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

On February 28, 2013, Burton W. Wiand, as Receiver[1] (the "**Receiver**"), moved the Court to enjoin (1) *R. Formica et al. v. D. Rowe et al.*, Case No. 8:11-cv-516-MSS-EAJ

[1] Mr. Wiand was appointed Receiver over 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 also 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

(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**") (the "**Motion**"). On March 11, 2013, the Receiver notified the Court that the plaintiffs in the Bell Case consented to the relief requested in the Motion (*see* Doc. 985), and the Court enjoined that case on the same day (*see* Doc. 986).

The plaintiffs in the Formica Case (the "**Formica Plaintiffs**"), however, oppose the Motion. *See* Doc. 987 (the "**Opposition**"). They argue that neither the All Writs Act nor a federal court's equitable powers to administer an equity receivership give this Court power to enjoin the Formica Case.[2] As shown below, however, these arguments fail because they focus on the wrong filings – *i.e.*, they focus on the judgment against the Rowe Defendants[3] and the order approving the Receiver's settlement with them – and ignore the key orders here: the Orders Appointing Receiver and the orders establishing and regulating the claims process. In those key orders, the Court directed the Receiver to "marshal and safeguard all of the assets of the Receivership Entities and take whatever actions are necessary for the protection of the investors" (*see, e.g.*, Doc. 984) and established a process for distributing marshaled assets in an equitable manner (*see* Docs. 391, 776), respectively. Notably, the

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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) (all of the entities in receivership are collectively referred to as the "**Receivership Entities**").

[2] The Formica Plaintiffs also argue the Receiver has not established the "'traditional injunction' factors" (*see* Opp. at 13-14), but the Receiver does not seek a "traditional injunction" here, and as such, he is not required to do so.

[3] "**Rowe Defendants**" refers to 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**").

Formica Plaintiffs concede they have already benefitted from those orders by receiving claims process distributions to date of $1,450,000. *See* Opp. at 4-5.

Allowing the Formica Case to proceed frustrates, threatens, and interferes with those orders because it would allow the Formica Plaintiffs to both (1) take Receivership property currently held by the Rowe Defendants (*i.e.*, the $9,304,250 in scheme proceeds the Rowe Defendants received from Arthur Nadel's Ponzi scheme (the "**scheme**")) and (2) do so without sharing it in a *pro rata* fashion through the claims process with all other similarly investors with approved claims. Indeed, the Formica Plaintiffs generally ignore the Rowe Defendants likely do not have enough assets to satisfy the Receiver's approximately $4 million judgment against them. The Rowe Defendants have claimed that much of the money in their possession was lost through an eight-figure investment in another Ponzi scheme,[4] and that was a consideration for the Receiver in fashioning the settlement that was ultimately reached with the Rowe Defendants. *See* Doc. 960. If the Rowe Defendants' claim is true, then all of their recoverable assets must be brought into this Receivership for distribution in the claims process. If the Court does not enjoin the Formica Case, the Rowe Defendants'

[4] The Rowe Defendants recommended to their subscribers investment funds that purported to produce the highest investment returns, and sometimes they invested their own money in the funds they recommended. Unfortunately for hundreds of investors, exceptionally high purported investment returns are the principal hallmark of a Ponzi scheme. *See In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, *12 (S.D.N.Y. 2007) (Ponzi operator "attracted investors by representing that the Fund was performing exceedingly well," which was "a clear enticement to investors" and "consistent with the existence of a Ponzi scheme"). It is thus not surprising that the Rowe Defendants recommended and invested in Ponzi schemes. For example, Richard Formica alleges he invested in the Draseena Group "[b]ased on Donald Rowe's recommendations" and that it turned out to be a Ponzi scheme. *See* Opp. at 4. Similarly, he alleges investing in the Carnegie Fund, a "feeder fund" created by Donald Rowe, but he learned at least three of the fund managers Rowe selected "were engaged in practices that may have been fraudulent." *See id.* at 5-6.

assets will be reduced by significant litigation defense costs to the detriment of this Receivership and defrauded investors. Further, if the Formica Plaintiffs obtain a judgment against the Rowe Defendants and they are able to collect money under that judgment, they will have received an inequitable preference and elevated themselves above other similarly situated claimants to the direct detriment of those other claimants. As detailed below, the Court indisputably has the power to enjoin the Formica Case under both the All Writs Act and equity, and an injunction at this time is necessary to preserve and protect the Orders Appointing Receiver and the orders governing the claims process and, more broadly, to ensure justice.

