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.
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RECEIVER'S UNOPPOSED MOTION TO (1) APPROVE DETERMINATION AND PRIORITY OF CLAIMS, (2) POOL RECEIVERSHIP ASSETS AND LIABILITIES, (3) APPROVE PLAN OF DISTRIBUTION, AND (4) ESTABLISH OBJECTION PROCEDURE

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Burton W. Wiand, as Receiver (the "**Receiver**"), respectfully moves this Court for an Order: (1) approving his determination and priority of claims as set forth in this Motion and attached **Exhibits B** through **J**; (2) pooling all assets and liabilities of the receivership entities into one consolidated Receivership estate; (3) approving a plan of distribution; and (4) establishing a procedure for objections to the Receiver's determination of claims and claim priority and plan of distribution.

It is worth emphasizing the last prong of the relief sought by this Motion: the Receiver seeks to establish an objection procedure which will allow the Receiver and the Court to efficiently address any objections to claim determinations, claim priority, and the plan of distribution in an orderly and fair process. This process will allow the Receiver to attempt to resolve objections before they are submitted to the Court for consideration, which will avoid inefficient piecemeal adjudication of objections and conserve both the Court's and the Receivership's time and resources. Accordingly, any objection to claim determinations, claim priority, or the plan of distribution directly filed in Court in response to this Motion should be denied without prejudice to its submission to the Receiver in accordance with the pertinent parameters set forth in Section V. of this Motion.

BACKGROUND

On January 21, 2009, the Securities and Exchange Commission (the "**Commission**") initiated this action to prevent the defendants from further defrauding investors of hedge funds managed by them. That same day, the Court entered an order appointing Burton W. Wiand as Receiver for Defendants Scoop Capital, LLC ("**Scoop Capital**") and Scoop Management, Inc. ("**Scoop Management**") and Relief Defendants Scoop Real Estate, L.P.

("**Scoop Real Estate**"); Valhalla Investment Partners, L.P. ("**Valhalla Investment Partners**"); Valhalla Management, Inc. ("**Valhalla Management**"); Victory Fund, Ltd. ("**Victory Fund**"); Victory IRA Fund, Ltd. ("**Victory IRA Fund**"); Viking IRA Fund, LLC ("**Viking IRA Fund**"); Viking Fund, LLC ("**Viking Fund**"); and Viking Management, LLC ("**Viking Management**").[1] (*See generally* Order Appointing Receiver (Doc. 8).)

The Court subsequently granted seven motions to expand the scope of the Receivership and appointed the Receiver as receiver over the following:

- Venice Jet Center, LLC, and Tradewind, LLC (Order, Jan. 27, 2009 (Doc. 17));
- Laurel Mountain Preserve, LLC; Laurel Preserve, LLC; the Marguerite J. Nadel Revocable Trust UAD 8/2/07; and the Laurel Mountain Preserve Homeowners Association, Inc. (Order, Feb. 11, 2009 (Doc. 44));
- The Guy-Nadel Foundation, Inc. (Order, Mar. 9, 2009 (Doc. 68));
- Lime Avenue Enterprises, LLC, and A Victorian Garden Florist, LLC (Amended Order, Mar. 17, 2009 (Doc. 81));
- Viking Oil & Gas, LLC (Order, July 15, 2009 (Doc. 153));
- Home Front Homes, LLC (Order, Aug. 10, 2009 (Doc. 172)); and
- Traders Investment Club (Order, Aug. 9, 2010 (Doc. 454)).

All of the entities and the trust in receivership are referred to collectively as the "**Receivership Entities**." The Receiver was reappointed as Receiver for the Receivership

[1] Relief Defendants Scoop Real Estate, Valhalla Investment Partners, Victory IRA Fund, Victory Fund, Viking IRA Fund, and Viking Fund are collectively referred to as the "**Hedge Funds**." Defendants Scoop Capital and Scoop Management and Relief Defendants Valhalla Management and Viking Management are collectively referred to as the "**Fund Managers**."

Entities by Orders dated June 3, 2009 (Doc. 140), January 19, 2010 (Doc. 316), and September 23, 2010 (Doc. 493). (All Orders appointing and reappointing Receiver are collectively referred to as "**Order Appointing Receiver**").

The Defendants and Relief Defendants purported to engage in the sale of securities in the form of hedge fund interests with high levels of return to investors throughout the United States and overseas. In reality, Arthur Nadel ("**Nadel**") and the other Defendants, through Relief Defendants, engaged in a Ponzi scheme (the "**scheme**") in which money raised from new investors and additional money raised from existing investors was used to: (1) pay fictitious returns to existing investors; (2) pay substantial management, advisory, and/or incentive fees to Nadel and others; and (3) purchase and/or fund additional businesses and other endeavors controlled by Nadel. While some investors received funds from Receivership Entities, others did not.

Pursuant to the Order Appointing Receiver, the Receiver was obligated to take possession of the Receivership Entities' assets for the benefit of defrauded investors. The Receiver's goal has been to marshal, liquidate, and then distribute Receivership assets to investors (and other creditors) with allowed claims in a fair and equitable manner.

PROCEDURAL BACKGROUND

On April 20, 2010, the Receiver filed an Unopposed Motion to (1) Approve Procedure to Administer Claims and Proof of Claim Form, (2) Establish Deadline for Filing Proofs of Claim, and (3) Permit Notice by Mail and Publication (the "**Claims Form Motion**") (Doc. 390). On April 21, 2010, the Court granted the Receiver's motion in its entirety (Doc. 391). The Court established a Claim Bar Date of the later of 90 days from the

date of the Order granting the Claims Form Motion or the mailing of Proof of Claim Forms to all known investors and other potential creditors (as the term Claim Bar Date is defined in the Claims Form Motion). Pursuant to the Court's Order, any person or entity who failed to submit a proof of claim to the Receiver so that it was actually received by the Receiver on or before the Claim Bar Date is barred and precluded from asserting any claim against the Receivership or any Receivership Entity.

The Court's Order further provided that sufficient and reasonable notice would be given by the Receiver if made (1) by mail to the last known addresses of all known potential claimants, (2) by global publication on one day in The Wall Street Journal and publication on one day in the Sarasota-Herald Tribune, and (3) by publication on the Receiver's website (www.nadelreceivership.com). In compliance with the Court's Order, on June 4, 2010, the Receiver mailed 1,256 packages to the last known addresses of known investors and their attorneys, if any, and any other known potential creditors of the Receivership estate, thereby establishing September 2, 2010, as the Claim Bar Date. Each package included a cover letter, the Notice of Deadline Requiring Filing of Proofs of Claim (the "**Notice**"), and a Proof of Claim Form (collectively, the "**Claims Package**"). The Receiver also published the Notice in the global edition of The Wall Street Journal and in the Sarasota Herald-Tribune on June 15, 2010, and posted the Notice and a Proof of Claim Form on his website.

Following investors' and other potential creditors' submission of Proof of Claim Forms (the "**Claimants**"), over time the Receiver sent approximately 134 letters to pertinent Claimants notifying them of deficiencies in their respective Proof of Claim Forms. The Receiver sent these letters to give Claimants an opportunity to correct deficiencies in their

claim filings which might ultimately affect the recognition of their claim. The Claimants were given thirty days from the date of the notice of deficiency to return a corrected Proof of Claim Form.

The Receiver received 504 claims (the "**Claims**").[2] Of the 504 claims, 478 claims were submitted in connection with 473 investor "accounts"[3] (the "**Investor Claimants**" or "**Investor Claims**"), which represent approximately 60% of all currently known Investor Accounts.[4] The Receiver also received 26 claims from other purported creditors (the "**Non-Investor Claimants**" or "**Non-Investor Claims**"), including two claims from taxing authorities (the "**Tax Lien Claimants**" or "**Tax Lien Claims**"). Fourteen of the 504 claims were received after the Claim Bar Date.

