UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

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

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

Defendants,

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

Relief Defendants.
_____/

THE RECEIVER'S UNOPPOSED MOTION FOR PERMISSION TO PROSECUTE LIMITED CROSS-APPEALS

Burton W. Wiand, as Receiver (the "**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**") and for Traders Investment Club, moves this Court for permission to proceed with limited cross-appeals regarding substantively identical portions of two orders entered by the Honorable Elizabeth A. Kovachevich on January 23, 2013, incorporating and adopting reports and

recommendations issued by Magistrate Mark A. Pizzo in *Wiand, as Receiver v. Lee*, Case No. 8:10-cv-210-T-17MAP (M.D. Fla.) (*see* Docs. 163, 169), and *Wiand, as Receiver v. Dancing $*, Case No. 8:10-cv-92-T-17MAP (M.D. Fla.) (*see* Docs. 121, 128) (collectively, the "**Orders**") granting summary judgment in favor of the Receiver but denying his request for prejudgment interest. The pertinent documents are attached as **Exhibits A, B, C, and D**.

The Orders correctly concluded Arthur Nadel ("**Nadel**") operated "a massive [P]onzi scheme" through the Hedge Funds; that as part of that scheme, Nadel made transfers to the defendants with the actual intent to hinder, delay, or defraud any creditor of Nadel as required by Fla. Stats. § 726.105(1)(a); and that the Receiver is entitled to summary judgment in the amount of the defendants' "**false profits**" (*i.e.*, the amount the defendants received from Nadel's scheme in excess of the amount they invested; investors who received false profits are referred to as "**profiteers**"). Of course, the Receiver has no objection to these legally and factually-supported conclusions. The defendants in *Lee* and *Dancing $*, however, noticed their appeals of these Orders.

With respect to the Receiver's request for prejudgment interest, the Orders "balance[ed] the equities at hand" and concluded they weighed in favor of the defendants and against an award of prejudgment interest because, although the defendants are "net winner[s]" (or profiteers) as compared to the hundreds of investors who lost approximately $168 million in Nadel's Ponzi scheme (the "**losing investors**"), the defendants nevertheless have "suffered enough." The Receiver believes this conclusion is erroneous because it inequitably advantages the defendants at the expense of the Hedge Funds and defrauded investors who lost money in the scheme for three main reasons: (1) even after losing their

cases, the defendants are far better off than the losing investors because they only have to return their false profits; (2) while the vast majority of investors with false profits voluntarily repaid them to the Receiver, the defendants made the Receivership expend resources to litigate their cases to judgment – which took approximately three years; and (3) because Nadel operated a Ponzi scheme through the Hedge Funds, the defendants necessarily received money stolen from other investors (*see In re Slatkin*, 525 F.3d 805, 815 (9th Cir. 2008) (noting that source of false profits paid to Ponzi scheme investor "was a theft from the other investors")) and the Receiver is entitled to the return of that money with interest (*see, e.g., Moran v. Goldfarb,* 2012 WL 2930210, *9 (S.D.N.Y. 2012) ("[T]he Receiver, on behalf of investors who lost their investments in the Ponzi scheme, is entitled to prejudgment interest on [investor-defendant's] false profits" because investor-defendant "received money that was never in fact his to spend.")).

Notably, as previously mentioned, the defendants in the *Lee* and *Dancing $* cases have already filed Notices of Appeal with respect to the Orders' principal conclusions (*see Lee* Doc. 171; *Dancing $* Doc. 131), and the Receiver seeks only to file limited cross-appeals with respect to the Orders' denial of prejudgment interest on the Receiver's fraudulent transfer claims. The Receiver is not seeking to appeal this issue in any case in which the defendant does not initiate the appeal. As explained in more detail below, the Receiver's arguments in favor of his entitlement to prejudgment interest have merit. In addition, the cross-appeals are in the best interests of the Receivership estate for at least three other reasons: (1) the Receiver will be forced to oppose the defendants' appeals in any event, and his cross-appeals will impose only minimal additional costs on the Receivership estate;

(2) the Receiver seeks more than $474,000 in prejudgment interest from the defendant-appellants; and (3) the Orders discourage settlement and incentivize delay and obstruction, including the advancement of borderline frivolous legal arguments, by allowing profiteers to retain stolen funds as long as possible without penalty, which is detrimental to losing investors who are eligible to receive distributions from the Receivership estate and unfair to the profiteers who voluntarily returned their false profits and thus saved the Receivership estate the resources of having to recover them through a judgment.

