UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

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

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

Defendants,

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

Relief Defendants.
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RECEIVER'S MOTION TO CLARIFY CERTAIN SETTLEMENT ORDERS

Burton W. Wiand (the "**Receiver**"), as Receiver for Valhalla Investment Partners, L.P.; Viking Fund, LLC; Viking IRA Fund, LLC; Victory Fund, Ltd.; Victory IRA Fund, Ltd.; and Scoop Real Estate, L.P. (collectively, the "**Hedge Funds**"), seeks clarification of specific language in this Court's orders approving the Receiver's settlements with Goldman Sachs Execution & Clearing, L.P. ("**GSEC**") (Doc. 742), Shoreline Trading Group, LLC ("**Shoreline**") (Doc. 835), and Holland & Knight LLP ("**H&K**") (Doc. 922) (collectively, the "**Settlement Orders**"). Through those settlements, the Receiver marshaled $37,350,000 for

the benefit of the Receivership Estate, including for hundreds of defrauded investors who collectively lost approximately $168 million. Through the Receiver's efforts to date, those investors have recovered approximately 37% of their approved claims. However, an argument made in an arbitration by a "**profiteer**" (*i.e.*, an investor who received more than it invested, or, in other words, who received "**false profits**"), if adopted, threatens to foreclose any further recovery by the Receiver of fraudulently transferred money. (A copy of that profiteer's brief containing the argument is attached as **Exhibit A**.) In turn, this will significantly harm this Receivership and investors who suffered losses and will be unfair to the large number of other profiteers who have already returned money to the Receiver. As explained below, the pertinent profiteer's argument is premised on a misleading and incorrect interpretation of specific language in the Settlement Orders. The Receiver seeks clarification that the Settlement Orders were never intended to and do not bar the Receiver from recovering fraudulent transfers from investor-defendants that profited from Arthur Nadel's ("**Nadel**") Ponzi scheme. The relief sought by the Receiver is particularly important because the grounds for vacating or appealing an arbitration determination are narrow, and a determination by the arbitrators that is inconsistent with the Settlement Orders would have profoundly inequitable consequences for this Receivership.

BACKGROUND

After defrauding hundreds of investors for more than ten years, Nadel's scheme collapsed in January 2009. *See, e.g., Wiand, as Receiver v. Lee,* Case No. 8:10-cv-210-T-17MAP (M.D. Fla.), Order (Doc. 169) adopting Report and Recommendation (Doc. 163) (concluding Nadel operated Hedge Funds as a Ponzi scheme). On January 21, 2009, this

Court appointed the Receiver and directed him to "administer and manage the business affairs, funds, assets, choses in action and any other property of the [Hedge Funds and other Receivership Entities]; marshal and safeguard all of the assets of the [Hedge Funds and other Receivership Entities]; and take whatever actions are necessary for the protection of the investors." *See, e.g.,* Doc. 8 at 1-2. In following this mandate, the Receiver functions as an arm of the court. *United States v. Perraud*, 672 F. Supp. 2d 1328, 1339 (S.D. Fla. 2009) ("[T]he receiver is an arm of the court.").

Two Categories Of Claims Brought By Receivers

Pursuant to this mandate, in relevant part, the Receiver investigated Nadel's scheme and, under well-established law, identified two categories of potential targets for lawsuits. *See Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543, 551 (Fla. 2d DCA 2003) (distinguishing claims brought by receivers against "recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation and taken prior to the receivership" from "common law tort claims against third parties to recover damages in the name or shoes of the corporation"); *see also In re Wiand R'ship Cases*, 2007 WL 963165, *7 (M.D. Fla. 2007) (recognizing distinction between two categories of claims and noting that unjust enrichment claim seeking recovery of transfers of Ponzi scheme proceeds is not a suit on behalf of investors and "may be properly categorized as an action directly against ... the recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation") (quotation omitted). The **first** category involved fraudulent transfer and unjust enrichment claims against investors in the scheme "to recover assets rightfully belonging to the" Hedge Funds (what are commonly called "**clawback**" claims). Such

claims do not involve traditional "damages" (like those recoverable under tort claims), and they are typically brought against investors who received false profits. *See, e.g., Perkins v. Haines*, 661 F.3d 623, 627 (11th Cir. 2011) ("Any transfers over and above the amount of the principal – *i.e.*, for fictitious profits – are ... subject to recovery."). The **second** category involved claims asserted against alleged wrongdoers, such as alleged tortfeasors and similar defendants, who were potentially liable to the Hedge Funds for traditional "damages" by, for example, allegedly aiding or abetting Nadel's scheme and thus injuring the Hedge Funds. Relevant here, the entities targeted by the Receiver for this second category of claims included GSEC, Shoreline, and H&K.