To make the process less burdensome for investors, the Court approved the Receiver's proposal to include in Proof of Claim Forms distributed to investors his calculation for the applicable Investor Account's "**Net Investment Amount**" where sufficient information existed. The Net Investment Amount for an account was calculated by adding all amounts contributed by the pertinent investor(s) to an account and subtracting all

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[2] Overall, the Receiver received and reviewed 631 Proof of Claim Forms. This number includes corrected and supplemented Proof of Claim Forms that were received in response to deficiency letters sent by the Receiver. As noted above, these 631 Proof of Claims Forms relate to 504 total claims.

[3] Although Nadel and the Receivership Entities did not maintain separate investor accounts, the purported statements they created and distributed referred to fictitious "accounts" in the Hedge Funds (the "**Investor Accounts**"). For ease of reference, this Motion and its Exhibits use the term "account" even though no such accounts actually existed.

[4] Multiple claims were submitted for five accounts.

distributions made to that accountholder(s), regardless of whether those distributions were characterized as interest, earnings, returns of principal, or by any other terminology. In other words, the Net Investment Amount reflects dollars an investor actually deposited in the scheme minus dollars that investor actually received from the scheme.

If the Investor Claimant agreed with the numbers provided by the Receiver, it did not have to provide any documentation supporting its claim. The Investor Claimant, however, was required to sign under penalty of perjury and return the completed Proof of Claim Form by the Claim Bar Date.[5] Of the 478 Investor Claims submitted, 392 claims agreed with the Receiver's calculations; 63 claims disagreed; 4 claims did not indicate whether they agreed; and the remaining 19 claims were not provided calculations by the Receiver for various reasons. To date, the Receiver has received claims from Investor Claimants totaling approximately $149,033,449.32 and claims from Non-Investor Claimants totaling approximately $9,205,581.14, for a total claim amount of approximately $158,239,030.46.[6]

After the filing of this Motion, the Receiver will promptly mail a letter giving notice of this Motion to all Claimants to the mailing address provided on each of their respective submitted Proof of Claim Forms, and to their attorneys, if any were identified. The letter will inform the Claimants that this Motion is available on the Receiver's website or, upon request,

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[5] For the Court's ease of reference, a copy of a blank Proof of Claim Form is attached as **Exhibit A**.

[6] The amount indicated for Non-Investor Claimants may not include all claimed interest, fees, or penalties which may be sought by them. Importantly, these numbers reflect the amount Claimants are claiming they are owed, and not the amount the Receiver has determined is the value of allowable claims.

from the Receiver's office. The letter will also advise each Claimant of his, her, or its respective claim number.[7]

THE RECEIVER'S DETERMINATIONS AND FURTHER PLANS FOR ADMINISTERING THE CLAIMS PROCESS

I. OVERVIEW OF THE RECEIVER'S DETERMINATION OF CLAIMS AND CLAIM PRIORITY

As set forth in the Receiver's Claims Form Motion, any properly completed and timely filed proof of claim should be allowed if it is established that: (1) the claim arises out of any Receivership Entity's activities; (2) losses resulted from such activities; (3) any alleged claim and losses are consistent with the books and records gathered by the Receiver; and (4) no other ground exists for denying the claim. The Receiver has carefully and thoroughly reviewed and considered all 504 submitted claims. The Receiver has determined that each claim falls within one of five categories:

(1) Investor Claims and Tax Lien Claims which should be allowed and should receive the highest priority among claims;

(2) Investor Claims which should be allowed in part and also should receive the highest priority among claims;

(3) secured Non-Investor Claims (the "**Non-Investor Secured Claims**") which should be allowed in part, but should be paid only from the proceeds of the sale of the collateral securing the claims, less certain fees and costs;

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[7] To minimize public disclosure of Claimants' financial affairs, the Receiver has assigned each claim a number. As permitted by Court order (Doc. 674), by separate sealed filing, the Receiver will file with the Court a list disclosing the identity of each Claimant associated with each claim identified by number in **Exhibits B** through **J**.

In certain instances, however, where the Claimant's identity is important to the determination of a claim, this Motion discloses that information.

(4) unsecured Non-Investor Claims (the "**Non-Investor Unsecured Claims**") which should be allowed (in whole or in part), but should be paid only after defrauded investors' allowed claims have been paid in full; and

(5) claims which should be denied.

As detailed in **Exhibits B** through **J**, the Receiver has proposed an Allowed Amount[8] for each claim. The Receiver's determination of a Claimant's Allowed Amount is not indicative of the amount the Claimant will receive through distributions of Receivership assets. Rather, each Claimant holding an allowed claim with a positive Allowed Amount will be eligible for distributions on a *pro rata* basis depending on the priority of the claim (unless otherwise discussed in this Motion), and ultimately will likely only receive a percentage of its Allowed Amount. For example, claims submitted by Non-Investor Unsecured Claimants, such as unsecured trade creditors, may receive no distributions despite having a positive Allowed Amount because, as discussed below in Section II. A., those claims are subject to a lower priority than defrauded investors' claims.

As of November 29, 2011, the Receiver had approximately $21,882,616.97 in cash and certificates of deposits in all Receivership accounts. The Receiver believes that he has sufficient funds to warrant the expense inherent in making an interim distribution. As discussed in more detail below, the Receiver recommends making an interim distribution as

[8] "**Allowed Amount**" is the amount of a claim to which the Receiver has determined the Claimant is entitled. The Allowed Amount will serve as the basis for determining a Claimant's ultimate distribution of Receivership assets.

soon as practicable after Claimants have had the opportunity to object as provided in Section V. of this Motion.

The Receiver considered each submitted claim to determine its claim category, with the goal that distribution of the Receivership's assets be equitable and fair among all Claimants. Various types of Claimants submitted claims, including individual investors, institutional investors, service providers, and mortgage lenders. Some Claimants had no reason to know of Nadel's scheme while others were more sophisticated and, at a minimum, should have recognized at least some of the numerous "red flags." A subsequent reasonable and diligent inquiry would have revealed fraud or, at a minimum, failed to ameliorate suspicions. It is through the Receiver's review and assessment of information each Claimant provided, the books and records of the Receivership Entities, and information obtained from non-parties that the Receiver established the categories of Claimants discussed in this Motion to assure fair and equitable treatment.

The Receiver asks the Court to approve his recommended claim determinations as set forth in **Exhibits B** through **J** and, in certain instances, discussed in more detail below. Further, as the Claim Bar Date has passed and all Claimants and other potential creditors have had ample notice of the claims process and an opportunity to file claims and to seek enforcement of any liens or other asserted rights or interests in Receivership property, the Receiver asks the Court to issue an order (1) confirming that no further claims will be considered and (2) barring any future claims against Receivership Entities, Receivership property, the Receivership estate, or the Receiver, and any proceedings or other efforts to enforce or otherwise collect on any lien, debt, or other asserted interest in or against

Receivership Entities, Receivership property, or the Receivership Estate. Such an order is important to bring finality and to allow distributions to proceed, and is warranted in light of the ample time that has been available to address such matters.

A. Allowed Investor Claims And Tax Lien Claims, Which Should Receive Highest Priority

1. Allowed Investor Claims

Highest priority should be given to claims submitted by investors who were victimized by the scheme and who did not have reason to recognize "red flags." Specifically, these investors invested a principal amount in the scheme which exceeded any distributions they received from the scheme. The Receiver has determined that 345 Investor Claims should be allowed. These claims are identified in **Exhibit B** and are consistent with the Receivership Entities' books and records and other documents recovered by the Receiver (collectively, the "**Receivership Records**"). Accordingly, the Court should allow each of these claims in the Allowed Amounts as set forth in **Exhibit B**.

