

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

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

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

Defendants,

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

Relief Defendants.

RECEIVER'S MOTION TO APPROVE SETTLEMENT

Burton W. Wiand, as Receiver, moves the Court for an order approving settlement of *Burton W. Wiand, as Receiver v. Donald Rowe et al.*, Case No.: 8:10-cv-245-T-17MAP (M.D. Fla.) (the "**Rowe Action**"), on the basis of the Settlement Agreement attached as Exhibit A.

MEMORANDUM IN SUPPORT

The Securities and Exchange Commission (the “**Commission**” or “**SEC**”) instituted this action to “halt [an] ongoing fraud, maintain the status quo, and preserve investor assets ...” (Doc. 1, Compl., ¶ 7.) Mr. Wiand was appointed by this Court as the Receiver for defendants other than Arthur Nadel (“**Nadel**”) and for relief defendants. (See Order Reappointing Receiver (Doc. 140).) Additionally, the Receivership was expanded to include Venice Jet Center, LLC and Tradewind, LLC (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. (Doc. 44); The Guy-Nadel Foundation, Inc. (Doc. 68); Lime Avenue Enterprises, LLC, and A Victorian Garden Florist, LLC (Doc. 79); Viking Oil & Gas, LLC (Doc. 153); Home Front Homes, LLC (Doc. 172); Traders Investment Club (Doc. 454); Summer Place Development Corporation (Doc. 911); and Respiro, Inc. (Doc. 916). All of the entities in receivership are collectively identified herein as the Receivership Entities.

Pursuant to the Order Reappointing Receiver (Doc. 493), the Receiver has the duty and authority to:

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

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

The Receiver sued Donald Rowe, individually (“**D. Rowe**”) and as Trustee of The Wall Street Digest Defined Benefit Pension Plan (the “**Plan**”); Joyce Rowe (“**J. Rowe**,” and collectively with D. Rowe, the “**Rowes**”); and one of the Rowes’ entities, Carnegie Asset Management, Inc. (“**CAM**”), to recover sums received from the Receivership Entities with a view to marshaling assets for an eventual distribution to investors with verifiable claims in an equitable and appropriate manner (the Rowes, the Plan, and CAM are collectively referred to as “**Defendants**”). The Receiver alleged that D. Rowe, the publisher of a subscription-based investment newsletter called “The Wall Street Digest” (the “**Digest**”), played a key role in Nadel’s Ponzi scheme by soliciting for several years the majority of investors in the purported investment funds underlying this case (the “**Hedge Funds**”). He did this by including glowing recommendations of and touting the Hedge Funds and Nadel and his associate, Neil Moody (“**Moody**”), in the Digest and in standalone “reports” circulated to the Digest’s subscribers as “America’s Top-Ranked Money Manager” and with similar praise. In exchange for soliciting investors, D. Rowe, through CAM and another defunct entity he controlled, Wall Street On Line, received “fees” (1) in the form of a percentage of the purported performance of the investments he solicited for the Hedge Funds and (2) following the end of the relationship between D. Rowe and Nadel and Moody, in the form of “settlement” payments relating to a dispute over additional “fees” D. Rowe believed he was owed.

The Receiver further alleged that none of the Defendants were licensed to offer or sell securities or investment advisory services in Florida and were otherwise not registered as a broker-dealer, investment advisor, or a representative of a broker-dealer or investment advisor; that they did not adequately disclose to potential investors they solicited that they were being compensated for doing so; and that their solicitations constituted a general solicitation for the sale of unregistered securities. All of this, the Receiver also alleged, violated state and federal securities laws. Of these “fees,” \$1,158,049.93 were paid to CAM; \$445,650.73 were paid to Carnegie Wealth Management, Inc., another defunct entity previously owned by D. Rowe; \$1,065,245.06 were paid to Wall Street On Line; and \$31,918.84 were paid directly to D. Rowe. As such, Defendants or entities controlled by one or both of the Rowes received “fees” totaling \$2,700,864.56.

Further, each of the Rowes and also the Plan invested in Hedge Funds and each received “false profits” (*i.e.*, an amount from Hedge Funds which exceeded the amount each of them invested). Specifically, D. Rowe received from his investment a total of \$2,090,818.31 in transfers, of which \$770,818.31 were false profits; J. Rowe received from her investment a total of \$2,310,750.58 in transfers, of which \$1,655,750.58 were false profits; and the Plain received from its investment a total of \$2,201,816.03 in transfers, of which \$1,601,816.03 were false profits. In sum, Defendants collectively received a total of \$6,603,384.92 from their investments in the Hedge Funds, \$4,028,384.92 of which were false profits. All of these matters are alleged in paragraphs 101 through 114 and the Exhibits of the Second Amended Complaint filed in the Rowe Action (*Rowe* Doc. 116).

