Securities and Exchange Commission v. Nadel et al

Doc. 966 Att. 1

EXHIBIT A

Dockets.Justia.com

ARBITRATION TRIBUNALS OF THE AMERICAN ARBITRATION ASSOCIATION

BURTON W. WIAND, 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., *Petitioner*, v. WORLD OPPORTUNITY FUND, L.P., *Respondent.*	CASE NO. 51-512-Y-892-12

MOTION TO ENFORCE JUDGMENT CREDIT

COMES NOW Respondent World Opportunity Fund, L.P. ("WOF"), by and through its undersigned attorneys, and files this motion to enforce certain judgment credits obtained by virtue of two bar orders entered in federal district court. WOF asks the Panel to issue an award to the Receiver valued at zero dollars and without prejudice to WOF's defenses on the merits, recognizing that even if the Receiver could prove his claims that they are subject to judgment credits rendering his claims valueless.

During his tenure, the Receiver has received millions of dollars in settlements from Goldman Sachs and Holland & Knight. As part of those settlements, a federal district court enjoined any other party from suing those defendants in any matter related to the receivership. Under the terms of the agreements, enjoined parties are entitled to a judgment credit up to the value of the settlement amounts, each of which exceeds the Receiver's claims in this case.

I. FACTUAL BACKGROUND

Valhalla Investment Partners LP ("Valhalla") was founded in 1999 by Neil Moody as a Delaware limited liability partnership. Valhalla Management was founded in the same year by

Neil Moody as a Florida corporation, for the purpose of being Valhalla's general partner. The Receiver admits that Neil Moody (and his son Chris) were the only principals at Valhalla and Valhalla Management.

According to company documents, Valhalla did invest in various securities over its life—including making investment gains and losses as discussed in WOF's response to the Receiver's claim.

At some subsequent point, but no earlier than 2001, Valhalla began to obtain investment advisory services from Scoop Management, a Florida corporation, whose principal was Arthur Nadel. Mr. Nadel was never an officer, director, principal, or partner in either Valhalla or Valhalla Management. In connection with these services to the funds, including Valhalla, Mr. Nadel used the law firm of Holland & Knight LLP ("H&K") to offer advice and provide legal assistance to the funds to whom Mr. Nadel provided services. In the same timeframe, a clearing house named Spear, Leeds & Kellogg LP (n/k/a Goldman Sachs Execution & Clearing LP ("GSEC")), provided certain services to Mr. Nadel, including permitting him to use certain off books accounts in connection with his scheme.

WOF invested approximately $1.7M in Valhalla between October of 2001 and March of 2005, becoming a limited partner in Valhalla. WOF subsequently redeemed its interests in Valhalla between the end of the third quarter in 2006 and the end of the fourth quarter of 2007, receiving approximately $4 million from Valhalla. Valhalla was placed into receivership in January 2009, and Mr. Nadel pled guilty to securities fraud and was subsequently imprisoned.

WOF was sued in federal court for both the principal and returns made in the Valhalla investment. While the Receiver sometimes claims that Mr. Nadel ran a $330 million scheme, claims by investors were only $168 million. In addition to WOF, the Receiver sued 120 other

innocent investors for the return of $32,755,269 in so-called "false profits." Twelfth Report at 38.[1] As of October 2012, the Receiver had settled many of these claims for $22,573,977. *Id.* According to its disclosures to the federal court, the Receiver only has approximately $10 million in outstanding claims against innocent victims of Mr. Nadel's fraud who received more in the investments than they paid in. The claims against WOF for $4 million are among those in the $10 million outstanding clawback claims by the Receiver.

A. THE CLAIMS AGAINST HOLLAND & KNIGHT AND GOLDMAN SACHS.

Between August of 2009 and August of 2012, the Receiver and a class of defrauded limited partners, including limited partners of Valhalla, sued H&K for fraud, malpractice, and related claims seeking $168 million in damages. *See* Tenth Report at 54. In the course of the litigation, the Receiver concluded that "H&K prepared various Private Placement Memoranda ('PPMs') used to sell certain interests in the Hedge Funds; that H&K represented the Hedge Funds, as well as Nadel's management companies; and that H&K may have failed to appropriately respond to certain 'red flags' that could, upon further inquiry, have revealed Nadel's scheme. After [his] investigation, [he] concluded that H&K breached certain duties to the Hedge Funds and allowed conflicts of interest to go unresolved." Wiand Decl. ¶ 5, No. 8:09-cv-87, Dkt. 899 (M.D. Fla. Aug. 28, 2012), attached hereto as Exhibit A.