ARGUMENT

"It is a well-established rule that as an officer of the court, 'a receiver may not ordinarily appeal without first obtaining authority from his creator, the court appointing him." *Holland v. Sterling Enters., Inc.*, 777 F.2d 1288, 1291-92 (7th Cir. 1985) (quoting *Hatten v. Vose,* 156 F.2d 464, 468 (10th Cir. 1946)). This rule, however, is not jurisdictional in nature, and there is no authority to suggest that a receiver can toll the deadline for filing notices of appeal under Rule 4 of the Federal Rules of Appellate Procedure to obtain approval. *See Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274, 1276-77 (7th Cir. 1997). The Receiver's deadlines to file Notices of Appeal were February 22 and 23, 2013.[1]

Meritorious Grounds For The Receiver's Cross-Appeals

The Receiver believes his arguments in favor of his entitlement to prejudgment interest have merit. First, although the Orders concluded the defendants have "suffered

[1] To preserve his rights, the Receiver has already filed Notices of Appeal in the relevant cases. *See Lee* Docs. 181, 183; *Dancing $* Doc. 132. If the Court grants this motion, the Receiver will proceed with the cross-appeals. If the Court denies this motion, the Receiver will dismiss the cross-appeals.

enough," prejudgment interest is not punitive. *See, e.g., Comprehensive Care Corp. v. Katzman*, 2011 WL 2938268, *7 (M.D. Fla. 2011) (prejudgment interest is "merely another element of pecuniary damages that serves to make the party whole") (*citing Argonaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212, 214-15 (Fla. 1985)). "Prejudgment interest should not be thought of as a windfall…; it is simply an ingredient of full compensation that corrects judgments for the time value of money." *Donell v. Kowell,* 533 F.3d 762, 772 (9th Cir. 2008); *Moran,* 2012 WL 2930210 at *9 ("[T]he Receiver, on behalf of investors who lost their investments in the Ponzi scheme, is entitled to prejudgment interest on [investor-defendant's] false profits" because investor-defendant "received money that was never in fact his to spend.").

Second, courts routinely award prejudgment interest on fraudulent transfer claims against "winning" Ponzi scheme investors – or profiteers – like the defendant-appellants. *See In re Slatkin*, 525 F.3d 805, 820 (9th Cir. 2008) (affirming prejudgment interest award); *In re Agric. Research & Tech. Group, Inc.*, 916 F.2d 528, 541-42 (9th Cir. 1990) (same, noting return of funds with interest is "a sensible result" because transferees "enjoyed the benefit of the transferred funds"); *Wing v. Buchanan*, 2012 WL 775688, *2 (D. Utah 2012) (granting summary judgment in favor of receiver for false profits and prejudgment interest); *Fisher v. Cooper*, 2009 WL 5177768, *4 (D. Haw. 2009) (awarding prejudgment interest); *In re National Liquidators, Inc.*, 232 B.R. 99, 102 (Bankr. S.D. Ohio 1999) (same); *La Bella v. Bains*, 2012 WL 1976972, *5 (S.D. Cal. 2012) (same); *Moran,* 2012 WL 2930210 at *9 (same); *In re Ramirez Rodriguez*, 209 B.R. 424, 434 (S.D. Tex. 1997) (same); *In re Ramirez Rodriguez*, 204 B.R. 510, 518 (S.D. Tex. 1995) (same, noting "[a]n award of prejudgment

interest to the trustee will compensate debtors' estates for [transferee's] use of those funds that were wrongfully withheld from the estates during the pendency of this case"); *In re Indep. Clearing House*, 77 B.R. 843, 875-76 (D. Utah 1987) (same).

Third – and the reason why courts routinely award prejudgment interest in these matters – the goal of a receivership court is to treat similarly situated investors equally because "equality is equity," yet here even if the defendants are required to pay prejudgment interest, they will still be better situated than the hundreds of defrauded losing investors who collectively lost approximately $168 million. *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 defendants claim to be entitled."); *Donell,* 533 F.3d at 772 ("Most of the scheme's 5,200 net losers are likely to recover only pennies on the dollar of their initial investment."); *Moran,* 2012 WL 2930210 at *7 n.4 ("[T]here is no reason that [investor-defendant] or his wife should fare *better* than the other investors who were victimized by [Ponzi perpetrator]"). They will still be better off because although losing investors have now recovered approximately 37% of their losses through the claims process as a result of the Receiver's efforts, without the payment of prejudgment interest, the defendants will have suffered **no** loss because they will only have paid back their "false profits." And with their payment of prejudgment interest, the *Lee* defendants will still have retained approximately 76.6% and the *Dancing $* defendant approximately 95% of the money each invested in the scheme (as compared to only 37% for the majority of losing investors).

