THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

Case No. 8:09-cv-0087-T-26TBM

-v-

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,
VICKING FUND, LLC, AND
VIKING MANAGEMENT,

Relief Defendants.

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THE FORMICAS' MEMORANDUM OF LAW IN OPPOSITION TO THE RECEIVER'S MOTION TO ENJOIN COURT PROCEEDINGS

PRELIMINARY STATEMENT

The Receiver's belated motion to enjoin the Formicas' action is baseless because: (1) the Receiver has adequate remedies at law—including a judgment which he already obtained and can execute and use to restrain assets—so an injunction pursuant to the All Writs Act is impermissible; (2) the Receiver cites no authority for his contention that the All Writs Act or a court's equity power may be used to enjoin a non-competing action brought by defrauded investors against non-parties to this enforcement action, and (3) the Court's equitable power is not unlimited and cannot be used to deprive the Formicas of their constitutional right to due process.

Burton W. Wiand, the Receiver ("Receiver")[1] for certain hedge funds in which Richard, Marilynn, Ami, Kevin and Matthew Formica (the "Formicas") invested, now moves to enjoin an action brought by the Formicas against Donald Rowe, Carnegie Asset Management, Inc. ("CAM") and the Wall Street Digest, Inc. ("WSD")—three non-parties to this enforcement action. *See* Receiver's Motion to Enjoin Court Proceedings, dated February 28, 2013 ("Receiver's Motion"). The Receiver admits that he agreed to make this motion as part of the settlement of the clawback case he brought against Rowe and certain Rowe entities, *Wiand v. Rowe, et al.*, Case No. 8:10-cv-245-T-17MAP (M.D. Fla.),[2] demonstrating the Receiver himself

[1] Wiand is 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 referred to herein as the "Nadel Funds").

[2] 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"). *See* Case No. 8:10-cv-245-T-17MAP (M.D. Fla.).

believes the injunction is either unnecessary or baseless—otherwise, he would have moved long ago.

Neither the All Writs Act nor this Court's equitable power permits the issuance of an injunction here. The Receiver's attempt to enjoin the Formicas' action indefinitely is tantamount to a death knell—as time passes, memories fade, evidence is lost, and the Formicas' chance of successfully prosecuting their case against Rowe, CAM and WSD is severely diminished—though they have devoted substantial time, energy and resources to pursuing their meritorious claims, many of which are not based on their investments in the Nadel Funds.

PROCEDURAL HISTORY AND RELEVANT FACTS[3]

A. Procedural History

The Formicas originally filed their complaint in the Middle District of New Jersey on February 22, 2010. *See* Case No. 8:11-cv-00516-MSS-EAJ at Dkt. Ent. 1. On June 24, 2010, the Formicas filed an amended complaint—the operative complaint here. *Id.* at Dkt. Ent. 22. The amended complaint alleged federal and common law claims against Rowe, CAM and WSD, including, *inter alia*, violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), as well as state law claims for fraud, negligent misrepresentation, negligence, breach of fiduciary duty and unjust enrichment. *See* Ex. A, Plaintiffs' Amended Complaint, ¶¶ 90-138, 148-57.

While this case was pending in the District of New Jersey, Rowe, CAM and WSD moved to dismiss and/or to transfer venue to the Middle District of Florida. *See* Case No. 8:11-cv-00516-MSS-EAJ at Dkt. Ent 27. By order dated March 10, 2011, the Honorable Peter G. Sheridan granted Defendants' motion in part and transferred the case to the Middle District of Florida pursuant to 28 U.S.C. § 1404 (a). *Id. at* Dkt. Ent. 55.

[3] The Formicas' include only those facts relevant to their opposition to the Receiver's Motion.

