been in the Exhibit listing denied claims because they had no loss. (*See* Claim Nos. 348, 353, 356, 359, 361, 366, 368, 371, 376, 382, 384, 386, 388, 392, 400, 403, 410, 411, 414, and 420.) Also included in **Exhibit D** for ease of reference are related claims for Investor Accounts which may have purportedly transferred funds or have been consolidated with other Investor Accounts which are involved in the set-offs discussed above. (*See* Claim Nos. 357, 362, 370, 379, and 380.)

thoroughly reviewed those claims and relevant Receivership Records, and those records show the figures and Allowed Amounts set forth in **Exhibit D** for each of those claims accurately reflect their Net Investment Amount. Accordingly, the Court should allow each of those claims only for the Allowed Amounts specified in **Exhibit D**.

3. Investor Claim Which Received Inequitable Preference Payment Resulting In A 50% Recovery Only Should Be Allowed To Receive Any Distribution When And If Other Investor Claimants With Allowed Claims Have Received A 50% Recovery Of Their Allowed Amounts.

As discussed in more detail below in Section II. C. 1. and as set forth in **Exhibit D**, one Investor Claim should be allowed only in part because the Claimant received an inequitable preference payment after it was placed on notice of "red flags." (*See* Claim No. 391.) Specifically, in 2005 the Claimant invested $2 million in Victory Fund. By 2008, the purported value of that "investment" exceeded $3 million, and the Claimant attempted to redeem its entire "investment" by no later than September 30, 2008. Nadel resisted the Claimant's initial attempt to redeem citing "extraordinary market circumstances." In reality, the scheme was on the brink of collapse and Nadel had run out of money to satisfy the redemption request. In response, the Claimant sent Nadel letters and emails demanding the return of its purported investment and threatening legal action if Nadel did not comply. To forestall the immediate detection of his scheme, Nadel arranged a partial "redemption" of $1 million to the Claimant on November 11, 2008. Two months later, Nadel's scheme collapsed, and he fled Sarasota.

The $1 million that Nadel transferred to the Claimant after being threatened with legal action was an inequitable preference payment made after the Claimant was placed on

notice of red flags as a result of Nadel's refusal to honor the Claimant's redemptions request. That preference amounted to a return to the Claimant of 50% of its principal investment under inequitable circumstances. As such, that transfer effectively should be treated as an "advance" on claims process distributions, and the Claimant should not be allowed to participate in any further distributions *unless and until* all Investor Claimants receive 50% of their Allowed Amounts.

C. Allowed In Part Non-Investor Secured Claims, Which Should Only Be Paid From Proceeds Of The Sale Of Collateral Less Certain Fees And Costs

The Receiver received secured claims which should be allowed in part from two banks which loaned money to certain Receivership Entities for the purchase of real property: (1) Branch Banking & Trust Company ("**BB&T**") and (2) Bank of Coweta.[13] (*See* Claim Nos. 481 and 482.) Both BB&T and Bank of Coweta have secured liens on property purchased with those loans.

BB&T loaned $394,000 to Receivership Entity Laurel Preserve, LLC to refinance Nadel's cottage located at 10 Laurel Cottage Lane, Black Mountain, North Carolina (the "**Laurel Preserve Cottage**"). (*See* Claim No. 482.) The principal balance of the loan when the Receiver was appointed was $360,157.37. During the life of the loan, $79,103.30 was paid towards the loan's principal or interest. Thus, BB&T has already received slightly more

[13] The Receiver also received: (1) a secured claim from Wachovia Bank, N.A. ("**Wachovia Bank**") relating to a loan to a Receivership Entity for the purchase of real estate (*see* Claim No. 502) and (2) two claims from LandMark Bank of Florida ("**LandMark Bank**") asserting secured interests in connection with a loan made to Christopher Moody (*see* Claim Nos. 500 and 501). However, as discussed in Sections II. D. 2. and II. D. 3. below, those claims should be denied.

than 20% of the original loan amount. As discussed in more detail in Section II. C. 2. below and as set forth in **Exhibit E**, this claim should be allowed in the amount of $360,157.37, which is the principal amount of the loan outstanding at the time of the Receiver's appointment, but should only be paid from the proceeds of the eventual sale of the Laurel Preserve Cottage, less fees and costs incurred by the Receivership to maintain and sell the property. Because the Receiver is entitled to compensation for these fees and costs, the Receiver's fees and costs should be deducted from the proceeds of the sale of the property first and then the remaining proceeds should be distributed to BB&T up to the Allowed Amount.

Bank of Coweta loaned $1,000,000 to Receivership Entity Tradewind, LLC for the purchase of five aircraft T-hangars and one box hangar in Coweta County, Georgia (the "**Hangars**"). (*See* Claim No. 481.) When the Receiver was appointed, the principal balance of the loan was $964,300.80. The Receiver has been making monthly payments on that loan because he believes they are in the best interest of the Receivership. As of November 25, 2011, the principal balance of the loan was $891,628.04. During the life of the loan, $399,078.75 has been paid towards the loan's principal or interest. Thus, Bank of Coweta has already received nearly 40% of the original loan amount. Because the Receiver has been making payments on this loan, as discussed in more detail in Section II. C. 2. below and set forth in **Exhibit E**, this claim should be allowed in the amount of the principal amount of the loan outstanding at the time of the eventual sale of the Hangars, not to exceed $891,628.04, but should only be paid from the proceeds of the eventual sale of the Hangars, less fees and costs incurred by the Receivership to maintain and sell the Hangars. Again, because the

Receiver is entitled to compensation for these fees and costs, the Receiver's fees and costs should be deducted from the proceeds of the sale of the property first and then the remaining proceeds should be distributed to Bank of Coweta up to the Allowed Amount.

D. Allowed And Allowed In Part Non-Investor Unsecured Claims, Which Should Receive Lowest Priority Among Allowed And Allowed In Part Claims

Unsecured non-investor creditors submitted 13 claims for amounts owed in connection with their provision of goods or services to Receivership Entities ("**Non-Investor Unsecured Claimants**"). The total amount of those 13 claims is $755,452.51, and they are itemized in **Exhibit F.** Eight of those claims should be allowed for the full amount claimed (*see* Claim Nos. 484, 485, 486, 488, 490, 491, 492, and 493), and the remaining five claims should have Allowed Amounts that are less than the amount claimed (*see* Claim Nos. 483, 487, 489, 494, and 495). The latter five claims should be allowed only in the Allowed Amounts set forth in **Exhibit F**. As discussed in Section II. A. below, all of the Allowed and Allowed In Part Non-Investor Unsecured Claims should receive the lowest priority among Allowed and Allowed In Part claims, such that those claims are paid only after the Allowed Amounts of all Investor Claims have been paid in full.

The reasons for allowing five of the Non-Investor Unsecured Claims only in part are specified in **Exhibit F**, but following is a summary. Two claims seek fees for services provided after appointment of the Receiver which the Receiver did not request or approve. (*See* Claim Nos. 487 and 494.) One claim seeks late charges for unpaid invoices. (*See* Claim No. 489.) Another claim seeks the remainder of monthly payments due on a pre-Receivership lease agreement for Receivership Entities' offices plus interest through the term

of a lease which runs until after this Receivership was instituted. (*See* Claim No. 495.) That claim also: (1) seeks a 3% rent increase beginning more than two months after appointment of the Receiver and after the offices had been vacated and (2) fails to reduce the amount sought by the last month's rent, which was prepaid by Receivership Entities. The final claim seeks the balance due on a promissory note given by a Receivership Entity plus exorbitant interest of 25% beginning from January 2009 (*i.e.*, the month of the Receiver's appointment), legal fees, and management fees presumably for services rendered to the Receivership Entity. (*See* Claim No. 483.) As a matter of equity, under the circumstances of this Receivership, these claims should not recover for unsolicited services, interest charges, late fees, legal fees, management fees, or rent increases imposed or incurred after the Receiver's appointment. The Receiver's claim determination for each of these claims deducts from their respective Allowed Amounts the amounts claimed for these items.

E. Denied Claims

Forty-three of the 504 submitted claims should be denied. These claims are identified and discussed in **Exhibits G** and **H** and briefly summarized below.

1. Investor Claims Which Should Be Denied Because No Losses Were Suffered

Nineteen of the 43 claims, all 19 of which are Investor Claims, should be denied because the Investor Claimants submitting those claims did not experience any losses. (*See* Claim Nos. 449, 450, 451, 452, 453, 454, 455, 456, 459, 461, 462, 463, 464, 465, 466, 467, 468, 471, and 477.) In fact, 16 of those 19 Investor Claims were submitted by Investor Claimants who are overall net "winners." This means that when considering all Investor Accounts associated with each of those Investor Claimants, each Investor Claimant had an

overall False Profit. For at least one of those Investor Claimants, False Profits exceeded $1 million.

Consistent with the legal authority discussed below in Section II. B., claims by Investor Claimants who have not experienced an overall loss should be denied. It would be inequitable and inconsistent with precedent to allow an Investor Claimant to recover for a loss in one Investor Account when the Investor Claimant has received False Profits greater than that loss in connection with another Investor Account. These claims should be denied as set forth in **Exhibit G**.

2. Investor Claim Which Should Be Denied Because It Was Filed After The Claim Bar Date And Investor Claimant Failed To Explain Reason For Late Submission

Fourteen Proof of Claim Forms were received after the Claim Bar Date. The Receiver sent a letter to each Investor Claimant who filed a late claim without providing an explanation for the late filing. The letter requested that any extenuating circumstances for the late filing be provided to the Receiver in writing and that failure to do so could result in denial of the claim. The Receiver received responses for each such claim except for one. (*See* Claim No. 458.) Not only did the non-responding Investor Claimant (which is a Limited Liability Company) fail to provide any explanation for the late filing, but the Receiver has learned the owners of this Claimant, along with other individuals, previously invested in Hedge Funds through another Limited Liability Company. That previous investment received False Profits. Because the Receiver was not provided any details about who invested in the Hedge Funds through both Limited Liability Companies and how much

those persons or entities invested in and received from the Hedge Funds, the Receiver cannot determine each such person or entity's losses or False Profits.

Pursuant to the Court's Order on the Claims Form Motion, any person or entity who failed to submit a proof of claim to the Receiver so that it was actually received by the Receiver on or before the Claim Bar Date is barred and precluded from asserting any claim to Receivership assets. Under the circumstances of this Receivership, and specifically the scheme's impact on defrauded investors with losses, a limited exception should be made for Investor Claimants that provided extenuating circumstances for the delay which the Receiver believes, under the totality of the circumstances, reasonably justify allowing those late-filed claims. (*See* Claim Nos. 5, 48, 52, 57, 181, 183, 269, 357, 358, 359, and 417.)[14] This conclusion is heavily based on the fact that (i) because those claims were filed so close in time to the Claim Bar Date (they were received by October 6, 2010, which is slightly more than one month after the Claim Bar Date), there is no prejudice in accepting them at this time and (ii) the Claimants made an effort to provide extenuating circumstances for their late filings. On the other hand, however, as specified in **Exhibit G**, the late-filed Investor Claim discussed in the previous paragraph should be denied for the reasons discussed.

[14] Another late-filed claim was accompanied by an explanation of extenuating circumstances (*see* Claim No. 471), but as explained in **Exhibit G** and Section I. E. 1., this claim should be denied because the associated Investor Account had False Profits rather than a loss.

3. Claims Which Should Be Denied For Failure To Cure Deficiencies In Proof Of Claim Forms

a. Investor Claims From Offshore Nominee Accounts That Did Not Disclose Beneficial Owners

Two Investor Claims should be denied because they were submitted by nominees of offshore bank accounts that did not disclose the beneficial owners of the accounts. (*See* Claim Nos. 445 and 469.) The Receiver sent these Investor Claimants letters explaining the deficiencies in the Proof of Claim Forms and requesting disclosure of all beneficial owners of the pertinent accounts. One offshore bank did not respond to the deficiency letter. (*See* Claim No. 469.) The other offshore bank provided some information but wrote on the Proof of Claim Form that the beneficial owners, which appear to be investment funds, "do not intend to provide/divulge the requested information." (*See* Claim No. 445.) This answer was given in response to Question 3 on the Proof of Claim Form (*see* Exhibit A) which states: "If this form is being completed on behalf of an entity, please provide the full name of the entity and all of its trustees, officers, directors, managing agents, shareholders, partners, beneficiaries, and any other party with an interest in the entity."

These offshore banks' refusal to provide requested information has impeded the Receiver from assessing whether the pertinent Investor Claimants have submitted allowable claims. For instance, without knowing the beneficial owners of the accounts, the Receiver cannot determine whether those owners held other Investor Accounts, whether they received False Profits in connection with any such other accounts, whether they otherwise received additional money from Receivership Entities, or whether they were "insiders." Accordingly, these claims should be denied as set forth in **Exhibit G**.

b. Investor Claims Filed By Claimants Who Lack Necessary Authority

The Receiver received three Investor Claims from Millennium Trust submitted on behalf of accounts for which it acted as custodian. (*See* Claim Nos. 457, 470, and 472.) Millennium Trust acted as custodian for numerous Individual Retirement Accounts which invested in the Hedge Funds. These claims were submitted on behalf of Marguerite Nadel (Nadel's wife); Geoff Quisenberry (her son); and an investor. Mrs. Nadel's and the investor's respective Proof of Claim Forms were signed only by an officer of Millennium Trust and not by them. Mr. Quisenberry's Proof of Claim Form was signed by him and the same Millennium Trust officer, but Mr. Quisenberry's signature was not an original signature. Further, the claim submitted on behalf of the investor is a duplicate claim as that investor also submitted his own claim for that same account.

The Receiver sent letters to these Claimants identifying the deficiencies in the submitted Proof of Claim Forms. The Receiver requested (1) a writing showing Millennium Trust had authority to submit the relevant claims or (2) an original signature of the account owner on the Proof of Claim Form certifying the information provided on the Proof of Claim Form was true and correct. The Receiver received no response from Millennium Trust or the underlying Claimants regarding these deficiencies.

