UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No. 8:09-cv-0087-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 ENJOIN COURT PROCEEDINGS

Pursuant to Rule 66 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1651, and Rule 3.01 of the Local Rules for the Middle District of Florida, Burton W. Wiand, as Receiver, moves the Court for an order enjoining (1) *R. Formica et al. v. D. Rowe et al.*, Case No. 8:11-cv-516-MSS-EAJ (M.D. Fla.) (the "**Formica Case**"); and (2) *J. Bell, II et al. v. D. Rowe et al.*, Case No. 2009 CA 4925 NC (Fla. 12th Judicial Cir. Ct., Sarasota County) (the "**Bell Case**") (collectively, the "**WSD Subscriber Cases**").

BACKGROUND

On January 21, 2009, this Court appointed Burton W. Wiand (the "**Receiver**") as Receiver for Valhalla Investment Partners, L.P. ("**Valhalla Investment**"); Viking Fund, LLC ("**Viking Fund**"); Viking IRA Fund, LLC ("**Viking IRA Fund**"); Victory Fund, Ltd. ("**Victory Fund**"); Victory IRA Fund, Ltd. ("**Victory IRA Fund**"); and Scoop Real Estate, L.P. ("**Scoop Real Estate**") (collectively, the "**Hedge Funds**").[1] (*See* Order Reappointing Receiver (Doc. 935)). Documents previously filed in this Securities & Exchange Commission enforcement action (the "**Commission Proceeding**") detail the fraudulent investment scheme that underlies this action (the "**scheme**") (*See, e.g.,* Receiver's 12th Interim Report (Doc. 929)). Further, in ancillary "clawback" cases brought by the Receiver, this Court held that Arthur Nadel ("**Nadel**") operated the Hedge Funds as "a massive Ponzi scheme" during the entire time that transfers were made to investors in the scheme. *See Wiand, as Receiver v. Dancing $, LLC*, Case No. 8:10-cv-92-T-17MAP (M.D. Fla.) (Doc. 121), *adopted* (Doc. 128); *Wiand, as Receiver v. D. Cloud*, Case No. 8:10-cv-150-T-17MAP (M.D. Fla.) (Doc. 70), *adopted* (Doc. 76); *Wiand, as Receiver v. Lee*, Case No. 8:10-cv-210-T-17MAP (M.D. Fla.) (Doc. 163), *adopted* (Doc. 169); *Wiand, as Receiver v. Mason*, Case No. 8:10-cv-2146-T-17MAP (M.D. Fla.) (Doc. 71), *adopted* (Doc. 78); *Wiand, as Receiver v.*

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[1] Mr. Wiand was also appointed Receiver over Scoop Capital, LLC; Scoop Management, Inc.; Venice Jet Center, LLC; Tradewind, LLC; Laurel Mountain Preserve, LLC; Laurel Preserve, LLC; Marguerite J. Nadel Revocable Trust UAD 8/2/07; Laurel Mountain Preserve Homeowners Association, Inc.; Guy-Nadel Foundation, Inc.; Lime Avenue Enterprises, LLC; A Victorian Garden Florist, LLC; Viking Oil & Gas, LLC; Home Front Homes, LLC; Traders Investment Club; Summer Place Development Corporation; and Respiro, Inc. (Docs. 8, 17, 44, 68, 79, 140, 153, 172, 454, 911, and 916) (collectively, the "**Receivership Entities**").

