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,

Relief Defendants.
_____/

RECEIVER'S MOTION TO APPROVE SETTLEMENT

Burton W. Wiand, as Receiver (the "**Receiver**"), moves the Court for an order approving settlement of claims he intended to assert against Goldman Sachs Execution & Clearing, L.P. ("**GSEC**") on the basis of the Settlement Agreement attached as **Exhibit A** (the "**Settlement Agreement**"), which, among other things, contemplates entry of a bar order as described below. Contemporaneously with this motion, the Receiver is also filing (1) the Affidavit Of Burton W. Wiand In Support Of Receiver's Motion To Approve Settlement (the "**Receiver's Affidavit**"), which sets forth the facts and conclusions on which this motion

relies, and (2) a Motion To Approve Proposed Notice Of Settlement (the "**Notice Motion**"). The Receiver respectfully requests that the Court first address the Notice Motion and, if that motion is granted, that it continue a decision on this motion until after the deadline set forth in the Notice Motion for objections or other responses to the relief requested in this motion.

ARGUMENT

The Securities and Exchange Commission (the "**Commission**" or "**SEC**") instituted this action (the "**SEC Receivership Action**") to "halt [an] ongoing fraud, maintain the status quo, and preserve investor assets . . . ." (Dkt. 1, Compl. ¶ 7.) Mr. Wiand was appointed by this Court as the Receiver for Defendants other than Arthur Nadel ("**Nadel**") and for Relief Defendants. (*See* Order Appointing Receiver (Dkt. 8).) Additionally, the Receivership was expanded to include Venice Jet Center, LLC and Tradewind, LLC (Dkt. 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. (Dkt. 44); The Guy-Nadel Foundation, Inc. (Dkt. 68); Lime Avenue Enterprises, LLC, and A Victorian Garden Florist, LLC (Dkt. 79); Viking Oil & Gas, LLC (Dkt. 153); Home Front Homes, LLC (Dkt. 172); and Traders Investment Club (Dkt. 454). All of the entities in receivership are collectively referred to as the "**Receivership Entities,**" and Receivership Entities 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. are collectively referred to as the "**Hedge Funds**".

Pursuant to the Order Appointing Receiver (Dkt. 8), in relevant part the Receiver has the duty and authority to:

> 2. Investigate the manner in which the affairs of the Receivership Entities were conducted and institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Entities and their investors and other creditors as the Receiver deems necessary . . . against any transfers of money or other proceeds directly or indirectly traceable from investors in the Receivership Entities; provided such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement or profits, recovery and/or avoidance of fraudulent transfers under Florida Statute § 726.101, et. seq. or otherwise, rescission and restitution, the collection of debts, and such orders from this Court as may be necessary to enforce this Order.

Further, the Order Appointing Receiver (at paragraph 6) authorizes the Receiver to "[d]efend, compromise or settle legal actions . . . in which the Receivership Entities or the Receiver is a party . . . with authorization of this Court . . . ."

The Receiver's Investigation Of Nadel And GSEC

The Receiver's investigation has revealed that Nadel used certain financial institutions in connection with his Ponzi scheme. One such institution, GSEC (formerly known as Spear, Leeds & Kellogg, L.P.), provided clearing services for Shoreline Trading Group LLC ("**Shoreline**"), an introducing Broker/Dealer that dealt directly with Nadel's and certain Receivership Entities' securities transactions. The Receiver gathered information relating to these transactions and contacted GSEC to discuss its role in providing such services to Nadel and Receivership Entities. From the beginning, GSEC cooperated with the Receiver and, in fact, produced a large volume of documents and was responsive to all requests for documents made by the Receiver over time. Further, in November 2010, GSEC entered into a tolling agreement, at the Receiver's request, so the parties could fully investigate matters and work to resolve them in an amicable fashion without concern for applicable statutes of limitation.

The Receiver's investigation revealed information indicating to the Receiver that while GSEC had no actual knowledge of Nadel's scheme and provided only customary prime brokerage services at the request of Shoreline, GSEC may have failed to appropriately respond to certain "red flags" that could, upon further inquiry, have revealed Nadel's scheme. In addition, the Receiver determined that GSEC may have failed to raise certain questions with respect to accounts controlled by Nadel. Based upon those findings, the Receiver concluded that it was appropriate to seek compensation for the Receivership estate from GSEC. While the Receiver determined that some amount of compensation was due from GSEC to the Receivership, he was presented with various possibilities for calculating the actual value of his claims. For example, in negotiating the Settlement Agreement the Receiver considered the following variations for determining damages:

- **Apportioned Loss Amount:** Hundreds of investors lost approximately $168 million in connection with Nadel's scheme. The Receiver could have attempted to hold GSEC responsible for a portion of all such losses (according to GSEC's comparative liability and minus the amount recovered by the Receiver through "clawback" lawsuits and related litigation) on the theory that GSEC should have detected and prevented (or at least terminated) the Ponzi scheme. As discussed in more detail below, however, GSEC is a clearing firm, and clearing firms typically possess formidable legal defenses to recovery. The Receiver is unaware of any case in which a clearing firm has been held responsible for all losses arising from a Ponzi scheme.

- **Unauthorized External Transfers:** The Receiver's investigation determined that Nadel used "shadow" accounts at Wachovia Bank, N.A. ("**Wachovia**") to perpetrate and perpetuate his scheme. Specifically, Nadel opened accounts in a "doing business as" capacity to mimic the names of Hedge Funds Valhalla Investment Partners, Viking Fund, and Viking IRA Fund (the shadow accounts included one in the name of "Arthur Nadel dba Valhalla Investments" and another one in the name of "Arthur Nadel dba Viking Fund"). Nadel was not an officer, director, or principal of these three Hedge Funds and otherwise did not have authority to open accounts on their behalf. Nevertheless, GSEC followed Nadel's instructions, as provided to GSEC by Shoreline, to transfer money from the Hedge Funds' "official" trading accounts at GSEC to Nadel's imposter accounts

at Wachovia. During the course of the scheme, such transfers totaled approximately $10 million.

- **GSEC's Fees & Interest:** The Hedge Funds were charged certain fees for services provided to them and were charged interest for margin credit extended to the Hedge Funds. These amounts represent GSEC's and Shoreline's revenues in connection with the scheme. Collectively, GSEC and Shoreline received approximately $13.5 million in fees and interest, and the majority of that money went to Shoreline rather than GSEC.

Given these various possibilities for calculating damages to the Receivership Entities, the ultimate determination of the value of the Receiver's claims following a trial or similar proceeding could vary significantly, depending on the applicable legal theory, the fact finder's view of causation, the relative apportionment of losses between GSEC and other potential tortfeasors, and the strength of GSEC's defenses.

GSEC has maintained, and continues to maintain, that its conduct was in no way inappropriate, that it did not fail to comply with its duties and obligations, and that its position as a clearing broker limits any liability the Receiver might assert against it. However, due to practical concerns and a desire to resolve what could be a protracted dispute resolution process, GSEC determined early on to attempt to negotiate a resolution to the Receiver's claims in order to avoid the obvious expense and disruption that would be caused by protracted litigation.

The Receiver's Negotiations With GSEC

Once the Receiver and GSEC had exchanged significant amounts of information and had communicated their various views with respect to GSEC's potential liability, the Receiver and GSEC's counsel engaged in negotiations with respect to the specifics of a

potential resolution of their dispute. These negotiations focused on potential liability, defenses, and risk to the parties, as well as the potential valuation of the Receiver's claims.