Further, information on the Proof of Claim Forms for both Mrs. Nadel and Mr. Quisenberry was not complete or accurate. For instance, even though required by the Proof of Claim Forms, they fail to identify any money Mrs. Nadel or Mr. Quisenberry received from Receivership Entities that was unrelated to the specific accounts held by Millennium Trust. This omission renders those forms severely inaccurate because both of them received

substantial "wages" from Receivership Entity Scoop Management. This omission from Mr. Quisenberry's Proof of Claim Form is particularly troubling because he signed a copy under penalty of perjury. Indeed, neither Mrs. Nadel nor Mr. Quisenberry suffered overall losses because they each received substantial amounts of scheme proceeds unrelated to investments, including as "wages." And in any event, the money used to fund their Millennium Trust Individual Retirement Account investments was scheme proceeds which they received as "wages." For these reasons, these claims should be denied as specified in **Exhibit G**.

c. Claims With No Supporting Documentation

The Receiver received an Investor Claim from Nadel's brother-in-law. (*See* Claim No. 460.) The Receiver did not provide any amounts in the Exhibit A attached to the Proof of Claim Form for this Claimant. In light of the relationship between the Claimant and Nadel, the Receiver wanted the Claimant to provide proof that the investment was (1) made with money that was not proceeds of the scheme or (2) not simply credited on the books without actual receipt of funds. The Claimant did not provide any supporting documentation as required by the Proof of Claim Form. The Receiver sent the Claimant a letter identifying this deficiency and providing the Claimant 30 days to provide the requested documentation, but the Claimant did not respond. Receivership Records do not reflect any actual deposit of money to fund this investment, and because this Claimant failed to provide documentation, the Receiver has no record that this was a legitimate investment. Accordingly, the claim should be denied as specified in **Exhibit G**.

The Receiver also received a claim from an individual with a correctional facility's address as a return address who appears to be an inmate of that facility. (*See* Claim No. 497.)

No record of this Claimant was found in Receivership Records. The Claimant submitted a claim for "health care goods and services of a confidential nature." He also states that he was an investor and unpaid creditor. However, the Proof of Claim Form was not properly completed and did not include any supporting documents. The Receiver sent the Claimant a letter identifying the deficiencies and providing the Claimant 30 days to correct them, but the Receiver did not receive any response. Because the Receiver has no record of this Claimant or any purported investment made or service provided and because the Claimant failed to provide any support for his claim, the claim should be denied as specified in **Exhibit H**.

4. Claims Which Should Be Denied Because They Relate To Matters Outside The Scope Of The Receivership

The Receiver received two claims for matters which are outside the scope of the Receivership and do not involve Receivership Entities. One pertinent Claimant is a former wife of Nadel who seeks recovery for purported mortgage loans secured by her property obtained while she and Nadel were married. (*See* Claim No. 504.) The other Claimant is a purported investor who seeks recovery of her purported investment or loan given to an individual named J.C. Abercrombie. (*See* Claim No. 503.) Neither J.C. Abercrombie nor the purported investment appears to have any relationship to this Receivership. Likewise, the claim relating to the purported mortgages on Nadel's former wife's property is not within the scope of this Receivership. That claim involves alleged damages caused by Nadel in his individual capacity that have no relation to the activities of the Receivership Entities. In fact, the conduct purportedly giving rise to that claim pre-dates the matters which underlie this case. Relief in this receivership does not extend to all victims of frauds perpetrated by the

same actors. *S.E.C. v. Homeland Commc'ns Corp.*, 2010 WL 2035326, *4 (S.D. Fla. 2010). Accordingly, these claims should be denied as set forth in **Exhibit H**.

5. Claims Which Should Be Denied Because Claimants Were On Inquiry Or Actual Notice Of Fraud

a. Sophisticated Financial Companies

As discussed in detail in Section II. D. below, eight claims should be denied because the Claimants had either actual or inquiry notice of fraud, and thus it would be inequitable to share Receivership assets with these Claimants. (*See* Claim Nos. 446, 447, 448, 473, 476, 500, 501, and 502.) Five of these claims were Investor Claims submitted by: (1) Citco Global Custody N.V. ("**Citco**"), a global foreign bank, on behalf of KBC Financial Products ("**KBC**"), a sophisticated financial products firm with offices in London, New York, and Hong Kong (Claim Nos. 446, 447, and 448);[15] and (2) Think Strategy Capital Management LLC ("**Think Strategy**"), a capital management firm that acted as investment manager of the TS Multi-Strat Fund LP, an offshore investment fund (Claim Nos. 473 and 476).[16] The

[15] This Claimant's Proof of Claim Forms were deficient because they failed to provide information requested in Question 3. *See* Proof of Claim Form, Ex. A. The Receiver sent the Claimant notice of the deficiency and provided the Claimant with 30 days to correct the deficiency. The Claimant did not respond to this request and thus these claims should be denied for this reason alone.

[16] This Claimant's Proof of Claim Forms were deficient because they were not signed by an individual authorized to act on behalf of the entity which held the account. Rather, the signature line simply bore the name of the company itself. The Receiver sent the Claimant notice of the deficiency and provided the Claimant with 30 days to correct the deficiency. The Claimant did not respond to this request and thus these claims should be denied for this reason alone.

remaining three of these claims were Non-Investor Claims submitted by (1) Wachovia Bank (Claim No. 502); and (2) LandMark Bank (Claim Nos. 500 and 501).

As discussed in detail in Section II. D. below, each of these Claimants was a sophisticated financial company and, at a minimum, should have recognized at least some of the numerous and easily discernible "red flags" surrounding Nadel and Receivership Entities. In turn, they should have conducted a diligent and reasonable investigation, which would have uncovered fraud or, at a minimum, failed to ameliorate the issues. As a consequence, they were on inquiry notice of fraud. Further, as also detailed in Section II. D. 3. below, one of these Claimants, LandMark Bank, was on actual notice of fraud when it purportedly entered into the transaction which forms the basis of one of its claims (*see* Claim No. 501). Under principles of equity, these Claimants should not receive any Receivership assets. Accordingly, these claims should be denied as set forth in **Exhibits G** and **H**.

b. Receivership Entity Employee

Similarly, as discussed in more detail in Section II. E. below, the Receiver received two claims from a former employee of a Receivership Entity. (*See* Claim Nos. 474 and 475.) The Claimant was employed by Scoop Management as a bookkeeper from approximately December 2004 through the collapse of the scheme and was Neil Moody's step-child.[17] The

[17] Neil Moody and his son Christopher Moody were "business partners" of Nadel (Neil and Christopher Moody are collectively referred to as the "**Moodys**"). Each of them consented to entry of judgments for securities fraud in connection with the scheme and to disgorge all gains they received from the scheme. *See generally S.E.C. v. Neil V. Moody et al.*, Case No. 8:10-cv-00053-T-33TBM (M.D. Fla.), Consent of Def. Neil V. Moody ¶ 3 (Doc. 2, Ex. 2); Consent of Def. Christopher D. Moody ¶ 3 (Doc. 2, Ex. 1); Judgments of Permanent Injunction and Other Relief against Neil Moody (Doc. 9) and Christopher Moody (Doc. 9-1).

Claimant was involved in certain aspects of the financial affairs of Viking Fund, Viking IRA Fund, Valhalla Investment Partners, Valhalla Management, and Viking Management. The Claimant is also identified as handling the Hedge Fund Investor Account for Receivership Entity Viking Oil & Gas, LLC and Neil Moody's personal account. In only approximately four years as a bookkeeper, the Claimant received total compensation of $385,811.32. The Claimant received wages of $118,326.76 in 2008 alone. The median salary for a bookkeeper in the relevant geographic area is less than half the amount the Claimant received. Receivership Records also indicated the Claimant drove a car paid for by Receivership Entities and had a Receivership Entity credit card.

As detailed in Section II. E. below, these claims should be denied for two independent reasons. First, they should be denied because the Claimant cannot satisfy the good faith obligations. The Claimant was on inquiry notice of problems with the Hedge Funds because (1) the Claimant had an intimate connection with investor assets, movement of funds, and Neil Moody's accounting and (2) the Claimant received more than twice the amount of compensation that was justified for the services the Claimant provided – which were clerical and often of a personal nature for Neil Moody. Second, even if the Claimant had satisfied good faith obligations, the claim still should be denied because the claimed loss – a combined $91,987.50 – is more than offset by the excess salary the Claimant received, which consisted of proceeds of the scheme.[18] Accordingly, these claims should be denied as specified in **Exhibit G**.

[18] Further, the Claimant failed to provide proof of every investment deposit the Claimant purportedly made. The Proof of Claim Forms sent to this Claimant did not include (footnote cont'd)

6. Investor Claim Which Should Be Denied Because Claimant Is A Charitable Organization Whose Invested Principal Consisted Of Proceeds Of The Scheme It Received From Neil Moody

One claim was filed by a charitable organization which received contributions from the Neil V. Moody Charitable Foundation (the "**Moody Foundation**") and then invested most of those funds in a Hedge Fund. (*See* Claim No. 478.) Specifically, from April 26, 2004 through November 21, 2008, Neil Moody, through the Moody Foundation, gave this Claimant approximately $1,219,222 on the condition that it invest the bulk of those funds in Valhalla Investment Partners. The Claimant "invested" $1,111,111.40 of those funds and received $30,315.90 in distributions from this "investment." The donations given to this Claimant consisted of proceeds of the scheme funneled to Neil Moody as Hedge Fund management "fees" based on grossly distorted Hedge Fund performance figures and asset values. As such, those donations were actually funds wrongfully taken from new and existing investors of the Hedge Funds. As explained in Section II. F. below, the Claimant did not provide any value in return for those donations.

Also as discussed in Section II. F. below, the Receiver can recover scheme proceeds transferred as a donation or "gift" to a charity. Thus, if the Claimant had kept all of the funds

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any calculation for Net Investment Amount. Accordingly, the Claimant was required to provide documentation, such as cancelled checks and bank statements, showing the funds invested and received. While the Claimant provided documents substantiating some investments, the Claimant did not provide support for all funds the Claimant purportedly invested. Without that proof, the Claimant has not established that all of the Claimant's investments in the Hedge Funds were legitimate and made with actual dollars and that the Claimant was not simply credited with "deposits" without actually depositing funds. As such, even if this claim were allowable, the amount of the claim should be reduced by the amount of claimed deposits the Claimant failed to substantiate.

it received from the Moody Foundation, the Receiver would have a claim to recover them. Here, the Claimant transferred almost all of the funds back into the scheme. Because it had no right to receive or keep those funds in the first place, it now has no right to recover them from the Receivership estate. To the contrary, the Receiver has a right to recover from the Claimant the approximately $138,426.50 the Claimant retained from the Moody Foundation's donations. As such, this claim should be denied as specified in **Exhibit G**.

7. Investor Claim Which Should Be Denied Because Claimant Is A Charitable Organization Which Received Scheme Proceeds As Donations Which Far Exceed Its Claimed Loss Amount

One claim was filed by a charitable organization which received donations from Nadel's Guy-Nadel Foundation. (*See* Claim No. 499.) Specifically, from at least 2006 through 2008, Nadel, through the Guy-Nadel Foundation, gave that Claimant over $682,500. The Guy Nadel Foundation was funded exclusively with scheme proceeds. In some instances, Nadel transferred scheme proceeds directly from Fund Managers to the Guy-Nadel Foundation. In other instances, Nadel transferred scheme proceeds from the Fund Managers to himself or his wife and then to the Guy-Nadel Foundation. As such, the donations given to this Claimant consisted of proceeds of the scheme and thus were funds wrongfully taken from new and existing investors of the Hedge Funds. This Claimant, like the charitable organization discussed in Section II. F. of this Motion, did not provide any value in return for those donations.

As discussed in Section II. F. below, the Receiver has a claim to recover all scheme proceeds transferred as a donation or "gift" to the Claimant.[19] Here, the Claimant has asserted a claim in the amount of $58,114.50 for the return of a payment it made to Receivership Entity Home Front Homes for the purchase of building materials which were not delivered. The Receiver believes that it is fair and equitable to set-off this claim with the claim the Receiver has against the Claimant to recover all scheme proceeds transferred to the Claimant as donations (*i.e.*, over $682,500). Because those transfers exceed the amount claimed, the claim should be denied as specified in **Exhibit H**.

8. Investor Claim Which Should Be Denied Because Claimant's Sole Director Has Ties To Other Investor Accounts, Including Accounts That Experienced False Profits

One Investor Claim submitted by an offshore bank was submitted on behalf of an entity whose sole director is an individual with close affiliations with other entities that invested in the Hedge Funds. (*See* Claim No. 444.) That director has a financial interest in at least two other Investor Accounts funded from offshore which had combined False Profits of approximately $1,084,293.47. The Receiver also has information that the director is a partner of a trust which invested in another Investor Account through a Swiss bank. The Swiss bank has refused to provide all pertinent information about the investment and the beneficial owners, citing Swiss banking laws. However, the Receiver knows that trust received at least $458,000 in False Profits.

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[19] The Receiver investigated the recovery of those transfers, but based on evidence of inability to pay provided by the Claimant, the Receiver determined that it was not in the Receivership's best interest to pursue litigation.

Further still, this director is a highly sophisticated investor who should be subject to the equitable considerations discussed in Section II. D. 1. above. Because the Receiver has not been provided sufficient information regarding this director and his control and involvement with the entity that is the beneficial owner of this claim and in light of that director's close affiliation with other investors that had False Profits, this claim should be denied, as also specified in **Exhibit G**.

9. Claims Which Should Be Denied Because Claimants Waived Them In Related Transactions With The Receiver

After filing their Proof of Claim Forms, Investor Claimants asserting 23 Investor Claims settled litigation brought against them by the Receiver. *See* **Exhibit I**. As part of those settlements, each of the Claimants waived any claim they may have had to a distribution of Receivership assets. Accordingly, as set forth in **Exhibit I**, each of those 23 Investor Claims should be denied.