Meeker, Case No. 8:10-cv-166-T-17MAP (M.D. Fla.) (Doc. 125), *adopted* (Doc. 134); *Wiand, as Receiver v. Morgan*, Case No. 8:10-cv-205-T-17MAP (M.D. Fla.) (Doc. 124), *adopted* (Doc. 130); *Wiand, as Receiver v. Rowe*, Case No. 8:10-cv-245-T-17MAP (M.D. Fla.) (Doc. 106). On January 20, 2010, the Receiver filed a complaint against Donald Rowe, individually ("**D. Rowe**") and as Trustee of The Wall Street Digest Defined Benefit Pension Plan (the "**Plan**"); Joyce Rowe ("**J. Rowe**," collectively with D. Rowe, the "**Rowes**"); and one of the Rowes' entities, Carnegie Asset Management, Inc. ("**CAM**") (collectively, the "**Rowe Defendants**"), to recover sums received from the Hedge Funds and Receivership Entities. *See generally Rowe*, Case No. 8:10-cv-245-T-17MAP (M.D. Fla.). To resolve *Rowe*, the Receiver and the Rowe Defendants entered into a settlement agreement on January 27, 2013 (the "**Settlement Agreement**") (*see* Doc. 960, Ex. A). As part of the Settlement Agreement, the Rowe Defendants consented to entry of a joint and several judgment against them in favor of the Receiver for $4,278,385 and agreed to use an annuity to pay the Receiver $250,000. In addition, the Receiver agreed to move this Court to enjoin the pending WSD Subscriber Cases (*see* Doc. 960 at 6). On February 5, 2013, the Court entered an Order approving the Settlement Agreement. (*See* Order Granting Motion to Approve Settlement (Doc. 963)).

In February 2010, Richard Formica, an investor in Nadel's scheme, along with Marilynn Formica, Ami Marie Formica, Matthew Francis Formica, and Kevin Francis Formica, commenced the Formica Case in the United States District Court for the District of New Jersey against D. Rowe, CAM, and another entity controlled by D. Rowe, The Wall Street Digest ("**WSD**"), to recover damages arising from Rowe's solicitation and

involvement with the Hedge Funds as well as other investments that were not related to this case. A copy of the operative Complaint in the Formica Case is attached as **Exhibit 1**.[2] Similarly, in March 2009, Joseph T. Bell, II commenced, and later several other investors in Nadel's scheme joined,[3] the Bell Case in the Circuit Court of Sarasota County, Florida, against D. Rowe, CAM, and WSD to recover damages arising from Rowe's solicitation and involvement with the Hedge Funds. A copy of the operative Complaint in the Bell Case is attached as **Exhibit 2**.

In light of the caselaw discussed below and the Court's injunction issued earlier in this case to stop another proceeding (*see* Doc. 190), the parties in the WSD Subscriber Cases should have foreseen the possibility of their cases being enjoined. In fact, in his December 13, 2010, written responses and objections to a subpoena served by the plaintiffs in the Formica Case, the Receiver warned the Formica Case plaintiffs that he "reserve[d] the right to move any appropriate court, including [this Court] . . . , to enjoin" the Formica Case "to the extent it interferes with the Receivership or for any other appropriate reason."

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[2] On March 11, 2011, the Formica Case was transferred to the Middle District of Florida, Case No. 8:11-cv-00516-MSS-EAJ (M.D. Fla.).

[3] Additional plaintiffs were added to the Bell Case through a Second Amended Complaint filed on February 11, 2010. The Bell Case plaintiffs presently include: Joseph T. Bell, II, individually and on behalf of the Joseph T. Bell, M.D. SEP IRA; Dennis Fleming, individually and on behalf of the Dennis Fleming IRA; Hamilton Hagar, individually and on behalf of the Hamilton Hagar IRA, SEP IRA, and Roth IRA; Scott Lochridge; Randolph Naylor, individually and on behalf of the Randolph Naylor IRA; Michael Ward, individually and on behalf of the Michael Ward SEP IRA; Marvin Berkman, individually and on behalf of the Marvin Berkman IRA; Larry W. Hull, individually and on behalf of the Larry W. Hull IRA; Roger B. Johnson, individually and on behalf of the Roger B. Johnson IRA, and his spouse, Li Hsu Johnson; Stuart H. Archer; and Charles Savoca, individually and on behalf of the Charles Savoca IRA, and his spouse, Barbara Savoca.