In accordance with the Case Management and Scheduling Order, fact discovery was conducted and completed by July 2, 2012. *Id.* at Dkt. Ent. 98. Expert discovery was conducted and completed by September 25, 2012. *Id.* at Dkt. Ent. 112. Rowe, CAM and WSD moved for summary judgment on October 23, 2012, and the Formicas' opposition was filed on November 21, 2012. *Id.* at Dkt. Ents. 114, 117, 125-32. The summary judgment motions filed on behalf of Rowe, CAM and WSD are currently pending. *Id.* at Dkt. Ent. 134. Trial and all other pretrial deadlines are stayed pending resolution of the pending summary judgment motions. *Id.*

B. Relevant Facts

The Formicas' amended complaint—which the Receiver now seeks to enjoin—contains federal and common law claims against the Formica Defendants, for, *inter alia*, violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), as well as state law claims for fraud, negligent misrepresentation, negligence, breach of fiduciary duty and unjust enrichment. *See* Ex. A, Plaintiffs' Amended Complaint, ¶¶ 90-138, 148-57. The Formicas' claims are based on their investments in five groups of hedge funds and/or fund of funds—including, but not limited to the Nadel Funds—all of which were recommended by Donald Rowe. *See generally*, Ex. A. Richard, Marilyn, Ami, Matthew and Kevin Formica were at all relevant times investors in the following hedge funds: Scoop Real Estate, L.P.; Viking IRA Fund, LLC; and Viking Fund LLC (collectively, the "Nadel Funds"), which were managed by Arthur Nadel, Neil V. Moody, and Christopher D. Moody. The Formicas were also investors in the following hedge funds: Draseena Three Oaks Currency Fund, LLC; Draseena Three Oaks Senior Strength Fund, LLC; Draseena Three Oaks Senior Strength Q Fund, LLC; Draseena Arrow Fund, LLC; Draseena Arrow Fund II, LLC (collectively, the "Draseena Group"); High Street Futures Fund, LP; High Street Global Futures Fund, LTD (collectively, the "High Street

Funds"); The Carnegie Fund, LP ("The Carnegie Fund"); and The Wall Street Digest Fund, LP ("The Wall Street Digest Fund"). *See* Ex. A, ¶ 1.

The details of the Formicas' investments in the various funds are set forth below.

1) The Formicas' Investments in the Draseena/Kenzie Funds (1996-2010)

Based on Donald Rowe's recommendations, Richard Formica began investing with the Draseena Group in 1996, and remained invested for fourteen years. *See* Ex. C, Declaration of Richard Formica dated November 20, 2012, at ¶12.[4] Over the course of fourteen years, the Formicas invested a total of approximately $5,849,121 in the Draseena funds. *Id.* at ¶13. In or around 2010, Richard Formica learned that the government brought criminal charges against the funds' managers and that the Draseena Group funds were a fraud. *Id.* at ¶14. On or about June 17, 2010, the SEC filed a complaint in the United States District Court for the Northern District of Illinois against, *inter alia* Daniel Spitzer, Draseena Funds Group, Corp. and Kenzie Financial Management, Inc., to halt a $105 million fraudulent Ponzi scheme allegedly run by Daniel Spitzer and the entities he controlled. *See SEC v. Spitzer et al.*, 10-c-3758 (N.D. Ill.), Dkt. Ent. 2. Though the Formicas were able to redeem some of their investment in the Draseena Group, they are still owed in excess of $1,840,592. *See* Ex. B at ¶15. The SEC has advised the Formicas that there are no assets left in the Draseena Group funds. *Id.*

2) The Formicas' Investments in the Nadel Funds (2001-2009)

Based on Donald Rowe's recommendations, Richard Formica invested millions in the Nadel-Moody funds. *Id.* at ¶ 19. As a result of Rowe's recommendation to invest in the Nadel Funds, the Formicas lost $3,893,535. *Id.* at ¶25. To date, the Formicas have recovered

[4] Filed on November 21, 2012, in opposition to Rowe, CAM and WSD's motion for summary judgment in Case 8:11-cv-00516-MSS-EAJ. *See* Ex. A, Dkt. Ent. 126.

approximately $1,450,000, less than 40% of the amount authorized by the Receiver. *See* Case No. 8:09-cv-87-T-26TBM, Dkt. Ent. 676.