The Shoreline Settlement

Shoreline is an introducing Broker/Dealer whose registered representatives dealt directly with Nadel and the Hedge Funds, and it was one of the main financial institutions used by Nadel to perpetrate his scheme. *See* Doc. 803 at 3. The Receiver's investigation revealed that Shoreline may have failed to take certain actions which could have uncovered the scheme, and it was the Receiver's position that such inaction damaged the Hedge Funds. *Id.* at 4. On March 16, 2012, Shoreline settled the Receiver's claims pre-suit for $2,500,000 and a bar order. *Id.* at 6. The bar order was a condition of the settlement, and all of the benefits of the settlement (primarily $2,500,000) flowed to the Receivership estate for the benefit of investors and other creditors. *Id.* at 10-17.

The GSEC Settlement

GSEC (formerly known as Spear, Leeds & Kellogg, L.P.) provided clearing services for Shoreline, including for transactions entered into by Nadel. *See* Doc. 679 at 3. The

Receiver's investigation revealed that while GSEC had no actual knowledge of Nadel's scheme, it too may have failed to take certain actions which could have uncovered the scheme. *Id.* at 4. The Receiver believed that such inaction damaged the Hedge Funds. *Id.* On December 14, 2011, GSEC settled the Receiver's potential claims pre-suit for $9,850,000 and a bar order. *Id.* at 6. As with the Shoreline settlement, the bar order was a condition of the settlement, and all of the benefits of the settlement (primarily $9,850,000) flowed to the Receivership estate for the benefit of investors and other creditors. *Id.* at 11-17.

The H&K Settlement

H&K is a law firm that provided legal services to Nadel and the Hedge Funds. *See* Doc. 898 at 4. The Receiver's investigation revealed that H&K may have been professionally negligent, breached fiduciary duties owed, and aided and abetted Nadel's fraud and breaches of fiduciary duty. *Id.* The Receiver believed that such inaction damaged the Hedge Funds. *Id.* On September 28, 2012, H&K settled the Receiver's claims for $25,000,000 and a bar order. *Id.* at 6-8. As with the Shoreline and GSEC settlements, the bar order was a condition of the settlement, and all of the benefits of the settlement (primarily $25,000,000 minus attorneys' fees) flowed to the Receivership estate for the benefit of investors and other creditors. *Id.* at 9-16.

The Receiver's "Clawback" Cases To Recover Fraudulent Transfers

Distinct from his damages claims against potential tortfeasors like Shoreline, GSEC, and H&K, the Receiver also brought many actions in this Court asserting fraudulent transfer and unjust enrichment claims against numerous investors who received fraudulent transfers from Nadel's Ponzi scheme. As explained in detail below in Section I, under well-settled

law these claims were distinct from his damages claims because they were premised on the defendants' unlawful receipt of assets rightfully belonging to the Hedge Funds. *See Freeman*, 865 So.2d at 551. The Receiver settled with at least 49 such investor-defendants pre-suit. He then filed approximately 150 actions in this Court, the vast majority of which have likewise settled. Through these settlements, the Receiver recovered more than $22.5 million for the Receivership Estate. The Receiver has also recently obtained judgments totaling $2,223,373.76 in five clawback cases, and only one other such case remains pending before the Court. An additional 24 clawback cases, however, were compelled to arbitration.