As explained below, a stay of the WSD Subscriber Cases is now necessary to preserve the Rowe Defendants' assets during the Receiver's efforts to collect on the $4,278,385 judgment obtained under the Settlement Agreement, and it is in the best interests of the Receivership Estate. Notably, all of the plaintiffs in the WSD Subscriber Cases are participating in the claims process in this case and have already received interim distributions from the Receiver. Specifically, the full claim amount for each of the plaintiffs in the Formica Case was allowed, and each plaintiff has received distributions for his or her respective amounts claimed. (*See* Receiver's Unopposed Mot. to Approve Determination of Claims and Supplemental Mot. (Doc. 675, Ex. B and Doc. 857)). Similarly, the full claim amounts for the following plaintiffs in the Bell Case were allowed: Joseph T. Bell, on behalf of the Joseph T. Bell, II, M.D. SEP IRA; Scott Lochridge; Randolph Naylor, individually and on behalf of the Randolph Naylor IRA; Michael Ward, on behalf of the Michael Ward SEP IRA; Marvin Berkman, individually and on behalf of the Marvin Berkman IRA; Roger B. Johnson, individually and on behalf of the Roger B. Johnson IRA, and his spouse, Li Hsu Johnson; Stuart H. Archer; Charles Savoca, individually and on behalf of the Charles Savoca IRA, and his spouse, Barbara Savoca. The claims of the remaining plaintiffs in the Bell Case were allowed in part as they were reduced by the amount of false profits experienced in some related "accounts" with the Hedge Funds. *See id.*

This Court previously enjoined a competing proceeding through its inherent powers to fashion equitable relief for the same reasons underlying this motion. Specifically, in an Order dated September 3, 2009, the Court enjoined *Louis D. Paolino, Jr. v. Neil V. Moody et al.*, Case No. 2009 CA 1876 NC (Fla. 12th Judicial Cir. Ct., Sarasota County) (the "**Paolino**

Case") (Doc. 190), in which an investor in Nadel's scheme sought to recover assets from "insiders" that were acquired with the proceeds of the fraudulent scheme that underlies this case. In issuing the Order, the Court observed that "[t]he realistic threat to this Court's already established jurisdiction over the receivership estate lies in the windfall that would go to a single investor, Paolino, at the expense of all the other defrauded investors waiting in line." *See* Doc. 190 at 7. Subsequently, the Court denied Paolino's Motion for Relief from Order/Clarification on September 8, 2009 (Doc. 192). In denying the motion, the Court confirmed its goal to ensure the Receiver "marshal all of the assets of the receiver's estate for the benefit of *all* defrauded investors and not just a select few. To that end, this Court will enjoin, under the appropriate circumstances, any other legal proceeding which will have the effect of undermining the Court's and the receiver's missions." (*See* Order Denying Motion for Relief from Order/Clarification (Doc. 192)) (emphasis in original). At this time, because the Receiver has obtained a judgment against the same defendants as in the Formica and Bell Cases and collections on that judgment will benefit all defrauded investors with allowed claims, the continuation of those cases will raise the very same concerns which previously prompted the Court to enjoin the Paolino Case and, consequently, the Formica and Bell Cases should be enjoined too.

ARGUMENT

I. THIS COURT HAS THE POWER TO ENJOIN COURT PROCEEDINGS PURSUANT TO THE ALL WRITS ACT

The Court's power to stay both federal and state court proceedings is derived from (1) the All Writs Act pursuant to 28 U.S.C. § 1651 and (2) the inherent powers of an equity court to fashion relief. *See generally SEC v. Nadel*, 2009 WL 2868642 (M.D. Fla. 2009); *SEC v.*

Credit Bancorp, Ltd., 93 F. Supp. 2d 475 (S.D.N.Y. 2000). The All Writs Act empowers United States District Courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Injunctive relief for both state and federal court proceedings falls within the scope of the All Writs Act. *See Wright v. Linkus Enterprises, Inc.*, 259 F.R.D. 468, 477 (E.D. Cal. 2009); *Newby v. Enron Corp.*, 302 F.3d 295, 301 (5th Cir. 2002).