As a result of these negotiations, an agreement has been reached between the Receiver and GSEC to be presented through this motion to the Court which includes a resolution of all claims the Receiver and Receivership estate may have against GSEC that in any way relate to any matters arising out of Nadel's conduct, including any of the account relationships with respect to which GSEC had any involvement. It is the intention of the Receiver and GSEC to resolve through GSEC's payment to the Receivership estate of $9,850,000 (the "**Settlement Amount**") any claims of investment losses or other damages that might be asserted against GSEC.

Settlement Considerations

In deciding to accept $9,850,000 from GSEC in resolution of all claims against that entity, the Receiver considered a number of significant factors. First, the Receiver considered the risks associated with litigating his claims. Primary among those risks is the fact that GSEC is a clearing firm and not an introducing broker (here, the introducing broker is Shoreline). "Generally, clearing brokers execute, clear, and settle trades for the introducing brokers who have direct relationships with the client." *SFM Holdings, Ltd. v. Banc of America Securities, LLC*, 600 F.3d 1334, 1338 (11th Cir. 2010). Because introducing brokers serve as intermediaries between clients and clearing firms, courts have held that, absent special circumstances, clearing firms are generally insulated from many potential claims. *See, e.g., id.* at 1338-39 (noting that "clearing brokers ordinarily owe no fiduciary duty to the customers of introducing brokers"); *Stander v. Fin. Clearing & Servs.*

Corp., 730 F. Supp. 1282 (S.D.N.Y. 1990) (dismissing claim for aiding and abetting securities law violation against clearing firm after observing that a "clearing broker normally has no direct contact with the individual customer"); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 472 (S.D.N.Y. 2001) ("A clearing broker does not provide 'substantial assistance' to or 'participate' in a fraud when it merely clears trades.").

As discussed below, however, clearing firms are not completely protected from liability for their actions or omissions. *See, e.g., Goldman Sachs Execution & Clearing, L.P. v. Official Unsecured Creditors' Comm. of Bayou Group, LLC,* 2010 WL 4877847 (S.D.N.Y. Nov. 30, 2010) (refusing to vacate arbitration award against GSEC in the amount of fraudulent transfers into hedge fund accounts), *appeal pending*; *In re Manhattan Inv. Fund Ltd. (Gredd)*, 397 B.R. 1 (S.D.N.Y. 2007) (rejecting clearing firm's argument that it acted as a "mere conduit" in connection with fraudulent transfers).[1] The Receiver believes the Settlement Amount represents an equitable and good faith balance between the advantages afforded to clearing firms by relevant authorities and GSEC's potential liability in connection with Nadel's scheme. In addition, the Receiver recognizes that GSEC is financially able to vigorously defend itself against the Receiver's claims. Consequently, litigation would likely require expenditure of substantial Receivership resources and would not be without significant risks. If litigation is unsuccessful, defrauded investors would recover nothing instead of the $9,850,000 set forth in the Settlement Agreement.

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[1] The *Gredd* ruling was presented to, but not reviewed by, the Second Circuit following a jury verdict finding the clearing firm received the fraudulent transfers in good faith. 328 Fed. Appx. 709, 2009 WL 1528764 (2d Cir. June 2, 2009).

Second, the Receiver considered the potential value of his claims against GSEC. As noted above, under principles of comparative fault, the Receiver could have attempted to hold GSEC responsible for its portion of all investor losses arising from Nadel's scheme, which losses total approximately $168 million. However, the Receiver is unaware of any case in which a clearing firm has been held responsible for all losses arising from a Ponzi scheme. In addition, the Receiver considered the amount of money that Nadel transferred from the Hedge Funds' official accounts at GSEC to Nadel's imposter accounts at Wachovia Bank. As noted above, that amount is approximately $10 million. These transfers allowed Nadel to perpetrate and perpetuate his Ponzi scheme because it enabled him to move money to fund payments to investors for purported profits and principal. The Receiver contends that such transfers were improper and that GSEC did not follow relevant guidelines and internal policies and procedures applicable to third-party transfers. Courts have imposed liability on clearing firms and banks (which often occupy a similar position to clearing firms) in analogous circumstances. *See, e.g., Neilson v. Union Bank of Ca., N.A.,* 290 F. Supp. 2d 1101, 1120-21, 1143 (C.D. Ca. 2003) (holding that use of "atypical banking procedures" in connection with Ponzi scheme can demonstrate sufficient knowledge to support claim of aiding and abetting fraud; upholding negligence claim for failure to ensure "accuracy, legitimacy, and existence" of certain assets); *In re Lloyds Secs., Inc.* 1992 WL 318588, *11, 14 (Bankr. E.D. Pa. 1992) (holding that clearing firm "at all times maintained a duty to safeguard the funds and securities of the individual customers" and that firm breached that duty by failing to "put into practice the minimal checkpoint procedures which it has itself established to protect the customers"); *RPR Clearing, a Div. of Rauscher Pierce Refsnes, Inc.*

v. Glass, 1997 WL 460717, *2 (S.D.N.Y. 1997) (refusing to vacate arbitration award against clearing firm for "breach of ordinary care").

Finally, the Receiver considered the fees and margin interest that GSEC earned for providing clearing services to the Hedge Funds. As noted above, the Hedge Funds paid approximately $13.5 million in fees and interest to GSEC and Shoreline, collectively, and the majority of that went to Shoreline rather than to GSEC. Courts have allowed the recovery of fees, commissions, and similar payments as fraudulent transfers from individuals or entities that provided brokerage services in connection with Ponzi schemes. *In re Evergreen Sec., Ltd.,* 319 B.R. 245, 255 (Bankr. M.D. Fla. 2003) (allowing recovery of commissions as fraudulent transfers because broker "did not perform the minimal due diligence required to demonstrate good faith"); *In re World Vision Entertainment, Inc.,* 275 B.R. 641, 660 (Bankr. M.D. Fla. 2003) (same); *In re Randy*, 189 B.R. 425, 440 (Bankr. N.D. Ill. 1995) ("These brokers were also paid commissions for inducing persons who had already invested in the scheme to keep their principal investments in place so that the Ponzi scheme would not collapse. The underlying reasoning that courts have used to find that profits paid in a Ponzi scheme to innocent investors are fraudulent transfers applies equally well to commissions paid to brokers who promoted or aided the investment scheme, whether or not they had any culpable intent."). Courts are not, however, unanimous on this issue, as some defendants have successfully argued that they acted in good faith and provided reasonably equivalent value for the fees or commissions they received, which is a defense against the recovery of fraudulent transfers. *See, e.g., In re Fin. Fed. Title & Trust, Inc.*, 309 F.3d 1325, 1331-33 (11th Cir. 2002) (disagreeing with *Randy* and examining related cases).

In deciding to recommend the resolution reflected in the Settlement Agreement, the Receiver also found the following considerations significant:

(1) based on the information reviewed by the Receiver, this settlement constitutes a recovery by the Receivership of an amount well in excess of all revenues earned by GSEC as a result of its indirect dealings with Nadel;

(2) litigation of claims against GSEC could easily cost the Receivership in excess of $1 million and would in no way guarantee the significant benefit to the Receivership estate that will occur as a result of the settlement reached with GSEC; and

(3) it is the Receiver's opinion that the amount of this settlement constitutes a fair valuation of any potential liability that GSEC might have as a result of its involvement with any accounts controlled by Nadel, given the applicable claims, defenses, and risks.