3) The Formicas' Investments in High Street Capital Management (2006-2008)

In reliance on Donald Rowe's recommendations, on May 18, 2006, Richard Formica invested $250,000 of the Formicas' money in the High Street Futures Fund, LP. *See* Ex. B at ¶28. Over the next several months, until October 1, 2006, the Formicas invested an additional $1,200,000, for an aggregate investment of $1,450,000 in the High Street Futures Fund. *Id.* On July 1, 2006 and August 1, 2006, Richard Formica invested a total of $500,000 of plaintiffs' money in the High Street Global Futures Fund, Ltd. On August 31, 2007 and December 31, 2007, Richard Formica redeemed $711,239 from High Street and invested that money in the fraudulent Nadel Funds. *Id.* at ¶31. The remaining $488,761 was lost by High Street. *Id.* On October 31, 2007, Richard Formica redeemed $100,000 from the High Street Global Futures Fund and invested that sum in the Draseena funds. *Id.* Towards the end of 2007, the Formicas were able to redeem approximately $222,862 from High Street, but ended up losing a total of $815,899. *Id.* at ¶32.

4) The Formicas' Investments in the Carnegie Fund (Late 2007-2009)

In late 2007, Rowe created the Carnegie Fund—a feeder fund—and told Richard Formica that he would be the general partner of the fund and that when he got money from investors he would feed it to twenty different managers, each of whom managed a fund. *See* Ex. B at ¶34. Rowe told Richard that he would select the best twenty managers out of thousands, and that he would vet each manager. *Id.* In reliance on Donald Rowe's recommendations, Richard Formica invested $200,000 in the Carnegie Fund. *Id.* at ¶35. On February 1, 2008, Richard invested an additional $390,000 in the Carnegie Fund. *Id.* After investing in the Carnegie Fund, Richard

learned that three of nine managers selected by Rowe were engaged in practices that may have been fraudulent. *Id.* at ¶36. While the Formicas eventually redeemed $497,000 from the Carnegie Fund, they have been unable to redeem the remaining $93,000 of their investment. *Id.* at ¶37.

5) The Formicas' Investments in the Wall Street Digest Fund (Late 2008-2009)

Based on Donald Rowe's recommendations, Richard Formica invested $100,000 in the Wall Street Digest Fund, a fund of funds created by Rowe. *Id.* at ¶ 39. After receiving a report that they earned 5% during November 2008 and after a discussion with Rowe, the Formicas invested an additional $50,000 in the Wall Street Digest Fund on January 1, 2009. *Id.* But on March 19, 2009, the Formicas received a letter from the Wall Street Digest Fund stating that the track record of the fund for November and December was incorrect and had to be revised downward. *Id.* On April 7, 2009, Plaintiffs were able to redeem $140,000 of their investment from the Wall Street Digest Fund. They are still owed $7,000. *Id.* at ¶40.

LEGAL ARGUMENT

POINT I

THE RECEIVER HAS NOT ESTABLISHED THAT HE IS ENTITLED TO AN INJUNCTION UNDER THE ALL WRITS ACT

The Receiver conclusorily argues that this Court has the power to enjoin the Formicas' case pursuant to the All Writs Act and the inherent powers of an equity court to fashion relief. *See* Receiver's Motion at 6-11. But the Receiver ignores the fundamental principle that in order to obtain an injunction under the All Writs Act to enjoin the Formicas' case, he must establish that the integrity of this Court's orders or judgments are threatened by that action. And an injunction granted pursuant to the All Writs Act is prohibited where adequate remedies at law are available—here, the Receiver already has a judgment that he can enforce.