In one of those arbitrations, the respondent – profiteer World Opportunity Fund, L.P. ("**World Opportunity**") – has attempted to take advantage of its successful effort to move its case from this Court to the arbitration by moving to end that matter with an argument based on a misleading and incorrect interpretation of the Settlement Orders that would inequitably elevate itself above every other profiteer whose case has been resolved to date either pre- or post-suit and, of course, above every losing investor. Notably, in opposing World Opportunity's and other clawback defendants' efforts to compel arbitration, the Receiver warned not only of burdensome costs and expenses of arbitrating, but also of the real possibility of inconsistent decisions and this Court's loss of control over this Receivership inherent in the decision of common questions of fact and law by dozens of arbitrators in multiple jurisdictions.[1]

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[1] The Receiver explained how adjudication of the Receiver's claims by arbitrators would increase the possibility of inconsistent decisions affecting Receivership property: "In arbitration, the Receiver's claims would be adjudicated by different individuals in three states who could render inconsistent decisions. Simultaneously, the same types of clawback claims would proceed in this Court, raising the possibility of inconsistent decisions between the Court and arbitrators. This would leave Receivership property subject to disparate rulings in different forums, which is precisely what Congress intended to prevent through 28 U.S.C.

Specifically, this Court (both in this proceeding and in the Receiver's clawback cases) has determined Nadel operated the Hedge Funds as a Ponzi scheme. World Opportunity – a "feeder" investment fund – received more than $4 million in transfers from the scheme, including false profits of $2,290,865.60 (representing an incredible 135% "return"). To avoid returning those funds, World Opportunity filed a "Motion To Enforce Judgment Credit" (the "**Motion**") in arbitration, arguing the Receiver's claims against it are worthless. Specifically, it has asserted it has no obligation to repay the scheme proceeds it has received because it is entitled to a judgment credit under the Settlement Orders for the full value of those settlement amounts. In other words, because the Receiver seeks to recover from World Opportunity an amount that is less than the settlement amounts under the Settlement Orders, World Opportunity believes that, unlike all other profiteers, it should be allowed to keep all fraudulent transfers it received from the scheme including its false profits.

World Opportunity relies on the following language in the Settlement Orders to argue it is entitled to a "judgment credit": such person or entity [purportedly, World Opportunity] shall be entitled to such set-offs or judgment reductions as permitted by law, if any, as a result of said injunction [*i.e.*, the Settlement Orders]. *See, e.g.*, Doc. 742 at 7-8. According to World Opportunity, because the Settlements Orders barred it from bringing unasserted and unspecified claims against Shoreline, GSEC, and H&K, the language entitles it to a $37,350,000 credit on the Receiver's $4 million claims against it. As detailed below, this assertion is wrong and ignores the phrase "as permitted by law, if any," which was included to ensure that only defendants with an independent legal basis for a judgment credit – such as

§§ 754 and 1692." *See, e.g., Wiand, as Receiver v. Roby*, Case No. 8:10-cv-71-T-17MAP (M.D. Fla.) (Doc. 35 at 7-8).

under Florida's Uniform Contribution Among Tortfeasors Act, Fla. Stats. §§ 768.31 *et seq.* – receive such a credit. It was not intended to and does not give profiteers like World Opportunity who are sued by the Receiver exclusively under the Florida Uniform Fraudulent Transfer Act and for unjust enrichment for recovery of the Hedge Funds' assets a judgment credit. Indeed, if World Opportunity's assertions were correct, then following the entry of the Settlement Orders, the Receiver could not recover any money from a fraudulent transfer recipient unless the transfers to that recipient exceeded approximately $37 million (and no investor-defendant received that much from the scheme). Notably, the bar order did not leave World Opportunity without any recourse if it believed it was injured by Nadel's scheme; rather, as an investor it could have sought recourse through the claims process and the Receivership estate, which greatly benefitted from the pertinent settlements.

In arbitration, the Receiver opposed World Opportunity's Motion on the merits, but he also argued the arbitrators lacked authority to decide the Motion because it is premised on this Court's Settlement Orders and is clearly beyond the scope of the pertinent arbitration clause.[2] Nevertheless, the arbitrators set a hearing on the Motion for February 22, 2013. In an abundance of caution given the extreme and inequitable consequences on this Receivership of World Opportunity's argument, the Receiver seeks clarification from the Court that its Settlement Orders do not: give a judgment credit to defendants of the Receiver's fraudulent transfer and unjust enrichment claims; bar the Receiver from recovering fraudulent transfers of the Hedge Funds' assets; or entitle transfer recipients to a

[2] The pertinent arbitration clause provides, in relevant part, as follows: "In any such arbitration, each of the parties hereto agrees to request from the arbitrators that (a) their authority be limited to construing and enforcing the terms and conditions of the Agreement as expressly set forth herein. . . ."