In light of Defendants' role in Nadel's Ponzi scheme and their violations of federal and state securities laws, in the Rowe Action the Receiver sought recovery of all of the "fees" received by Defendants and also all transfers they received from the scheme in connection with their investments (in other words, with respect to those investment-related transfers, the Receiver did not only seek false profits). Specifically, under the Receiver's primary claim pursuant to Florida Statutes Section 726.105(1)(a), the Receiver was entitled to avoid every transfer from the scheme to Defendants (whether as "fees" or purported trading gains or principal redemptions) subject to a partial affirmative defense provided by Fla. Stats. § 726.109(1). Under that provision, Defendants had a partial affirmative defense in connection with investment related transfers which would allow them to retain an amount up to the amount of their principal investments in the scheme if they received the transfers in "good faith." Similarly, with respect to the transfers of "fees," Defendants had an affirmative defense to the extent they could establish both that they received them in "good faith" and that they provided "reasonably equivalent value" for the "fees." In light of the allegations discussed above relating to Defendants' role and misconduct, among other things, the Receiver did not believe Defendants could establish their "good faith" under Section 726.109(1) and consequently he sought recovery of all transfers from the scheme to Defendants.

As shown by the attached Settlement Agreement, the Receiver and Defendants, subject to the approval of this Court, have agreed to settle the Rowe Action, including on the following terms: (1) the Rowes will consent to entry of a joint and several judgment against them, the Plan, and CAM in favor of the Receiver in the amount of \$4,028,385 on all claims

which will be asserted in an amended complaint which the Receiver and Defendants will jointly move for leave to file; and (2) Defendants will also pay the Receiver \$250,000, which amount will be paid from the surrender of or a loan securitized by a \$400,000 annuity held by Defendants, which Florida law ordinarily exempts from creditor claims. In turn, the Receiver will treat the balance of that annuity as exempt from creditor claims, but he is otherwise not limited in pursuing collection efforts in accordance with applicable laws. In addition, as part of the settlement the Receiver will use best efforts to seek to enjoin two currently pending proceedings against Defendants brought by investors in Nadel's scheme: *R. Formica et al. v. D. Rowe et al.*, Case No. 8:11-cv-516-MSS-EAJ (M.D. Fla.), and *J. Bell, II et al. v. D. Rowe et al.*, Case No. 2009 CA 4925 NC (Fla. 12th Judicial Cir. Ct., Sarasota County). The Court, however, need not consider those injunctions to decide this motion because the settlement is not contingent on them, and the Receiver will brief their merits and the benefits of those injunctions to the Receivership estate after other steps contemplated by the attached settlement agreement have been taken.

In reaching this agreement, the Receiver considered a number of factors, including each Defendant's ability to pay – which consideration includes the fact that CAM and the Plan are defunct – and the risks of a bankruptcy discharge of any judgment the Receiver could obtain against Defendants after a trial. While at trial the Receiver would have sought a judgment totalling \$9,304,249.48, if successful the judgment would have been apportioned among Defendants with the Rowses likely subject to a judgment amount of \$4,433,487.73 and the remainder of the judgment apportioned against defunct entities. In addition, there would have been a significant risk that any judgment obtained after a trial would have been

dischargeable in bankruptcy. As such, there would have been a real possibility that the Receiver would have been left with a judgment having very little, if any, value. Instead, as part of the settlement, the Receiver is receiving a lower judgment amount (*i.e.*, in the amount of Defendants' false profits, or \$4,028,385), but that judgment will be against all Defendants jointly and severally and will be obtained after taking measures which should significantly decrease the risk of it being found dischargeable in any bankruptcy. Further, the Receiver will receive another \$250,000 procured through an asset (*i.e.*, an annuity) which is ordinarily exempt from creditor claims like those arising from the judgment contemplated by the settlement. With respect to moving to enjoin the *Formica* and *Bell* cases, the benefits will be detailed in a subsequent motion for the injunctions, but generally the injunctions would benefit the Receivership Estate by preserving the Rowses' assets during the Receiver's efforts to collect on the judgment. In reaching this settlement, the Receiver has also considered other factors, including the risks and expense of litigation.

The settlement reflected by the Settlement Agreement is in the best interests of the Receivership, the investors in the Receivership Entities, and Defendants, because resolution of the claim reduces risk to all parties and conserves judicial resources.

WHEREFORE, the Receiver moves the Court to approve the settlement reflected by the attached Settlement Agreement.

LOCAL RULE 3.01(g) CERTIFICATE OF COUNSEL

The undersigned counsel for the Receiver is authorized to represent to the Court that the SEC has no objection to the Court's granting this motion except that the SEC takes no

position with respect to the portion of the Settlement Agreement under which the Receiver agrees to file a motion to enjoin the *Formica* and *Bell* cases.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on February 4, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

s/ Gianluca Morello

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