As a result of GSEC's cooperative and good-faith approach to resolving matters with the Receiver, the Receiver and GSEC were able to reach an agreement before the filing of any action. This provided a considerable cost savings to the Receivership. As noted above and in the Settlement Agreement, the Receiver and GSEC, subject to the approval of this Court, have agreed to settle for, among other things, payment by GSEC to the Receiver of $9,850,000 and a broad release of liability. Also as part the Settlement Agreement, the Receiver and GSEC agreed to seek entry of a bar order precluding any claims against GSEC by investors in the Receivership Entities or by potential joint tortfeasors, including claims for contribution or indemnity, which relate in any way to Nadel's Ponzi scheme (the "**Bar Order**").

The Bar Order Is Appropriate

Federal Rule of Civil Procedure 16 provides the Court authority to use special procedures, including bar orders, to assist parties in reaching a settlement. *See* Fed. R. Civ. P. 16(c)(9). Relying on Rule 16 and the Bankruptcy Code, the Eleventh Circuit has explicitly authorized the use of bar orders in bankruptcy proceedings. *See In re Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996). According to the Eleventh Circuit, "[s]everal justifications for entering bar orders in bankruptcy cases exist" (*id.*):

> First, public policy strongly favors pretrial settlement in all types of litigation because such cases, depending on their complexity, can occupy a court's docket for years on end, depleting the resources of parties and the taxpayers while rendering meaningful relief increasingly elusive. Second, litigation costs are particularly burdensome on a bankrupt estate given the financial instability of the estate. Third, bar orders play an integral role in facilitating settlement. This is because defendants buy little peace through settlement unless they are assured that they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation.

Id. (quotations and citations omitted). All of these factors are as applicable to equity receiverships as they are to bankruptcy proceedings.[2] Entry of a bar order here is within the Court's broad power to administer this Receivership. *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) ("The district court has broad powers and wide discretion to determine relief in an equity receivership. . . . This discretion derives from the inherent powers of an equity court to fashion relief . . . ."); *S.E.C. v. HKW Trading LLC,* 2009 WL 2499146, *2

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[2] Although receivership and bankruptcy proceedings have some important distinctions, the similarities of their goals make an analogy here particularly appropriate. *See, e.g., S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 334 (7th Cir. 2010) (goal in securities-fraud receivership and liquidation bankruptcy is identical: the fair distribution of liquidated assets).

(M.D. Fla. 2009); *see also S.E.C. v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986); *S.E.C. v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 668 (6th Cir. 2001).

In fact, courts have issued bar orders in connection with settlements proposed by equity receivers. For example, in *Commodity Futures Trading Comm'n v. Equity Fin. Group*, 2007 WL 2139399 (D.N.J 2007), the court approved a settlement between an equity receiver and a firm retained by receivership entities to perform accounting services, and entered a bar order after finding that "the Receiver established th[e] settlement is in the best interest of the Receivership estate, and that federal law and public policy favor the entry of the Bar Order to facilitate settlement of th[e] matter." *Id.* at *2. The Court also found that the bar order would not prejudice investors because of the difficulties investors would have to bring claims directly against the settling defendant. *Id.; see also S.E.C. v. Capital Consultants, LLC,* 2002 WL 31470399 (D. Or. 2002) (approving settlement and entering bar order); *Gordon v. Dadante*, 336 Fed. Appx. 540 (6th Cir. 2009) (same); *Harmelin v. Man Fin., Inc.,* 2007 WL 4571021 (E.D. Pa. 2007) (same).

Here, the Receiver has determined that the settlement reflected by the Settlement Agreement is in the best interests of the Receivership and the investors in the Hedge Funds. Specifically, the settlement avoids protracted and expensive litigation, thereby avoiding litigation risk and conserving very substantial Receivership resources, as well as judicial resources. In addition, the Settlement Amount represents an equitable and good-faith resolution, especially when it is considered in light of GSEC's potential liability as measured by either (1) the amount of transfers that Nadel improperly made from the Hedge Funds' official accounts at GSEC to Nadel's imposter accounts at Wachovia Bank and (2) the

amount of fees and interest that GSEC earned from providing clearing services to the Hedge Funds. It is also in the best interests of investors because it represents a substantial recovery to the Receivership estate – roughly 50% as much as the amount the Receiver has recovered to date through clawback lawsuits, yet without the expense and risk of litigation – which will ultimately compensate investors with approved claims through the claims process.

The Bar Order is also authorized by and appropriate under the All Writs Act. "An important feature of the All-Writs Act is its grant of authority to enjoin and bind non-parties to an action when needed to preserve the court's ability to reach or enforce its decision in a case over which it has proper jurisdiction." *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985) (citing *United States v. New York Telephone Co.,* 434 U.S. 159, 174 (1977) ("The power conferred by the Act, extends, under appropriate circumstances, 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 encompasses even those who have not taken any affirmative action to hinder justice.")).[3]

Notice Will Be Provided To Investors

"[T]he requirements of the All-Writs Act are satisfied if the parties whose conduct is enjoined have actual notice of the injunction and an opportunity to seek relief from it in the district court." *Id.* at 340. Similarly, cases located by the Receiver involving equity receivers' requests for bar orders in connection with settlement of claims have included notice to investors of the request for a bar order. *See, e.g.*, *Equity Fin. Group*, 2007 WL

[3] "The power to bind non-parties distinguishes injunctions issued under the Act from injunctions issued in situations in which the activities of the third parties do not interfere with the very conduct of the proceeding before the court." *Baldwin*, 770 F.2d at 338.

4571021[4]; *Harmelin*, 2007 WL 4571021 (notice of bar order provided to all investors before court approved settlement); *Gordon*, 336 Fed. Appx. at 544 (court entered order providing interested parties with opportunity to "comment" on settlement reached by equity receiver with broker/dealer and request for bar order).

Here, the Receiver intends to provide: (1) actual notice of the settlement with GSEC and the requested Bar Order to the investors in the Hedge Funds and to potential tortfeasors the Receiver believes have liability to Receivership Entities – *i.e.*, the individuals and entities who are to be enjoined and barred from asserting claims against GSEC relating to Nadel's Ponzi scheme, and (2) publication notice to all other interested parties. A copy of the proposed notice to investors and potential joint tortfeasors is attached to the Notice Motion (the "**Notice**"), and an abbreviated version for publication is contained in the text of the Notice Motion. In brief, the Notice sets forth the terms of the Settlement Agreement and advises the recipients that they may object or otherwise respond to this motion in writing by January 17, 2012, by (1) filing their objection or response with the Court by that deadline and (2) simultaneously serving a copy on the Receiver. As such, the Notice will provide investors and known potential joint tortfeasors with actual notice of the proposed Settlement Agreement and the Bar Order and an opportunity to object. Unless the Court directs otherwise, no public hearing will be held concerning this motion.

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[4] Although there is no discussion of notice to investors in this *Equity Financial Group* opinion, the receiver's motion for approval of the settlement in that case explained that such notice had been provided. *See Equity Financial Group*, Case No. 1:04-cv-01512-RBK-AMD (D. N.J.), Memorandum In Support Of Motion Of Equity Receiver To Approve Settlement With Puttman & Teague, LLP, Elaine Teague, And John Puttman (Dkt. 428-3, ¶¶ 25, 36), attached as **Exhibit B**.