2. Allowed Tax Lien Claims

Under the procedures set forth in the Claims Form Motion, the Receiver sent Claims Packages to numerous state and federal taxing authorities, advising them of their opportunity to submit a claim. The Receiver selected these recipients based on information in his possession indicating ties between the Receivership and those jurisdictions. Specifically, the Receiver sent Claims Packages to the Internal Revenue Service ("**IRS**") and state and certain county taxing authorities in Florida, Delaware, Georgia, North Carolina, Mississippi, and Ohio. In Florida, the Receiver sent Claims Packages to the Florida Department of Revenue and the Sarasota County Tax Collector. In Delaware, the Receiver sent a Claims Package to

the Delaware Department of Revenue. In Georgia, the Receiver sent Claims Packages to the Georgia Department of Revenue, the Coweta County Tax Assessor, the Grady County Tax Assessor, and the Thomas County Tax Assessor. In North Carolina, the Receiver sent Claims Packages to the North Carolina Department of Revenue, the Alamance County Tax Department, the Buncombe County Tax Department, and the Wake County Revenue Department. In Mississippi, the Receiver sent Claims Packages to the Mississippi State Tax Commission and the Lee County Tax Collector. And in Ohio, the Receiver sent Claims Packages to the Ohio Department of Taxation and the Lorain County Auditor. In total, the Receiver sent Claims Packages to 23 local, state, and federal taxing authorities.

The Receiver received claims from two taxing authorities: the IRS and the Sarasota County Tax Collector. (*See* Claim Nos. 479 and 480 on **Exhibit C**, respectively.) The IRS's claim seeks $3,400 for penalties owed in connection with Receivership Entities' returns for the year ending 2007. The IRS submitted this claim on June 30, 2011, nearly ten months after the Claim Bar Date and only after repeated contact by the Receiver's accountant. Despite the IRS's late filing, given the low dollar amount of this tax claim, the Receiver does not believe it makes financial sense to contest the claim, and thus the Court should allow this claim as specified in **Exhibit C**.[9]

The Sarasota County Tax Collector's timely filed claim stems from tangible personal property taxes incurred in 2009 on property then owned by Receivership Entity Home Front

[9] Because the IRS's claim seeks a minimal amount and was received sufficiently prior to the filing of this Motion and any interim distribution, allowing this claim should not cause any appreciable prejudice to other Claimants.

Homes, LLC. The Sarasota County Tax Collector seeks $1,081.99. Given the low dollar amount of this tax claim, the Court should allow this claim as specified in **Exhibit C**.

Because the Claim Bar Date has long passed, the Court should order that the above taxing authorities are barred and precluded from asserting a claim or any further claim against the Receiver, Receivership estate, or any Receivership Entity. *See Callahan v. Moneta Capital Corp.*, 415 F.3d 114, 117-18 (1st Cir. 2005) (potential claimants that did not submit claims by bar date lacked "standing to object to the adjudication of a pending claim in the Claims Disposition Order"); *S.E.C. v. Princeton Econ. Int'l Ltd.*, 2008 WL 7826694, *4 (S.D.N.Y. 2008) ("All persons or entities with a claim that failed to file a proof of claim prior to the Bar Date and were not excused from filing a proof of claim under the Plan are forever barred, estopped, and permanently enjoined."); *C.F.T.C. v. Wall St. Underground, Inc.*, 2007 WL 1531856, *4 (D. Kan. 2007) (same). Enforcement of the Claim Bar Date against any future claim is necessary to allow the Receiver to proceed with his plan of distribution as discussed in Section I. E. 2. below.

B. Allowed In Part Investor Claims, Which Also Should Receive Highest Priority

The Receiver received 75 Investor Claims which, because of various factors, should not be allowed in full. These claims, and the factors impacting each claim, are set forth in

Exhibit D.[10] Sections I. B. 1. and I. B. 2. below contain general discussions of certain matters impacting the Allowed Amount of these claims. Section I. B. 3. below contains a preliminary discussion about additional matters impacting one of these claims.

1. Investor Claims Should Be Allowed Only For The Net Investment Amount

As a general matter, as detailed in Section II. B. below, an Investor Claimant is not entitled to an Allowed Amount that exceeds its Net Investment Amount. Accordingly, the Court should approve the "**Net Investment Method**" as the appropriate method for determining Allowed Amounts for Investor Claims. The Net Investment Method begins with the Net Investment Amount for each Investor Account which, as previously noted, adds all amounts contributed by the pertinent investor(s) to an account and subtracts all distributions made to that accountholder(s), regardless of whether those distributions were characterized as interest, earnings, returns of principal, or by any other terminology. The Court approved the Receiver's proposal to include this amount on the Proof of Claim Forms sent to investors where sufficient information was available.

The Net Investment Amount appropriately does not include any "**False Paper Profits**." False Paper Profits represent the purported appreciation in an Investor Account from the Hedge Funds' purported investment activities as reflected in statements sent to

[10] There are seven additional claims included in **Exhibit D** for which Investor Claimants agreed to a reduction of their claim amount or potential distribution as part of resolutions of litigation brought by the Receiver. The set-off or reduced amounts are reflected in **Exhibit D**. (*See* Claim Nos. 346, 351, 363, 377, 378, 390, and 396.) **Exhibit D** also includes one additional claim for an account which transferred all of its funds to one of the aforementioned claims. (*See* Claim No. 395).

investors. These False Paper Profits were fictitious because no profits were actually earned by the Hedge Funds. Rather, the Hedge Funds were operated as a Ponzi scheme, and the reported profits were a fiction. The fictitious profits were only on "paper" because the investors associated with those accounts did not ask for distributions of those purported profits and thus did not receive any money purportedly representing those fictitious profits.

In applying the Net Investment Method, where an Investor Claimant or related Investor Claimants have multiple accounts with the Hedge Funds and one or more of those accounts received "**False Profits**," those accounts have been considered on a consolidated basis. False Profits refer to the amount of money actually received by investors associated with an Investor Account from the scheme which exceeds the amount of money those investors actually invested in the scheme. Typically, Investor Claimants would have received False Profits because of distributions they received of purported investment gains or principal redemptions.

Inconsistent with the Net Investment Method, nine Investor Claims seek False Paper Profits in addition to their Net Investment Amounts. (*See* Claim Nos. 350, 369, 397, 398, 403, 405, 407, 408, and 417.)[11] The Receiver's determination of the Allowed Amounts for each of those nine Investor Claims reflects each of their associated Investor Account's Net Investment Amount but does not include their fictitious False Paper Profits.

Also inconsistent with the Net Investment Method, the Receiver received 24 claims for Investor Accounts which had losses but which were associated with investors who

[11] Claim Number 349 is included on **Exhibit D** because the Receiver has consolidated it into Claim Number 350.

received False Profits in connection with one or more additional Investor Accounts. (*See* Claim Nos. 347, 352, 355, 358, 360, 364, 365, 367, 372, 375, 381, 383, 385, 389, 393, 396, 401, 402, 404, 409, 412, 413, 418, and 419.) In determining the Allowed Amounts for those claims, the Receiver set-off the claimed losses with the False Profits in the related accounts.[12]

Accordingly, the Court should (1) find the Net Investment Method as proposed above and as reflected in the Exhibits is the appropriate method to use in determining Allowed Amounts for investors and (2) allow all of the foregoing claims for the Allowed Amounts as set forth in **Exhibit D**. Legal authority supporting these conclusions is detailed in Sections II. B. 1. and II. B. 2. below.

2. Investor Claims For Amounts That Are Inconsistent With The Amounts Reflected In Receivership Records Should Be Allowed Only In The Appropriate Amount Reflected In Receivership Records

Nine Investor Claims have claim amounts that are inconsistent with Receivership Records and should be allowed only in the appropriate amount reflected in those records. (*See* Claim Nos. 354, 373, 374, 387, 394, 399, 406, 415, and 416.) The Receiver has

[12] For ease of the Court's and the Claimants' review, **Exhibit D** includes both the claims for losses and the related claims involving Investor Accounts with False Profits. Entries in the "Recommended Claim Determination" column in **Exhibit D** for each of these claims identifies which claims should be set-off and the amounts to be set-off. Each claim involving an Investor Account with False Profits necessarily has no loss and thus has no Allowed Amount. Those False Profits claims are only included in **Exhibit D** for purposes of set-off and otherwise would have been in the Exhibit listing denied claims because they had no loss. (*See* Claim Nos. 348, 353, 356, 359, 361, 366, 368, 371, 376, 382, 384, 386, 388, 392, 400, 403, 410, 411, 414, and 420.) Also included in **Exhibit D** for ease of reference are related claims for Investor Accounts which may have purportedly transferred funds or have been consolidated with other Investor Accounts which are involved in the set-offs discussed above. (*See* Claim Nos. 357, 362, 370, 379, and 380.)

thoroughly reviewed those claims and relevant Receivership Records, and those records show the figures and Allowed Amounts set forth in **Exhibit D** for each of those claims accurately reflect their Net Investment Amount. Accordingly, the Court should allow each of those claims only for the Allowed Amounts specified in **Exhibit D**.