"judgment credit." Rather, the judgment credit is available to those who have an independent right to it – such as joint tortfeasors under Florida's Uniform Contribution Among Tortfeasors Act. For clawback defendants like World Opportunity, their recourse is the Receivership claims process, which benefitted greatly from the Settlement Orders.

ARGUMENT

I. THE RECEIVER'S CLAWBACK CLAIMS ARE LEGALLY DISTINCT FROM HIS DAMAGES CLAIMS

The pertinent language in the Settlement Orders was proposed by the Receiver, and the Court adopted it verbatim. The language relied upon by World Opportunity was only included in recognition of the Florida Uniform Contribution Among Tortfeasors Act ("**FUCATA**") and similar statutes which provide an independent basis for a credit based on the amount a joint tortfeasor pays to resolve litigation. *See* Declaration of Burton W. Wiand (the "**Wiand Decl.**") ¶ 11, which is being filed along with this motion. More specifically, that statute allows nonsettling joint-tortfeasors a judgment credit under certain circumstances when another joint-tortfeasor enters into a good-faith settlement with the injured party. Under those circumstances, the Settlement Orders allow a judgment credit because it is specifically "permitted by law."[3] The Settlement Orders themselves, however, give no right to a judgment credit in the absence of any legal ground for it. That is why the pertinent language in the Settlement Orders is qualified: a judgment credit is only allowed if "permitted by law," and the inclusion of the phrase "if any" demonstrates such circumstances will be limited.

[3] For example, in pursuing his claims against H&K, the Receiver recognized that in light of FUCATA he may not recover the full amount of the Hedge Funds' damages from H&K, given that he had already recovered approximately $12 million from two other potential joint tortfeasors – GSEC and Shoreline.

As previously noted, the Receiver's "clawback" cases are not premised on recovery of traditional "damages." Instead, they are premised on the return of assets rightfully belonging to the Hedge Funds and taken prior to the Receivership. As briefly noted above, *Freeman*, 865 So.2d at 551, explained the difference between fraudulent transfer and traditional tort damages claims asserted by a receiver in the wake of a Ponzi scheme:

> First, there are actions that the corporation, which has been "cleansed" through receivership, may bring directly against the principals or the recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation and taken prior to the receivership.... Distinct from these claims, however, are common law tort claims against third parties to recover damages in the name or shoes of the corporation for the fraud perpetrated by the corporation's insiders.

Id.; *see also In re Wiand R'ship Cases*, 2007 WL 963165 at *7 (recognizing distinction between two categories of claims and noting that unjust enrichment claim seeking recovery of transfers of Ponzi scheme proceeds is not a suit on behalf of investors and "may be properly categorized as an action directly against ... the recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation") (quotation omitted); *Knauer v. Jonathon Robert Fin. Group*, 348 F.3d 230, 231-36 (7th Cir. 2003) (distinguishing claims "seeking to recover the diverted funds from the beneficiaries of the diversions" from claims seeking "tort damages from entities that derived no benefit from the embezzlements" and noting that, with respect to the former category, the law "favor[s] exceptional treatment of receivers"); *Scholes v. Lehmann,* 56 F.3d 750, 754 (7th Cir. 1995) ("Now that the corporations created and initially controlled by [Ponzi perpetrator] are controlled by a receiver whose only object is to maximize the value of the corporations for the benefit of their investors and any creditors, we cannot see an objection to the receiver's

bringing suit to recover corporate assets unlawfully dissipated by [Ponzi perpetrator]. We cannot see any legal objection and we particularly cannot see any practical objection."); *Quilling v. Grand St. Trust*, 2005 WL 1983879, *6 (W.D.N.C. 2005) ("[O]nce the Receiver was appointed, the [harmed receivership entity] . . . became entitled to the return of the funds that were wrongfully diverted to the Defendants."); *S.E.C. v. Shiv*, 379 F. Supp. 2d 609, 618 (S.D.N.Y. 2005) (By seeking the return of fraudulent transfers, the Receiver acts to "undo" the fraud of the scheme's perpetrator.).