Two claims submitted by Non-Investor Claimants also have been waived. One of those claims was waived in connection with the conveyance of real property (*see* Claim No. 496). The other claim seeks recovery of a security deposit paid by the Claimant in connection with the lease of a gas station and associated real property entered into with Scoop Real Estate. (*See* Claim No. 498.) However, on August 4, 2010, that Claimant executed a lease termination agreement waiving all of its rights under the lease, which include any right to receive deposits paid on the lease. As such, these two claims also should be denied as set forth in **Exhibits H** and **J**.

II. THE RECEIVER'S DETERMINATION OF CLAIMS AND PRIORITY IS FAIR AND EQUITABLE

Section I provided an overview of the Receiver's determination of claims and claim priority. This Section provides additional information, including additional support for the basis of how the Receiver determined priority of claims, the proper method of calculating Allowed Amounts, and other matters affecting claims consistent with the goal of making distributions of Receivership Entities' assets fair and equitable.

A. Priority Of Claims

As discussed above, the Receiver has established the following categories of claims: (1) Investor Claims and Tax Lien Claims which should be allowed; (2) Investor Claims which should be allowed in part; (3) Non-Investor Secured Claims which should be allowed in part; (4) Non-Investor Unsecured Claims which should be allowed (in whole or in part); and (5) claims which should be denied. From these categories, the Receiver has determined the fair and equitable priority for each of these claims' participation in distributions of Receivership assets. The highest priority ("**Class 1**") should be afforded to all Investor Claims which are Allowed (**Exhibit B**) and Investor Claims which are Allowed In Part (**Exhibit D**). Also, given the diminutive amount, Tax Lien Claims which are Allowed (**Exhibit C**) should also receive this priority. Each Claimant holding a Class 1 claim will receive a *pro rata* share of its respective claim's Allowed Amount from the total aggregate distribution as discussed in more detail below in Section IV.

Second priority ("**Class 2**") should be afforded to Allowed In Part Non-Investor Secured Claims (*i.e.*, to Claimants holding such claims that were not on inquiry or actual notice of fraud or whose claims should not otherwise be denied for reasons discussed in this

Motion) (**Exhibit E**). However, as discussed in Section II. C. 2. a. below, these Claimants should be allowed to recover only from proceeds of the sale of the asset securing their respective interest up to the lesser of the outstanding principal amount of the debt (i) at the time of the Receiver's appointment or (ii) at the time of sale of the pertinent asset, as applicable, less fees and costs incurred by the Receivership to maintain and sell the asset. Class 2 claims have priority over all other classes with respect to the proceeds of the sale of the asset securing each of the respective secured claims.

Third priority ("**Class 3**") should be afforded to Allowed and Allowed In Part Non-Investor Unsecured Claims (**Exhibit F**). Claimants holding Class 3 claims will only participate in a distribution of Receivership assets after all Allowed Amounts for Class 1 claims have been satisfied in full.

The remaining claims ("**Class 4**") are those which should be denied in full (**Exhibits G** and **H**) or which have been waived (**Exhibits I** and **J**). Claimants holding Class 4 claims will not receive any distribution of Receivership assets.

The Court's power to approve the Receiver's claim determinations and priority of claims is settled. *See S.E.C. v. Elliot,* 953 F. 2d 1560, 1566 (11th Cir. 1992) (court has "broad powers and wide discretion" to assure equitable distributions). Further, courts have consistently found that treating similarly-situated parties alike in claims processes is fair and equitable. *Id. at* 1570*; United States v. Petters*, 2011 WL 281031, *7 (D. Minn. 2011) (*citing S.E.C. v. Credit Bancorp, Ltd*. 2000 WL 1752979, *28 (S.D.N.Y. 2000)). There is no requirement, however, that all claimants be treated in the same manner; rather, fairness only requires that similarly situated claimants should be treated alike. *See, e.g.¸ Quilling v. Trade*

Partners, Inc., 2006 WL 3694629, *1 (W.D. Mich. 2006) (distinguishing between fraud victims and general creditors); *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 184 (S.D.N.Y. 2009) ("The Receiver's proposal to treat differently those involved in the fraudulent scheme when distributions are being made is eminently reasonable and is supported by caselaw."). Further, no specific method of distribution is required; the method of distribution should simply be "fair and equitable." *S.E.C. v. P.B. Ventures*, 1991 WL 269982, *2 (E.D. Pa. 1991). In the end, "[a]n equitable plan is not necessarily a plan that everyone will like." *Credit Bancorp*, 2000 WL 1752979 at *29. Indeed, "when funds are limited, hard choices must be made." *Byers*, 637 F. Supp. 2d at 176 (quoting *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 84 (2d Cir. 2006)).

Investor Claims from investors who were not on inquiry or actual notice of fraud should be given highest priority. Typically, payment to claimants whose property was unlawfully taken from them, such as investors who had no reason to know of the scheme, is given a higher priority than payment to general creditors. *S.E.C. v. HKW Trading LLC*, 2009 WL 2499146, *3 (M.D. Fla. 2009); *Trade Partners, Inc.*, 2006 WL 3694629 at *1 ("As an equitable matter in receivership proceedings arising out of a securities fraud, the class of fraud victims takes priority over the class of general creditors with respect to proceeds traceable to the fraud."); *see also* III Clark on Receivers § 667 at 1154 (Anderson 3d ed. 1959). This is the appropriate priority because "[t]he equitable doctrine of constructive trusts gives 'the party injured by the unlawful diversion a priority of right over the other creditors of the possessor.'" *Id.* (quoting Clark on Receivers § 662.1 at 1174); *see also S.E.C. v. Megafund Corp.*, 2007 WL 1099640, *2 (N.D. Tex. 2007) (holding that general creditors

"will not be paid until all defrauded investors are fully compensated"); *C.F.T.C. v. PrivateFX Global One*, 778 F. Supp. 2d 775, 786-87 (S.D. Tex. 2011) (overruling objection of bank that extended line of credit and adopting receiver's argument that "courts regularly grant defrauded investors a higher priority than defrauded creditors").

In *S.E.C. v. Mutual Benefits Corp.*, Case No. 0:04-cv-60573, Order Granting Receiver's Motion For Final Determination Of Allowed Claims at 3 (S.D. Fla. Oct. 23, 2008), attached as **Exhibit K**, the court identified additional factors that weighed in favor of giving priority to investor claims:

> (1) this is an SEC enforcement action designed to protect the *investors*, not the creditors, (2) [the receivership entity's] fraudulent conduct was directed toward its *investors*, not its creditors (which were paid substantial amounts already), [and] (3) the investors as a whole are less able to bear the financial costs of [the receivership entity's] conduct than are the creditors. . . .

See also Trade Partners, Inc., 2006 WL 3694629 at *1 (noting "there is no evidence that there was an attempt to defraud [the objecting general creditor]"). Each of those factors applies equally here. Nadel focused his fraud on the individuals and entities that invested in the Hedge Funds. The Ponzi scheme depended on their capital infusions to survive, and when the Hedge Funds could no longer attract enough additional investments to cover Nadel's losses, pay bogus gains, return existing investors' funds, or cover other improper diversions of investors' money, the scheme collapsed. In addition, the funds available for distribution by the Receiver consist of proceeds of Nadel's scheme: they mainly consist of False Profits recovered from investors and money the Receiver raised through the sale of property that was purchased or financed with investors' funds. As such, as a matter of equity, defrauded investors should be compensated before general creditors.

Finally, Non-Investor Secured Claimants with allowed claims – *i.e.*, creditors who have a security interest in a Receivership asset in connection with debt owed to that creditor – should receive distributions solely from proceeds of the sale of the asset which secures their interest subject to several limitations. The basis for this treatment of this category of Claimants is detailed in Section II. C. 2. below.

B. The Net Investment Method Is The Proper Method Of Calculating Allowed Amounts For Investor Claims

As indicated above in Section I. B. 1., the Receiver calculated the Allowed Amount of each Investor Claim using the Net Investment Method. As discussed in that Section, the Net Investment Method begins with the calculation of an Investor Account's Net Investment Amount (*i.e.*, the actual dollars the Claimant "invested" in the scheme less any amounts the Claimant already received from the scheme) and does not include any fictitious False Paper Profits. Further, in applying the Net Investment Method, where Claimants have multiple Investor Accounts and one or more of those accounts received False Profits, the accounts are considered on a consolidated basis. For example, if a claimant has one Investor Account in which it invested $100,000 and received distributions of $50,000 and another Investor Account in which it invested $100,000 and received distributions of $125,000, absent application of the Net Investment Method (including consolidated treatment of the accounts), this claimant would have a claim for $50,000. Using the Net Investment Method, the claimant's loss of $50,000 is set-off by the claimant's False Profit of $25,000, resulting in a net claim amount of $25,000. Thus, the Net Investment Method yields the actual difference between how much an investor "deposited" in Nadel's scheme and how much the investor received back from that scheme. This method of calculating a Claimant's loss is equitable

and regularly adopted by receivership courts as demonstrated by legal authority cited in the next two subsections.

1. Investor Claimants May Not Recover False Paper Profits

As noted, False Paper Profits should not factor into the determination of an Allowed Amount because they do not reflect actual profits. Rather, they simply reflected numbers made up by Nadel. Using the Net Investment Method, the Allowed Amount only takes into account the actual dollars the Claimant "invested" less any amounts the Claimant already received, regardless of whether it was falsely represented to the Claimant that it had earned profits.

A Ponzi scheme is an illegal endeavor and thus creates no legal entitlement to profits or interest for its investors. *Warfield v. Carnie*, 2007 WL 1112591, *12-13 (N.D. Tex. 2007) (referencing *In re United Energy Corp.*, 944 F.2d 589, 595 (9th Cir. 1991)). As a fraudulent scheme, a Ponzi scheme has no legitimate investment appreciation or interest, and "recognizing profits or other earnings in claims for distribution would be to the detriment of later investors and would therefore be inequitable." *CFTC v. Equity Fin'l Group, LLC*, 2005 WL 2143975, *23 (D.N.J. 2005). Early investors would have the benefit of many more months of False Paper Profits to inflate their claim while more recent investors who lost the same amount of actual dollars would have far less of a claim because they had less time to accumulate those purported profits. Further, if such "paper profits" were recognized, early investors could potentially experience no actual losses as a result of receiving distributions over the years and yet still have a claim to False Paper Profits to the detriment of later investors who did not have the time to recoup their investment or accrue "profits." Early

investors should not benefit at the expense of later ones. *See Cunningham v. Brown*, 265 U.S. 1, 13 (1924); *Abrams v. Eby*, 294 F. 1, 4 (4th Cir. 1923); *In re Bernard L. Madoff Inv. Secs. LLC*, 2011 WL 3568936, *5 (2d Cir. 2011) (if Net Investment Method is not adopted "those claimants who have withdrawn funds from their . . . accounts that exceed their initial investments 'would receive more favorable treatment by profiting from the principal investments of those claimants who have withdrawn less money than they deposited, yielding an inequitable result'") (citations omitted). The purported profits or earnings reflected on statements provided to investors were wholly fictitious and arbitrarily determined by Nadel. The Net Investment Method avoids "the absurd effect of treating fictitious and arbitrarily assigned paper profits as real" and avoids legitimizing the scheme. *In re Madoff*, 2011 WL 3568936 at *5.

2. False Profits Received By An Investor Claimant In Connection With An Investor Account Should Set-Off Losses That Investor Suffered In Connection With Another Investor Account

Similarly, for an Investor Claimant who has an Investor Account with losses but received False Profits in connection with another Investor Account, the losses should be set-off with the False Profits. *See Equity Fin'l Grp.*, 2005 WL 2143975 at *12, 26 (upholding Receiver's determination to consolidate accounts). Courts have consistently held that an investor's claim should be limited to the total dollar amount of its investment reduced by any funds it received. *In re Old Naples*, 311 B.R. 607, 616 (M.D. Fla. 2002) (citing *In re C.J. Wright & Co.*, 162 B.R. 597 (Bankr. M.D. Fla. 1993)); *Warfield*, 2007 WL 1112591 at *12-13; *Homeland Communic'ns Corp.*, 2010 WL 2035326 at *3; *Credit Bancorp*, 2000 WL 1752979 at *40; *In re Madoff*, 2011 WL 3568936 at *3-5. As these cases show, this is the

most equitable and practical approach for determining investor claim amounts, and a common approach for handling investor claims in a receivership involving a fraudulent investment scheme. *See In re Madoff*, 2011 WL 3568936 at *3-5. As discussed above, netting Investor Accounts held by a Claimant where at least one account received False Profits is necessary under the Net Investment Method and avoids the inequitable possibility of allowing a Claimant to profit at the expense of similarly situated investors. Indeed, in determining which Hedge Fund investors should be sued by the Receiver for False Profits, where applicable the Receiver offset losses and False Profits for investors with multiple Investor Accounts and only sued if the Investor Accounts collectively had a False Profit.

This approach is warranted because any amount a Claimant received in excess of the amount invested in an Investor Account was not the result of any legitimate business or investment activity, but was a fraudulent transfer of funds deposited by new and existing investors. Thus, if a Claimant who received more than the actual dollars invested in connection with one Investor Account is allowed to claim losses in another Investor Account without setting off the profit and the loss, that Claimant will receive a disproportionate share of any distribution. Put differently, to allow investors to retain False Profits while simultaneously recognizing a claim for losses would be inequitable to investors who did not profit in any account. Accordingly, the Net Investment Method as proposed by the Receiver above and as reflected in the Exhibits is the appropriate method for determining Allowed Amounts for Investor Claims.