ARGUMENT

I. CONTRARY TO THE FORMICA PLAINTIFFS' CONTENTION, THIS COURT HAS THE POWER TO ENJOIN THE FORMICA CASE PURSUANT TO THE ALL WRITS ACT

In the Motion, the Receiver established this Court may enjoin the Formica Case under the All Writs Act, 28 U.S.C. § 1651(a). *See* Mot. at 6-7; *S.E.C. v. Credit Bancorp, Ltd.*, 93 F. Supp. 2d 475 (S.D.N.Y. 2000) ("[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."); *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); *S.E.C. 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'").

The Formica Plaintiffs disagree and argue "the Receiver must establish that the 'integrity' of this Court's judgments or orders are 'being threatened by someone else's action or behavior.'" Opp. at 7. They claim the Receiver cannot establish that here because (1) they are not trying to intervene in this case; (2) they do not seek to vacate or otherwise challenge the order approving the settlement with the Rowe Defendants; (3) "the mere inability to collect a judgment does not threaten the integrity of that judgment"; and (4) the requested relief is premature, as the Formica Plaintiffs do not yet have a judgment against the Rowe Defendants. *Id.* at 7-9. Fatally for these arguments, however, they focus on the judgment against the Rowe Defendants in *Wiand, as Receiver v. D. Rowe et al*., Case No. 8:10-cv-245-T-17MAP (M.D. Fla.) (*Rowe* Doc. 124) and the order in this case approving the Receiver's settlement (Doc. 963), and ignore the salient orders underlying the Motion: the Orders Appointing Receiver (Docs. 8, 140, 316, 493, 935, 984) and establishing the claims process (Docs. 391, 776).

Those latter two types of orders not only satisfy the requirement for an All Writs Act injunction under the standard articulated by the Formica Plaintiffs (which is quoted at the beginning of the preceding paragraph), but they easily satisfy the broader standard that actually applies:

> A court may grant a writ under this act whenever it is "calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it," and not only when it is "'necessary' in the sense that the court could not otherwise physically discharge its ... duties." *Adams v. United States,* 317 U.S. 269, 273, 63 S.Ct. 236, 239, 87 L.Ed. 268 (1942).

Klay v. United Healthcare Group, 376 F.3d 1092, 1100 (11th Cir. 2004). And also applicable here, "[s]uch writs may be directed to not only the immediate parties to a proceeding, but to 'persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and ... even those who have not taken any affirmative action to hinder justice.'" *Id.* (quoting *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174 (1977)).

A. Enjoining The Formica Case Under The All Writs Act Is Appropriate Because It Threatens The Orders Appointing Receiver

In the Orders Appointing Receiver, the Court directed the Receiver – who operates as an arm of the court (*see United States v. Perraud*, 672 F. Supp. 2d 1328, 1339 (S.D. Fla. 2009)) – to "marshal and safeguard all of the assets of the Receivership Entities and take whatever actions are necessary for the protection of the investors." *See, e.g.*, Doc. 984. Among the Receivership Entities' assets were the millions of dollars of scheme proceeds that were transferred to the Rowe Defendants as purported "fees," "investment profits," or "principal redemptions" (and the tens of millions of dollars similarly transferred to other clawback defendants and "winning" investors who settled with the Receiver pre-suit).[5] The Rowe Defendants (like the other clawback defendants and "winning" investors) merely held those funds in constructive trust for the Receiver. *See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000) ("Whenever the legal title to property is