II. THERE IS NO INDEPENDENT LEGAL BASIS FOR A JUDGMENT CREDIT FOR CLAWBACK CLAIMS

The distinction between the two categories of claims is critical here because the category involving clawback claims (*i.e.*, the fraudulent transfer and unjust enrichment claims) does not trigger FUCATA or any similar independent legal basis for a judgment credit. In his clawback cases, such as the one against World Opportunity, the Receiver is asserting clawback claims (*i.e.*, only the first category of claims addressed in the quote from *Freeman* in the preceding page against winning investors (for the return of Receivership property)), but he asserted or was going to assert tort damages claims against H&K, GSEC, and Shoreline (*i.e.*, the second category of claims discussed in the quote from *Freeman*). As a factual matter, both categories of claims arose from Nadel's Ponzi scheme, but they involved distinct types of claims – *i.e.*, a fraudulent transfer recipient is not a tortfeasor,[4] and

[4] Rather than being joint tortfeasors, fraudulent transfer recipients – absent any culpable conduct – must return the funds because they hold fraudulently transferred funds in constructive trust for the Receiver. *See 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 ....") (quotations omitted).

the avoidance of a fraudulent transfer does not give rise to tort concepts of indemnification or contribution, including as codified in FUCATA. *See Freeman v. First Union Nat. Bank*, 865 So. 2d 1272, 1276 (Fla. 2004) ("We simply can see no language in FUFTA that suggests an intent to create an independent tort for damages."); *Brown v. Nova Info. Sys., Inc.*, 903 So. 2d 968, 969 (Fla. 5th DCA 2005) (noting "a fraudulent conveyance claim has been held not to be a tort for purposes of establishing personal jurisdiction"). As such, defendants in the Receiver's clawback cases, such as World Opportunity, "are [not] permitted by law" to receive a "judgment credit." *See, e.g., In re Greektown Holdings, LLC,* 475 B.R. 563, 576, 577-78 (E.D. Mich. 2012) (holding "contribution only enters the discussion in the context of joint tortfeasors," and defendants were not joint tortfeasors because they were "individually liable for discrete transfers that each received, each of which [was] separately challenged"); *Wieboldt Stores, Inc. By & Through Raleigh v. Schottenstein*, 111 B.R. 162, 172 (N.D. Ill. 1990) (holding "recognition of a right to contribution under the Illinois fraudulent conveyance statute would be inconsistent with the statute's underlying purpose and would frustrate rather than further its aims"); *Nicolaci v. Anapol*, 387 F.3d 21, 27 (1st Cir. 2004) (holding no basis for indemnity claim in fraudulent transfer case and concluding common law indemnity has only been recognized in personal injury tort actions); *In re Dunhill Res., Inc.*, 2006 WL 2090208, *1 (Bankr. S.D. Tex. 2006) (dismissing claims for indemnification and contribution for fraudulent transfers). Put simply, the judgment credit recognized in the Settlement Orders is only available "as permitted by law" and no law provides such a credit for investors, like World Opportunity, defending against the Receiver's fraudulent transfer and unjust enrichment claims. There simply is no independent legal basis to permit a

judgment credit to investor-defendants like World Opportunity being sued to return Receivership property.

Instead of receiving a $37 million judgment credit, profiteers who are forced to return more than their false profits (if they only return their false profits, they suffer no damages) could be entitled to a *pro rata* share of the H&K, GSEC, and Shoreline settlements (in addition to a *pro rata* share of money the Receiver recovered from other sources) through the claims process, assuming (1) they filed a contingent claim, or if not, (2) they successfully move this Court to file a late claim. *See, e.g., In re Rothstein Rosenfeldt Adler, PA*, 2010 WL 3743885, *7 (S.D. Fla. 2010) (noteholders intentionally failed to file bankruptcy claims, but court rejected argument they "would receive essentially no benefit in exchange for having" their claims against settling defendant barred because, if ultimately allowed to participate in bankruptcy distribution, they would "receive a benefit as a result of the entry of a bar order"); *Quilling v. Trade Partners*, 2007 WL 107669, *2 (W.D. Mich. 2007) ("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."). In other words, the bar order does not leave them without recourse – if they are entitled to recover for any claim, they can try to do so through the claims process like any other investor.