C. Other Limitations On Claims

1. Limitation On Participation In Any Distribution For Investor Claimant Which Received Inequitable Preference Payment

One Investor Claimant received an inequitable preference payment while it was on notice of red flags associated with the Hedge Funds. (*See* Claim No. 391.) The Claimant invested $2 million dollars in one Hedge Fund in 2005. In June 2008, the Claimant requested a full redemption, and when the funds were not forwarded shortly after the close of the quarter ending September 30, 2008, the Claimant repeated its request. Ultimately, the Claimant sent several letters and emails demanding the return of its investment and reserving its rights to pursue legal remedies. Nadel resisted the Claimant's attempt to withdraw the funds citing "extraordinary market circumstances." In reality, Nadel's scheme was on the brink of collapse, and he could not satisfy the redemption request. Because of the Claimant's persistence, Nadel eventually had no choice but to relent, and the Claimant ultimately agreed to accept $1 million in November 2008 and the balance in January 2009. The Claimant received the $1 million payment merely two months before the scheme collapsed; it did not receive the balance of redemption request. Nadel arranged for this $1 million payment to forestall the immediate detection of his scheme because the Claimant was insisting on a redemption. The $1 million that Nadel transferred to the Claimant was an inequitable preference payment composed of investors' comingled principal investment money. Nadel's initial failure to fund the redemption request and his later agreement to fund it in installments was a clear red flag, so by the time the Claimant received funds it was aware of possible problems.

The U.S. Supreme Court has held that no Ponzi scheme victim may keep a preference. *See Cunningham*, 265 U.S. at 12 (holding "[t]hose who were successful in the race of diligence . . . secured an unlawful preference" and violated "the principle that equality is equity"). Other courts have adopted and applied the Supreme Court's reasoning. *See S.E.C. v. George*, 426 F.3d 786, 799 (6th Cir. 2005) ("The mere coincidence that the [perpetrators] . . . chose the . . . defendant[-investors] (instead of others) to receive funds contributed by other investors in order to delay the discovery of this scheme does not entitle the . . . defendant[-investors] to preferential treatment."); *Elliott*, 953 F.2d at 1570 ("As all of the former securities owners occupied the same legal position, it would not be equitable to give some of them preferential treatment in equity. In fact, the equities weigh against allowing some to benefit from the fortuity that [the scheme's perpetrator] had not sold all of the securities."). Further, the Claimant received "funds contributed by other investors in order to delay the discovery of [Nadel's] scheme," and this "mere coincidence" and fortuitous timing should not elevate it above similarly situated investors. *George*, 426 F.3d at 799.

Because the preference payment transferred to the Claimant 50% of its principal investment, it should not be allowed to participate in any further distributions *unless and until* all Investor Claims recover 50% of their Allowed Amounts. As set forth in **Exhibit D**, to allow the Claimant to receive additional Receivership distributions without such a restriction would give it a greater recovery than other investors and would be inequitable because the Claimant received a preference payment and, in fact, the payment occurred after it learned of red flags. *See id.* ("Hundreds of other investors were victimized by this scheme,

yet they will recover only 42 percent of the money they invested, not the 100 percent to which the defendant[-investors] claim to be entitled.").

2. Limitations On Allowed Amounts For Non-Investor Secured Claimants Who Were Not On Inquiry Or Actual Notice Of Fraud

The only two Non-Investor Secured Claimants who were not on inquiry or actual notice of fraud are BB&T and Bank of Coweta. (Claim Nos. 481 and 482.) As noted in Section I. C. above, each of them loaned money to a Receivership Entity for the purchase of real property and each submitted a claim in connection with the loan asserting a security interest in the real property. The Receiver has no information indicating that either bank had any involvement in or notice of fraud. As such, those claims should be allowed in the amount of the lesser of the principal amount of the loan outstanding (i) at the time of the Receiver's appointment or (ii) at the time of sale of the underlying collateral, although as detailed below the Claimants only should be paid from the proceeds which may ultimately be recovered from the sale of the collateral less fees and costs incurred by the Receivership to maintain and sell the properties.

a. Non-Investor Secured Creditors Can Only Recover From The Proceeds Of Sale Of Collateral

Courts regularly require that claims of secured creditors, like BB&T's and Bank of Coweta's, be satisfied only from the proceeds of the secured collateral. *See Petters*, 2011 WL 281031 at *3 (establishing separate group of creditors, which included banks holding secured loans, each of which received the specific assets assigned to it). If the value of the collateral is insufficient to satisfy the secured creditor's claim, that creditor may not recover the deficiency from the receivership's other assets. *See* Clark on Receivers § 660(a) at 1155;

Byers, 637 F. Supp. 2d at 183 (adopting distribution plan which "only permit[ted] secured creditors to recover out of their collateral" and "prohibit[ed] them from recovering under the [p]lan for their deficiency claims"). This rule exists because secured creditors typically enjoy a greater recovery, on a percentage basis, than defrauded investors and general creditors. *Id.* at 183 (quoting *Official Comm. of Unsecured Creditors of WorldCom, Inc.*, 467 F.3d 73 ("[I]t is fair and reasonable that the limited funds available for distribution not be directed to those who have already recovered more than the approximately thirty-six cents on the dollar recovered by general creditors, and rather be used to increase the still-considerably smaller recovery of those covered by the proposed Distribution Plan.")). Indeed, secured creditors have an advantage as they have an identifiable asset over which they enjoy priority in relation to other creditors, including defrauded investors. Accordingly, BB&T's and Bank of Coweta's claims should be paid only out of the proceeds of the sale of their collateral.

b. Non-Investor Secured Creditors' Claims Should Be Subordinated To The Receiver's Recovery Of Fees And Costs Incurred By The Receivership For Maintaining And Selling The Collateral

The Receiver is entitled to compensation for fees and expenses related to managing the properties underlying the secured creditors' claims. In that regard, "an equity receiver does not merely inherit an owner's rights; the receiver is an officer of the court entrusted with administration of the property." *Gaskill v. Gordon*, 27 F.3d 248, 251 (7th Cir. 1994). As a result, "[t]he district court appointing the receiver has discretion over who will pay the costs of the receiver." *Elliott*, 953 F.2d at 1576; *Gaskill*, 27 F.3d at 251 (noting "the district court may, in its discretion, determine who shall be charged with the costs of the receivership"). "The court in equity may award the receiver fees from property securing a claim if the

receiver's acts have benefitted that property." *Elliott*, 953 F.2d at 1576; *Gaskill*, 27 F.3d at 251 ("As a general rule, the expenses and fees of a receivership are a charge upon the property administered."). To have "benefitted" a property, the Receiver's acts need not have increased the property's monetary value. *See Elliott*, 953 F.2d at 1577. "Even though a receiver may not have increased, or prevented a decrease in, the value of the collateral, if a receiver reasonably and diligently discharges his duties, he is entitled to compensation." *Id.* (citing *Donovan v. Robbins*, 588 F. Supp. 1268, 1273 (N.D. Ill. 1984) (district court awarded receiver a fee simply for determining how much money to release to creditor)).

Here, the Receiver has reasonably and diligently discharged his duties with respect to the properties underlying the secured creditors' claims. In that regard, the Receiver has paid all applicable taxes on the properties. *See Elliott*, 953 F.2d at 1576-77 ("In most cases, the benefit is easy to determine, such as when the receiver pays taxes on the property. . . ."). Further, the Receiver has maintained both the cottage securing BB&T's interest and the airport facilities securing Bank of Coweta's interest to prevent them from falling into disrepair. With respect to leased properties, the Receiver has also collected rents from the tenants. As such, the Receiver has conferred a benefit on the properties underlying the claims submitted by the secured creditors, and the Receiver is entitled to satisfy his fees and expenses from the proceeds of the sale of the underlying properties before any proceeds are paid to BB&T or Bank of Coweta. *See Elliott*, 953 F.2d at 1576 ("The district court found that it would be inequitable for the burden of the receivership to fall solely on the unsecured investors since the secured investors had substantially benefitted from the Receiver's work."); *Gaskill*, 27 F.3d at 251 ("Courts in equity have allowed liens for receivership

expenses to take priority over secured creditors' interests in the property when the receiver's acts have benefited the property.").

c. Non-Investor Secured Creditors' Claim Amounts Should Be Decreased By Interest Purportedly Accrued Since The Receivership's Inception

Like investors who may not recover False Paper Profits, interest, or, more broadly, lost opportunity costs on their "investment", it is not fair or equitable to allow BB&T or Bank of Coweta to recover post-receivership interest on their loans. *Cf. Warfield*, 2007 WL 1112591 at *13 (defendants "could have no reasonable expectation of profiting from an illegal Ponzi scheme"); *S.E.C. v. Forte*, 2010 WL 939042, *5 (E.D. Pa. 2010) ("A receiver's legal entitlement to recover a winning investor's false profits is thus well-settled"). In other words, they should not be entitled to any interest accrued on their loans since inception of this Receivership. Payment of interest would unfairly diminish funds available to pay the claims of innocent defrauded investors.

As discussed above in Section I. C., BB&T loaned $394,000 to a Receivership Entity and has already received payments totaling $79,103.30, representing a recovery to date of 20% of the principal loan amount. Bank of Coweta loaned $1,000,000 and has already received $399,078.75, representing a recovery to date of nearly 40% of the principal loan amount. Considering (i) the amounts these secured creditors have already received – all of which consisted of scheme proceeds; (ii) their ability to absorb losses as compared to a typical investor in this Receivership; and (iii) that the scheme was not directed at them, Claim Numbers 481 and 482 should be allowed only in part and subjected to the limitations set forth in this and the two previous subsections and also reflected in **Exhibit E**. *See Mutual*

Benefits Corp., Case No. 0:04-cv-60573, **Ex. K** at 3 (holding that defrauded investors receive priority because they were the target of fraud and are "less able to bear the financial costs" of such conduct).

D. Claims Which Should Be Denied Because Claimants Were On Inquiry Or Actual Notice Of Fraud

Five Investor Claims and three Non-Investor Claims should be denied because the Claimants were either on inquiry or actual notice of fraud. These claims were submitted by the following: (1) Citco, on behalf of KBC; (2) Think Strategy, as investment manager of the TS Multi-Strat Fund LP; (3) Wachovia Bank; (4) LandMark Bank; and (5) a former Scoop Management employee and Moody family member. (*See* Claim Nos. 446, 447, 448, 473, 476, 500, 501, and 502; **Exs. G** and **H**.)

As previously noted, District Courts sit as courts of equity over federal receiverships. *See, e.g., Elliot*, 953 F.2d at 1566. As such, the Court has "broad powers and wide discretion" to fashion appropriate relief, including in devising a plan for distribution of receivership assets. *See, e.g., id.* In resolving claims submitted in a claims process, courts consider a wide variety of factors with the ultimate goal of fashioning an equitable system that treats similarly situated claimants equally. *See, e.g., Homeland Commc'ns. Corp.*, 2010 WL 2035326 at *2 ("[I]n deciding what claims should be recognized and in what amounts, the fundamental principle which emerges from case law is that any distribution should be done equitably and fairly, with similarly situated investors or customers treated alike. . . .") (quotation omitted); *Cunningham*, 265 U.S. at 13 (as among "equally innocent victims, equality is equity"); *Elliot,* 953 F.2d at 1570 (same). One consideration is whether the claimant acted in "good faith" or, put differently, whether the claimant knew or should have

known of fraud. *See, e.g., Megafund Corp.*, 2007 WL 1099640 at *2 (claims disallowed because claimants did not show they acted in good faith).

In pertinent part, the concept of good faith derives from fraudulent conveyance statutes, including the Florida Uniform Fraudulent Transfer Act, Fla. Stats. §§ 726.101 *et seq.* ("**FUFTA**"). Under FUFTA, the Receiver may recover transfers for the benefit of the Receivership estate that were made with "actual intent to hinder, delay, or defraud" creditors (Fla. Stats. § 726.105(1)(a)), which intent is established as a matter of law when a transfer is made during a Ponzi scheme. *See, e.g., In re Christou*, 2010 WL 4008191, *3 (Bankr. N.D. Ga. 2010) ("Any transfers made during the course of a Ponzi scheme are presumptively made with intent to defraud."); *Wing v. Horn*, 2009 WL 2843342 at *4-5 (D. Utah 2009) ("[I]nference of fraudulent intent applies to all transfers from a Ponzi scheme"; categorizing transactions "is inconsistent with fraudulent transfer law's focus on the transferor"); *Quilling v. Schonsky*, 247 Fed. App'x 583, 586 (5th Cir. 2007) ("[T]ransfers made from a Ponzi scheme are presumptively made with intent to defraud . . . ."); *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) (same). FUFTA provides an affirmative defense, however, under which the Receiver may not recover a transfer if the transferee can demonstrate: (1) that it received the transfer in "good faith" and (2) that it provided reasonably equivalent value for the transfer. *See* Fla. Stats. §§ 726.109(1), (2)(b).

Consistent with this equitable principal that claimants who cannot satisfy the good faith standard should have their claims denied, in his "clawback" lawsuits against sophisticated investors who knew or should have known of fraud, the Receiver has tailored his FUFTA claims to require those defendants to show they satisfied the good faith standard.

See, e.g., Wiand, as Receiver v. Buhl, Case No. 8:10-cv-00075-T-17MAP (M.D. Fla.)*; Wiand, as Receiver v. EFG Bank et al.,* 8:10-cv-00241-T-17MAP (M.D. Fla.). Specifically, rather than presuming those defendants acted in good faith, the Receiver has sought to recover all transfers received by them from Nadel's scheme, thus requiring them to prove, *inter alia*¸ their respective good faith before being allowed to keep an amount of distributions equivalent to their principal investment. *See, e.g., Forte*, 2010 WL 939042 at *6 ("If a winning investor should have known [his] or her investment was 'too good to be true,' the court will void the return of principal to that investor. That principal will then be redistributed *pro rata* to all defrauded investors.").

Just as "winning" investors (*i.e.*, investors who received False Profits) who cannot satisfy the good faith standard are not entitled to retain any distributions they received under FUFTA, it would be inequitable to allow Claimants who cannot satisfy the good faith standard to receive distributions of Receivership assets. *See PrivateFX Global One*, 2011 WL 888051 at *9-10 ("Sitting in equity, the district court is a court of conscience.") (quotations omitted); *S.E.C. v. Sunwest Mgmt., Inc.*, 2009 WL 3245879, *9 (D. Or. 2009) ("In approving a plan of distribution in an SEC receivership case, the court must determine the most equitable distribution result for all claimants, including investors."); *Megafund Corp.*, 2007 WL 1099640 at *2 (overruling objection to magistrate's recommendation that claim be denied due to claimant's lack of good faith).