[5] The Receiver need not trace the exact dollars the Rowe Defendants received from the Ponzi scheme to establish the Rowe Defendants still have those same exact dollars. Courts have held that "*any* comingling is enough to warrant treating all the funds as tainted." *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 177 (S.D.N.Y. 2009). Because "money is fungible" it is "impossible to differentiate between 'tainted' and 'untainted' dollars. . . ." *S.E.C. v. Lauer*, 2009 WL 812719, *4-5 (S.D. Fla. 2009). "Once proceeds become tainted, they cannot become untainted." *United States v. Ward*, 197 F.3d 1076, 1083 (11th Cir. 1999).

obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired ... and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder...."); *In re Fin. Fed. Title & Trust, Inc.*, 347 F.3d 880 (11th Cir. 2003) (imposing constructive trust on property purchased with Ponzi scheme proceeds). Through the judgment, the Receiver perfected his right, on behalf of Receivership Entities and the Receivership estate, to recover that money, consistent with his obligations under the Orders Appointing Receiver. All that remains now is the actual collection.[6]

The Formica Case directly frustrates and threatens the Orders Appointing Receiver for several reasons. First, allowing that case to proceed will force the Rowe Defendants to spend money to defend it which would otherwise be available to the Receiver to satisfy the

[6] The Formica Plaintiffs also argue the Court cannot enjoin their action under the All Writs Act because the Receiver has adequate remedies at law to collect his judgment – *i.e.*, writs of execution and orders either restraining the Rowe Defendants from paying their attorneys or restraining the attorneys from accepting the money. *See* Opp. at 12. As an initial matter, any order directed at the payment of the Rowe Defendants' legal fees would be an injunction, not a remedy at law. In any event, the Receiver has not sought the Court's aid in enforcing his judgment; rather, he seeks to restrain the Formica Plaintiffs from obtaining Receivership property and interfering with this Receivership's efforts to marshal assets, which can only be accomplished through invocation of this Court's powers. Notably, the Formica Plaintiffs also claim "the Receiver could argue that his judgment has priority, and he can take all appropriate action to ensure that his is satisfied first." *See id.* Setting aside that it is doubtful such an order would constitute a remedy at law, as the Formica Plaintiffs claim, such a restriction would not be sufficient because, as discussed in the next paragraph, it would still force the Rowe Defendants to spend a significant amount of money to defend the Formica Case that could otherwise be available toward satisfying the Receiver's judgment. In short, the Receiver is not "like all other litigants" (*id.*); he functions as an arm of the Court, and the Court has the power to prevent a race to seize the Rowe Defendants' assets, most if not all of which constitute Receivership property, between the Receiver and the Formica Plaintiffs.

judgment.[7] That is of particular concern now because as is clear from the Opposition, that case has reached a phase when the Rowe Defendants will necessarily have to spend significant sums of money. As the Opposition explains, the Formica Case is past discovery and a fully briefed summary judgment motion is pending. *See* Opp. at 13. But the pending summary judgment motion was filed by the Rowe Defendants; the Formica Plaintiffs did not file one. Without a dispositive motion by the Formica Plaintiffs, the Formica Case will necessarily have to be tried to a jury in the near future, and federal court jury trials are expensive and will require the Rowe Defendants to spend a significant sum of money.

Second, any judgment the Formica Plaintiffs obtain will mean they will be competing directly with the Receiver to recover from the Rowe Defendants. That is particularly problematic here because the Rowe Defendants likely do not have sufficient assets to satisfy the Receiver's judgment, so any amounts recovered by the Formica Plaintiffs will reduce the amounts the Receiver will be able to recover. *See Byers*, 637 F. Supp. 2d at 176 (noting "when funds are limited, hard choices must be made"). In other words, if the Formica Plaintiffs' collection efforts are successful in any way, they will have obtained money that otherwise should and would have been brought into this Receivership for the benefit of all defrauded investors with approved claims in this action. As such, their case directly frustrates and threatens the Orders Appointing Receiver. *See* 28 U.S.C. § 754 (receiver "appointed in any civil action or proceeding involving property ... shall be vested with

[7] The depletion of the Rowe Defendants' money on the defense of the Formica Case (along with waste of judicial resources) is why the Formica Plaintiffs' suggestion that the Court allow the Formica Case to proceed and then enjoin collection on any judgment obtained in that case until the Receiver's judgment is satisfied (*see* Opp. at 12 (suggesting this possibility)) does not adequately protect the Receivership.

complete jurisdiction and control of all such property with the right to take possession thereof"); *Eller Indus., Inc. v. Indian Motorcycle Mfg., Inc.*, 929 F. Supp. 369, 372 (D. Col. 1995) (actions that confer on one creditor "a priority and preference over other creditors" are "contrary to receivership law, which places receivership property under the [c]ourt's control for the equal benefit of all creditors").