While the Anti-Injunction Act, 28 U.S.C. § 2283, may preclude a district court from enjoining state court proceedings, injunctions sought by receivers in SEC enforcement actions like this case are often exempt from such preclusion, especially given the complex nature and multitude of parties involved in receivership proceedings. *See Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 476 (granting receiver's motion for order under All Writs Act and inherent power of Court to issue all orders necessary or appropriate in aid of its jurisdiction); *SEC v. Wencke*, 577 F.2d 619, 622–623 (9th Cir. 1978) (enjoining further proceedings in related state-court receivership because doing so "was necessary for the [federal] receivership to achieve its purposes"); *see also Becker v. Greene*, 2009 WL 2948463, *4 (M.D. La. 2009) (noting "[t]he 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.'"). As such, pursuant to a federal court's power under the All Writs Act, "a federal court may enjoin actions in other jurisdictions that would undermine its ability to reach and resolve the merits of the dispute before it." *Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 476 (internal quotations omitted).

II. THIS COURT'S POWER OVER EQUITY RECEIVERSHIPS IS EXTREMELY BROAD AND INCLUDES THE POWER TO ENJOIN COMPETING CASES

Independent of the All Writs Act, the Court's power to supervise an equity receivership and determine the appropriate action to be taken in the administration of the receivership is extremely broad. *See, e.g., SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). The Court's wide discretion derives from the inherent powers of an equity court to fashion relief. *See Vescor Capital Corp.*, 599 F.3d at 1193–1194 (concluding stay of all actions related to property held within receivership estate was well within the district court's broad equitable powers to fashion relief). The purpose of establishing a receivership is "to protect the estate property and ultimately return that property to the proper parties in interest," and a receiver is vested with the duty and authority to marshal and preserve assets to effectuate an orderly, efficient, and equitable administration. *Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 476–477; *Vescor Capital Corp.*, 599 F.3d at 1197 (observing "in 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."); *see also* 28 U.S.C. § 754 (noting a receiver "appointed in any civil action or proceeding involving property . . . shall be vested with complete jurisdiction and control of all such property with the right to take possession thereof."). In fact, "[s]uch efforts would be rendered meaningless if third parties are permitted to obtain judgments against the estate and thereby deplete its assets." *Credit*

Bancorp, Ltd., 93 F. Supp. 2d at 477 (internal quotations omitted). As such, a district court presiding over an equity receivership in a Commission enforcement action has the power to stay "competing actions." *Id.*

Courts have expressly recognized the need in receivership proceedings to stay competing actions. *See Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 477 (observing "where 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" and "[t]he 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."); *see also Eller Industries, Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F.Supp. 369, 373 (D. Colo. 1995) ("Federal Courts have the power, if necessary, to take control over an entity and impose a receivership free from interference in other court proceedings."); *Oppenheimer v. San Antonio Land & Irrigation Co.*, 246 F. 934, 935 (5th Cir. 1917) (noting district court has "complete jurisdiction and control" over receivership property, and, thus, "was not in error in restraining proceedings in another court involving the same subject-matter."). Indeed, the absence of such authority would render the receivership process meaningless because non-parties could deplete the receivership estate or prevent it from recovering assets simply by filing competing actions. *See Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 477; *see also Foshee v. Forethought Fed. Sav. Bank*, 2010 WL 3239272, *10 (W.D. Tenn. 2010) (theorizing that allowing plaintiffs to proceed with a separate federal action would serve to circumvent Receiver's exclusive control over receivership property).

This Court's Order Reappointing Receiver expressly authorizes, empowers, and directs the Receiver to "[d]efend, compromise or settle legal actions . . . [and] the Receiver may file appropriate pleadings in the Receiver's discretion." (*See* Doc. 935 at ¶ 6). And, as in *Credit Bancorp*, the Order Reappointing Receiver here requires that the Receiver "marshal and safeguard all of the assets of the Receivership Entities and take whatever actions are necessary for the protection of the investors." (Doc. 935). Here, collection of the $4.2 million judgment as part of the Settlement Agreement will add significant value to the Receivership Estate for the benefit of all defrauded investors with allowed claims, including the plaintiffs in the Bell and Formica Cases. Allowing the WSD Subscriber Cases to proceed at this time would necessarily require the Rowes to expend assets for their defense which could otherwise be used to satisfy the $4.2 million judgment in favor of the Receiver.