3. Investor Claim Which Received Inequitable Preference Payment Resulting In A 50% Recovery Only Should Be Allowed To Receive Any Distribution When And If Other Investor Claimants With Allowed Claims Have Received A 50% Recovery Of Their Allowed Amounts.

As discussed in more detail below in Section II. C. 1. and as set forth in **Exhibit D**, one Investor Claim should be allowed only in part because the Claimant received an inequitable preference payment after it was placed on notice of "red flags." (*See* Claim No. 391.) Specifically, in 2005 the Claimant invested $2 million in Victory Fund. By 2008, the purported value of that "investment" exceeded $3 million, and the Claimant attempted to redeem its entire "investment" by no later than September 30, 2008. Nadel resisted the Claimant's initial attempt to redeem citing "extraordinary market circumstances." In reality, the scheme was on the brink of collapse and Nadel had run out of money to satisfy the redemption request. In response, the Claimant sent Nadel letters and emails demanding the return of its purported investment and threatening legal action if Nadel did not comply. To forestall the immediate detection of his scheme, Nadel arranged a partial "redemption" of $1 million to the Claimant on November 11, 2008. Two months later, Nadel's scheme collapsed, and he fled Sarasota.

The $1 million that Nadel transferred to the Claimant after being threatened with legal action was an inequitable preference payment made after the Claimant was placed on

notice of red flags as a result of Nadel's refusal to honor the Claimant's redemptions request. That preference amounted to a return to the Claimant of 50% of its principal investment under inequitable circumstances. As such, that transfer effectively should be treated as an "advance" on claims process distributions, and the Claimant should not be allowed to participate in any further distributions *unless and until* all Investor Claimants receive 50% of their Allowed Amounts.

C. Allowed In Part Non-Investor Secured Claims, Which Should Only Be Paid From Proceeds Of The Sale Of Collateral Less Certain Fees And Costs

The Receiver received secured claims which should be allowed in part from two banks which loaned money to certain Receivership Entities for the purchase of real property: (1) Branch Banking & Trust Company ("**BB&T**") and (2) Bank of Coweta.[13] (*See* Claim Nos. 481 and 482.) Both BB&T and Bank of Coweta have secured liens on property purchased with those loans.

BB&T loaned $394,000 to Receivership Entity Laurel Preserve, LLC to refinance Nadel's cottage located at 10 Laurel Cottage Lane, Black Mountain, North Carolina (the "**Laurel Preserve Cottage**"). (*See* Claim No. 482.) The principal balance of the loan when the Receiver was appointed was $360,157.37. During the life of the loan, $79,103.30 was paid towards the loan's principal or interest. Thus, BB&T has already received slightly more

[13] The Receiver also received: (1) a secured claim from Wachovia Bank, N.A. ("**Wachovia Bank**") relating to a loan to a Receivership Entity for the purchase of real estate (*see* Claim No. 502) and (2) two claims from LandMark Bank of Florida ("**LandMark Bank**") asserting secured interests in connection with a loan made to Christopher Moody (*see* Claim Nos. 500 and 501). However, as discussed in Sections II. D. 2. and II. D. 3. below, those claims should be denied.

than 20% of the original loan amount. As discussed in more detail in Section II. C. 2. below and as set forth in **Exhibit E**, this claim should be allowed in the amount of $360,157.37, which is the principal amount of the loan outstanding at the time of the Receiver's appointment, but should only be paid from the proceeds of the eventual sale of the Laurel Preserve Cottage, less fees and costs incurred by the Receivership to maintain and sell the property. Because the Receiver is entitled to compensation for these fees and costs, the Receiver's fees and costs should be deducted from the proceeds of the sale of the property first and then the remaining proceeds should be distributed to BB&T up to the Allowed Amount.

Bank of Coweta loaned $1,000,000 to Receivership Entity Tradewind, LLC for the purchase of five aircraft T-hangars and one box hangar in Coweta County, Georgia (the "**Hangars**"). (*See* Claim No. 481.) When the Receiver was appointed, the principal balance of the loan was $964,300.80. The Receiver has been making monthly payments on that loan because he believes they are in the best interest of the Receivership. As of November 25, 2011, the principal balance of the loan was $891,628.04. During the life of the loan, $399,078.75 has been paid towards the loan's principal or interest. Thus, Bank of Coweta has already received nearly 40% of the original loan amount. Because the Receiver has been making payments on this loan, as discussed in more detail in Section II. C. 2. below and set forth in **Exhibit E**, this claim should be allowed in the amount of the principal amount of the loan outstanding at the time of the eventual sale of the Hangars, not to exceed $891,628.04, but should only be paid from the proceeds of the eventual sale of the Hangars, less fees and costs incurred by the Receivership to maintain and sell the Hangars. Again, because the

Receiver is entitled to compensation for these fees and costs, the Receiver's fees and costs should be deducted from the proceeds of the sale of the property first and then the remaining proceeds should be distributed to Bank of Coweta up to the Allowed Amount.

D. Allowed And Allowed In Part Non-Investor Unsecured Claims, Which Should Receive Lowest Priority Among Allowed And Allowed In Part Claims

Unsecured non-investor creditors submitted 13 claims for amounts owed in connection with their provision of goods or services to Receivership Entities ("**Non-Investor Unsecured Claimants**"). The total amount of those 13 claims is $755,452.51, and they are itemized in **Exhibit F.** Eight of those claims should be allowed for the full amount claimed (*see* Claim Nos. 484, 485, 486, 488, 490, 491, 492, and 493), and the remaining five claims should have Allowed Amounts that are less than the amount claimed (*see* Claim Nos. 483, 487, 489, 494, and 495). The latter five claims should be allowed only in the Allowed Amounts set forth in **Exhibit F**. As discussed in Section II. A. below, all of the Allowed and Allowed In Part Non-Investor Unsecured Claims should receive the lowest priority among Allowed and Allowed In Part claims, such that those claims are paid only after the Allowed Amounts of all Investor Claims have been paid in full.

The reasons for allowing five of the Non-Investor Unsecured Claims only in part are specified in **Exhibit F**, but following is a summary. Two claims seek fees for services provided after appointment of the Receiver which the Receiver did not request or approve. (*See* Claim Nos. 487 and 494.) One claim seeks late charges for unpaid invoices. (*See* Claim No. 489.) Another claim seeks the remainder of monthly payments due on a pre-Receivership lease agreement for Receivership Entities' offices plus interest through the term

of a lease which runs until after this Receivership was instituted. (*See* Claim No. 495.) That claim also: (1) seeks a 3% rent increase beginning more than two months after appointment of the Receiver and after the offices had been vacated and (2) fails to reduce the amount sought by the last month's rent, which was prepaid by Receivership Entities. The final claim seeks the balance due on a promissory note given by a Receivership Entity plus exorbitant interest of 25% beginning from January 2009 (*i.e.*, the month of the Receiver's appointment), legal fees, and management fees presumably for services rendered to the Receivership Entity. (*See* Claim No. 483.) As a matter of equity, under the circumstances of this Receivership, these claims should not recover for unsolicited services, interest charges, late fees, legal fees, management fees, or rent increases imposed or incurred after the Receiver's appointment. The Receiver's claim determination for each of these claims deducts from their respective Allowed Amounts the amounts claimed for these items.

E. Denied Claims

Forty-three of the 504 submitted claims should be denied. These claims are identified and discussed in **Exhibits G** and **H** and briefly summarized below.