Good faith is an objective standard. *See Terry v. June*, 432 F. Supp. 2d 635, 641 (W.D. Va. 2006). "The relevant inquiry is what the transferee objectively knew or should have known instead of examining the transferee's actual knowledge from a subjective

standpoint." *See Quilling v. Stark*, 2007 WL 415351, *3 (N.D. Tex. 2007). "[I]f the circumstances would place a reasonable person on inquiry notice of a debtor's fraudulent purpose, and *diligent* inquiry would have discovered the fraudulent purpose, then the transfer is fraudulent." *In re World Vision Entertainment, Inc.*, 275 B.R. 641, 659 (Bankr. M.D. Fla. 2002). "Importantly, a transferee may not remain willfully ignorant of facts which would cause it to be on notice of a debtor's fraudulent purpose, and then put on 'blinders' prior to entering into transactions with the debtor and claim the benefit of [the good faith defense]." *Id.* (internal citations and quotations omitted). In turn, a diligent inquiry "must ameliorate the issues that placed the transferee on inquiry notice in the first place" and cannot consist of merely inquiring with the transferor about the suspicious circumstances. *In re Bayou Group*, 396 B.R. 810, 846 (Bankr. S.D.N.Y. 2008). In short, if a Claimant's reasonable conduct would have revealed any questions or concerns about any Receivership Entity or Nadel or anyone else associated with a Receivership Entity, that Claimant could not have acted in good faith unless it subsequently conducted a diligent and reasonable inquiry which ameliorated those questions or concerns. Without satisfying these obligations, the Claimant was on inquiry notice of fraud.

All but one of the claims submitted by Claimants on inquiry notice of fraud were submitted by sophisticated financial institutions that, had they acted in a reasonable manner, would have recognized at least some red flags and subsequently would have had to investigate Nadel and Receivership Entities. Had they done so, the institutions would have readily discovered fraudulent conduct. The final claim discussed in this Section was submitted by an employee of a Receivership Entity (who was a member of the Moody

family) who also was on inquiry notice of fraud. Given the numerous and easily discoverable red flags, these Claimants did not act in good faith. *See, e.g., In re Pearlman*, 440 B.R. 569, 577 (Bankr. M.D. Fla. 2010) (lenders to Ponzi scheme that ignored red flags did not act in good faith); *S.E.C. v. Basic Energy & Affiliated Res.*, 273 F.3d 657, 660 (6th Cir. 2001) (affirming distribution plan that prohibited defendants from recovering at all, and reduced recovery of employees based on level of involvement in fraudulent scheme).

1. Investor Claimants That Are Sophisticated Financial Companies And Were On Inquiry Notice Of Fraud

As noted above in Section I. E. 5. a., KBC and Think Strategy are sophisticated financial firms which invested in Hedge Funds. KBC has offices around the globe and invested through Citco, another sophisticated global firm. KBC invested in the Hedge Funds in connection with a complex derivative transaction with Think Strategy. KBC advertises that it operates under "the highest professional standards," is provided "support and resources [from its owner, a] leading European banking and insurance group," and its employees are "highly talented." KBC Financial Products, Home, http://www.kbcfp.com/home.html (last visited Oct. 20, 2011). Citco claims it is a global industry leader with more than 5,000 staff in over 44 countries and that it excels in providing hedge fund administration, custody and fund trading, and financial products and corporate planning solutions. Citco, Corporate Overview, http://www.citco.com/#/corporate-overview (last visited Oct. 20, 2011). Think Strategy claims that it "is an asset management firm with a global focus that specializes in alternative investments [and] is the investment manager for several market neutral and multi-strategy hedge funds." Further, it states that its "research department is involved in a continual process of evaluations and due diligence" and it "has over 50 years of combined

investment experience." Think Strategy Capital, http://thinkstrategycapital.net/pages/home.php (last visited Oct. 20, 2011).

Clearly, these Investor Claimants were highly sophisticated, experienced, and knowledgeable about investing, reasonable investment practices, and realistic investment performance. Had they acted in a manner that was reasonable and diligent for their sophistication, experience, and knowledge, they would have easily discovered red flags, which in turn would have required them to investigate further, which instead of ameliorating the situation would have uncovered fraudulent conduct. The red flags were numerous and easily discoverable. For example, before perpetrating the scheme, Nadel had been disbarred from the practice of law in New York State for engaging in "dishonesty, fraud, deceit and misrepresentation" by misusing money that had been deposited in his escrow account. That determination was made in a published opinion.

Further, the following relevant information was in the public records of Sarasota County – the same county in which Nadel, the Hedge Funds, and almost all other Receivership Entities were based:

- Nadel had at least eight money judgments entered against him in Sarasota County courts for failure to pay amounts owed; and

- Nadel had gone through a divorce in which in publicly filed documents he: was alleged to have defrauded "numerous individuals and/or businesses;" swore he was a "self employed" "musician" and later unemployed, had monthly gross income of $889.00 and later none, had monthly expenses of $2,894.00, had total assets of $1,650.00 and later of only $1,000.00, and had total liabilities of $129,075.00; and he otherwise represented to the court that he was "financially impoverished" and had "no assets, no liquidity, no money in the bank, and no resources of any kind."

There were also many red flags directly connected to the Hedge Funds and disclosed to investors and potential investors, including the following:

- marketing materials showed the Hedge Funds never reported a single quarter with a negative return;
- the same marketing materials showed the Hedge Funds reported unusually high investment returns - for example, they reported yields between 11.43% and 55.12% per year, and in most years between 20% and 50%;
- for the 79 months during which Victory Fund (one of the Hedge Funds in which Think Strategy invested) was in existence before Think Strategy's investment, that fund only reported one month with a negative return (and at -0.27%, it was barely negative) – in contrast, the S&P index had 31 months of negative returns during the same period;
- for the 110 months during which Valhalla Investment Partners (another Hedge Fund in which Think Strategy invested) was in existence before Think Strategy's investment, that fund only reported four months with negative returns (and at -1.30%, -0.6%, -0.38%, and -0.04%, they were barely negative) – in contrast, the S&P index had 49 months of negative returns during the same period;
- for the 46 months during which Victory Fund (one of the Hedge Funds in which KBC invested) was in existence before KBC's investment, that fund reported no months with a negative return – in contrast, the S&P index had 20 months of negative returns during the same period;
- for the 65 months during which Valhalla Investment Partners (another Hedge Fund in which KBC invested) was in existence before KBC's investment, that fund reported only three months with negative returns (and at -1.30%, -0.6%, and -0.04%, they were barely negative) – in contrast, the S&P index had 32 months of negative returns during the same period;
- the Hedge Funds were not audited; and
- the Hedge Funds' purported accountant had been misidentified as a "CPA" (in reality, his license had been "null and void" since 1989)

and had been the subject of an investigation and a cease and desist notice from state regulators for improperly identifying himself as a CPA, all of which information was publicly available.

Because these Claimants would have discovered red flags had they acted in a reasonable and diligent manner, they were on inquiry notice of fraud. *In re Old Naples Securities, Inc.*, 311 B.R. at 612-13; *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 23 (S.D.N.Y. 2007) (sophisticated claimant cannot claim ignorance to support its argument that it acted in good faith); *In re M & L Business Machine Co.*, 84 F.3d at 1330, 1339 (10th Cir. 1996) (experienced investor should have realized excessive annual returns as a red flag, and acted in accordance with such information). Accordingly, as also reflected on **Exhibit D**, KBC's and Think Strategy's claims (Claim Nos. 446, 447, 448, 473, and 476) should be denied as it would be inequitable to share Receivership assets with them in light of their failure to act in good faith.

2. Non-Investor Secured Claimant Wachovia Bank Had Inquiry Notice Of Fraud

Wachovia Bank loaned Scoop Real Estate $2,655,000 to purchase a building at 841 South Main Street, Graham, North Carolina which is currently being leased to a Rite-Aid Pharmacy (the "**Rite-Aid Building**"). Wachovia Bank has received payments of interest or principal of $681,050.22 on this loan, representing a 25.65% recovery to date. All of those payments were made with proceeds of the scheme. Wachovia Bank was a well-known bank and part of a financial services company based in Charlotte, North Carolina. In December 2008, Wachovia Bank was acquired by Wells Fargo & Company.

Wachovia Bank was, at a minimum, on inquiry notice of fraud for two independent reasons: (1) because Nadel used a set of "shadow" bank accounts at Wachovia Bank to

perpetrate his scheme and to ostensibly conceal it from the staff of the Fund Managers, and those accounts involved a number of improprieties that should have raised numerous red flags at Wachovia Bank; and (2) because Wachovia Bank was an investor in one of the Hedge Funds.

Nadel had been a customer of Wachovia Bank for some time when he opened a set of shadow accounts at Wachovia Bank to commingle money invested in the Hedge Funds and to move it in and out of the Hedge Funds' "official" trading accounts to satisfy redemptions after the close of each calendar quarter. Indeed, because regulatory and contractual considerations prohibited money from being directly transferred between trading accounts, and also for other reasons, Nadel could not have perpetrated the scheme without the Wachovia Bank shadow accounts. Those accounts included not only (1) accounts opened in the name of Scoop Real Estate and Victory Fund which Nadel had authority to do, but also (2) accounts opened in a "doing business as" capacity to mimic the name of the three Hedge Funds for which the Moodys were the principals: Valhalla Investment Partners, Viking Fund, and Viking IRA Fund. Specifically, 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. As a result, he opened shadow accounts for those funds in the name of "Arthur Nadel dba Valhalla Investments" and "Arthur Nadel dba Viking Fund," as applicable. This alone should have raised red flags because Wachovia Bank knew of the Hedge Funds and Nadel's role, and he had no legitimate reason whatsoever to open two "dba" accounts to mimic names of Hedge Funds. In fact, Nadel was a significant customer for Wachovia Bank and thus had a personal banker who reviewed and managed his relationship with the bank. Further, as

discussed below, Wachovia Bank was an investor in Viking Fund and thus was fully aware the Moodys were the principals of that fund and that Nadel was only the purported investment adviser and thus was without authority to open bank accounts on behalf of that fund.

Many other red flags were raised in connection with the shadow accounts. For example, on a quarterly basis Nadel transferred large sums of money between shadow accounts to then funnel money into the Hedge Funds' trading accounts to satisfy redemptions. This was a way to recycle investors' money to pay purported gains and principal redemptions and this repetitive and periodic movement of money through accounts controlled by the same person – Nadel – but held in different names should have raised red flags. As another example, Nadel initiated numerous wires from trading accounts which were accepted into Wachovia Bank shadow accounts that bore an account name that was different from the deposit account name attached to the wires. In other words, Wachovia Bank repeatedly allowed Nadel to deposit money into his shadow accounts even though those deposit wires were made in favor of entities whose names did not match those on the shadow account in which the wire was deposited. This too should have raised red flags. To satisfy its good faith obligations, at a minimum Wachovia Bank should have conducted a reasonable investigation of these matters, which in turn would have uncovered fraudulent conduct. Wachovia Bank, however, did not comply with its obligations and thus did not act in good faith. Indeed, by honoring and executing all of these transactions Wachovia Bank actively helped Nadel perpetrate the scheme and convert and misappropriate scheme proceeds.

Further still, Wachovia Bank was an investor in two Hedge Funds, and thus should have been aware of red flags from that interaction with Nadel and Hedge Funds. Specifically, a related Wachovia Bank entity which acted as a broker/dealer held investments in two Hedge Funds for the benefit of Wachovia Bank in connection with a financial transaction involving Wachovia Bank tied to the returns paid by those Hedge Funds. Those investments were littered with the same red flags discussed above in Section II. D. 1. Additional red flags raised by these investments included:

- for the 63 months during which Viking Fund was in existence before Wachovia Bank's investment, that fund only reported one month with a negative return (and at -0.31%, it was barely negative) – in contrast, the S&P index had 22 months of negative returns during the same period;

- for the 35 months during which Scoop Real Estate was in existence before Wachovia Bank's investment, that fund only reported one month with a negative return (and at -0.25%, it was barely negative) – in contrast, the S&P index had 11 months of negative returns during the same period;

- for the approximately 21 months during which the pertinent investment in Viking Fund was in place, the fund did not report a single month with a negative return – in contrast, the S&P index had 11 months of negative returns during the same period; and

- for the approximately 18 months during which the pertinent investment in Scoop Real Estate was in place, the fund did not report a single month with a negative return – in contrast, the S&P index had 8 months of negative returns during the same period.