III. WORLD OPPORTUNITY'S ARGUMENT IS INCONSISTENT WITH THE COURT'S ACTIONS SINCE THE SETTLEMENT ORDERS

The Settlement Orders do not change the distinction between clawback claims and damages claims. And they do not contain any language creating a right to a judgment credit. Rather, they merely explicitly recognize that laws exist – such as FUCATA – which may

entitle certain individuals or entities to credit for the settlement amounts paid by GSEC, H&K, and Shoreline. Consistent with this, since the GSEC Settlement Order (the first of the Settlement Orders), the Court has approved at least 12 settlements with investor-defendants or other fraudulent transfer recipients, and all of those settlements were for amounts significantly less than the $9,850,000 GSEC paid to the Receivership Estate.[5] If the Court intended its Settlement Orders to create a right to a judgment credit for clawback defendants, then presumably it would not have approved any of these settlements because they were all below the settlement amounts paid by GSEC, Shoreline, and H&K. Similarly, in his ancillary "clawback" cases, the Court has recently entered judgments for the Receiver in amounts less than the amount the Receiver recovered from GSEC, Shoreline, and H&K.[6]

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[5] *See* **Composite Exhibit B**, which includes: Order approving pre-suit settlement with YMCA Foundation of Sarasota, Inc. for $75,000.00; Order approving settlement of *Wiand, as Receiver v. Cloud et al.,* Case No. 8:10-cv-165-T-17MAP (M.D. Fla.), for $328,600.52; Order approving settlement of *Wiand, as Receiver v. Linstead,* JAMS Arbitration Ref. No. 1440003229, for $202,000.00; Order approving pre-suit settlement with Girls, Inc. of Sarasota County for $100,000.00; Order approving pre-suit settlement with Geofco Holdings, Inc., Michael G. Edgecombe, and Barbara Edgecombe for $150,000.00; Order approving settlement of *Wiand, as Receiver v. EFG Bank et al.,* Case No.8:10-cv-241-T-17MAP (M.D. Fla.), for $811,828.84; Order approving settlement of *Wiand, as Receiver v. Russell,* Case No. 8:10-cv-176-T-17MAP (M.D. Fla.), for $100,000.00; Order approving settlement of *Wiand, as Receiver v. Sarasota Opera Association, Inc.,* Case No. 8:10-cv-248-T-17MAP (M.D. Fla.), for $514,382.16; and Order approving settlement of *Wiand, as Receiver v. Catholic Charities, Diocese of Venice, Inc.,* Case No. 8:10-cv-247-T-17MAP (M.D. Fla.), and *Wiand, as Receiver v. Bishop Frank J. Dewane,* Case No. 8:10-cv-246-T-17MAP (M.D. Fla.), for $521,168.00; Order approving settlement of *Wiand, as Receiver v. Rowe et al.,* Case No. 8:10-cv-245-T-17MAP (M.D. Fla.), for $250,000 and a $4 million judgment; Order approving settlement of *Wiand, as Receiver v. Buhl,* Case No. 8:10-cv-75-T-17MAP (M.D. Fla.), for $115,000.

[6] *See Wiand, as Receiver v. Lee,* Case No. 8:10-CV-210-T-17MAP (M.D. Fla.) (Doc. 170), judgment in favor of the Receiver for $935,631.51; *Wiand, as Receiver v. Morgan,* Case No. 8:10-CV-205-T-17MAP (M.D. Fla.) (Doc. 131), judgment in favor of the Receiver for $380,369.00; *Wiand, as Receiver v. Dancing $, LLC,* Case No. 8:10-CV-92-T-17MAP (M.D. Fla.) (Doc. 129), judgment in favor of the Receiver for $107,172.11; *Wiand, as Receiver v. D. Cloud,* Case No. 8:10-CV-150-T-17MAP (M.D. Fla.) (Doc. 77), judgment in favor of the Receiver for $763,539.83; and *Wiand, as Receiver v. Mason et al.,* Case No. 8:10-CV-2146-T-17MAP (M.D. Fla.) (Doc. 79), judgment in favor of the Receiver for $36,661.31.