Likewise, the Receiver investigated claims against GSEC for related issues. He determined that "while GSEC had no actual knowledge of Nadel's scheme and provided only customary prime brokerage services at the request of Shoreline, GSEC may have failed to appropriately respond to certain 'red flags' that could, upon further inquiry, have revealed Nadel's scheme. In addition, [he] determined that GSEC may have failed to raise certain

[1] The Receiver's are periodically filed with the federal court in the Middle District of Florida and are available at http://www.nadelreceivership.com/receiverreports.html.

questions with respect to accounts controlled by Nadel." Wiand Decl. ¶ 7, No. 8:09-cv-87, Dkt. 680 (M.D. Fla. Dec. 14, 2011), attached hereto as Exhibit B. For example, GSEC permitted Nadel to use "shadow accounts" at Wachovia to perpetuate his fraud and GSEC permitted Nadel to move funds between its official accounts and those shadow accounts when a reasonable clearing institution would have uncovered the fraud. *Id.* ¶ 12. As with H&K, the Receiver sought to hold GSEC responsible for the full $168 million that represented the losses by the investors in the hedge funds. *Id.* ¶ 11.

B. THE RECEIVER SETTLES THE CLAIMS AGAINST HOLLAND & KNIGHT AND GOLDMAN SACHS.

On December 14, 2011, the Received sought judicial approval of his negotiated settlement with GSEC. The settlement required GSEC to pay the receivership $9,850,000 "in resolution of all claims against that entity as well as the entry of a bar order." Order at 2, No. 8:09-cv-87, Dkt. 742 (M.D. Fla. Feb. 10, 2012), attached hereto as Exhibit C. Several clawback defendants objected to the bar order, arguing that they would not receive compensation for the claims being settled and that the bar order unfairly prejudiced their rights to sue GSEC. The Court noted that the "Receiver additionally demonstrates that entry of the bar order facilitates a *higher* settlement value and, therefore, a larger recovery for claimants tha[n] would otherwise be available without the bar order." *Id.* at 3 (emphasis added).

The GSEC bar order provides:

> *All individuals or entities who invested money in a Receivership Entity*, as well as persons or entities who may have liability to Receiver, the Receivership Entities, or such investors arising or resulting from the fraudulent scheme underlying the SEC Receivership Action . . . *are permanently enjoined and barred from commencing or pursuing a claim, action, or proceeding of any kind and in any forum against GSEC* that arises from or relates to the clearing, execution, and/or prime brokerage services that GSEC performed for Receivership Entities.

Id. at 7 (emphasis supplied). In exchange for the loss of claims against GSEC, anyone losing a claim is entitled to a judgment credit.

> *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.*

Id. at 7–8 (emphasis supplied).

On August 28, 2012, the Receiver filed a signed settlement agreement in the H&K action, wherein H&K agreed to pay $25 million in settlement of claims. In connection with the settlement, the federal court entered another bar order, which provides in relevant part:

> IT IS FURTHER ORDERED that *all individuals or entities who invested money in a Receivership Entity*, as well as all persons or entities who may have liability to the Receiver, the Receivership Entities, or such investors arising or resulting from the operations of any of the Receivership Entities or from the fraudulent scheme underlying the SEC Receivership Action . . . *are permanently enjoined and barred from commencing or pursuing a claim, action or proceeding of any kind and in any forum against H&K* that directly or indirectly arises from or relates to the operation of the Receivership Entities or is in connection with any of the legal services that H&K performed in connection with the Receivership Entities, including the Relief Defendants, or the allegations of the SEC Receivership Action.

Order at 3–4, No. 8:09-cv-87, Dkt. 922 (M.D. Fla. Oct. 2, 2012) (emphasis supplied), attached hereto as Exhibit D. Any claim that WOF may wish to assert against H&K for the failures to identify and correct the securities fraud perpetuated by Mr. Nadel has been barred by the court's bar order. In compensation for the loss of its claims against H&K, WOF was awarded a judgment credit:

> IT IS FURTHER ORDERED *that said injunction bars all claims against H&K for contribution, indemnity, or any other cause of action* arising from

> the liability of any person or entity 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.*

Id. at 4 (emphasis supplied).

II. ARGUMENT AND CITATION TO AUTHORITY

In this case, Burton Wiand (the "Receiver") represents Valhalla Investment Partners, L.P. ("Valhalla") and asserts claims for unjust enrichment and fraudulent transfer. WOF's objections to the merits in this arbitration are more fully stated in its response to the Receiver's statement of claim. This motion does not directly address those merits. Instead, because the Receiver signed and a court entered multiple orders barring claims against certain culpable persons, WOF received several judgment credits. This motion addresses the impact of these judgment credits.