1. Investor Claims Which Should Be Denied Because No Losses Were Suffered

Nineteen of the 43 claims, all 19 of which are Investor Claims, should be denied because the Investor Claimants submitting those claims did not experience any losses. (*See* Claim Nos. 449, 450, 451, 452, 453, 454, 455, 456, 459, 461, 462, 463, 464, 465, 466, 467, 468, 471, and 477.) In fact, 16 of those 19 Investor Claims were submitted by Investor Claimants who are overall net "winners." This means that when considering all Investor Accounts associated with each of those Investor Claimants, each Investor Claimant had an

overall False Profit. For at least one of those Investor Claimants, False Profits exceeded $1 million.

Consistent with the legal authority discussed below in Section II. B., claims by Investor Claimants who have not experienced an overall loss should be denied. It would be inequitable and inconsistent with precedent to allow an Investor Claimant to recover for a loss in one Investor Account when the Investor Claimant has received False Profits greater than that loss in connection with another Investor Account. These claims should be denied as set forth in **Exhibit G**.

2. Investor Claim Which Should Be Denied Because It Was Filed After The Claim Bar Date And Investor Claimant Failed To Explain Reason For Late Submission

Fourteen Proof of Claim Forms were received after the Claim Bar Date. The Receiver sent a letter to each Investor Claimant who filed a late claim without providing an explanation for the late filing. The letter requested that any extenuating circumstances for the late filing be provided to the Receiver in writing and that failure to do so could result in denial of the claim. The Receiver received responses for each such claim except for one. (*See* Claim No. 458.) Not only did the non-responding Investor Claimant (which is a Limited Liability Company) fail to provide any explanation for the late filing, but the Receiver has learned the owners of this Claimant, along with other individuals, previously invested in Hedge Funds through another Limited Liability Company. That previous investment received False Profits. Because the Receiver was not provided any details about who invested in the Hedge Funds through both Limited Liability Companies and how much

those persons or entities invested in and received from the Hedge Funds, the Receiver cannot determine each such person or entity's losses or False Profits.

Pursuant to the Court's Order on the Claims Form Motion, any person or entity who failed to submit a proof of claim to the Receiver so that it was actually received by the Receiver on or before the Claim Bar Date is barred and precluded from asserting any claim to Receivership assets. Under the circumstances of this Receivership, and specifically the scheme's impact on defrauded investors with losses, a limited exception should be made for Investor Claimants that provided extenuating circumstances for the delay which the Receiver believes, under the totality of the circumstances, reasonably justify allowing those late-filed claims. (*See* Claim Nos. 5, 48, 52, 57, 181, 183, 269, 357, 358, 359, and 417.)[14] This conclusion is heavily based on the fact that (i) because those claims were filed so close in time to the Claim Bar Date (they were received by October 6, 2010, which is slightly more than one month after the Claim Bar Date), there is no prejudice in accepting them at this time and (ii) the Claimants made an effort to provide extenuating circumstances for their late filings. On the other hand, however, as specified in **Exhibit G**, the late-filed Investor Claim discussed in the previous paragraph should be denied for the reasons discussed.

[14] Another late-filed claim was accompanied by an explanation of extenuating circumstances (*see* Claim No. 471), but as explained in **Exhibit G** and Section I. E. 1., this claim should be denied because the associated Investor Account had False Profits rather than a loss.

3. Claims Which Should Be Denied For Failure To Cure Deficiencies In Proof Of Claim Forms

a. Investor Claims From Offshore Nominee Accounts That Did Not Disclose Beneficial Owners

Two Investor Claims should be denied because they were submitted by nominees of offshore bank accounts that did not disclose the beneficial owners of the accounts. (*See* Claim Nos. 445 and 469.) The Receiver sent these Investor Claimants letters explaining the deficiencies in the Proof of Claim Forms and requesting disclosure of all beneficial owners of the pertinent accounts. One offshore bank did not respond to the deficiency letter. (*See* Claim No. 469.) The other offshore bank provided some information but wrote on the Proof of Claim Form that the beneficial owners, which appear to be investment funds, "do not intend to provide/divulge the requested information." (*See* Claim No. 445.) This answer was given in response to Question 3 on the Proof of Claim Form (*see* Exhibit A) which states: "If this form is being completed on behalf of an entity, please provide the full name of the entity and all of its trustees, officers, directors, managing agents, shareholders, partners, beneficiaries, and any other party with an interest in the entity."

These offshore banks' refusal to provide requested information has impeded the Receiver from assessing whether the pertinent Investor Claimants have submitted allowable claims. For instance, without knowing the beneficial owners of the accounts, the Receiver cannot determine whether those owners held other Investor Accounts, whether they received False Profits in connection with any such other accounts, whether they otherwise received additional money from Receivership Entities, or whether they were "insiders." Accordingly, these claims should be denied as set forth in **Exhibit G**.

b. Investor Claims Filed By Claimants Who Lack Necessary Authority

The Receiver received three Investor Claims from Millennium Trust submitted on behalf of accounts for which it acted as custodian. (*See* Claim Nos. 457, 470, and 472.) Millennium Trust acted as custodian for numerous Individual Retirement Accounts which invested in the Hedge Funds. These claims were submitted on behalf of Marguerite Nadel (Nadel's wife); Geoff Quisenberry (her son); and an investor. Mrs. Nadel's and the investor's respective Proof of Claim Forms were signed only by an officer of Millennium Trust and not by them. Mr. Quisenberry's Proof of Claim Form was signed by him and the same Millennium Trust officer, but Mr. Quisenberry's signature was not an original signature. Further, the claim submitted on behalf of the investor is a duplicate claim as that investor also submitted his own claim for that same account.

The Receiver sent letters to these Claimants identifying the deficiencies in the submitted Proof of Claim Forms. The Receiver requested (1) a writing showing Millennium Trust had authority to submit the relevant claims or (2) an original signature of the account owner on the Proof of Claim Form certifying the information provided on the Proof of Claim Form was true and correct. The Receiver received no response from Millennium Trust or the underlying Claimants regarding these deficiencies.

Further, information on the Proof of Claim Forms for both Mrs. Nadel and Mr. Quisenberry was not complete or accurate. For instance, even though required by the Proof of Claim Forms, they fail to identify any money Mrs. Nadel or Mr. Quisenberry received from Receivership Entities that was unrelated to the specific accounts held by Millennium Trust. This omission renders those forms severely inaccurate because both of them received

substantial "wages" from Receivership Entity Scoop Management. This omission from Mr. Quisenberry's Proof of Claim Form is particularly troubling because he signed a copy under penalty of perjury. Indeed, neither Mrs. Nadel nor Mr. Quisenberry suffered overall losses because they each received substantial amounts of scheme proceeds unrelated to investments, including as "wages." And in any event, the money used to fund their Millennium Trust Individual Retirement Account investments was scheme proceeds which they received as "wages." For these reasons, these claims should be denied as specified in **Exhibit G**.

c. Claims With No Supporting Documentation

The Receiver received an Investor Claim from Nadel's brother-in-law. (*See* Claim No. 460.) The Receiver did not provide any amounts in the Exhibit A attached to the Proof of Claim Form for this Claimant. In light of the relationship between the Claimant and Nadel, the Receiver wanted the Claimant to provide proof that the investment was (1) made with money that was not proceeds of the scheme or (2) not simply credited on the books without actual receipt of funds. The Claimant did not provide any supporting documentation as required by the Proof of Claim Form. The Receiver sent the Claimant a letter identifying this deficiency and providing the Claimant 30 days to provide the requested documentation, but the Claimant did not respond. Receivership Records do not reflect any actual deposit of money to fund this investment, and because this Claimant failed to provide documentation, the Receiver has no record that this was a legitimate investment. Accordingly, the claim should be denied as specified in **Exhibit G**.

The Receiver also received a claim from an individual with a correctional facility's address as a return address who appears to be an inmate of that facility. (*See* Claim No. 497.)

No record of this Claimant was found in Receivership Records. The Claimant submitted a claim for "health care goods and services of a confidential nature." He also states that he was an investor and unpaid creditor. However, the Proof of Claim Form was not properly completed and did not include any supporting documents. The Receiver sent the Claimant a letter identifying the deficiencies and providing the Claimant 30 days to correct them, but the Receiver did not receive any response. Because the Receiver has no record of this Claimant or any purported investment made or service provided and because the Claimant failed to provide any support for his claim, the claim should be denied as specified in **Exhibit H**.