Investors Will Not Be Prejudiced By Entry Of The Bar Order

Entry of the Bar Order is also appropriate because investors will not be prejudiced by it as (1) there are no pending litigations between any of them and GSEC; (2) any contemplated actions by investors may be barred by applicable statutes of limitation; and (3) the claims that investors might assert against GSEC, in the absence of the Bar Order, are more limited – and thus less valuable – than the Receiver's potential claims.

First, there are no pending litigations between investors and GSEC relating to Nadel's Ponzi scheme despite the fact that the scheme collapsed almost three years ago, in January 2009. This indicates that no investor is likely to assert any claims against GSEC. *See Harmelin,* 2007 WL 4571021 at *4 ("[I]n the two and a half years since Mr. Hodgson was appointed as Receiver and despite all the communications that have gone forth, and the website, and the absence of any Order precluding an investor from filing their own lawsuit, no investor has done so.").

Second, the Receiver has had a tolling agreement with GSEC since November 2010, yet he is unaware of any investors with similar agreements. As such, it is possible that future claims by investors would be barred by applicable statutes of limitation. *See id.* (considering statutes of limitation in entering bar order).

Third, the claims that investors might assert against GSEC, in the absence of the Bar Order, are more limited – and thus less valuable – than the Receiver's potential claims. Specifically, because GSEC had an introduced relationship (via Shoreline) with Nadel and Receivership Entities (*i.e.*, the Hedge Funds), the Receiver could potentially assert breach of contract and breach of duty claims against GSEC as well as claims for the return of

fraudulent transfers. On the other hand, because GSEC had no relationship with investors, they would likely be limited to asserting claims for violations of securities laws, which are difficult to prosecute and have been significantly narrowed. For example, in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148 (2008), the United States Supreme Court confirmed that there is no private right of action for aiding and abetting a violation of Section 10(b) of the Securities Exchange Act of 1934. Accordingly, an investor would have to prove, among other things, that GSEC was a primary actor engaged in securities fraud. Indeed, an investor's ability to assert against GSEC any claim other than a claim for violations of federal securities laws appears to have been significantly limited by the Honorable Elizabeth A. Kovachevich's decision in *Sullivan v. Holland & Knight LLP,* 2010 WL 1558553, *6 (M.D. Fla. 2010). In that case, which relates to Nadel's Ponzi scheme, Judge Kovachevich held that claims asserted by investors in the scheme against a law firm that represented the Hedge Funds and other receivership entities, among others, which claims included claims under the Florida Securities Investor Protection Act and related common law claims, were barred by the Securities Litigation Uniform Standards Act. In light of these matters, investors are unlikely to be able to obtain a greater recovery from GSEC than that obtained by the Receiver and reflected in the Settlement Agreement. This is another reason why the settlement with GSEC, including the Bar Order, is in the bests interests of the Receivership and, ultimately, of defrauded investors.

Joint Tortfeasors Are Not Entitled To Contribution From GSEC

Under Florida law, if the Court approves the Settlement Agreement, no joint tortfeasor will be entitled to contribution from GSEC in connection with Nadel's scheme. Specifically, under the Uniform Contribution Among Tortfeasor's Act:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and, (b) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

Fla. Stats. § 768.31(5). Here, the terms of the Settlement Agreement do not discharge any potential tortfeasor from liability other than GSEC. Further, for the reasons discussed before and in the Receiver's Affidavit, both GSEC and the Receiver entered into the Settlement Agreement in good faith. As such, if approved the Settlement Agreement will discharge GSEC from "from all liability for contribution to any other tortfeasor," including Shoreline. Accordingly, the Bar Order – in barring potential joint tortfeasors' claims against GSEC – is consistent with Florida law.

CONCLUSION

For these reasons, the Receiver respectfully requests that this Court enter an Order granting this Motion and finding and ordering that:

1. The settlement between the Receiver and GSEC presented to the Court in this motion is a fair, equitable, and good faith settlement of all claims the Receiver, the Receivership estate, and the Receivership Entities may have against GSEC;

2. The settlement reflected in the Settlement Agreement attached as Exhibit A is approved, and the Receiver is authorized to enter into and complete the proposed settlement with GSEC in accordance with the requirements of the Settlement Agreement;

3. All individuals or entities who invested money in a Receivership Entity, as well as all persons or entities who may have liability to the Receiver, the Receivership Entities, or such investors arising or resulting from the fraudulent scheme underlying the SEC Receivership Action, together with their respective heirs, trustees, executors, administrators, legal representatives, agents, successors, and assigns, are permanently enjoined and barred from commencing or pursuing a claim, action, or proceeding of any kind and in any forum against GSEC that arises from or relates to the clearing, execution, and/or prime brokerage services that GSEC performed for Receivership Entities, or the allegations of the SEC Receivership Action; and

4. Said injunction bars all claims against GSEC for contribution, indemnity, or any other cause of action arising from the liability of any person or entity to the Receiver or to any of the Receivership Entities or their investors (including claims in which the injury is the liability to the Receiver or any of the Receivership Entities or their investors or where damages are calculated based on liability to the Receiver or any of the Receivership Entities or their investors), in whatever form and however denominated.

A proposed Order is attached as **Exhibit C**. However, as indicated at the beginning of this motion, the Receiver respectfully requests that the Court first address the Notice Motion and, if that motion is granted, that it continue a decision on this motion until after the

deadline set forth in the Notice Motion for objections or other responses to the relief requested in this motion.

LOCAL RULE 3.01(g) CERTIFICATION

Pursuant to Local Rule 3.01(g), counsel for the Receiver has conferred with counsel for the Commission and is authorized to represent to the Court that the Commission has no objection to the relief requested in this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 14, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on December 14, 2011, I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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EXHIBIT A

SETTLEMENT AGREEMENT

WHEREAS, by orders dated January 21, 2009, June 3, 2009, January 19, 2010, and September 23, 2010 the Court in Securities & Exch. Comm'n v. Arthur Nadel, et al., Case No. 8:09-cv-87-T-26TBM (M.D. Fla.) (the "SEC Receivership Action"), appointed Burton W. Wiand as Receiver (the "Receiver") for Scoop Capital, LLC; Scoop Management, Inc.; 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; Viking Management, LLC; Traders Investment Club; Venice Jet Center, LLC; Tradewind, LLC; Laurel Mountain Preserve, LLC; Laurel Preserve, LLC; the Marguerite J. Nadel Revocable Trust UAD 8/2/07; the Laurel Mountain Preserve Homeowners Association, Inc.; The Guy-Nadel Foundation, Inc.; Lime Avenue Enterprises, LLC; A Victorian Garden Florist, LLC; Viking Oil & Gas, LLC; Home Front Homes, LLC and all of their subsidiaries, successors, and assigns (collectively the "Receivership Entities"); and

WHEREAS, the Receiver intends to commence an arbitration before the Financial Industry Regulation Authority (the "Arbitration"), to assert claims against Goldman Sachs Execution & Clearing, L.P. ("GSEC") seeking damages allegedly sustained by the Receivership Entities from the fraudulent scheme which underlies the SEC Receivership Action and the return of certain funds allegedly received by GSEC from or at the direction of one or more of the Receivership Entities; and

WHEREAS, the Receiver and GSEC acknowledge they have negotiated at arm's-length and have entered into this agreement in good faith; and

WHEREAS, GSEC denies any and all liability or wrongdoing, but wishes to resolve these matters amicably; and

WHEREAS, any resolution of this matter by agreement of the Receiver and GSEC is subject to approval by the Court presiding over the SEC Receivership Action (the "SEC Receivership Court");

NOW, THEREFORE, and subject to the approval of the SEC Receivership Court, GSEC has agreed to pay and the Receiver has agreed to accept on behalf of all Receivership Entities a total of $9,850,000.00 (the "Settlement Amount") in full settlement of the Released Claims (as defined below) to be paid within 10 days after approval of this settlement by the SEC Receivership Court becoming a final, non-appealable order.