Federal courts may issue three separate types of injunctions: (1) traditional injunctions; (2) statutory injunctions, or (3) injunctions under the All Writs Act. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2007). In the Eleventh Circuit, a federal court may not issue a traditional injunction in a case where the movant has no cause of action pending against the enjoined party. *Id.* at 1097-98 ("...any motion or suit for a traditional injunction must be predicated upon a cause of action."). Here, the Receiver has no claims against the Formicas in this enforcement (or any other) action. Thus, the Receiver cannot obtain a traditional injunction to enjoin the Formicas' action. Nor is there any statutory basis for issuing an injunction. So, in order to enjoin the Formicas' action under the All Writs Act, the Receiver must satisfy all of the Act's requirements.

In order to obtain an injunction under the All Writs Act, the Receiver must establish that the "integrity" of this Court's judgments or orders are "being threatened by someone else's action or behavior." *Id.* at 1100. "The All Writs Act confers on courts 'extraordinary powers' that are 'firmly circumscribed.'" *Alabama v. United States Army Corps of Engineers*, 424 F.3d 1117, 1132 (11th Cir. 2005) (quoting *ITT Cmty. Dev. Corp. v. Barton*, 569 F.2d 1351, 1358 (5th Cir. 1978)). An injunction under the All Writs Act invokes the equitable power of the court—so, a court may not issue an injunction under the All Writs Act if adequate remedies at law are available. *Id.* (citing *Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1526 n. 13 (11th Cir. 1994); *Klay,* 376 F.3d at 1100-01 (11th Cir. 2004))).

A. The Formicas' Action does not threaten the integrity of this Court's Judgments or Orders

Here, the Receiver does not explain—even in the barest of terms—how any of this Court's judgments or orders are threatened by the Formicas' action. *See, generally*, Receiver's Motion. The Formicas are not trying to intervene in this case. The Formicas do not challenge the validity

of this Court's order approving the settlement agreement between the Receiver and the Rowe Defendants (Dkt. Ent. 963), nor do the Formicas seek to vacate that Order. The Order approving the Receiver's settlement agreement with the Rowe Defendants will remain in full force and effect regardless of whether the Formicas prevail in their action. The Formicas have not requested that the Court presiding over their action issue any orders or judgments that are inconsistent with this Court's orders. And, even if the Formicas were to eventually obtain a judgment against the Rowe Defendants in their action, the Receiver would not be prevented from pursuing satisfaction of his judgment. Further, even if the Formicas' action caused Rowe to deplete his assets so that he is unable to satisfy the Receiver's judgment—and the Receiver can only speculate that this will be the case—the mere inability to collect a judgment does not threaten the integrity of that judgment. When entering a final judgment, courts do not guarantee that the prevailing party will be able to collect against the losing party. So, the Receiver's hypothetical inability to collect on his judgment in no way renders his judgment less valid or unenforceable. Because the Receiver cannot establish that the Formicas' action is a threat to the integrity of this Court's jurisdiction, the Receiver has failed to establish that he is entitled to an injunction under the All Writs Act. *Klay*, 376 F.3d at 1100.

The Receiver argues that the Formicas' action involves property that is the subject of the proceeding before this Court—the Rowe Defendants' assets—and that an injunction pursuant to the All Writs Act is necessary to preserve it. But the Receiver ignores the fact that the Formicas do not possess and have never possessed any of the Rowe Defendants' assets, they are not the recipients of any payments of attorneys' fees and they have no judgment against Rowe, CAM or WSD. At this juncture, Rowe's counsel—not the Formicas—would be the recipient of any future attorneys' fees expended in Rowe's defense, and the Receiver can serve a restraining

notice to prevent Rowe from paying those fees to his attorney and depleting his assets. The Receiver has a judgment upon which he can execute against Rowe's assets, thereby preventing those assets from being used for any purpose other than to satisfy the Receiver's judgment. So, not only can this Court's jurisdiction over the Rowe Defendants' assets easily be preserved without an All Writs Act injunction, any request for injunctive relief is premature, as the Formicas have not obtained a judgment that would affect the Rowe Defendants' assets.