IV. WORLD OPPORTUNITY'S CONSTRUCTION OF THE SETTLEMENT ORDERS IS PROFOUNDLY INEQUITABLE

Aside from being legally wrong, World Opportunity's argument would lead to disparate and otherwise profoundly inequitable treatment of profiteers by allowing some of them to retain the money Nadel stole from losing investors and fraudulently transferred to perpetrate his Ponzi scheme while the vast majority of them have already returned that money. *In re Slatkin*, 525 F.3d 805, 815 (9th Cir. 2008) (noting that source of money paid to Ponzi scheme investor "was a theft from the other investors"); *see Cunningham v. Brown,* 265 U.S. 1, 13 (1924) (noting in the original Ponzi scheme case that "equality is equity"); *Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372 (D. Col. 1995) (actions that confer on one creditor "a priority and preference over other creditors" are "contrary to receivership law, which places receivership property under the [c]ourt's control for the equal benefit of all creditors"); *S.E.C. v. TLC Invs. & Trade Co.*, 147 F. Supp. 2d 1031, 1035 (C.D. Cal. 2001) ("[A] primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors"); *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986) (same); *U.S. Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 2010 WL 960362, at *6 (N.D. Ill. Mar. 15, 2010) (same).

Further, because the Receiver seeks less than $37 million in each of his remaining clawback cases, a purported "judgment credit" in that amount would foreclose any further recovery for defrauded investors who have recovered only 37% of their losses to date through the claims process – in contrast, World Opportunity would not only be left with no losses, but it would actually have profited greatly from Nadel's scheme. *See S.E.C. v.*

George, 426 F.3d 786, 799 (6th Cir. 2005) ("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 relief the defendants claim to be entitled."); *Donell v. Kowell,* 533 F.3d 762, 772 (9th Cir. 2008) ("Most of the scheme's 5,200 net losers are likely to recover only pennies on the dollar of their initial investment."); *Moran v. Goldfarb*, 2012 WL 2930210, *7 n.4 (S.D.N.Y. 2012) ("[T]here is no reason that [investor-defendant] or his wife should fare *better* than the other investors who were victimized by [Ponzi perpetrator]."). This result is illogical because if the Receiver had settled with GSEC, Shoreline, or H&K early in the Receivership, under World Opportunity's reasoning, he would not have been able to pursue any clawback claims. World Opportunity and other investor-defendants who received funds stolen from defrauded losing investors would thus be allowed to keep that money. This is not only patently inequitable but it would also incentivize delay and obstruction by clawback defendants.

V. THE COURT HAS AUTHORITY TO, AT MINIMUM, CLARIFY THE SETTLEMENT ORDERS

The Receiver is not asking the Court to enjoin the arbitration against World Opportunity or to do anything else other than to clarify its own Orders as they relate to a discrete issue. This relief is particularly important because the grounds for vacating or appealing an arbitration determination are narrow, and a determination by the arbitrators that is inconsistent with the Settlement Orders would have profoundly inequitable consequences for this Receivership. "The court may properly draw to itself all disputes as to other rights pertaining to such property because 'every court has inherent equitable power to prevent its own process from working injustice to anyone . . . .'" *Consolidated Rail Corp. v. Fore River*

Ry. Co., 861 F.2d 322, 327 (1st Cir. 1988) (*quoting* R. Clark, *Law & Practice of Receivers* § 280(a), at 446 (1959)). As such, the Court's clarification of its own Orders is well within its authority, especially in a situation such as this one where the Court has the much broader authority to enjoin the arbitration altogether and to require the Receiver's clawback claims to be litigated in this Court. *See S.E.C. v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980) ("The power of a receivership court to prevent the commencement, prosecution, continuation, or enforcement of such [competing] actions has been recognized specifically in the context of securities fraud cases."); *Becker v. Greene*, 2009 WL 2948463, at *4 (M.D. La. 2009) ("The Receiver and the Receivership Court's power to protect and marshal assets would be severely diminished if every court in the nation, state or federal, could make its own determination of what constitutes an asset of the 'Receivership Estate.'"); *S.E.C. v. Credit Bancorp, Ltd.*, 93 F. Supp. 2d 475, 476-77 (S.D.N.Y. 2000) ("[W]here a court has appointed a receiver and obtained jurisdiction over the receivership estate, as here, the power to stay competing actions falls within the court's inherent power to prevent interference with the administration of that estate."); *Eller Indus.*, 929 F. Supp. at 371-72 (enjoining bankruptcy court because "[i]n the exercise of its jurisdiction over the debtor's property, the court has power to issue injunctions and all other writs necessary to protect the estate from interference and to ensure its orderly administration"); *Oppenheimer v. San Antonio Land & Irrigation Co.*, 246 F. 934, 935 (5th Cir. 1917) (district court with "complete jurisdiction and control" over receivership property "was not in error in restraining proceedings in another court involving the same subject-matter"); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 69 F.2d 60, 61 (2d Cir. 1934) ("Receivership court has jurisdiction to decide all questions of preservation, collection,