4. Claims Which Should Be Denied Because They Relate To Matters Outside The Scope Of The Receivership

The Receiver received two claims for matters which are outside the scope of the Receivership and do not involve Receivership Entities. One pertinent Claimant is a former wife of Nadel who seeks recovery for purported mortgage loans secured by her property obtained while she and Nadel were married. (*See* Claim No. 504.) The other Claimant is a purported investor who seeks recovery of her purported investment or loan given to an individual named J.C. Abercrombie. (*See* Claim No. 503.) Neither J.C. Abercrombie nor the purported investment appears to have any relationship to this Receivership. Likewise, the claim relating to the purported mortgages on Nadel's former wife's property is not within the scope of this Receivership. That claim involves alleged damages caused by Nadel in his individual capacity that have no relation to the activities of the Receivership Entities. In fact, the conduct purportedly giving rise to that claim pre-dates the matters which underlie this case. Relief in this receivership does not extend to all victims of frauds perpetrated by the

same actors. *S.E.C. v. Homeland Commc'ns Corp.,* 2010 WL 2035326, *4 (S.D. Fla. 2010). Accordingly, these claims should be denied as set forth in **Exhibit H**.

5. Claims Which Should Be Denied Because Claimants Were On Inquiry Or Actual Notice Of Fraud

a. Sophisticated Financial Companies

As discussed in detail in Section II. D. below, eight claims should be denied because the Claimants had either actual or inquiry notice of fraud, and thus it would be inequitable to share Receivership assets with these Claimants. (*See* Claim Nos. 446, 447, 448, 473, 476, 500, 501, and 502.) Five of these claims were Investor Claims submitted by: (1) Citco Global Custody N.V. ("**Citco**"), a global foreign bank, on behalf of KBC Financial Products ("**KBC**"), a sophisticated financial products firm with offices in London, New York, and Hong Kong (Claim Nos. 446, 447, and 448);[15] and (2) Think Strategy Capital Management LLC ("**Think Strategy**"), a capital management firm that acted as investment manager of the TS Multi-Strat Fund LP, an offshore investment fund (Claim Nos. 473 and 476).[16] The

[15] This Claimant's Proof of Claim Forms were deficient because they failed to provide information requested in Question 3. *See* Proof of Claim Form, Ex. A. The Receiver sent the Claimant notice of the deficiency and provided the Claimant with 30 days to correct the deficiency. The Claimant did not respond to this request and thus these claims should be denied for this reason alone.

[16] This Claimant's Proof of Claim Forms were deficient because they were not signed by an individual authorized to act on behalf of the entity which held the account. Rather, the signature line simply bore the name of the company itself. The Receiver sent the Claimant notice of the deficiency and provided the Claimant with 30 days to correct the deficiency. The Claimant did not respond to this request and thus these claims should be denied for this reason alone.

remaining three of these claims were Non-Investor Claims submitted by (1) Wachovia Bank (Claim No. 502); and (2) LandMark Bank (Claim Nos. 500 and 501).

As discussed in detail in Section II. D. below, each of these Claimants was a sophisticated financial company and, at a minimum, should have recognized at least some of the numerous and easily discernible "red flags" surrounding Nadel and Receivership Entities. In turn, they should have conducted a diligent and reasonable investigation, which would have uncovered fraud or, at a minimum, failed to ameliorate the issues. As a consequence, they were on inquiry notice of fraud. Further, as also detailed in Section II. D. 3. below, one of these Claimants, LandMark Bank, was on actual notice of fraud when it purportedly entered into the transaction which forms the basis of one of its claims (*see* Claim No. 501). Under principles of equity, these Claimants should not receive any Receivership assets. Accordingly, these claims should be denied as set forth in **Exhibits G** and **H**.

b. Receivership Entity Employee

Similarly, as discussed in more detail in Section II. E. below, the Receiver received two claims from a former employee of a Receivership Entity. (*See* Claim Nos. 474 and 475.) The Claimant was employed by Scoop Management as a bookkeeper from approximately December 2004 through the collapse of the scheme and was Neil Moody's step-child.[17] The

[17] Neil Moody and his son Christopher Moody were "business partners" of Nadel (Neil and Christopher Moody are collectively referred to as the "**Moodys**"). Each of them consented to entry of judgments for securities fraud in connection with the scheme and to disgorge all gains they received from the scheme. *See generally S.E.C. v. Neil V. Moody et al.*, Case No. 8:10-cv-00053-T-33TBM (M.D. Fla.), Consent of Def. Neil V. Moody ¶ 3 (Doc. 2, Ex. 2); Consent of Def. Christopher D. Moody ¶ 3 (Doc. 2, Ex. 1); Judgments of Permanent Injunction and Other Relief against Neil Moody (Doc. 9) and Christopher Moody (Doc. 9-1).

Claimant was involved in certain aspects of the financial affairs of Viking Fund, Viking IRA Fund, Valhalla Investment Partners, Valhalla Management, and Viking Management. The Claimant is also identified as handling the Hedge Fund Investor Account for Receivership Entity Viking Oil & Gas, LLC and Neil Moody's personal account. In only approximately four years as a bookkeeper, the Claimant received total compensation of $385,811.32. The Claimant received wages of $118,326.76 in 2008 alone. The median salary for a bookkeeper in the relevant geographic area is less than half the amount the Claimant received. Receivership Records also indicated the Claimant drove a car paid for by Receivership Entities and had a Receivership Entity credit card.

As detailed in Section II. E. below, these claims should be denied for two independent reasons. First, they should be denied because the Claimant cannot satisfy the good faith obligations. The Claimant was on inquiry notice of problems with the Hedge Funds because (1) the Claimant had an intimate connection with investor assets, movement of funds, and Neil Moody's accounting and (2) the Claimant received more than twice the amount of compensation that was justified for the services the Claimant provided – which were clerical and often of a personal nature for Neil Moody. Second, even if the Claimant had satisfied good faith obligations, the claim still should be denied because the claimed loss – a combined $91,987.50 – is more than offset by the excess salary the Claimant received, which consisted of proceeds of the scheme.[18] Accordingly, these claims should be denied as specified in **Exhibit G**.

[18] Further, the Claimant failed to provide proof of every investment deposit the Claimant purportedly made. The Proof of Claim Forms sent to this Claimant did not include (footnote cont'd)

6. Investor Claim Which Should Be Denied Because Claimant Is A Charitable Organization Whose Invested Principal Consisted Of Proceeds Of The Scheme It Received From Neil Moody

One claim was filed by a charitable organization which received contributions from the Neil V. Moody Charitable Foundation (the "**Moody Foundation**") and then invested most of those funds in a Hedge Fund. (*See* Claim No. 478.) Specifically, from April 26, 2004 through November 21, 2008, Neil Moody, through the Moody Foundation, gave this Claimant approximately $1,219,222 on the condition that it invest the bulk of those funds in Valhalla Investment Partners. The Claimant "invested" $1,111,111.40 of those funds and received $30,315.90 in distributions from this "investment." The donations given to this Claimant consisted of proceeds of the scheme funneled to Neil Moody as Hedge Fund management "fees" based on grossly distorted Hedge Fund performance figures and asset values. As such, those donations were actually funds wrongfully taken from new and existing investors of the Hedge Funds. As explained in Section II. F. below, the Claimant did not provide any value in return for those donations.

Also as discussed in Section II. F. below, the Receiver can recover scheme proceeds transferred as a donation or "gift" to a charity. Thus, if the Claimant had kept all of the funds

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any calculation for Net Investment Amount. Accordingly, the Claimant was required to provide documentation, such as cancelled checks and bank statements, showing the funds invested and received. While the Claimant provided documents substantiating some investments, the Claimant did not provide support for all funds the Claimant purportedly invested. Without that proof, the Claimant has not established that all of the Claimant's investments in the Hedge Funds were legitimate and made with actual dollars and that the Claimant was not simply credited with "deposits" without actually depositing funds. As such, even if this claim were allowable, the amount of the claim should be reduced by the amount of claimed deposits the Claimant failed to substantiate.

it received from the Moody Foundation, the Receiver would have a claim to recover them. Here, the Claimant transferred almost all of the funds back into the scheme. Because it had no right to receive or keep those funds in the first place, it now has no right to recover them from the Receivership estate. To the contrary, the Receiver has a right to recover from the Claimant the approximately $138,426.50 the Claimant retained from the Moody Foundation's donations. As such, this claim should be denied as specified in **Exhibit G**.