The Cross-Appeals Are In The Best Interests Of The Receivership

The Receiver believes the cross-appeals of the Orders are in the best interests of this Receivership, as they are intended to maximize the estate for defrauded investors, who are the central focus of this Receivership and the Receiver's efforts to marshal assets. *See Marion v. TDI, Inc.*, 2006 WL 3742747, *2 (E.D. Pa. 2006) ("The whole purpose of the SEC proceeding is to remedy violations of the securities laws for the benefit of investors."). Specifically, the Receiver seeks prejudgment interest of more than $474,000 from the defendants in *Lee* and *Dancing $*, and because those defendants have already filed Notices of Appeal in connection with the Orders, the marginal cost to the Receivership estate of bringing the cross-appeals in addition to opposing the defendants' appeals will be minimal (and certainly only a fraction of the amount sought from the defendants).

Further, the Orders set a problematic precedent for equity receiverships generally by discouraging settlement and incentivizing delay, obstruction, and free-riding by clawback defendants. Because Nadel operated a Ponzi scheme through the Hedge Funds, winning investors (including the defendant-appellants) necessarily received money stolen from losing investors. *See In re Slatkin*, 525 F.3d at 815 (noting that source of false profits paid to Ponzi scheme investor "was a theft from the other investors"). Although as a general rule winning investors were not part of (or, in most cases, even aware of) Nadel's theft, they nevertheless benefitted from the stolen funds for many years. Under such circumstances, there were clearly no legitimate legal defenses to the Receiver's fraudulent transfer claims. *See In re Bayou Group*, LLC, 362 B.R. 624, 635-36 (Bankr. S.D.N.Y. 2007) ("[V]irtually every court to address the question has held unflinchingly that to the extent that investors have received

payments in excess of the amounts they have invested, those payments are voidable as fraudulent transfers."). To the extent the Orders essentially conclude a receiver should be precluded from recovering prejudgment interest simply because the defendants invested in a Ponzi scheme without knowing it, then the most winning investors will ever be required to disgorge is the amount of their false profits – *i.e.*, money that never rightfully belonged to them in the first place and that receivers have a clear right to recover. Such a limitation – which will still leave winning investors in a much better position than losing investors – will incentivize winning investors to delay the day they have to return their false profits as long as possible and proceed with litigation (and even take borderline frivolous positions to do so), which will unnecessarily raise costs for receivership estates and thus harm losing investors.[2] Notably, the defendants are among the first group of winning investors to have forced the

[2] There were many examples of borderline frivolous arguments by defendants in the Receiver's clawback cases. For example, the defendant in *Dancing $* relied on a purported expert who admitted that Nadel operated a Ponzi scheme through the Hedge Funds since at least 2006, and the defendant received all of its transfers from the scheme in 2008 – that defendant still somehow argued Nadel was not operating a Ponzi scheme. The defendants in *Lee* repeatedly raised standing-related arguments that have never been adopted by any court considering a receiver's ability to bring "clawback" actions and proffered an expert who admitted he had not conducted necessary analysis and even ignored Nadel's misrepresentations to investors. And the defendants are not alone. The defendant in *Wiand, as Receiver v. Buhl,* Case No. 8:10-CV-75-T-17MAP (M.D. Fla.), was sanctioned by the magistrate judge for failing to comply with his discovery obligations (*see Buhl* Doc. 69) and did not respond to the Receiver's summary judgment motion until the Magistrate Judge ordered him to do so (*see id.* Doc. 119). The defendant in *Wiand, as Receiver v. Khodorkovsky,* Case No. 8:10-CV-2148-T-17MAP (M.D. Fla.), failed to respond to either of the Receiver's summary judgment motions and ultimately filed bankruptcy. The defendant in *Wiand, as Receiver v. J. Cloud,* Case No. 8:10-CV-149-T-17MAP (M.D. Fla.), similarly delayed until the eve of trial and then filed for bankruptcy. These defendants' tactics demonstrate they perceive they have nothing to lose by retaining their false profits as long as possible. While they are free to adopt that strategy, it should have consequences – the payment of interest – once the Receiver prevails on his claims.

Receiver's claims to judgment.[3] Given the foregoing, it is in the best interests of this Receivership to proceed with the cross-appeals discussed above.

CONCLUSION

For the foregoing reasons, the Receiver respectfully asks the Court to grant him permission to prosecute the cross-appeals of the Orders with respect to the limited question of entitlement to prejudgment interest.

LOCAL RULE 3.01(g) CERTIFICATE OF COUNSEL

Counsel for the Receiver has conferred with counsel for the Securities and Exchange Commission, and the Commission has no objection to the requested relief.

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[3] Before filing any lawsuits in connection with Nadel's scheme, the Receiver sent demand letters to winning investors proposing settlement terms. As a result of those letters, the Receiver settled with at least 49 winning investors. The Receiver then filed approximately 150 lawsuits against winning investors who refused to settle. The vast majority of those suits have since settled or have otherwise been amicably resolved.

CERTIFICATE OF SERVICE

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

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