Over the years, the Receiver has sought to hold many individuals and entities responsible for the entire amount of Mr. Nadel's fraud—approximately $168 million. Rather than pursue any of those claims to trial and a judgment, the Receiver has compromised those claims, in amounts of his choosing—variously $2.5 million, $9.85 million, and $25 million.[2] Yet, these discretionary acts of settlement for less than $168 million have potentially deprived the investors in the funds of a recovery of the amounts that they lost. Had the Receiver obtained a full recovery in his lawsuits, he would have been able to reimburse the investors completely for their losses.

---

[2] This motion addresses only the two largest bar orders currently docketed in the federal court action, since the $35 million in judgment credits provided by those two orders alone exceeds the entire balance of the claims made in the clawback actions. This motion does not attempt to catalogue every credit that WOF might be entitled to use as an offset to the Receiver's claims for damages, although the efforts of the Receiver to collect assets for the estate are more fully documented in his interim receivership reports.

An important consequence for this arbitration is that the Receiver would have lacked any injuries to pursue in his clawback actions if he had recovered sufficient funds through his other efforts. Fundamentally, the Receiver has traded claims against people and entities he believes participated in the wrong-doing for clawback claims against innocent investors, including WOF.

In connection with compromising the claims of the receivership and the investors, the Receiver also provided an additional incentive for alleged participants in the fraud to settle by negotiating a bar order to benefit them. These orders bar claims against the settling defendants by any investor for claims related to Mr. Nadel's fraud. Thus, without receiving any monetary benefit in the Receiver's settlements, WOF is forever barred from obtaining relief from the very people that the Receiver believes aided and abetted Mr. Nadel's fraud. Those parties who paid the Receiver money would otherwise be subject to an action by WOF for indemnity and damages should the Receiver succeed in this arbitration. WOF was, however, given a judgment credit in lieu of any suit it might wish to bring against the parties with whom the Receiver settled. This motion seeks to enforce that right.

A. THE BAR ORDERS EFFECTIVELY PROHIBIT WOF FROM SEEKING INDEMNIFICATION FROM H&K AND GSEC, AND WOF IS THEREFORE ENTITLED TO A JUDGMENT CREDIT.

The Receiver has made his bed, and now he must lie in it. The Receiver was willing to settle cases against H&K and GSEC for $25 million and $10 million respectively. He gave those settling parties substantial non-monetary concessions, including perpetual peace from further litigation involving and relating to the investment funds that constitute the receivership estate. *In re Oil & Gas Litig.*, 967 F.2d 489, 494 (11th Cir. 1992) ("Defendants buy little peace through settlement unless they are assured that they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation."). For the Receiver, the cost of selling peace to H&K and GSEC is an

inability to maintain suits against anyone barred by the court's order unless the amounts sought exceed at least the sum of the two settlement amounts. *In re Healthsouth Corp. Sec. Litig.*, 572 F.3d 854, 861 (11th Cir. 2009) (observing that "plaintiffs will recover nothing at all from [defendant] and other non-settling defendants unless the verdict exceeds [the settlement amount of] $445 million").

In this case, the Receiver has sued WOF for return of funds that he alleges were wrongfully disbursed in connection with a fraud perpetuated by Mr. Nadel. The underlying basis for the suit is that other investors in Valhalla did not receive a return on their investment, as they had been lead to believe. Using the Receiver's terminology, those other investors lost their money, and those losses amounted to something on the order of $168 million. This is the same loss for which he sued GSEC and H&K.

The Receiver has the duty and obligation to pursue wrong-doers and those associated with them to recover money for the investors who lost money in the investment fraud. Rather than pursue those claims to judgment, the Receiver compromised those claims for the certainty of a lesser payout. But he also barred people and entities (like WOF) from maintaining their own suits. The quid pro quo of the bar order requires a judgment reduction in this case.

In fact, the bar orders entered into in these cases are explicit and almost seem written to protect clawback defendants. WOF is one of the "individuals or entities who invested money in a Receivership Entity." GSEC Order at 7; H&K Order at 3–4. WOF is also a "person[] who may have liability to Receiver, the Receivership Entities, or such investors arising or resulting from the fraudulent scheme underlying the SEC Receivership Action." *Id.* WOF is therefore barred from asserting any of the very (presumably meritorious) claims previously asserted by the class of investors represented by the Johnson Pope firm in the H&K action or the Receiver's pre-

suit negotiations with GSEC.[3] Because of the bar orders, WOF cannot assert those claims or related claims for indemnity.[4]

Finally, the judgment credit applies when a subsequent suit bars not simply claims against joint tortfeasors but rather when the "injury is the liability to the Receiver or any of the Receivership Entities" or "where damages are calculated based on liability to the Receiver or any of the Receivership Entities." GSEC Order at 7–8. Here, WOF meets the standards in the bar orders because any claim against GSEC or H&K would be based on an injury to WOF that is an alleged liability to Valhalla and the damages to-be-sought against GSEC or H&K would be "calculated based on liability to the Receiver." The bar order is not limited to joint tortfeasors, since it bars anyone who has any liability to the Receiver. It was intentionally worded broadly to afford the settling defendants the maximum protection from follow-on lawsuits. In fact, the settling defendants likely had exactly the clawback defendants in mind in requesting the bar order.