The Formica Plaintiffs' attempts to distinguish the cases cited in the Motion miss the point: they focus on the identity of the parties, but the courts' key consideration in those opinions is whether the property or assets at issue rightfully belonged in the underlying receivership. For example, the Formica Plaintiffs argue "[a]ll of the SEC enforcement cases cited by the Receiver involved requests by receivers to enjoin competing actions brought against enforcement defendants or relief defendants," and "the Formicas have not brought an action against any defendant or relief defendants in this enforcement action." *See* Opp. at 10. But the salient issue in those cases – and here – is not who the parties are; it is whether the competing actions seek to obtain property that rightfully belongs to the Receivership. Similarly, contrary to the Formica Plaintiff's assertions, *S.E.C. v. Credit Bancorp*, 93 F. Supp. 2d 475 (S.D.N.Y. 2000), is entirely consistent with the Receiver's efforts to enjoin the Formica Case because it recognized the competing action there, if successful, would "reduce the total assets of defendant Credit Bancorp's estate, which would correspondingly reduce the money available to Credit Bancorp's customers." Opp. at 9 (citing *id.* at 477). As explained above, it is unlikely the Rowe Defendants have sufficient assets to satisfy the Receiver's $4 million judgment against them, so if the Rowe Defendants have to spend money to defend the Formica Case or if the Formica Plaintiffs obtain a judgment and

successfully collect any amounts from them, they will have "reduce[d] the total assets of [the Receivership] estate, which would correspondingly reduce the money available to [the Hedge Funds'] customers." *See id.*

Ultimately, the relief requested in the Motion is not materially different from the relief granted by this Court with respect to *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 sued Neil and Christopher Moody. The key consideration there – like here – was whether the Receivership had a right to the assets sought to be recovered. There, the Court expressly 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* Doc. 192 (emphasis in original). While the Formica Plaintiffs claim the Paolino Case is distinguishable because it involved "tangible property" purchased with scheme proceeds and the Moodys had "close ties to various Receivership Entities," those are irrelevant distinctions. If the Court can enjoin an investor's suit to recover tangible property purchased with scheme proceeds, why can it not enjoin an investor's suit to recover the proceeds themselves? And that the Moodys were the defendants in the Paolino Case actually undermines, rather than bolsters, the Opposition because they are <u>not</u> defendants or relief defendants in this case, which in turn directly conflicts with the Formica Plaintiffs' bright-line attempts to distinguish *Credit Bancorp* and the Receiver's other authorities based on the identity of the defendants in those cases.

B. Enjoining The Formica Case Under the All Writs Act Also Is Appropriate Because It Frustrates And Threatens The Orders Relating To The Claims Process

Similarly, the Formica Case also frustrates and threatens the Court's orders establishing the claims process because it seeks to elevate the Formica Plaintiffs above other similarly-situated claimants in the claims process. The claims process is governed by equity, equity is equality, and the Formica Plaintiffs' efforts will lead to inequality if successful by benefitting them to the detriment of all other claimants with allowed claims. Specifically, if the Rowe Defendants have assets sufficient to satisfy the Receiver's $4 million judgment against them, those assets are Receivership property. And the only way for an investor to obtain Receivership property should be through the claims process. Indeed, the Formica Plaintiffs have already received $1.45 million through that process and stand to benefit from future distributions as well, including the distribution of assets collected from the Rowe Defendants. If the Formica Plaintiffs obtain a judgment and successfully collect from the Rowe Defendants, they would not only obtain Receivership property outside the claims process, but they would also likely be removing money from the claims process that otherwise would have been distributed to all investors with approved claims. *See Quilling v. Trade Partners*, 2007 WL 107669, *2 (W.D. Mich. 2007) ("The use of a *pro rata* distribution plan is especially appropriate for fraud victims of a Ponzi scheme, in which earlier investors' returns are generated by the influx of fresh capital from unwitting newcomers rather than through legitimate investment activity.").