Upon receipt and clearing of this full settlement payment, the Receiver, on behalf of the Receivership Entities and their employees, agents, representatives, beneficiaries, investors, creditors, and assigns, shall be deemed to have released and forever discharged GSEC, its parents, subsidiaries, and affiliates, and their respective officers, directors, employees, agents, successors, and assigns of and from any and all claims which could have been asserted in the Arbitration, as well as any and all other claims, demands, rights, promises, and obligations arising from or related in any way to GSEC's involvement with or provision of services to any account, product, fund, entity, or venture established, operated, or controlled by Arthur Nadel or any Receivership Entity or the allegations of the SEC Receivership Action ("Released Claims"). However, this release and discharge is not intended to and does not release or discharge any claim the Receiver or any Receivership Entity or any employees, agents, representatives, beneficiaries, or assigns of any Receivership Entity had, has, or may have against Shoreline Trading Group, LLC, and any of its parents, subsidiaries, affiliates, successors, and assigns or any of their current or former directors, officers, employees, representatives, or agents, including but

not limited to Matt Ventura or Mike Murray. Upon the Receiver's receipt and clearing of the full settlement payment, GSEC shall be deemed to have waived any claim that it had, has, or hereafter may have against the Receiver and/or any Receivership Entity relating to GSEC's involvement with any account, product, fund, entity, or venture established, operated, or controlled by Arthur Nadel or any Receivership Entity or the allegations of the SEC Receivership Action, *provided*, however, that nothing herein shall be deemed to waive any claim, counterclaim, or defense GSEC or any other released person or entity hereunder has, had, or may have against any person or entity who asserts any claim against GSEC or such released person or entity that is permitted to proceed despite the bar order referenced below.

The Receiver and GSEC understand and agree that, subject to the approval of the SEC Receivership Court, the payment of the Settlement Amount, release, and waiver of claims as provided herein is in full accord and satisfaction of and in compromise of the Released Claims, and the payment, release, and waiver are not an admission of liability, which is expressly denied, but are made solely for the purpose of terminating a dispute and avoiding litigation.

After execution of this Settlement Agreement by all parties, the Receiver will promptly move the SEC Receivership Court for approval of this settlement. In the motion, the Receiver will request that the SEC Receivership Court enter an Order approving the settlement, including a bar order, in the form annexed hereto as Exhibit A.

To the extent necessary, GSEC agrees to assist the Receiver reasonably in seeking the SEC Receivership Court's approval of this settlement. GSEC also agrees to continue to reasonably cooperate with the Receiver's efforts to gather information and otherwise fulfill his Court-ordered obligations imposed in the SEC Receivership Action, including

by providing additional information relating to the Receivership Entities which the Receiver may request through document requests or other discovery tools available to the Receiver under applicable laws and rules.

GSEC understands and agrees that each party shall bear its own individual costs and attorney's fees incurred in the resolution of this matter.

The Receiver and GSEC agree this Settlement Agreement shall be governed by and be enforceable under Florida law in the United States District Court for the Middle District of Florida, Tampa Division. Any dispute that arises with respect to this agreement between the parties hereto shall be submitted to the SEC Receivership Court for summary resolution.

The Receiver and GSEC also agree that electronically transmitted copies of signature pages will have the full force and effect of original signed pages.

In witness whereof the parties have set their hands as of the dates indicated.

By: _____
As Authorized Representative of
Goldman Sachs Execution & Clearing, L.P.

Date: 12/14/11

By: _____
Burton W. Wiand, as Receiver
of the Receivership Entities

Date: 12/13/11

Exhibit A

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,

Relief Defendants.
_____/

[PROPOSED] ORDER

This matter having come before the Court on motion by Burton W. Wiand, as Receiver ("Receiver") for Scoop Capital, LLC, Scoop Management, Inc., Scoop Real Estate, L.P., Valhalla Investment Partners, L.P., Victory IRA Fund, Ltd., Victory Fund, Ltd., Viking IRA Fund, LLC, Viking Fund LLC, Valhalla Management, Inc., Viking Management, LLC, Venice Jet Center, LLC, Tradewind, LLC, Laurel Mountain Preserve, LLC, Laurel Preserve, LLC, Laurel Mountain Preserve Homeowners Association, Inc., Marguerite J. Nadel Revocable Trust UAD 8/2/07, Guy-Nadel Foundation, Inc., Lime Avenue Enterprises, LLC, A Victorian Garden Florist, LLC, Viking Oil & Gas, LLC, Traders Investment Club, and Home Front

Homes, LLC, and all other entities subject to receivership pursuant to the Court's orders appointing and reappointing Receiver and expanding receivership in the proceeding styled Securities & Exch. Comm'n v. Arthur Nadel, et al., Case No. 8:09-cv-87-T-26TBM (M.D. Fla.) (the "SEC Receivership Action") (collectively, the "Receivership Entities"), to approve the Settlement Agreement with Goldman Sachs Execution and Clearing, L.P. (formerly known as Spear, Leeds & Kellogg, L.P.) ("GSEC") (Dkt. [___]);

And due and proper notice of the motion having been given to all interested persons;

And the Court having considered the moving papers and any other filings relating to the Receiver's motion;

UPON DUE CONSIDERATION, it is **ORDERED AND ADJUDGED** that the Receiver's Motion to Approve Settlement (Dkt. [___]) is **GRANTED**.

IT IS FURTHER ORDERED THAT the Court specifically approves the written Settlement Agreement entered into between the Receiver and GSEC that is attached to the Receiver's motion as Exhibit A (the "Settlement Agreement") and incorporated herein by reference;

IT IS FURTHER ORDERED THAT the Court finds that the settlement between the Receiver and GSEC presented to the Court is a fair, equitable, reasonable, adequate, and good faith settlement of all claims the Receivership estate and the Receivership Entities may have against GSEC;

IT IS FURTHER ORDERED THAT the Receiver is authorized to enter into and complete the settlement with GSEC in accordance with the requirements of the Settlement Agreement;

IT IS FURTHER ORDERED THAT all individuals or entities who invested money in a Receivership Entity, as well as all persons or entities who may have liability to the Receiver, the Receivership Entities, or such investors arising or resulting from the fraudulent scheme underlying the SEC Receivership Action, together with their respective heirs, trustees, executors, administrators, legal representatives, agents, successors and assigns, are permanently enjoined and barred from commencing or pursuing a claim, action or proceeding of any kind and in any forum against GSEC that arises from or relates to the clearing, execution, and/or prime brokerage services that GSEC performed for Receivership Entities, including the Relief Defendants, or the allegations of the SEC Receivership Action;

IT IS FURTHER ORDERED that said injunction bars all claims against GSEC for contribution, indemnity, or any other cause of action arising from the liability of any person or entity to the Receiver or to any of the Receivership Entities or their investors (including claims in which the injury is the liability to the Receiver or any of the Receivership Entities or their investors or where damages are calculated based on liability to the Receiver or any of the Receivership Entities or their investors), in whatever form and however denominated, and that such person or entity shall be entitled to such set-offs or judgment reductions as permitted by law, if any, as a result of said injunction;

IT IS FURTHER ORDERED that the releases included in the Settlement Agreement have been given in good faith, and that the Settlement Agreement therefore discharges GSEC from all liability for contribution to any other tortfeasor pursuant to, at a minimum, Fla. Stat. § 768.31(5) and 15 U.S.C. § 78u-4(f)(7); and

IT IS FURTHER ORDERED that under the circumstances of this matter, including the need to bring finality to the resolution of potential claims between the Receiver and GSEC so

that payment of the amount contemplated by their settlement can be made to the receivership estate for the benefit of defrauded investors with allowed claims, there is no just reason for delay of entry of a final judgment approving the Settlement Agreement. Accordingly, the Clerk of the Court is directed to enter this Order as a final judgment.