Because Wachovia Bank would have discovered red flags had it acted in a reasonable and diligent manner, it was on inquiry of notice of fraud. Accordingly, as also reflected on

Exhibit H, Wachovia Bank's claim (Claim No. 502) should be denied as it would be inequitable to share Receivership assets with it.[20]

3. Non-Investor Secured Claimant LandMark Bank Had Actual Notice Of Fraud

After filing its claims, Claimant LandMark Bank failed and was closed by government regulators on July 22, 2011. Before failing, LandMark Bank provided personal and business banking services in Florida's Sarasota and Manatee Counties, and it had actual notice of fraud at the time it entered into a transaction which underlies one of its claims. Indeed, it knowingly violated orders of this Court in trying to take control of interests in Receivership property. Specifically, on January 3, 2007, LandMark Bank loaned $1,000,000 to Christopher Moody for a personal line of credit (the "**LOC**"). On November 2, 2007, the

[20] At a minimum, if Wachovia Bank's claim is not denied, it should be equitably subordinated to the allowed and allowed in part claims of all other Claimants. "Equitable subordination does not deal with the existence or non-existence of the debt, but rather involves the question of order of payment." *In re Lockwood*, 14 B.R. 374, 380–81 (Bankr. E.D.N.Y. 1981). "The fundamental aim of equitable subordination is 'to undo or offset any inequality in the claim position of a creditor that will produce injustice or unfairness to other creditors. . . .'" *Id.* (quoting *In re Westgate Cal. Corp.*, 642 F.2d 1174, 1177 (9th Cir. 1981)). "Subordination is an equitable power and is therefore governed by equitable principles." *Westgate Cal. Corp.*, 642 F.2d at 1177. "Courts equitably subordinate claims when the claimant has engaged in some type of inequitable conduct and the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant." *Picard v. Katz*, 2011 WL 4448638, *6 (S.D.N.Y. 2011) (internal quotations omitted). "Inequitable conduct encompasses conduct that may be lawful but is nevertheless contrary to equity and good conscience." *Id.* (internal quotation omitted). Courts have applied equitable subordination to instances like this case where claimants seek recovery following the collapse of a Ponzi scheme. *See In re Bernard L. Madoff Inv. Secs. LLC*, 2011 WL 4434632, *19-20 (Bankr. S.D.N.Y. 2011) (holding that in SIPA liquidation, claims of Madoff family members should be subordinated); *Picard*, 2011 WL 4448638 at *6 (holding that "while the Trustee cannot disallow the defendants' claims against the Madoff Securities' estate, he can potentially subordinate them by proving that the defendants invested with Madoff Securities with knowledge, or in reckless disregard, of its fraud").

LOC was increased to $2,000,000. Christopher Moody executed a promissory note for the loan and pledged his interest in his Viking Fund Investor Account, which he held in the name of his revocable trust, the Christopher D. Moody Revocable Trust. The LOC was due on November 1, 2009. Nadel fled on January 14, 2009, and on January 21, 2009, the Commission filed this case and the Receiver was appointed. Christopher Moody notified LandMark Bank's president that Nadel had fled and that the Hedge Funds, including Viking Fund, were worthless. In turn, LandMark Bank's president told Christopher Moody the bank wanted additional security for the LOC. Notably, the bank's chairman of the board and Executive Officer was Christopher Moody's accountant and thus knew that virtually all of Christopher Moody's income came from the Hedge Funds. To satisfy LandMark Bank's request for additional security for the LOC, on or about January 30, 2009, Christopher Moody, as Trustee of the Christopher D. Moody Revocable Trust, purported to pledge to Landmark Bank Bonds.com stock and notes from Bonds.com. Those shares, however, had been purchased with proceeds of the scheme. And Christopher Moody's Bonds.com notes similarly involved loans of funds which were proceeds of the scheme.

LandMark Bank has filed two claims related to the LOC (Claim Nos. 500 and 501). One claim seeks $2,090,488.34 (as of August 19, 2010) purportedly due on the LOC and secured by Christopher Moody's trust's pledged Investor Account with Viking Fund. The other claim asks that the Receiver turnover to LandMark Bank the purportedly pledged Bonds.com interests. Both of those claims should be denied.[21]

[21] At a minimum, if those claims are not denied, they should be equitably subordinated to the allowed and allowed in part claims of all other Claimants. *See supra* n. 20.

a. The Claim Relating To A Loan Secured By Christopher Moody's Trust's Investment In Viking Fund Should Be Denied

As stated above, one of LandMark Bank's claims (Claim No. 500) seeks recovery based on the original security for the LOC, which consisted of Christopher Moody's trust's interest as an investor in Viking Fund. Specifically, the UCC-1 filed by LandMark Bank covers the following collateral: "[a]ll of Debtor's [Christopher D. Moody, as Trustee of the Christopher D. Moody Revocable Trust] right, title and interest in Viking Fund, LLC . . . and also together with all of Debtor's right, title and interest to all dividends or distributions arising there from . . . ." That claim should be denied for two independent reasons: (1) because Christopher Moody's conduct severed his trust's interest in Viking Fund as a matter of equity; and (2) because that interest is worthless as a matter of law.

On January 11, 2010, the Commission instituted an enforcement action against Christopher Moody alleging that he violated antifraud provisions of the federal securities laws in connection with the scheme. *See generally S.E.C. v. Neil V. Moody et al.*, Case No. 8:10-cv-00053-T-33TBM (M.D. Fla.) (the "**Moody SEC Action**"), Compl. (attached as Exhibit A to Doc. 325). On that same day, Christopher Moody, without admitting or denying the allegations in the complaint, consented to entry of a permanent injunction and agreed to disgorge all ill-gotten gains. (Moody SEC Action, Consent of Def. Christopher D. Moody ¶ 3 (Doc. 2, Ex. 1).) On April 7, 2010, a Judgment of Permanent Injunction and Other Relief was entered against Christopher Moody permanently enjoining him from further violations of the antifraud provisions of the federal securities laws. (Moody SEC Action (Doc. 9-1).) In other words, Christopher Moody consented to entry of a judgment that he engaged in

securities fraud in connection with the scheme and to disgorge all gains obtained from that scheme.

For purposes of the claims process, as a matter of equity this conduct severed Christopher Moody's (and his trust's) interest in his trust's Investor Account. *See, e.g., Byers,* 637 F. Supp. 2d at 184 ("The Receiver's proposal to treat differently those involved in the fraudulent scheme when distributions are being made is eminently reasonable and is supported by caselaw."); *Basic Energy & Affiliated Res.,* 273 F.3d at 660 (affirming distribution plan that prohibited defendants from recovering at all, and reduced recovery of employees based on level of involvement in fraudulent scheme); *S.E.C. v. Enterprise Trust Co.*, 2008 WL 4534154, *3 (N.D. Ill. 2008) ("Disqualifying those who took the business over the edge is the most common feature, and the least contested aspect, of distribution plans."); *S.E.C. v. Merrill Scott & Assocs.,* 2006 WL 3813320, *6–7 (D. Utah 2006) (excluding from distribution party who referred clients to defendant). Because Christopher Moody and his trust have no interest in his Investor Account, LandMark Bank similarly has no interest in it as its security interest is defined as Christopher Moody's trust's "right, title and interest" in that account and its "dividends and distributions" from that account.

But even setting aside Christopher Moody's culpability, his status as an "insider," and his receipt of tens of millions of dollars of scheme proceeds as "compensation," the claim still should be denied because his Investor Account is not entitled to any distributions in the claims process. As previously noted, during the relevant time all of Christopher Moody's income consisted of scheme proceeds he received as "fees" or from "income" derived from those "fees." As such, all of the money he invested in the pertinent Investor Account

consisted of scheme proceeds. In other words, Christopher Moody did not fund his trust's Investor Account with legitimate money; it was funded with scheme proceeds. That is to say, it was funded with fraudulent transfers which the Receiver is entitled to recover for the benefit of defrauded investors. Because the Investor Account was not funded with money to which Christopher Moody was entitled, his (or his trust's) interest in that account is worthless as it is not entitled to any money in this claims process. These circumstances are identical to those faced by the non-profit Claimant discussed below in Section II. F., which received scheme proceeds through the Moody Foundation. Accordingly, as reflected in **Exhibit H**, Claim Number 500 should be denied.

b. The Claim Relating To A Loan Secured By A Purported Pledge Of Bonds.com Interests As Collateral Also Should Be Denied

LandMark Bank's second claim (Claim No. 501) seeks to perfect its claimed interest in Christopher Moody's prior interest in Bonds.com. That claim should be denied for three independent reasons: (1) LandMark Bank had actual notice of fraud at the time it entered into the transaction purportedly giving rise to that claim; (2) that transaction violated the temporary injunction and Order Appointing Receiver in this case; and (3) that transaction involved an avoidable fraudulent transfer. First, the claim should be denied because LandMark Bank had actual notice of fraud before it entered into the transaction underlying this claim. Indeed, LandMark Bank sought the additional security underlying this claim precisely because it learned the then-existing security for the LOC – Christopher Moody's trust's Viking Fund Investor Account – was worthless, Nadel had used Viking Fund and the rest of the Hedge Funds as a scam, Nadel had fled, the Commission had filed an enforcement

action to stop a fraudulent scheme involving Viking Fund and the rest of the Hedge Funds, and a receiver had been appointed. Further, LandMark Bank's chairman of the board and Executive Officer was also Christopher Moody's accountant and thus knew that virtually all of the latter's income had come from the Hedge Funds at the center of the Commission's enforcement action. In other words, not only did LandMark Bank request additional security precisely because it was on actual notice of fraud, but its chairman and Executive Officer knew that any other collateral pledged by Christopher Moody – including his interests in Bonds.com – would have been purchased or funded with money Christopher Moody received from the scheme.

Second, the claim also should be denied because the transaction underlying the claim violated both the temporary restraining order ("**TRO**") (Doc. 9) and the Order Appointing Receiver (Doc. 8), both of which were entered on January 21, 2009. Specifically, Christopher Moody's purported pledge of his Bonds.com interests, and LandMark Bank's acceptance of them, violated the TRO because it enjoined Nadel and "any person acting in active concert or participation" with him (like Christopher Moody) "from, directly or indirectly, transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating or otherwise disposing of, or withdrawing any asset or property," including securities, or "drawing from any lines of credit." TRO at 4. It also violated the Order Appointing Receiver because that Order explicitly granted title to "all property, real or personal" of the Hedge Funds and their principals, which included Christopher Moody, to the Receiver. Doc. 8 ¶ 17. Indeed, that grant of title to the Receiver left Christopher Moody with no interest in Bonds.com to pledge to LandMark Bank. The purported pledge

nevertheless violated the Order Appointing Receiver because it represented an attempt to directly interfere with the Receiver's "custody, possession, management, and control" of receivership assets. Doc. 8 ¶ 13.

Third, the claim also should be denied because the transaction that forms the basis of the claim was a fraudulent transfer. Nadel caused the Hedge Funds and the Fund Managers to transfer money from the Hedge Funds to Christopher Moody (either directly or through the Fund Managers), including tens of millions of dollars as purported compensation, by grossly misrepresenting trading results and net asset values. Christopher Moody then used that money – which was scheme proceeds – to purchase and fund the equity and debt interests in Bonds.com which underlie this claim. The transfers from the Hedge Funds to Christopher Moody were fraudulent under, *inter alia*, Florida Statutes Section 726.105(1)(a) because they were made from a Ponzi scheme with "actual intent to hinder, delay, or defraud" creditors.[22] *See In re Christou*, 2010 WL 4008191 at *3 ("Any transfers made during the course of a

[22] Because Christopher Moody acquired the Bonds.com collateral using scheme proceeds, the collateral is subject to a constructive trust in favor of defrauded investors. "The doctrine of constructive trusts is a recognized tool of equity designed in certain situations to right a wrong committed and to prevent unjust enrichment of one person at the expense of another either as a result of fraud, undue influence, abuse of confidence or mistake in the transaction." *In re Fin. Fed. Title & Trust, Inc.*, 347 F.3d 880, 891 (11th Cir. 2003) (affirming imposition of constructive trust over homestead property purchased with Ponzi scheme proceeds); *see also Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000) ("Whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired . . . and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder . . . .") (internal quotations omitted); *F.T.C. v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142 (9th Cir. 2010) ("Importantly, that a transferee was not 'the original wrongdoer' does not insulate him from liability for restitution.").

Ponzi scheme are presumptively made with intent to defraud.") (emphasis added); *Schonsky*, 247 Fed. App'x at 586 ("[T]ransfers made from a Ponzi scheme are presumptively made with intent to defraud . . . .") (emphasis added); *Byron*, 436 F.3d at 558 (same); *S.E.C. v. Harris*, 2010 WL 3719318, *1 (N.D. Tex. 2010) (same). The fact that LandMark Bank received its purported interest in the Bonds.com collateral from Christopher Moody rather than directly from the Hedge Funds does not change the analysis, especially since it provided no value for its receipt of that interest and its receipt of that interest could not have been in good faith as it had actual notice of fraud. *See* Fla. Stats. § 726.109(1)(2)(b) (addressing subsequent transferees and affirmative defenses).

In short, as also reflected in **Exhibit H**, to the extent LandMark Bank received any interests in Bonds.com from Christopher Moody, it would be inequitable to allow LandMark Bank to benefit from those interests at the expense of investors. That is particularly so because LandMark Bank, with the assistance of counsel, knowingly and deliberately tried to take Receivership assets funded with scheme proceeds away from the Receiver's and, ultimately, this Court's control. Accordingly, the Court should deny Claim Number 501.

E. Investor Claims Which Should Be Denied Because Claimant Was An Employee Of A Receivership Entity

The Receiver also received claims from a former employee of a Receivership Entity. (*See* Claim Nos. 474 and 475.) The Claimant was Neil-Moody's step-child, was employed by Scoop Management as a bookkeeper, and was involved in handling certain aspects of the financial affairs of Viking Fund, Viking IRA Fund, Valhalla Investment Partners, Valhalla Management, and Viking Management. The Claimant is also identified as handling the

Investor Account for Receivership Entity Viking Oil & Gas, LLC and Neil Moody's personal account.

During the approximately four years of employment, the Claimant received total compensation of $385,811.32; the Claimant received wages of $118,326.76 in 2008 alone. Receivership Records also indicated the Claimant drove a car paid for by Receivership Entities and had a Receivership Entity credit card. The benefits derived from the car and credit card are not included in the above calculation of compensation. According to Salary.com, the median salary for a bookkeeper in Sarasota, Florida is $45,692. The Claimant's average salary for the approximately four years the Claimant was employed was $96,452.83, which was more than double the median salary. In other words, the Claimant received $385,811.32 (without considering the value of the Receivership Entity car and credit card or that some of the work performed by the Claimant involved Neil Moody's personal affairs) when the typical bookkeeper would have received less than $183,000 for the same time.