C. An Injunction Under The All Writs Act Is Appropriate And Necessary At This Time

The Formica Plaintiffs also contend an injunction now would be premature because they do not yet have a judgment against the Rowe Defendants. But this ignores the discretion afforded courts by the All Writs Act: "A court may grant a writ under this act **whenever it is calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it, and not only when it is 'necessary'** in the sense that the court could not otherwise physically discharge its ... duties." *Klay,* 376 F.3d at 1100 (internal quotations omitted; emphasis added). And such writ "may be directed to ... [any] persons who, though not parties to the original action or engaged in wrongdoing, **are in a position to frustrate the implementation of a court order or the proper administration of justice, and ... even those who have not taken any affirmative action to hinder justice**." *Id.* (internal quotations omitted; emphasis added). In other words, the All Writs Act specifically permits the issuance of an injunction **before** the Formica Plaintiffs obtain a judgment against the Rowe Defendants. That injunction is necessary now because, as previously discussed, allowing the Formica Case to proceed to judgment would (1) reduce the Rowe Defendants' assets through attorneys' fees and costs; (2) raise the real possibility of a direct competition between the Receiver and the Formica Plaintiffs for the Rowe Defendants' assets; and (3) elevate the Formica Plaintiffs above similarly situated defrauded investors.[8]

[8] The Formica Plaintiffs suggest the Court could enjoin the Rowe Defendants' attorneys from being paid rather than enjoining the case (*see* Opp. at 8-9), but that suggestion does not address the threat and interference of a competing judgment in favor of the Formica Plaintiffs against the Rowe Defendants.

II. INDEPENDENTLY OF THE ALL WRITS ACT, THIS COURT'S EQUITABLE POWER OVER RECEIVERSHIPS IS EXTREMELY BROAD AND INCLUDES THE POWER TO ENJOIN COMPETING CASES

In the Motion, the Receiver also established that, independent of the All Writs Act, the Court's power to supervise this equity Receivership is extremely broad and includes the power to stay "competing actions." *See* Mot. at 8-11; *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010); *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *S.E.C. v. First City Fin. Corp*., 890 F.2d 1215, 1230 (D.C. Cir. 1989); *S.E.C. v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986); *Credit Bancorp*, 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"); *see also Eller Industries*, 929 F. Supp. at 373 ("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"); *Foshee v. Forethought Fed. Sav. Bank*, 2010 WL 3239272, *10 (W.D. Tenn. 2010) (theorizing that allowing plaintiffs to proceed with separate federal action would serve to circumvent Receiver's exclusive control over receivership property).

In the Opposition, the Formica Plaintiffs argue an injunction would violate their due process rights because they have asserted claims against the Rowe Defendants that do not arise from the Ponzi scheme underlying this action. Specifically, they argue 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." Opp. at 15. As such, the Formica Plaintiffs contend, the Court purportedly lacks the equitable power to enjoin the Formica Case because doing so would serve "no legitimate governmental objective." But this argument also misses the point: the Rowe Defendants have limited assets; their remaining assets up to approximately $4 million rightfully belong to this Receivership; and allowing the Formica Case to proceed threatens the Receivership by depleting the Rowe Defendants' assets through defense costs. And each of these critical items is present whether or not the Formica Plaintiffs' claims against the Rowe Defendants relate to this Receivership or not. Proceeding with their case against the Rowe Defendants' despite those defendants' close ties to this Receivership is a risk the Formica Plaintiffs knowingly accepted. In fact, in his December 13, 2010, written responses and objections to a subpoena served by the Formica Plaintiffs, the Receiver warned them 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."