DONE AND ORDERED at Tampa, Florida, on January ___, 2012.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING COMMISSION, Plaintiff, vs. EQUITY FINANCIAL GROUP, LLC, TECH TRADERS, INC., TECH TRADERS, LTD., MAGNUM INVESTMENTS, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, and J. VERNON ABERNETHY, Defendants.	)	No.: 04-cv-1512 (RBK) Hearing Date: February 2, 2007

MEMORANDUM IN SUPPORT OF MOTION OF EQUITY RECEIVER TO APPROVE SETTLEMENT WITH PUTTMAN & TEAGUE, LLP, ELAINE TEAGUE, AND JOHN PUTTMAN

Stephen T. Bobo (the "**Receiver**"), the Equity Receiver of Defendant Equity Financial Group, LLC ("**Equity**"), the managing member of Shasta Capital Associates, LLC ("**Shasta**"), submits this memorandum in support of his motion for entry of an Order approving a settlement agreement with Puttman & Teague, LLP, Elaine Teague and John Puttman (collectively, "**TEAGUE**") and permanently enjoining and barring members of Shasta and certain defendants

EXHIBIT B

from commencing or continuing claims against TEAGUE that arise out of or relate to the accounting services TEAGUE provided to Equity, for itself and on behalf of Shasta from July 2001 through April 1, 2004.

A. The Receiver's Investigation of Claims Against TEAGUE

1. This Court appointed the Receiver as part of the initial restraining order entered on April 1, 2004. According to the provisions of that order, the responsibilities of the Receiver include "marshalling, preserving, accounting for and liquidating assets" of the Defendants and initiating or becoming party to "any actions or proceedings ... necessary to preserve or increase the assets of the Defendants."

2. From approximately July 2001 through the present, Defendant Equity has been the manager of Shasta, which pooled funds invested by its members for trading in commodity futures contracts through Tech Traders, Inc.

3. From approximately July 2001 through April 1, 2004, Equity, for itself and on behalf of Shasta, retained TEAGUE to provide accounting services, including providing certain agreed upon procedures in connection with the verification of Tech Traders, Inc.'s ("**Tech Traders**") monthly performance results and providing the results in monthly "reports" on Puttman & Teague, LLP letterhead sent to Equity and others.

4. Pursuant to authority from this Court, the Receiver has investigated the quality of TEAGUE's services and the impact of those services on Equity, for itself and on behalf of Shasta. This investigation has included review of statements, correspondence and supporting documentation, participating in the depositions of Elaine Teague, Robert W. Shimer ("**Shimer**"), Vincent J. Firth ("**Firth**"), and Jack Vernon Abernethy ("**Abernethy**"), interviews with various investors, and reviewing applicable professional standards. As a result of this investigation, the

Receiver has determined that Equity, for itself and on behalf of Shasta, may have meritorious claims against TEAGUE arising out of the accounting services described in paragraph 3 above. TEAGUE denies that any such claims exist.

B. The Receiver's Preliminary Conclusions Regarding Potential Damages of Shasta

5. As set forth in the Affidavit of Stephen T. Bobo In Support Of Motion Of Equity Receiver For Entry Of Order Approving Settlement With Puttman & Teague, LLP, Elaine Teague, and John Puttman ("Bobo Affidavit"), the Receiver and his attorneys and accountants have spent considerable time investigating the investment activities of the Defendants, including attempting to estimate the aggregate loss that will be ultimately suffered by Shasta and its members. These efforts have included obtaining and reviewing the paper and electronic records of Equity, Shasta, Tech Traders, the Magnum entities, Shimer and Firth. The Receiver's accountants have reviewed and summarized the records of nearly 50 banks and trading accounts used by the Defendants in their investment activities. The Receiver has interviewed numerous investors, as well as Defendants Shimer, Coyt E. Murray ("**Murray**") and Abernethy.

6. Shasta was organized in mid-2001 and began accepting funds from its members at the beginning of 2002 to place with Tech Traders for trading commodities. Shasta took in approximately $14.6 million from outside members. By April 1, 2004, it had transferred $13.9 million to Tech Traders for commodity trading. Shasta did not place any funds received from its investors in any other investments. Shasta had a total of approximately 65 outside members as of April 1, 2004. From funds received from Tech Traders, Shasta disbursed $1.5 million back to certain of its investors.

7. Tech Traders regularly reported substantial trading profits to its investors. Shasta in turn reported the supposed profit amounts to its members.

8. Of the approximately $43.1 million that investors placed with Tech Traders between April 12, 2001 and April 1, 2004, Tech Traders returned a net amount of approximately $11.3 million[1] to investors. Approximately $17.5 million previously held by brokerage firms and banks in Tech Traders' name was frozen by this Court's restraining orders. Another $870,000 was frozen in Shasta's bank account, although $497,000 of that amount was received after the freeze order and has been returned to investors.

9. The Receiver can only estimate the damages suffered by Shasta and its members at this time. The damages amount is inversely related to the amount of the total distributions to be made, which can only be estimated for several reasons. First, the Receiver only recently received approval of a claim process for non-investor creditors of Tech Traders and Equity and cannot predict the total amount of allowable creditor claims. Second, the Receiver has not made a final determination regarding possible meritorious claims against other former professionals and other third parties. Third, the costs of fully administering the receivership are unknowable at this point.

10. Taking all these uncertainties into account, however, the Receiver estimates that Shasta will ultimately be able to return to its members somewhere in the range of 50 percent of their investments, including prior distributions. In the aggregate, the damages of Shasta and its members thus will likely be in the range of one-half of the difference between $14.6 million and $1.5 million, or about $6.5 million.

C. The TEAGUE Settlement

11. After first entering into a tolling agreement to alleviate statute of limitations concerns, the Receiver engaged in lengthy negotiations with TEAGUE in an attempt to resolve

[1] Although Tech Traders repaid investors approximately $12 million, over $600,000 of the $12 million represents fictitious profits and not returns of principal.

the claims without the need for litigation. That negotiation process included a one-day mediation conducted by the Honorable Kenneth Gillis (Ret.), an experienced former judge of the Circuit Court of Cook County, Illinois. The negotiations resulted in TEAGUE agreeing to pay a settlement amount of $700,000, subject to certain terms and conditions as discussed below. A true and correct copy of the parties' settlement agreement is attached to the Bobo Affidavit as Exhibit 1.

12. Among the information the Receiver considered in negotiating a settlement was TEAGUE's ability to satisfy a significant judgment. For the period in question, TEAGUE has professional malpractice insurance coverage with a claim limit of $1 million. The Receiver also reviewed financial statements for the TEAGUE firm and its two principals and is satisfied that their assets are likely not substantial enough to justify the expenses of collection. The Receiver therefore attributed little additional net value to a recovery from those other sources, after considering the costs of collection efforts.