B. Because of the Judgment Reduction Required by the Bar Order, the Receiver Cannot Obtain a Judgment Against WOF

The judgment credits in the bar orders effectively render the Receiver's claims against WOF valueless. Courts considering enforcement of bar orders replicate the fairness inquiry that warranted their initial imposition. Thus,

---

[3] The Receiver paid the Johnson Pope firm $6.8 million for its legal services in connection with representing the class of fund investors in actions against H&K. Receiver's Motion to Approve Settlement at 16, No. 8:09-cv-87, Dkt. 898 (M.D. Fla. Aug. 28, 2012), attached hereto as Exhibit E. The class expressly excluded clawback defendants.

[4] Under the bar orders, WOF need not prove its claims for liability or indemnity against the settling defendants. Those claims are barred, and WOF was granted a judgment credit. WOF's claims for indemnity are clearly established under Florida law. *Fla. Dep't of Nat. Res. v. Garcia*, 753 So. 2d 72, 77 (Fla. 2000) ("At common law, a nonnegligent party who is vicariously liable for the tortious actions of another can seek indemnification from the tort-feasor.").

> Bar orders prohibiting these claims are permissible if they ensure fairness to non-settling defendants. By ensuring that . . . the non-settling defendants are not held responsible for any damages for which the settling defendants are proven liable, [the bar order] adequately compensates the non-settling defendants for their indemnity and contribution claims . . . . Ordinarily, the potential harshness of a bar order is mitigated by a judgment credit provision that protects a non-settling party from paying damages exceeding its own liability. The non-settling defendants are adequately protected by the judgment reduction provision.

AllState Ins. Co. v. Halima, No. 06-cv-1316, 2008 U.S. Dist. LEXIS 49414, at *5-6 (E.D.N.Y. June 26, 2008) (citations and alterations omitted). WOF is adequately protected in its lost rights to seek indemnity from GSEC and H&K only if the judgment credits provided in the bar orders are enforced against the Receiver.

Because it was the Receiver, rather than WOF, who agreed to a limitation on the liability of GSEC and H&K to the defrauded investors (including WOF), and because it was the Receiver who agreed to allow judgment credits to people and entities with claims against GSEC and H&K, it is the Receiver who reaps the consequences of what he previously sowed. This outcome is fair, first because it is the deal that the Receiver himself struck and the federal court approved. Second, it is fair because it was the Receiver's decision to limit his recovery to something less than the full amounts owed to the defrauded investors who lost money in the scheme. Finally, it is fair because WOF has been deprived of its valuable rights to seek recovery from persons and entities that the Receiver believes were complicit in Mr. Nadel's fraud—those rights that were sold by the Receiver in December 2011 and August 2012 for cash. By opposing this motion, the Receiver suggests that WOF received *nothing* in exchange for the Receiver's taking of something valuable—WOF's legal right to sue GSEC and H&K is barred only to the extent WOF also benefits from the judgment credits. The Receiver's opposition to the application of the judgment credits in this arbitration evoke many barnyard aphorisms, including (1) foxes and

henhouses, (2) all animals are equal, but some are more equal than others, (3) birds in hands and birds in bushes, and (4) geese and ganders. Having compromised his claims against the parties he believes abetted a fraudster, the Receiver should abide by the deals he struck with them and forego collecting from innocent investors.

Because the Receiver's claim for $4 million against WOF is less than the judgment credits available (in excess of $35 million), the Receiver should not recover in this arbitration and an award should issue confirming the Receiver's lack of entitlement to monetary relief.

III. CONCLUSION

For the reasons stated herein, WOF respectfully asks the panel to enforce the judgment credits provided by the bar orders negotiated by the Receiver. Because the Receiver seeks less than the full value of either settlement amount, he is not entitled to have any recovery in this action.

Respectfully submitted, this 11th day of December, 2012.

/s/ James E. Connelly
James E. Connelly
Georgia Bar No. 181808
jconnelly@wcsr.com
Mark A. Rogers
Georgia Bar No. 142487
marogers@wcsr.com

Womble Carlyle Sandridge & Rice, PLLC
271 17th Street, Suite 2400
Atlanta, Georgia 30363
Telephone: 404-872-7000
Facsimile: 404-888-7490

Attorneys for World Opportunity Fund, L.P.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this motion has been filed electronically with the case administrator for the American Arbitration Association as well as served by email on all attorneys of record.

This 11th day of December, 2012.

/s/ Mark A. Rogers
Mark A. Rogers