Contrary to the Formica Plaintiffs' contentions, as in all equity receiverships, bringing all Receivership property within this Court's "jurisdiction and control" through the Receiver's efforts – including through clawback cases such as the one against the Rowe Defendants – is a "legitimate governmental objective." *See* 28 U.S.C. § 754; *Credit Bancorp, Ltd.*, 93 F. Supp. 2d at 476-477 (purpose of receivership is "to protect the estate property and ultimately return that property to the proper parties in interest"); *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."). And as discussed in Sections I.A and B. above, allowing the Formica Case to proceed threatens that objective for several reasons, including that it would deplete money that rightfully belongs in the Receivership estate and inequitably elevate the Formica Plaintiffs above similarly situated claimants. *See, e.g., S.E.C. 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 receivership proceedings, courts will not allow non-parties to attempt to recover a larger portion of what they might be owed by means of instituting ancillary proceedings. *See S.E.C. v. Pittsford Capital Income Partners, LLC*, 2007 WL 61096, *2 (W.D.N.Y. 2007) ("[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); *S.E.C. 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).

Because the Formica Case seeks to recover assets from the Rowe Defendants that rightfully belong to the Receivership estate and that otherwise would flow to the Receivership estate for the benefit of all creditors, the Court indisputably has the power to enjoin it whether or not the claims asserted in that case relate to the scheme underlying this case. As noted above, receivership courts routinely enjoin actions that "compete" with a receivership's efforts to recover assets, and due process does not prohibit those injunctions. And even assuming *arguendo* the Formica Plaintiffs have a due process right to assert their claims against other private litigants (*i.e.*, the Rowe Defendants), their concerns are easily alleviated: the Court could simply enjoin the Formica Case until the Receiver fully satisfies his approximately $4 million judgment against the Rowe Defendants. This would allow the Receiver to recover from the Rowe Defendants the assets he is entitled to recover for the benefit of the Formica Plaintiffs and all other claimants with allowed claims without interference from the Formica Case, and if the Receiver is able to make a full recovery, the Formica Plaintiffs can then pursue the rest of their claims and, if successful, any of the Rowe Defendants' remaining assets. This would also prevent diminution of the Rowe Defendants' limited assets due to their need to defend the Formica Case.

Any other outcome would effectively create a race between the Receiver and the Formica Plaintiffs to seize the Rowe Defendants' limited assets, and preventing such a situation is a primary reason why courts supervising equity receiverships enter stays, freeze orders, and injunctions like the one sought in the Motion.[9]

[9] The Formica Plaintiffs also argue the Receiver's money judgment can only be enforced by a writ of execution, but the Motion does not seek to enforce the Receiver's judgment against the Rowe Defendants; rather, it seeks to prevent the Formica Plaintiffs from obtaining money

CONCLUSION

Pursuant to the All Writs Act and, independently, the Court's equitable powers, the Formica Case should be enjoined to ensure the Receiver has the best chance of collecting on his judgment against the Rowe Defendant for the benefit of the Receivership and all defrauded investors with allowed claims, including the Formica Plaintiffs.

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that rightfully belongs to the Receivership estate. And in any event, the Opposition's authorities expressly state other methods are available "in cases where established principles so warrant." *See* Opp. at 16. As the Receiver's authorities demonstrate, an equity receivership is one such case. In fact, a primary purpose of this Receivership is to obtain money judgments for the benefit of the Receivership estate and ultimately defrauded investors. *See* Doc. 984 at ¶ 6 (expressly authorizing the Receiver to "[d]efend, compromise or settle legal actions ... [and to] file appropriate pleadings in the Receiver's discretion"). In contrast, *United States v. Bradley*, 644 F.3d 1213, 1310-11 (11th Cir. 2011), involved the government's attempt to use a receiver "to collect the defendants' fines and special assessments" from nonparties under threat of contempt, which is plainly not the situation here. As such, the Formica Plaintiffs' authorities are inapposite.

CERTIFICATE OF SERVICE

I HERBY CERTIFY that on March 26, 2013, I electronically filed the foregoing with the Clerk of the Court and served it on Chris A. Baker, the Formica Plaintiffs' Tampa counsel, by using the CM/ECF system.

I FURTHER CERTIFY that on March 26, 2013, I sent the foregoing document and the notice of electronic filing by email to the following non-CM/ECF participants:

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