7. Investor Claim Which Should Be Denied Because Claimant Is A Charitable Organization Which Received Scheme Proceeds As Donations Which Far Exceed Its Claimed Loss Amount

One claim was filed by a charitable organization which received donations from Nadel's Guy-Nadel Foundation. (*See* Claim No. 499.) Specifically, from at least 2006 through 2008, Nadel, through the Guy-Nadel Foundation, gave that Claimant over $682,500. The Guy Nadel Foundation was funded exclusively with scheme proceeds. In some instances, Nadel transferred scheme proceeds directly from Fund Managers to the Guy-Nadel Foundation. In other instances, Nadel transferred scheme proceeds from the Fund Managers to himself or his wife and then to the Guy-Nadel Foundation. As such, the donations given to this Claimant consisted of proceeds of the scheme and thus were funds wrongfully taken from new and existing investors of the Hedge Funds. This Claimant, like the charitable organization discussed in Section II. F. of this Motion, did not provide any value in return for those donations.

As discussed in Section II. F. below, the Receiver has a claim to recover all scheme proceeds transferred as a donation or "gift" to the Claimant.[19] Here, the Claimant has asserted a claim in the amount of $58,114.50 for the return of a payment it made to Receivership Entity Home Front Homes for the purchase of building materials which were not delivered. The Receiver believes that it is fair and equitable to set-off this claim with the claim the Receiver has against the Claimant to recover all scheme proceeds transferred to the Claimant as donations (*i.e.*, over $682,500). Because those transfers exceed the amount claimed, the claim should be denied as specified in **Exhibit H**.

8. Investor Claim Which Should Be Denied Because Claimant's Sole Director Has Ties To Other Investor Accounts, Including Accounts That Experienced False Profits

One Investor Claim submitted by an offshore bank was submitted on behalf of an entity whose sole director is an individual with close affiliations with other entities that invested in the Hedge Funds. (*See* Claim No. 444.) That director has a financial interest in at least two other Investor Accounts funded from offshore which had combined False Profits of approximately $1,084,293.47. The Receiver also has information that the director is a partner of a trust which invested in another Investor Account through a Swiss bank. The Swiss bank has refused to provide all pertinent information about the investment and the beneficial owners, citing Swiss banking laws. However, the Receiver knows that trust received at least $458,000 in False Profits.

[19] The Receiver investigated the recovery of those transfers, but based on evidence of inability to pay provided by the Claimant, the Receiver determined that it was not in the Receivership's best interest to pursue litigation.

Further still, this director is a highly sophisticated investor who should be subject to the equitable considerations discussed in Section II. D. 1. above. Because the Receiver has not been provided sufficient information regarding this director and his control and involvement with the entity that is the beneficial owner of this claim and in light of that director's close affiliation with other investors that had False Profits, this claim should be denied, as also specified in **Exhibit G**.

9. Claims Which Should Be Denied Because Claimants Waived Them In Related Transactions With The Receiver

After filing their Proof of Claim Forms, Investor Claimants asserting 23 Investor Claims settled litigation brought against them by the Receiver. *See* **Exhibit I**. As part of those settlements, each of the Claimants waived any claim they may have had to a distribution of Receivership assets. Accordingly, as set forth in **Exhibit I**, each of those 23 Investor Claims should be denied.

Two claims submitted by Non-Investor Claimants also have been waived. One of those claims was waived in connection with the conveyance of real property (*see* Claim No. 496). The other claim seeks recovery of a security deposit paid by the Claimant in connection with the lease of a gas station and associated real property entered into with Scoop Real Estate. (*See* Claim No. 498.) However, on August 4, 2010, that Claimant executed a lease termination agreement waiving all of its rights under the lease, which include any right to receive deposits paid on the lease. As such, these two claims also should be denied as set forth in **Exhibits H** and **J**.

II. THE RECEIVER'S DETERMINATION OF CLAIMS AND PRIORITY IS FAIR AND EQUITABLE

Section I provided an overview of the Receiver's determination of claims and claim priority. This Section provides additional information, including additional support for the basis of how the Receiver determined priority of claims, the proper method of calculating Allowed Amounts, and other matters affecting claims consistent with the goal of making distributions of Receivership Entities' assets fair and equitable.

A. Priority Of Claims

As discussed above, the Receiver has established the following categories of claims: (1) Investor Claims and Tax Lien Claims which should be allowed; (2) Investor Claims which should be allowed in part; (3) Non-Investor Secured Claims which should be allowed in part; (4) Non-Investor Unsecured Claims which should be allowed (in whole or in part); and (5) claims which should be denied. From these categories, the Receiver has determined the fair and equitable priority for each of these claims' participation in distributions of Receivership assets. The highest priority ("**Class 1**") should be afforded to all Investor Claims which are Allowed (**Exhibit B**) and Investor Claims which are Allowed In Part (**Exhibit D**). Also, given the diminutive amount, Tax Lien Claims which are Allowed (**Exhibit C**) should also receive this priority. Each Claimant holding a Class 1 claim will receive a *pro rata* share of its respective claim's Allowed Amount from the total aggregate distribution as discussed in more detail below in Section IV.

Second priority ("**Class 2**") should be afforded to Allowed In Part Non-Investor Secured Claims (*i.e.*, to Claimants holding such claims that were not on inquiry or actual notice of fraud or whose claims should not otherwise be denied for reasons discussed in this

Motion) (**Exhibit E**). However, as discussed in Section II. C. 2. a. below, these Claimants should be allowed to recover only from proceeds of the sale of the asset securing their respective interest up to the lesser of the outstanding principal amount of the debt (i) at the time of the Receiver's appointment or (ii) at the time of sale of the pertinent asset, as applicable, less fees and costs incurred by the Receivership to maintain and sell the asset. Class 2 claims have priority over all other classes with respect to the proceeds of the sale of the asset securing each of the respective secured claims.

Third priority ("**Class 3**") should be afforded to Allowed and Allowed In Part Non-Investor Unsecured Claims (**Exhibit F**). Claimants holding Class 3 claims will only participate in a distribution of Receivership assets after all Allowed Amounts for Class 1 claims have been satisfied in full.

The remaining claims ("**Class 4**") are those which should be denied in full (**Exhibits G** and **H**) or which have been waived (**Exhibits I** and **J**). Claimants holding Class 4 claims will not receive any distribution of Receivership assets.

The Court's power to approve the Receiver's claim determinations and priority of claims is settled. *See S.E.C. v. Elliot,* 953 F. 2d 1560, 1566 (11th Cir. 1992) (court has "broad powers and wide discretion" to assure equitable distributions). Further, courts have consistently found that treating similarly-situated parties alike in claims processes is fair and equitable. *Id. at* 1570*; United States v. Petters*, 2011 WL 281031, *7 (D. Minn. 2011) (*citing S.E.C. v. Credit Bancorp, Ltd*. 2000 WL 1752979, *28 (S.D.N.Y. 2000)). There is no requirement, however, that all claimants be treated in the same manner; rather, fairness only requires that similarly situated claimants should be treated alike. *See, e.g.¸ Quilling v. Trade*

Partners, Inc., 2006 WL 3694629, *1 (W.D. Mich. 2006) (distinguishing between fraud victims and general creditors); *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 184 (S.D.N.Y. 2009) ("The Receiver's proposal to treat differently those involved in the fraudulent scheme when distributions are being made is eminently reasonable and is supported by caselaw."). Further, no specific method of distribution is required; the method of distribution should simply be "fair and equitable." *S.E.C. v. P.B. Ventures*, 1991 WL 269982, *2 (E.D. Pa. 1991). In the end, "[a]n equitable plan is not necessarily a plan that everyone will like." *Credit Bancorp*, 2000 WL 1752979 at *29. Indeed, "when funds are limited, hard choices must be made." *Byers*, 637 F. Supp. 2d at 176 (quoting *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 84 (2d Cir. 2006)).