The Receiver relies heavily on *SEC v. Credit Bancorp*, Ltd., 93 F.Supp.2d 475 (S.D.N.Y. 2000) in support of its contention that a court has broad powers to stay "competing" actions. *See* Receiver's Motion at 7-11. But *Credit Bancorp*—like the rest of the cases cited by the Receiver —is readily distinguishable from this case. In *Credit Bancorp*, the SEC brought an enforcement action against Credit Bancorp and several individual defendants, including Douglas Brandon, in the Southern District of New York, and a receiver was appointed. *Credit Bancorp*, 93 F.Supp.2d at 476. While the enforcement action was pending, Brandon brought a declaratory judgment action in Kentucky against two of Credit Bancorp's insurers, seeking coverage for claims brought against him in both the enforcement action and in other actions brought by customers of Credit Bancorp. *Id.* The *Credit Bancorp* Court granted the Receiver's motion to stay Brandon's action in Kentucky, reasoning that if Brandon prevailed in the Kentucky action, any payment by the insurers for his defense would reduce the total assets of defendant Credit Bancorp's estate, which would correspondingly reduce the money available to Credit Bancorp's customers. *Id.* at 477. The Court also concluded that because the factual and legal issues at issue in the Kentucky action would be adjudicated in the Southern District action, allowing Brandon to pursue his claim in Kentucky posed a risk of duplicative discovery and inconsistent rulings. *Id.*

None of the factors at issue in *Credit Bancorp* are present here. First, unlike in *Credit Bancorp*, here, the Formicas have not brought an action against any defendant or relief defendant in this enforcement action—they sued Donald Rowe, CAM and WSD, three non-parties. Second, the Receiver does not—because he cannot—argue that the factual and legal issues raised by the Formicas in their action against Rowe are the same as those in this enforcement action. This enforcement action involves the Nadel Funds only, whereas the Formicas' claims are based on Rowe's advice that they invest in not only the Nadel Funds, but in the fraudulent Draseena/Kenzie, High Street Capital Management, the Carnegie Fund and the Wall Street Digest funds.

The Receiver cites no case where a court used either the All Writs Act or its equitable power to grant a receiver's request to indefinitely enjoin an action (1) brought by an investor against a non-party clawback defendant, or (2) where a receiver has already obtained a judgment. All of the SEC enforcement cases cited by the Receiver involved requests by receivers to enjoin competing actions brought against enforcement defendants and relief defendants. He cites no cases where a receiver already in possession of a judgment successfully enjoined an action brought against a party who was not an enforcement defendant or relief defendant. *See, e.g. SEC v. Vescor Capital Corp.*, 599 F.3d 1189 (10th Cir. 2010) (upholding stay of competing actions to foreclose on real property owned by enforcement defendants); *SEC v. Pittsford Capital Income Partners*, No. 06 Civ. 6353 T(P), 2007 W: 61096 (W.D.N.Y. Jan. 5, 2007) (continuing stay of judgment creditors' actions to collect on notes owed by enforcement defendants); *SEC v. Wencke*, 577 F.2d 619, 622 (9th Cir. 1978) (enjoining proceedings in a related state-court receivership so that the federal receiver would have complete control over the enforcement defendant and his entities.)

The Receiver also relies on a prior decision by this Court which granted his motion to enjoin a competing state court proceeding against Chris and Neil Moody, though they are not parties to this enforcement action. *SEC v. Nadel*, No. 09-cv-87-T-26TBM, Dkt. Ent. 190 (enjoining *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"). But the *Paolino* Case involved tangible property that was part of the Receivership Estate at the time the Receiver sought the injunction—the jewelry at issue was purchased with proceeds obtained through the fraudulent scheme. *See, generally*, Dkt. Ent. 190. And though they were not defendants in the enforcement action, the defendants in the *Paolino* Case, Chris and Neil Moody, were officers of Receivership Entity Valhalla Management, which was the general partner of Valhalla Investment Partners. *See* Dkt. Ent. 177 at 3. The Moodys were also co-managing members of Receivership Entity Viking Management, which was the managing member of Viking Fund and Viking IRA Fund. *Id.* So, because of the Moodys' close ties to various Receivership Entities, the injunction of the competing action against the Moodys was akin to an injunction against the enforcement defendants.