13. The Receiver also considered the magnitude and scope of TEAGUE's role on behalf of Shasta, the potential defenses raised by TEAGUE during the negotiations and the risks of litigation. Although the Receiver believes the merits of the claims to be strong, achieving a better result through litigation is not assured. Another important consideration was that the costs of discovery and trial would be significant, including the costs of engaging an expert witness in the area of accountant malpractice. The Receiver believes that the total costs of litigating the claim to verdict would be well in excess of $100,000 and that recovery of those costs and attorneys' fees through the litigation would be unlikely. If an appeal were taken, this would result in additional fees and expenses for the receivership estate. A final significant factor considered by the Receiver was the effect of the settlement on the progress of the receivership as

a whole. Litigation against TEAGUE would cause the receivership to stay open for at least a year, or perhaps significantly longer depending on the Court's docket, whether an appeal were taken, and the degree of difficulty in enforcing the judgment. This additional period of delay unless the claim was settled was another significant motivation to resolve the matter through settlement.

14. The Receiver believes that the settlement amount of $700,000 is fair and reasonable under the circumstances. Those circumstances include the $1 million limit of TEAGUE's insurance coverage, the limited other resources available for recovery, the inherent risks and certain costs of litigating the claims against TEAGUE, and the need to expedite the administration of the receivership estate. The settlement amount also is well within a reasonable range of TEAGUE's proportional share of comparative liability for the range of damages suffered by Shasta and its members. As an additional confirming measure of the reasonableness of the settlement amount, Judge Gillis recommended this amount to the parties as an appropriate settlement during the mediation.

15. As a condition of settlement, TEAGUE has required the entry of an order permanently barring and enjoining Shasta members as well as Defendants Firth, Shimer, Abernethy, Murray and Tech Traders from commencing or continuing any individual claims against TEAGUE that arise out of or relate to the conduct described above in paragraph 3 (the "Bar Order"). This Bar Order would also apply to those persons' heirs, trustees, executors, administrators, legal representatives, agents, successors and assigns with notice or actual knowledge of the TEAGUE settlement or the Bar Order.

16. The proposed settlement agreement attached hereto also includes the following additional terms required by TEAGUE to provide appropriate assurances of finality:

a. the Receiver agrees not to execute on a money judgment he obtains against a third party not subject to the Bar Order to the extent of the amount of any money judgment that such third party obtains against TEAGUE in that same case;

b. the Receiver covenants not to sue TEAGUE on any related claims;

c. the Receiver will limit recoveries on claims against third parties not subject to the Bar Order who may have rights against TEAGUE to that defendant's proportionate share of liability and the fault of others for whom the defendant may be liable, but specifically excluding any share of liability that would be attributable to TEAGUE;

d. the Receiver agrees that after the effective date of the TEAGUE settlement, any settlements he enters into with third parties not subject to the Bar Order on claims relating to the allegations he asserted against TEAGUE shall include a general release by the settling party in favor of TEAGUE, and TEAGUE shall execute a reciprocal release in favor of such settling party; and

e. the terms of the settlement shall be kept confidential except as required to seek Court approval of the settlement, including notice of the terms to the Shasta investors and other parties in interest, and as thereafter required to respond to legal process.

D. Entry of the Bar Order is Broadly Supported by Federal Law and Public Policy

17. Entry of the Bar Order required by the proposed settlement is well within this Court's authority and discretion. Federal Rule of Civil Procedure 16 grants the Court authority to use special procedures, including bar orders, to assist parties in reaching a settlement. Fed. R. Civ. P. 16(c)(9); *see In re Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996). Federal common

law also authorizes entry of a bar order. *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1228-32 (9th Cir. 1989). In addition, a district court supervising an equity receivership has "extremely broad" inherent equity power to fashion effective relief. *SEC v. Handy,* 803 F.2d 1034, 1307 (9th Cir. 1986); *S.E.C. v. Wenke,* 622 F.2d 1363, 1369 (9th Cir. 1980). This equity power is at least as broad as the power of a bankruptcy court to enter an appropriate bar order. *Munford,* 97 F.3d at 455 (relying on Section 105(a) of the Bankruptcy Code and Fed. R. Civ. P. 16 to affirm bankruptcy court's entry of bar order).

18. Additionally, bar orders may play a critical role in facilitating settlement by allowing settling parties to limit the risks of settlement. *See Munford*, 97 F.3d at 455. Bar orders assure settling parties that they will be protected against claims of third parties related to the underlying litigation. The Court must determine whether the proposed Bar Order is fair and equitable. Among the factors courts consider in making such a determination are the interrelatedness of the claims that the bar order would preclude, the likelihood of third parties to prevail on the barred claim, the complexity of the litigation and the likelihood that the settlement would deplete the resources of the settling parties. *Id.* (relying on *U.S. Oil & Gas*, 967 F.2d at 493-96).

19. Public policy also strongly favors pretrial settlement. Depending on the complexity of the case, it can "occupy a court's docket for years on end, depleting the resources of parties and the taxpayers while rendering meaningful relief increasingly elusive." *Id.* (quoting *U.S. Oil & Gas v. Wolfson*, 967 F.2d 489, 493 (11th Cir. 1992) (internal quotations omitted)); *see also* Fed. R. Civ. P. 16, Advisory Comm. Notes ("Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible.").

20. In similar instances, courts have entered bar orders to facilitate the settlement of disputes. For example, in *SEC v. Capital Consultants, LLC*, the court granted the equity receiver's motion for approval of a settlement agreement (which contained a bar order) between the Receiver and certain defendants. No. Civ. 00-1290-KI, 2002 WL 31470399, at *3 (D. Or. Mar. 8, 2002). In that case, the settling defendants agreed to pay $500,000 to the receiver on behalf of all claimants in exchange for the claimants' release of all claims against the defendants. *Id.* at *1. The court approved the settlement as "fair and equitable to the [claimants] and...in the best interest of the receivership estate." *Id.* at *2.

21. Similarly, in *Neuberger v. Shapiro*, the court approved a settlement agreement among a plaintiff class, a co-plaintiff committee of unsecured creditors, and one of the defendants, an accounting firm. 110 F. Supp. 2d 373, 386-88 (E.D. Pa. 2000). The agreement contained a bar order that permanently enjoined "all parties to the Litigation" from bringing any claim against the accounting firm that involved the conduct alleged in the plaintiffs' complaint. *Id.* at 381. The court considered a number of factors before approving the class settlement, including the risks of establishing both liability and damages and the reasonableness of the settlement.[2] *Id.* at 378-80. Ultimately, the court concluded that the parties' settlement, which included the bar order, was "fair, reasonable and just and...in the best interests of the settlement class." *Id.* at 386. *Cf. In re Devon Capital Mgmt., Inc.*, 261 B.R. 619, 625-26 (W.D. Pa. 2001) (striking proposed bar order as overly broad because it prohibited "any and all persons," including those who were neither parties to settlement agreement nor beneficiaries of the settlement proceeds, from asserting claims against defendants). *See generally Eichenholtz v.*

[2] The court looked at "nine fairness factors" to be considered in approving all class action settlements. *See id.* Although some of these factors are specific to the class action context, most of the factors translate to other cases, such as the instant matter, where the settlement at issue will impact a large group of individuals.