and distribution of assets."). The Receiver merely asks the Court for clarification of its Settlement Orders, as World Opportunity's entire argument for a judgment credit is based on an incorrect, misleading, and profoundly inequitable interpretation of the Court's Orders which will impact all defrauded investors participating in the claims process.

CONCLUSION

For all of these reasons, the Receiver respectfully requests an Order clarifying that the following language in the Settlements Orders does not create a right to a judgment credit and thus does not provide a judgment credit to any investor in Nadel's scheme for the Receiver's clawback claims.

- **GSEC**, Doc. 742 at paragraph 5, pp. 7-8: The injunction bars all claims against GSEC for contribution, indemnity, or any other cause of action arising from the liability of any person or entity to the Receiver or to any of the Receivership Entities or their investors (including claims in which the injury is the liability to Receiver or any of the Receivership Entities or their investors or where damages are calculated based on liability to the Receiver or any of the Receivership Entities or their investors), in whatever form and however denominated, and that such person or entity shall be entitled to such set-offs or judgment reductions as permitted by law, if any, as a result of said injunction;

- **Shoreline**, Doc. 835 at p. 3: IT IS FURTHER ORDERED that said injunction bars all claims against Shoreline, its parents, subsidiaries, and affiliates, and their respective present and former officers, directors, employees, shareholders, principals, partners, members, managing members, member managers, agents, and successors for contribution, indemnity, or any other cause of action arising from the liability of any person or entity to the Receiver or to any of the Receivership Entities or their investors (including claims in which the injury is the liability to the Receiver or any of the Receivership Entities or their investors or where damages are calculated based on liability to the Receiver or any of the Receivership Entities or their investors), in whatever form and however denominated, and that such person or entity shall be entitled to such set-offs or judgment reductions as permitted by law, if any, as a result of said injunction; and

- **H&K**, Doc. 922 at p. 4: IT IS FURTHER ORDERED that said injunction bars all claims again H&K for contribution, indemnity, or any other cause of action arising from the liability of any person or entity to the Receiver or to any of the Receivership

> Entities or their investors (including claims in which the injury is the liability to the Receiver or any of the Receivership Entities or their investors or where damages are calculated based on liability to the Receiver or any of the Receivership Entities or their investors), in whatever form and however denominated, and that such person or entity shall be entitled to such set-offs or judgment reductions as permitted by law, if any, as a result of said injunction.

Because World Opportunity's entire argument for a judgment credit is based on a misinterpretation of this language, the Receiver respectfully requests the Court enter an Order in the form attached hereto as **Exhibit C**.

LOCAL RULE 3.01(G) CERTIFICATION

Counsel for the Receiver conferred with counsel for the Securities & Exchange Commission, and the Commission does not object to the relief requested in this motion. Further, counsel for the Receiver conferred with counsel for Holland & Knight LLP, Goldman Sachs Execution & Clearing, L.P., and Shoreline Trading Group, LLC. H&K and Shoreline have no objection to the requested relief, and GSEC takes no position.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 14, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on February 14, 2013, I furnished a true and correct copy of the foregoing to Counsel for World Opportunity Fund, L.P. by email and first-class mail delivery:

James E. Connelly
Email: jconnelly@wcsr.com
Mark A. Rogers
Email: marogers@wcsr.com
Womble Carlyle Sandridge & Rice, PLLC
271 17th Street
Suite 2400
Atlanta, GA 30363

s/Gianluca Morello
Gianluca Morello, FBN 034997
Email: gmorello@wiandlaw.com
Michael S. Lamont, FBN 0527122
Email: mlamont@wiandlaw.com
Jared P. Perez, FBN 0085192
Email: jperez@wiandlaw.com
Wiand Guerra King P.L.
5505 West Gray Street
Tampa, FL 33609
Tel: (813) 347-5100
Fax: (813) 347-5198

Attorneys for the Receiver, Burton W. Wiand