In contrast, here, the Formicas are defrauded investors who have sued non-parties to the enforcement action—they have not brought a competing action against an enforcement defendant or against any other party to this enforcement action and their case does not threaten the integrity of this proceeding, or of this Court's orders or judgments.

B. The Receiver has adequate remedies at law

The many adequate remedies at law available to the Receiver also preclude an injunction under the All Writs Act. *See Alabama*, 424 F.3d at 1132 ("[A] court may not issue an injunction under the All Writs Act if adequate remedies at law are available.") The Receiver has many remedies at law at his disposal to protect his judgment against the Rowe Defendants: He can (i) obtain a writ of execution of his judgment pursuant to Fed. R. Civ. P. 69 (a); (2) obtain an order which restrains Rowe from paying any legal fees incurred in defending the Formicas' case, or (ii) serve a restraining notice on Daniel Joy, counsel for Rowe in the Formicas' action, to prevent him from accepting payment of fees from Rowe. Rowe can proceed *pro se* if he is unable to pay an attorney to defend him without depleting his assets. And, even if the Formicas eventually obtain a judgment against Rowe, CAM and WSD, the Receiver could argue that his judgment has priority, and he can take all appropriate action to ensure that his is satisfied first. The Receiver does not explain why—like all other litigants—he should not use these remedies at law to ensure the preservation of Rowe's assets. Instead, he asks this Court to use its "firmly circumscribed" powers under the All Writs Act to take the drastic action of enjoining the Formicas' action—for an indefinite period of time—which would cause severe prejudice and irreparable harm.

Because the Receiver has many adequate remedies at law, an injunction under the All Writs Act is prohibited.

C. Even if this Court were to apply the "traditional injunction" factors, the Receiver has not met his burden[5]

The Eleventh Circuit requires a party seeking a permanent injunction to show: (1) it has prevailed in establishing the violation of the right asserted in his complaint; (2) there is no adequate remedy at law for the violation of this right, and (3) irreparable harm will result if the court does not order injunctive relief. *Alabama*, 424 F.3d at 1128 (citing Newman v. Alabama, 683 F.2d 1312, 1319 (11th Cir. 1982). Here, the Receiver points to no case law to support his contention that a Receiver appointed in an SEC enforcement action can enjoin a wholly separate federal case brought against a non-party who is not a defendant or a relief defendant in the enforcement action, or that a receiver may use an injunction issued under the All Writs Act as a way to collect a judgment where he has adequate remedies at law. So, the Receiver cannot establish a likelihood of success on the merits—let alone actual success on the merits.

Nor can the Receiver meet the second prong of the Eleventh Circuit's test, because, as set forth in Point I B, *supra*, he has multiple adequate remedies at law.

Similarly, the Receiver cannot meet his burden of showing irreparable harm. The Formicas have been litigating their case against Rowe, CAM and WSD for over two years—it is now at the summary judgment stage, the motion is fully briefed and is *sub judice* before the Honorable Mary S. Scriven. If the Receiver actually believed that the Formica case would cause irreparable injury to the enforcement action, presumably the Receiver would have moved to enjoin the Formicas' action from its inception. But the Receiver made no attempt to enjoin the Formicas' action—and in fact requested and received information from the Formicas' case to use in his own action against the Rowe Defendants. *See* Ex. C, Emails from Jared Perez of Wiand

[5] The law in the Eleventh Circuit is "deeply inconsistent" as to whether the movant must satisfy the traditional injunction requirements when seeking an injunction under the All Writs Act. *Alabama*, 424 F.3d at 1132 n. 20.

Guerra King, dated September 5 and 10, 2012; *see also*, Case 8:10-cv-245-T-17MAP, Dkt. Ent. 99, Ex. B (Receiver's designation of deposition testimony of Donald Rowe from the matter of *Formica v. Rowe*). The Receiver requests an injunction now not because he will suffer irreparable harm—but solely because he admittedly agreed to do so as part of his settlement with the Rowe Defendants. *See* Receiver's Motion at 3.