Further, the Receiver is acting for the benefit of all defrauded investors, including the plaintiffs in *Bell* and *Formica*; in contrast, the plaintiffs in those cases are acting solely for their own benefit. Allowing them to continue with competing state and federal court actions now that the Receiver has a judgment against the same parties those plaintiffs are pursuing would, if those plaintiffs also obtain judgment, provide them with all of the benefit of the assets funded with proceeds of the scheme at the expense of all other defrauded investors with allowed claims. This would result in an improper preference to the *Bell* and *Formica* plaintiffs and interfere with the Receiver's duty to marshal assets. *See e.g. SEC v. George*, 426 F.3d 786, 799 (6th Cir. 2005) ("'[E]quality is equity' as between 'equally innocent investors'...."); *see also Elliott*, 953 F.2d at 1570.

In sum, allowing the WSD Subscriber Cases to continue will benefit the *Bell* and *Formica* plaintiffs to the detriment of all other losing investors with allowed claims and thwart the fundamental purpose of a receivership. *See SEC v. Pittsford Capital Income Partners, LLC*, 2007 WL 61096, *2 (W.D.N.Y. 2007) (concluding fundamental purpose of receivership is to protect estate property and ultimately return it to proper parties). In receivership proceedings, courts are generally disinclined to allow non-parties to attempt to recover a larger portion of what they might be owed by means of instituting ancillary proceedings. *See Pittsford Capital Income Partners, LLC*, 2007 WL 61096 at *2 ("[G]ranting the relief requested by the Judgment Creditors would defeat this fundamental purpose because only a handful of victims would receive close to full compensation while the pro rata shares available to the hundreds of other victims would be significantly diminished."); *see also Foshee*, 2010 WL 3239272 at *10 (granting receiver's motion to stay federal court proceeding due to possibility of conflicting claims to assets in dispute); *SEC v. Universal Financial*, 760 F.2d 1034, 1038 (9th Cir. 1985) (refusing to lift receivership stay to allow investors to litigate claims due to concerns of diminution of possible receivership estate); *Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 476 (concluding that allowing non-party to continue prosecuting action would thwart Court's order directed at obtaining orderly and equitable administration of estate). To prevent that from happening here, the WSD Subscriber Cases should be enjoined from proceeding.

CONCLUSION

Allowing the WSD Subscriber Cases to continue will diminish the Rowe Defendants' assets that could otherwise be used to satisfy the $4.2 million judgment obtained by the

Receiver against them. Further, it will raise the risk that assets which should go to the Receivership Estate for the benefit of all defrauded investors with allowed claims will instead only benefit the plaintiffs in the WSD Subscriber Cases. All of this will prevent the Receiver from fulfilling his duty to marshal and safeguard the assets of the receivership estate. The WSD Subscriber Cases are each a "competing action" that may be enjoined to further the administration of the Receivership estate. *See Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 477. Accordingly, pursuant to the All Writs Act and the Court's equitable powers, the Bell and Formica Cases should be enjoined to ensure the Receiver has the best chance of collecting on the pertinent judgment for the benefit of the receivership and all defrauded investors with allowed claims, including the plaintiffs in the Bell and Formica Cases.

LOCAL RULE 3.01(g) CERTIFICATION OF COMPLIANCE

Counsel for the Receiver has conferred with counsel for the SEC, and the SEC takes no position on the relief requested in this motion.

CERTIFICATE OF SERVICE

I HERBY CERTIFY that on February 28, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on February 28, 2013, I mailed the foregoing document and the notice of electronic filing by first-class mail and email to the following non-CM/ECF participants:

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