These claims should be denied for two independent reasons. First, they should be denied because given the Claimant's disproportionate salary and close relations with investor assets, movement of funds, and Neil Moody's accounting, the Claimant, at a minimum, should have known that something was afoul. A reasonable person under these circumstances would have conducted a diligent inquiry and discovered fraud. As such, the Claimant did not act in good faith. *In re Manhattan Inv. Fund Ltd.*, 359 B.R. at 523-24; *see also In re M & L Business Machine Co.*, 84 F.3d at 1339; *Enterprise Trust Co.*, 2008 WL 4534164 at *3 ("Disqualifying those who took the business over the edge is the most

common feature, and the least contested aspect, of distribution plans."); *Basic Energy & Affiliated Res.*, 273 F.3d at 660 (affirming distribution plan that prohibited defendants from recovering at all, and reduced recovery of employees based on level of involvement in fraudulent scheme). As such, these claims should be denied.

Second, these claims should be denied even assuming the Claimant acted in good faith because the excess salary received is far more than the $91,987.50 loss claimed by the Claimant. All $385,811.32 the Claimant received as salary from Scoop Management were proceeds of the scheme. Using the median salary from Salary.com, the Claimant only should have earned approximately $183,000 for four years of employment. As such, the Claimant received excess wages of $202,811.32 (of course, this calculation favors the Claimant because it does not take into account the additional benefits provided by the car and credit card or that some of the work performed involved Neil Moody's personal affairs and not Scoop Management "business"). Because no value was provided for the excess wages, the Claimant is not entitled to benefit from them. Indeed, the Receiver is entitled to recover that sum as, at a minimum, a fraudulent transfer. *See In re Churchill Mortgage Inv. Corp.*, 256 B.R. 664, 682 (Bankr. S.D.N.Y. 2000) ("Fraudulent conveyance law is grounded in equity and is designed to enable a trustee or creditors to avoid a transfer in a transaction where the transferee received more from the debtor than the debtor received from the transferee. The remedy of avoidance seeks to rectify the disparity between that which the transferee gave and that which the transferee got in the transaction. It is this disparity that makes it equitable to require the transferee to repay the excess in value of what he received over what he gave up in the transaction."); *cf. In re Bernard L. Madoff Inv. Sec. LLC,* 2011 WL 4434632, *12

(Bankr. S.D.N.Y. 2011) ("The Defendants unsuccessfully argue that their services constituted reasonably equivalent value and fair consideration given to BLMIS in exchange for their salaries."). As such, it would be inequitable to allow the Claimant to retain the gross overpayment of wages and also assert a claim for investment losses. As reflected in **Exhibit G**, Claim Numbers 474 and 475 should be denied for these reasons.

F. Investor Claim Which Should Be Denied Because Principal Investment Was Made With Proceeds Of The Scheme

A charitable organization submitted a claim based on losses it purportedly sustained when it invested scheme proceeds it received from the Moody Foundation as donations in a Hedge Fund. That claim should be denied because the Claimant had no right to those funds in the first place. Specifically, between April 26, 2004, and November 21, 2008, Neil Moody, through his Moody Foundation, transferred $1,219,222.00 to the Claimant in numerous installments as donations. The donations consisted of scheme proceeds that Nadel caused Hedge Funds and Fund Managers to transfer from the Hedge Funds to Neil Moody, including tens of millions of dollars transferred as purported compensation, by grossly misrepresenting trading results and net asset values. In turn, Neil Moody transferred some of that money to the Moody Foundation. Neil Moody conditioned the donations on the Claimant's investment of that money in one of the Hedge Funds, and the Claimant "invested" $1,111,111.40 of those donations in Valhalla Investment Partners and received $30,315.90 in distributions from that "investment." The Claimant filed a claim for $1,080,795.50, its Net Investment Amount. (*See* Claim No. 478.)

The Claimant, however, did not invest its own money in the scheme. Rather, it reinvested scheme proceeds which it received as donations. The initial transfers from the

Hedge Funds to the Moody Foundation through Fund Managers and Neil Moody were fraudulent transfers under, *inter alia*, Florida Statutes Section 726.105(1)(a) because they were made from a Ponzi scheme and thus with "actual intent to hinder, delay, or defraud" creditors. *See In re Christou*, 2010 WL 4008191 at *3 ("Any transfers made during the course of a Ponzi scheme are presumptively made with intent to defraud."); *Schonsky*, 247 Fed. App'x at 586 ("[T]ransfers made from a Ponzi scheme are presumptively made with intent to defraud . . . ."); *Byron*, 436 F.3d at 558 (same); *Harris*, 2010 WL 3719318 at *1 (same); *see also In re Bayou Group, LLC*, 439 B.R. 284, 306 n.19 (S.D.N.Y. 2010) ("[W]here a Ponzi scheme exists, there is a presumption that transfers were made with the intent to hinder, delay and defraud creditors . . . ."); *Terry*, 432 F. Supp. 2d at 639-40 (same); *In re Fin. Resources Mortg., Inc.*, 2011 WL 2680878, *11 (Bankr. D.N.H. 2011) (same); *Quilling v. Stark*, 2006 WL 1683442, *6 (N.D. Tex. 2006) (same); *In re Madoff*, 440 B.R. at 255 (same).

That the Claimant was a subsequent transferee – *i.e.*, that it did not receive the transferred money directly from the Hedge Funds but rather through the Moody Foundation – does not change the analysis. *See* Fla. Stats. § 726.109. If the Claimant had not reinvested the majority of the funds that it received, the Receiver would have instituted a "clawback" action against it, as the Receiver has done against other organizations that received fraudulent transfers as charitable contributions. *See, e.g., Wiand, as Receiver v. Bishop Frank J. Dewane*, Case No. 8:10-cv-246-T-17MAP (M.D. Fla.); *Wiand, as Receiver v. Sarasota Opera Assoc., Inc.*, Case No.: 8:10-cv-248-T-17MAP (M.D. Fla.). Indeed, the Receiver has a claim against the Claimant to recover approximately $138,426.50, which represents money

(1) the Claimant received from the Moody Foundation and did not reinvest in the scheme and (2) the Claimant took as distributions from its "investment."

The Claimant cannot satisfy the affirmative defense to a fraudulent transfer claim provided by Florida Statutes Section 726.109, which requires it to demonstrate that (1) it received the transfers in "good faith" and (2) that it provided equivalent value for the transfers. *See* Fla. Stats. §§ 726.109(1), (2)(b). Specifically, the Claimant did not provide anything of value to the Hedge Funds in exchange for the donations – hence, their characterization as "charitable donations" – so they are avoidable fraudulent transfers regardless that the Claimant is a charitable organization. *See Scholes v. Lehman*, 56 F.3d 750, 761 (7th Cir. 1995) ("The statute makes no distinction among different kinds of recipient of fraudulent conveyances. Every kind is potentially liable."); *Hecht v. Malvern Preparatory Sch.*, 716 F. Supp. 2d 395, 402 (E.D. Pa. 2010) (holding that receiver was entitled to recover donation made with funds of innocent investors in Ponzi scheme); *In re C.F. Foods, L.P.*, 280 B.R. 103, 111 (Bankr. E.D. Penn. 2002) ("In perpetrating the Ponzi scheme, [the perpetrator] had to know that the monies from investors would eventually run out and that the payments to charities would contribute to the eventual collapse of the stratagem. Knowledge that future investors will not be paid is sufficient to establish actual intent to defraud them."). Because the Claimant did not invest money that it had a right to receive or keep, its Claim Number 478 should be denied as reflected on **Exhibit G**.

III. ALL ASSETS AND LIABILITIES OF THE RECEIVERSHIP ENTITIES SHOULD BE POOLED TO FORM A SINGLE RECEIVERSHIP ESTATE

A. Factual Basis For Pooling Assets And Liabilities

From 1999 through 2008, approximately $330 million was raised from approximately 687 investors on behalf of one or more of the Hedge Funds by Nadel and his entities, Scoop Management and Scoop Capital; by the rest of the Fund Managers; and by the Moodys through the offer and sale of securities in the form of interests in Hedge Funds as part of a single, continuous Ponzi scheme. The Receiver discovered that, although the Receivership Entities referred to separate Investor Accounts in communications with investors, in reality physically separate accounts did not exist. All investor funds were commingled in Nadel's and the Receivership Entities' financial accounts, regardless of with which Receivership Entity the money had been invested.

Nadel grossly overstated the trading results of the Hedge Funds. Despite only trading a very small portion of the money purportedly under management and achieving significantly lower, and typically negative yields (*i.e.*, trading losses) on those trades, Nadel, the Moodys, and the Fund Managers falsely communicated to investors and potential investors, through monthly "statements," Hedge Funds' "Executive Summaries," and other communications, that investments were generating positive returns and yielding between 10.97% and 55.12% per year. For most years, they falsely represented the investments were generating returns between 20% and 30%. In reality, overall the Hedge Funds experienced trading losses.

To perpetrate and perpetuate this scheme, Nadel caused the Hedge Funds to pay investors "trading gains" as reflected on their false monthly statements. The funds used to pay these purported trading gains were not generated from trading activities; rather they were

generated from new or existing investors. Nadel further caused the Hedge Funds to pay more than $95 million in "fees." Those fees were based on grossly inflated returns and thus were improperly and wrongfully paid. The negative cash flow of the Hedge Funds made the eventual collapse of the scheme inevitable.

Here, pooling all Receivership Entities' assets is appropriate because Nadel operated the Hedge Funds as part of a single, continuous Ponzi scheme, and all of the other Receivership Entities were acquired or funded with money that Nadel improperly diverted from the Hedge Funds. Further, Nadel treated the Hedge Funds as a single source of money, and the investors' money was commingled in the Hedge Funds' accounts and other accounts controlled by Nadel, especially in and through accounts he controlled at Wachovia Bank, including the shadow accounts discussed above in Section II. D. 2. Specifically, Nadel moved money raised from investors in the different Hedge Funds in, out, and between those accounts and also between those accounts and the Hedge Funds' trading accounts as necessary to satisfy redemptions and quarterly transfers of purported "profits" to investors. To the extent Nadel traded money, he did so in a pooled and commingled fashion through a single master trading account. Specifically, when trading, Nadel would pool all available money raised from investors and money in personal or other non-Hedge Fund accounts that he controlled into a single account, which he used to purchase securities. Then, after the close of the trading session, Nadel allocated the completed trades as he wished among the pooled accounts.

Consistent with legal authority discussed in the next Section, Nadel's treatment of the Receivership Entities and of investors' money in the manner described in the previous

paragraphs warrants pooling all assets of the Receivership Entities. Specifically, all money and other assets that constitute Receivership assets, regardless of how they were previously allocated, should be held to constitute one fund and used in a collective manner to pay the collective liabilities of the Receivership Entities, in accordance with the plan discussed in this Motion.

In the absence of an order pooling the assets and liabilities into one Receivership estate, the Receiver would have to separately administer claims to assets held by each of the Receivership Entities. In addition to being inconsistent with Nadel's treatment of those entities, this would be a time-consuming, costly, and to a large extent, arbitrary task. Separate administration of each Receivership Entity's claims would require the Receiver to (1) apportion administrative costs among the Receivership Entities, (2) apportion third-party recoveries among the Receivership Entities, and (3) separately distribute the remaining assets from each entity. Essentially, trying to separately administer each entity would require the Receiver to force an order upon each Receivership Entity when none existed. The end result could be that some Claimants would receive a greater recovery simply because it was falsely represented to them that they were investing with a particular Receivership Entity instead of another one. Pooling the assets and liabilities of the Receivership Entities is the most cost-effective and equitable approach, and is warranted by the facts.

B. Legal Basis For Pooling Assets And Liabilities

Treating all Receivership assets as a single fund to pay all collective liabilities of the Receivership Entities benefits all Claimants and, as noted in the previous Section, is consistent with the manner in which Nadel operated those entities. Further, this requested

relief is well within the Court's broad power to administer this Receivership. *See Elliott*, 953 F.2d at 1566 ("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 . . . ."); *HKW Trading LLC*, 2009 WL 2499146 at *2; *see also S.E.C. v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986); *Basic Energy & Affiliated Resources, Inc.*, 273 F.3d at 668. The primary purpose of an equity receivership is to promote the orderly and efficient administration of the estate for the benefit of the creditors. *See Hardy*, 803 F.2d at 1038. Consolidating all of the assets and liabilities of the Receivership Entities best serves this purpose.

Courts routinely permit equity receivers to pool assets. *See, e.g.*, *HKW Trading*, 2009 WL 2499146 at *6 ("The Court directs that all assets and liabilities of the Receivership Entities be consolidated for all purposes."); *S.E.C. v. Credit Bancorp, Ltd.*, 290 F.3d 80, 91 (2d Cir. 2002) (affirming district court's equitable authority to treat all fraud victims alike and order *pro rata* distribution of assets); *Basic Energy*, 273 F.3d at 663 (adopting receiver's plan to create single pool of assets for all investors); *Elliott*, 953 F.2d at 1584 (approving district court's decision to reject tracing and treat three companies as single entity); *S.E.C. v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 332 (5th Cir. 2001) (affirming district court's order approving receiver's plan to distribute funds to all Claimants on *pro rata* basis even though funds invested by two claimants were segregated by fraudster and traced to separate account); *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115-16 (9th Cir. 1999) (affirming district court's adoption of receiver's plan to treat three companies involved in scheme as one for purposes of paying claims because each entity appeared to be alter ego of the other);

Quilling v. Trade Partners, Inc., 2008 WL 4283359, *4 (W.D. Mich. 2008) ("In [r]eceivership cases where the fraud has features that are similar or common to all victims, and at least some commingling of funds occurred, pro rata distribution of pooled assets has been the standard. . . . "); *S.E.C. v. Amerifirst Funding, Inc.*, 2008 WL 919546, *5 (N.D. Tex. 2008) (concluding "the most equitable approach is to pool the assets" of three receivership entities and distribute funds on *pro rata* basis even in absence of specific instances of commingling because entities were used similarly to further fraudulent scheme); *U.S. v. Durham*, 86 F.3d 70, 72-73 (5th Cir. 1996) (approving receiver's plan to distribute money to claimants on *pro rata* basis even though majority of money could be traced to one claimant); *see also U.S. v. Real Property Located at 13328 & 13324 State Hwy.*, 89 F.3d 551, 553 (9th Cir. 1996) (approving district court's finding that "[i]nstead of engaging in a tracing fiction, the equities demand that all [defrauded] customers share equally in the fund of pooled assets in accordance with the SEC plan").