If this Court enjoins the Formicas' action, the severe injury to the Formicas outweighs any purported threatened injury to the Receiver—especially because the Receiver seeks to enjoin their case for an indefinite period of time. But if this Court were to deny the Receiver's request, the Receiver would suffer no harm at all—he has already obtained a judgment against the Rowe Defendants and has many tools at his disposal to enforce and collect it. However, an injunction for an indefinite period of time would deprive the Formicas of their day in court, though they have expended considerable time and resources over the last years trying to vindicate their rights. Importantly, the Formicas' action is based on Rowe's recommendations that they invest in a variety of fraudulent hedge funds—not just those that are part of the Receivership—and the Formicas should not be prevented from recovering for the losses they suffered as a result of those investments, which have nothing to do with this enforcement case or with the clawback action the Receiver brought against the Rowe Defendants.

POINT II

THIS COURT'S POWER OVER EQUITY RECEIVERSHIPS IS NOT UNLIMITED AND MAY NOT BE USED TO ENJOIN THE FORMICAS' CASE

In his motion, the Receiver cites cases that stand for the general proposition that a court has broad power over equity receiverships. *See* Receiver's Motion at 8-11. But the Receiver cites none in which a court used that power to enjoin a separate federal action brought against a non-party to the enforcement action, and none in which a receiver sought to use an injunction

under the All Writs Act as a means of enforcing/collecting on a judgment. *Id.* Further, though the Receiver claims an injunction is necessary to prevent the Formicas from recovering more of the "assets funded with the proceeds of the scheme at the expense of all other defrauded investors with allowed claims," the Receiver ignores that the Formicas' action against Rowe, CAM and WSD is based on their investments in hedge funds *other than the Nadel Funds*. The Receiver does not—because he cannot—explain why it would be inequitable for the Formicas to recover for the losses *only they suffered* as a result of their investments in the Draseena Funds, the High Street Funds, the Carnegie Fund and the Wall Street Digest Fund. An injunction that indefinitely prevents the Formicas from redressing the fraud perpetrated against them violates their constitutional rights to due process.

The Supreme Court has determined that "'[t]he touchstone of due process is protection of the individual against arbitrary action of government,' whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (citations omitted). Here, there is no reasonable justification for an injunction—this Court's jurisdiction is not threatened and the Receiver has remedies at law that he can use to enforce and collect on his judgment—and thus no legitimate governmental objective would be served by enjoining the Formicas' case.

The equitable powers of a court are not unlimited. *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 199 (1982). "A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of the law, or even without the authority of law." *Rees v. City of Watertown*, 86 U.S. 107, 122 (1874). Nor may a court's equity powers be exercised in a way that deprives a person of constitutionally or statutorily

protected rights. *Carter v. Gallagher*, 452 F.2d 315, 324 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

Here, the Receiver seeks to use an injunction as a way to collect his judgment against the Rowe Defendants. But Eleventh Circuit precedent is clear: "'A federal court should not...enforce a money judgment by contempt or methods [other] than a writ of execution, except in cases where established principles so warrant.'" *U.S. v. Bradley*, 644 F.3d 1213, 1310-11 (11th Cir. 2011) (citing *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 980 (11th Cir.), *cert. denied sub nom*, *Simmons v. Combs*, 479 U.S. 853 (1986). Here, the Court cannot use its power to allow the Receiver to circumvent Fed. R. Civ. P. 69 and established Eleventh Circuit precedent by permitting him to collect his judgment through an injunction—especially where an adequate remedy at law—a writ of execution—is not only available, but required.

CONCLUSION

The Receiver's motion to enjoin the Formicas' case against Rowe, CAM and WSD should be denied in its entirety.

DATED: March 14, 2013

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By: */s/ Chris A. Barker*
Chris A. Barker

CERTIFICATE OF SERVICE

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

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