Investor Claims from investors who were not on inquiry or actual notice of fraud should be given highest priority. Typically, payment to claimants whose property was unlawfully taken from them, such as investors who had no reason to know of the scheme, is given a higher priority than payment to general creditors. *S.E.C. v. HKW Trading LLC*, 2009 WL 2499146, *3 (M.D. Fla. 2009); *Trade Partners, Inc.*, 2006 WL 3694629 at *1 ("As an equitable matter in receivership proceedings arising out of a securities fraud, the class of fraud victims takes priority over the class of general creditors with respect to proceeds traceable to the fraud."); *see also* III Clark on Receivers § 667 at 1154 (Anderson 3d ed. 1959). This is the appropriate priority because "[t]he equitable doctrine of constructive trusts gives 'the party injured by the unlawful diversion a priority of right over the other creditors of the possessor.'" *Id.* (quoting Clark on Receivers § 662.1 at 1174); *see also S.E.C. v. Megafund Corp.*, 2007 WL 1099640, *2 (N.D. Tex. 2007) (holding that general creditors

"will not be paid until all defrauded investors are fully compensated"); *C.F.T.C. v. PrivateFX Global One*, 778 F. Supp. 2d 775, 786-87 (S.D. Tex. 2011) (overruling objection of bank that extended line of credit and adopting receiver's argument that "courts regularly grant defrauded investors a higher priority than defrauded creditors").

In *S.E.C. v. Mutual Benefits Corp.*, Case No. 0:04-cv-60573, Order Granting Receiver's Motion For Final Determination Of Allowed Claims at 3 (S.D. Fla. Oct. 23, 2008), attached as **Exhibit K**, the court identified additional factors that weighed in favor of giving priority to investor claims:

> (1) this is an SEC enforcement action designed to protect the *investors*, not the creditors, (2) [the receivership entity's] fraudulent conduct was directed toward its *investors*, not its creditors (which were paid substantial amounts already), [and] (3) the investors as a whole are less able to bear the financial costs of [the receivership entity's] conduct than are the creditors. . . .

See also Trade Partners, Inc., 2006 WL 3694629 at *1 (noting "there is no evidence that there was an attempt to defraud [the objecting general creditor]"). Each of those factors applies equally here. Nadel focused his fraud on the individuals and entities that invested in the Hedge Funds. The Ponzi scheme depended on their capital infusions to survive, and when the Hedge Funds could no longer attract enough additional investments to cover Nadel's losses, pay bogus gains, return existing investors' funds, or cover other improper diversions of investors' money, the scheme collapsed. In addition, the funds available for distribution by the Receiver consist of proceeds of Nadel's scheme: they mainly consist of False Profits recovered from investors and money the Receiver raised through the sale of property that was purchased or financed with investors' funds. As such, as a matter of equity, defrauded investors should be compensated before general creditors.

Finally, Non-Investor Secured Claimants with allowed claims – *i.e.*, creditors who have a security interest in a Receivership asset in connection with debt owed to that creditor – should receive distributions solely from proceeds of the sale of the asset which secures their interest subject to several limitations. The basis for this treatment of this category of Claimants is detailed in Section II. C. 2. below.

B. The Net Investment Method Is The Proper Method Of Calculating Allowed Amounts For Investor Claims

As indicated above in Section I. B. 1., the Receiver calculated the Allowed Amount of each Investor Claim using the Net Investment Method. As discussed in that Section, the Net Investment Method begins with the calculation of an Investor Account's Net Investment Amount (*i.e.*, the actual dollars the Claimant "invested" in the scheme less any amounts the Claimant already received from the scheme) and does not include any fictitious False Paper Profits. Further, in applying the Net Investment Method, where Claimants have multiple Investor Accounts and one or more of those accounts received False Profits, the accounts are considered on a consolidated basis. For example, if a claimant has one Investor Account in which it invested $100,000 and received distributions of $50,000 and another Investor Account in which it invested $100,000 and received distributions of $125,000, absent application of the Net Investment Method (including consolidated treatment of the accounts), this claimant would have a claim for $50,000. Using the Net Investment Method, the claimant's loss of $50,000 is set-off by the claimant's False Profit of $25,000, resulting in a net claim amount of $25,000. Thus, the Net Investment Method yields the actual difference between how much an investor "deposited" in Nadel's scheme and how much the investor received back from that scheme. This method of calculating a Claimant's loss is equitable

and regularly adopted by receivership courts as demonstrated by legal authority cited in the next two subsections.

1. Investor Claimants May Not Recover False Paper Profits

As noted, False Paper Profits should not factor into the determination of an Allowed Amount because they do not reflect actual profits. Rather, they simply reflected numbers made up by Nadel. Using the Net Investment Method, the Allowed Amount only takes into account the actual dollars the Claimant "invested" less any amounts the Claimant already received, regardless of whether it was falsely represented to the Claimant that it had earned profits.

A Ponzi scheme is an illegal endeavor and thus creates no legal entitlement to profits or interest for its investors. *Warfield v. Carnie*, 2007 WL 1112591, *12-13 (N.D. Tex. 2007) (referencing *In re United Energy Corp.*, 944 F.2d 589, 595 (9th Cir. 1991)). As a fraudulent scheme, a Ponzi scheme has no legitimate investment appreciation or interest, and "recognizing profits or other earnings in claims for distribution would be to the detriment of later investors and would therefore be inequitable." *CFTC v. Equity Fin'l Group, LLC*, 2005 WL 2143975, *23 (D.N.J. 2005). Early investors would have the benefit of many more months of False Paper Profits to inflate their claim while more recent investors who lost the same amount of actual dollars would have far less of a claim because they had less time to accumulate those purported profits. Further, if such "paper profits" were recognized, early investors could potentially experience no actual losses as a result of receiving distributions over the years and yet still have a claim to False Paper Profits to the detriment of later investors who did not have the time to recoup their investment or accrue "profits." Early

investors should not benefit at the expense of later ones. *See Cunningham v. Brown*, 265 U.S. 1, 13 (1924); *Abrams v. Eby*, 294 F. 1, 4 (4th Cir. 1923); *In re Bernard L. Madoff Inv. Secs. LLC*, 2011 WL 3568936, *5 (2d Cir. 2011) (if Net Investment Method is not adopted "those claimants who have withdrawn funds from their . . . accounts that exceed their initial investments 'would receive more favorable treatment by profiting from the principal investments of those claimants who have withdrawn less money than they deposited, yielding an inequitable result'") (citations omitted). The purported profits or earnings reflected on statements provided to investors were wholly fictitious and arbitrarily determined by Nadel. The Net Investment Method avoids "the absurd effect of treating fictitious and arbitrarily assigned paper profits as real" and avoids legitimizing the scheme. *In re Madoff*, 2011 WL 3568936 at *5.

2. False Profits Received By An Investor Claimant In Connection With An Investor Account Should Set-Off Losses That Investor Suffered In Connection With Another Investor Account

Similarly, for an Investor Claimant who has an Investor Account with losses but received False Profits in connection with another Investor Account, the losses should be set-off with the False Profits. *See Equity Fin'l Grp.*, 2005 WL 2143975 at *12, 26 (upholding Receiver's determination to consolidate accounts). Courts have consistently held that an investor's claim should be limited to the total dollar amount of its investment reduced by any funds it received. *In re Old Naples*, 311 B.R. 607, 616 (M.D. Fla. 2002) (citing *In re C.J. Wright & Co.*, 162 B.R. 597 (Bankr. M.D. Fla. 1993)); *Warfield*, 2007 WL 1112591 at *12-13; *Homeland Communic'ns Corp.*, 2010 WL 2035326 at *3; *Credit Bancorp*, 2000 WL 1752979 at *40; *In re Madoff*, 2011 WL 3568936 at *3-5. As these cases show, this is the