Indeed, courts have held that "*any* comingling is enough to warrant treating all the funds as tainted." *Byers*, 637 F. Supp. 2d at 177. Because "money is fungible" it is "impossible to differentiate between 'tainted' and 'untainted' dollars. . . ." *S.E.C. v. Lauer*, 2009 WL 812719, *4-5 (S.D. Fla. 2009). "Once proceeds become tainted, they cannot become untainted." *United States v. Ward*, 197 F.3d 1076, 1083 (11th Cir. 1999). In addition, "when tainted funds are used to pay costs associated with maintaining ownership of [a] property, the property itself and its proceeds are tainted by the fraud." *Lauer*, 2009 WL 812719 at *3 (citing *United States v. One Single Family Residence Located at 15603 85th Ave. North, Lake Park, Palm Beach County, Fla.*, 933 F.2d 976, 982 (11th Cir. 1991)).

In short, the most equitable and efficient approach is to pool all assets and liabilities of the Receivership Entities into one consolidated estate. *See 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").

IV. THE RECEIVER'S PROPOSED PLAN OF DISTRIBUTION, INCLUDING AN INTERIM DISTRIBUTION

A. The Receiver's Plan

As of November 29, 2011, total cash and certificates of deposit in all Receivership accounts is approximately $21,882,616.97. Including money the Receiver is owed by defendants in settled ancillary litigation, the total money on hand and due to the Receiver is $23,775,811.62. The Receiver seeks leave to make distributions on a *pro rata* basis, and he expects to make a first interim distribution of $18 million to holders of Allowed Claims in the near future. If approved by the Court, all distributions will be made in accordance with applicable parameters set forth in this Motion, including those relating to priorities and those governing the source of distributions to Non-Investor Secured Claimants.

The Receiver has proposed a procedure in Section V. below for Claimants to object to the claims determinations made by the Court based on this Motion. The procedure provides, in relevant part, that each Claimant will have 20 days from the date the Receiver mails notice to each Claimant of the Court's order on this Motion to serve the Receiver with an objection to his, her, or its claim determination. After this twenty-day objection period expires and the Receiver completes an initial review of any objections, the Receiver intends to file a motion for approval of a first interim distribution in the amount of $18 million less any reserves

necessitated by any timely served objections. The Receiver will make these reserves where necessary so that objections do not delay a first interim distribution.[23] In other words, the anticipated $18 million distribution will be reduced by the amount reserved, if any. Any reserves will be in the amount of the *pro rata* share of the interim distribution allocated to the objected claim based on the full claim amount. The reserves will be held until the claim objection is resolved. If the objection is resolved for less than the full claim amount, the unpaid reserves will be distributed on a *pro rata* basis in a subsequent distribution.

The Receiver believes that an interim distribution of $18 million, even less any possible reserves for objected claims, will provide a sufficient amount of money to Claimants to warrant the expense of the distribution. Further, the proposed interim distribution amount will leave enough funds in the Receivership to cover the expenses of (1) addressing any claims disputes, (2) administering the Receivership, and (3) paying the Receiver's professionals for services already and yet to be provided. To the extent possible and feasible, the Receiver will make additional interim distributions before making a final distribution at the close of the Receivership. Before making any distribution, the Receiver will seek leave from the Court, and at that time will provide further specifics about the distribution.

In this Motion, however, the Receiver seeks approval of a distribution plan which provides that, subject to applicable exceptions, priorities, and other parameters discussed in this Motion, Claimants receive a fixed percentage of their Allowed Amount from the

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[23] Although the Receiver will make every effort to make a prompt interim distribution, depending on the nature of any timely objection received by the Receiver, this proposed interim distribution may have to be modified or delayed until any objection warranting such delay is resolved.

aggregate amount distributed to Claimants in any particular distribution based upon the following formula: each claim's Allowed Amount divided by the total Allowed Amount of all Allowed Claims multiplied by the aggregate distribution amount.

B. The Receiver's Plan Is Consistent With Applicable Legal And Equitable Principles

As previously noted, the evidence in the Receiver's possession demonstrates that all investor funds were commingled and transferred among various accounts for the Receivership Entities, Nadel's personal accounts, and other accounts controlled by Nadel; the Receivership Entities did not maintain separate investor accounts; and investors were defrauded in the same manner. Accordingly, all Claimants with allowed claims should share equally (on a *pro rata* basis) in the pooled assets recovered by the Receiver, subject to the claim priorities and other applicable limitations discussed in this Motion and ultimately established by the Court. The Receiver recommends the Court approve the distribution of funds on a *pro rata* basis according to the formula set forth in the previous Section.

The Court has wide latitude in exercising inherent equitable power in approving a plan of distribution of receivership funds. *Forex*, 242 F.3d at 331 (affirming district court's approval of plan of distribution because court used its discretion in "a logical way to divide the money"); *Quilling v. Trade Partners, Inc.*, 2007 WL 107669, *1 (W.D. Mich. 2007) ("In ruling on a plan of distribution, the standard is simply that the district court must use its discretion in a logical way to divide the money" (internal quotations omitted)). In approving a plan of distribution in a receivership, "the district court, acting as a court of equity, is afforded the discretion to determine the most equitable remedy." *Forex*, 242 F.3d at 332. The Court may adopt any plan of distribution that is logical, fair, and reasonable. *Wang*, 944

F.2d at 83-84; *Basic Energy*, 273 F.3d at 671; *Trade Partners*, 2007 WL 107669 at *1. "Therefore, '[a]ny action by a trial court in supervising an equity receivership is committed to his sound discretion and will not be disturbed unless there is a clear showing of abuse.' " *S.E.C. v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 373 (5th Cir.1982) (quoting *S.E.C. v. Ark. Loan & Thrift Corp.*, 427 F.2d 1171, 1172 (8th Cir.1970)).

Consistent with the features of the scheme, "courts have favored *pro rata* distribution of assets where, as here, the funds of defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders." *Credit Bancorp*, 290 F.3d at 88; *see Trade Partners*, 2007 WL 107669 at *2 ("The use of a *pro rata* distribution plan is especially appropriate for fraud victims of a Ponzi scheme, in which earlier investors' returns are generated by the influx of fresh capital from unwitting newcomers rather than through legitimate investment activity."). A logical, fair, and reasonable distribution plan may provide for reimbursement to certain claimants while excluding others. *See Wang*, 944 F.2d at 84; *Basic Energy*, 273 F.3d at 660-61. The proposed plan of distribution set forth in this Section is logical, fair, and reasonable.

V. THE PROPOSED PROCEDURE FOR OBJECTIONS IS LOGICAL, FAIR, AND REASONABLE

A. The Proposed Objection Procedure

For efficiency, the Court should adopt a formal procedure to handle instances where a Claimant does not agree with the Receiver's recommended determination of the Claimant's claim or objects to claim priority or the plan of distribution as approved by the Court. The procedure recommended below allows the Receiver to (1) address any disputed matters in a fair and efficient manner and (2) present any unresolved objections to the Court in an

organized and, if appropriate, consolidated manner which will be efficient and, to the extent possible, avoid the Court's receipt of objections on a piecemeal basis. The procedure also provides each Claimant with notice and an opportunity to be heard in accordance with applicable due process obligations.

The Receiver respectfully requests the Court adopt the following procedure (the "**Proposed Objection Procedure**"):

a) Within three (3) business days of the date of the Order on this Motion, the Receiver will post the Order on his website, www.nadelreceivership.com. A copy of this Motion will be posted soon after it is filed.

b) Within ten (10) days after the date of the Order on this Motion, the Receiver will mail each Claimant by United States First Class Mail at the address provided on the Proof of Claim Form a letter setting forth the procedure for objecting to the Receiver's determination of a claim (the "**Receiver's Claim Determination**"), claim priority, or plan of distribution as approved by the Court. The letter will provide notice that the Court's Order on this Motion is available on the Receiver's website. The letter will further provide that a Claimant may contact the Receiver's office for a copy of the Motion and/or Order in the event a Claimant does not have access to the internet or cannot otherwise access the Motion and/or Order.

c) Any Claimant that is dissatisfied with the Receiver's Claim Determination, claim priority, or plan of distribution must serve the Receiver in accordance with the service requirements of Rule 5 of the Federal Rules of Civil Procedure with a written objection no later than twenty (20) days after the date of mailing of the Receiver's letter advising the Claimant of the Order on this Motion. All objections must be served on the Receiver at Burton W. Wiand c/o Maya M. Lockwood, Esq., Wiand Guerra King P.L., 3000 Bayport Drive, Suite 600, Tampa, Florida 33607, and should not be filed with the Court. Such objections shall clearly state the nature and basis of the objection, and provide all supporting statements and documentation the Claimant wishes the Receiver and the Court to consider.

d) Failure to properly and timely serve an objection to the Receiver's Claim Determination, claim priority, or plan of distribution shall permanently waive the Claimant's right to object to or contest the Receiver's Claim Determination, claim priority, and plan of distribution and the final claim amount shall be set as the Allowed Amount determined by the Receiver as set forth in the Exhibits attached to this Motion as approved by the Court.

e) Although each objecting Claimant previously submitted to this Court's jurisdiction by filing a claim with the Receiver, by serving an objection the objecting Claimant shall be deemed to have confirmed submission to the jurisdiction of this Court. A person serving an objection to the Receiver's Claim Determination, claim priority, or plan of distribution, shall be entitled to notice, but only as it relates to adjudication of the particular objection and the claim to which the objection is directed.

f) The Receiver may attempt to settle and compromise any claim or objection subject to the Court's final approval.

g) At such times as the Receiver deems appropriate, he shall file with the Court: (1) the Receiver's further determination of a claim with any supporting documents or statements he considers are appropriate, if any; (2) any unresolved objections, with supporting statements and documentation, as served on the Receiver by the Claimant; and (3) any settlements or compromises that the Receiver wishes the Court to rule upon.

h) The Court may make a final determination based on the submissions identified in the previous paragraph or may set the matter for hearing and, following the hearing, make a final determination. The Claimant shall have the burden of proof. The Receiver will provide notice of such hearing as provided in paragraph e) above.

This Proposed Objection Procedure promotes judicial efficiency, reduces litigation costs for the Receivership, is logical, fair, and reasonable, and is in the Receivership's best interest.

B. The Proposed Objection Procedure Is Consistent With Applicable Legal And Equitable Principles

The Proposed Objection Procedure satisfies due process. Due process essentially requires that the proceeding be fair and that affected parties be given notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Elliott*, 953 F.2d at 1566. The use of summary proceedings to implement claims procedures is customary in Commission receiverships and satisfies due process requirements when claimants receive an opportunity to be heard, to object to their claim determination, and to have their claims considered by a court. *See Elliott*, 953 F.2d at 1566; *Basic Energy*, 273 F.3d at 668-671. The Proposed Objection Procedure achieves each of these requirements.

FDIC v. Bernstein noted:

> One common thread keeps emerging out of the cases involving equity receiverships – that is, a district court has extremely broad discretion in supervising an equity receivership and in determining the appropriate procedures to be used in its administration.
>
> In keeping with this broad discretion, "the use of summary proceedings in equity receiverships as opposed to plenary proceedings under the Federal Rules of [Civil Procedure] is within the jurisdictional authority of a district court." Such procedures "avoid formalities that would slow down the resolution of disputes. This promotes judicial efficiency and reduces litigation costs to the receivership," thereby preserving receivership assets for the benefit of creditors.

786 F. Supp. 170, 177-78 (E.D.N.Y. 1992) (citations omitted). Under applicable law, this Court should approve the Proposed Objection Procedure because it satisfies due process and is logical, fair, and reasonable. *See Elliott*, 953 F.2d at 1567 (summary proceedings are appropriate where party has full and fair opportunity to present claims and defenses).

Specifically, the Proposed Objection Procedure provides for (1) notice to Claimants of the Receiver's determination of their claims, claim priority, and plan of distribution; (2) the opportunity for Claimants to object to these matters; and (3) the review of unresolved objections by the Court.

Importantly, the Proposed Objection Procedure eliminates the need for any objections to be filed with the Court in direct response to this Motion. In turn, that will preclude inefficient piecemeal presentation and adjudication of objections by the Court. Such a piecemeal process would result in an inefficient claims process for both the Court and the Receivership. As such, the Proposed Objection Procedure promotes judicial efficiency; reduces litigation costs for the Receivership; is logical, fair, and reasonable; and meets due process requirements.

CONCLUSION

For these reasons, the Receiver respectfully requests the Court enter an order:[24]

1. Approving the Receiver's determination of claims as set forth in this Motion and in attached **Exhibits B** through **J**;

2. Authorizing the Receiver to consolidate all Receivership Entities' assets and liabilities for all purposes, including for payment of administrative costs, for receipt of third-party recoveries, and for making distributions to holders of allowed claims;

3. Approving the Net Investment Method as set forth above and in the attached Exhibits as the proper method for calculating allowed amounts for investors;

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[24] For the Court's convenience, a copy of a proposed order granting this Motion is attached as **Exhibit L**.

4. Approving the plan of distribution as set forth above in Section IV.;

5. Approving the Proposed Objection Procedure as set forth above in Section V. for objections to the plan of distribution and the Receiver's claim determinations and claim priorities as set forth in this Motion and attached **Exhibits B** through **J**; and

6. Precluding further claims against Receivership Entities, Receivership property, the Receivership estate, or the Receiver by any Claimant, taxing authority, or any other public or private person or entity and precluding any proceedings or other efforts to enforce or otherwise collect on any lien, debt, or other asserted interest in or against Receivership Entities, Receivership property, or the Receivership estate.

LOCAL RULE 3.01(G) CERTIFICATION

The undersigned 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 sought herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 7, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on December 8, 2011, I will mail the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participant(s):

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