Brennan, 52 F.3d 478 (3rd Cir. 1995) (approving the use of bar orders against non-settling defendants).

22. The requested order barring claims against TEAGUE is consistent with and permissible under both the All Writs Act, 28 U.S.C. § 1651, and the Anti-Injunction Act, 28 U.S.C. § 2283. The All Writs Act provides federal courts with the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Here, the proposed Bar Order applies not only to certain Defendants but also to approximately 70 Shasta investors. Although these Shasta investors are not technically parties to this case, they are parties in interest and virtually all have submitted claims to the Receiver. Accordingly, enjoining these investors from bringing related claims against TEAGUE is consistent with the All Writs Act.

23. As one federal appeals court has noted:

> An important feature of the All-Writs Act is *its grant of authority to enjoin and bind non-parties to an action when needed to preserve the court's ability to reach or enforce its decision in a case* over which it has proper jurisdiction. . . . The power to bind non-parties distinguishes injunctions issued under the Act from injunctions issued in situations in which the activities of the third parties do not interfere with the very conduct of the proceeding before the court.

In re Baldwin-United Corp., 770 F.2d 328, 338 (2nd Cir. 1985) (emphasis added) (internal citation omitted); *see also United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977) (finding that the power conferred by the All Writs Act extends to nonparties "who are in a position to frustrate the implementation of a court order or the proper administration of justice. . .").

24. The *Baldwin* court held that the requirements of the All Writs Act are satisfied "if the parties whose conduct is enjoined have actual notice of the injunction and an opportunity to seek relief from the district court." *Baldwin*, 770 F.2d at 340.

25. The principles espoused by the *Baldwin* court are applicable here. The requested injunctive relief is necessary "to prevent third parties from thwarting the court's ability to reach and resolve the merits of the federal suit before it." *Id.* at 338-39. The Receiver will provide notice of the requested Bar Order to all parties whose conduct is to be enjoined. In addition, all Shasta investors are already before this Court on matters relating to claims they filed in the receivership – with the exception of a handful of investors who had been repaid in full before this case began.

26. A federal court's broad authority under the All Writs Act may be limited by the Anti-Injunction Act, which prevents the court from granting an injunction to stay a state court proceeding unless "expressly authorized by Act of Congress, *or where necessary in act of its jurisdiction, or to protect or effectuate its judgments.*" 28 U.S.C. § 2283 (emphasis added); *see also Baldwin*, 770 F.2d at 335. The Anti-Injunction Act, however, would only apply where a state court action had already been initiated. Here, the Receiver is unaware of any existing state court actions involving claims against TEAGUE that arise out of or relate to the conduct described above in paragraph 3. Accordingly, the Anti-Injunction Act would not now apply.

27. Even if an investor were to file a state court action at a later date, the Anti-Injunction Act would allow the Court to enjoin such an action in certain circumstances. One such circumstance exists where an injunction is necessary to protect or effectuate the Court's judgments. 28 U.S.C. § 2283; *see also Flanagan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998) (federal injunction staying state court proceeding proper where district court expressly retained jurisdiction to construe and enforce settlement agreement); *Gross v. Barnett Banks, Inc.*, 934 F. Supp. 1340, 1345-46 (D. Fla. 1995) (district court issued injunction to prevent state court from interfering with settlement in federal class action involving substantially similar claims and to

protect district court's judgment). Similarly, this Court is requested to retain jurisdiction to construe and ensure the effectiveness of the TEAGUE settlement agreement.

28. An injunction is also permissible where it is necessary in aid of the district court's jurisdiction. 28 U.S.C. 2283; *see also Flanagan*, 143 F.3d at 545-46. This clearly extends to the Court's jurisdiction over the assets of this receivership estate and the ability to maximize these assets for the benefit of investors and other parties in interest.

29. The Bar Order sought by the Receiver is necessary to protect and effectuate this Court's judgment, and is likewise necessary in aid of this Court's jurisdiction. As a result, the requested relief would be consistent with the Anti-Injunction Act even if that statute were applicable.

E. The Bar Order Will Not Prejudice Shasta Members

30. The requested Bar Order against Shasta members asserting related claims meets the fair and equitable standards. Based on the course of the settlement negotiations, the Receiver believes that this requirement is fair to Shasta and its members because such a favorable level of settlement value would not be available to Shasta in the absence of such a Bar Order. Therefore, Shasta investors will receive a higher recovery will be available as the result of being barred from asserting related individual claims. The investor claims to be barred would only be those arising from the same conduct as the claim being settled, and the settlement proceeds will be received for the benefit of those investors. Thus, there is a high degree of interrelatedness with the claims to be barred.

31. It is unclear at best whether the Shasta investors possess and could prevail on individual claims against TEAGUE. They would likely have to overcome issues of standing, privity and statute of limitations. In addition, many Shasta members signed agreements which,

according to TEAGUE, provide a contractual defense against claims by those members. TEAGUE's proportional share of comparative liability could also be asserted to attempt to limit or preclude additional investor recovery. On the other hand, all of the Shasta members who are still owed funds have filed claims in this proceeding, and they will likely obtain a higher distribution amount through these settlement terms than without the Bar Order provision. This factor also favors entry of the proposed Bar Order.

32. The individual barred claims would likely have the same relatively high degree of complexity as the accounting malpractice claim being settled. This factor likewise favors the Bar Order.

33. This proposed settlement would also deplete 70 percent of the available insurance coverage, leaving a maximum of only $300,000 in coverage that could be reached by any other claimant. From his review of TEAGUE's financial information, the Receiver has concluded that TEAGUE's non-insurance assets would likely yield marginal additional value, after considering collection costs. Although the settlement would exhaust most of the insurance value available, it would not entirely deplete it. Not obtaining all of the value available does not preclude entry of the Bar Order, however. *See Munford*, 97 F.3d at 456 (settlement of $350,000 and bar order approved where insurance coverage was $400,000). On balance, the Receiver believes that TEAGUE is contributing a substantial enough portion of the available insurance coverage as to make any possible individual investor claims against TEAGUE economically unattractive. This level of settlement would not be available to Shasta in the absence of the Bar Order. Therefore, the Receiver believes that, on balance, this factor also favors entry of the Bar Order.

34. The Receiver is unaware that any Shasta member has either commenced a lawsuit against TEAGUE or has retained counsel to review the factual background and potential

individual claims against TEAGUE. In addition, the Receiver has discussed the proposed settlement terms and proposed claims bar with approximately six Shasta investors. All indicated agreement with the settlement concept and expressed no objection to being barred from bringing individual claims.

35. Although the Receiver believes that Shasta members will accept the proposed settlement terms and will not object to being barred from asserting related individual claims against TEAGUE in return for receiving the monetary benefits of the settlement, those members are entitled to the opportunity to review and comment on the terms, including the proposed Bar Order.

36. Accordingly, the Receiver mailed to a notice to Shasta members regarding this motion, the settlement terms and background, the proposed Bar Order, and how to respond to the motion should they choose to do so. The form of notice provided to the Shasta members is attached to the Bobo Affidavit as Exhibit 2.

E. The Court Should Exercise Continued Jurisdiction Over the Settlement Agreement

37. The settlement agreement with TEAGUE contains certain detailed terms that the parties negotiated at length. In recognition of the complexity and importance of those provisions to the overall settlement, and the significance of the settlement payment to Shasta and its investors, as well as the possibility of disagreements over the interpretation and compliance with the various terms, the Receiver and TEAGUE have conditioned their agreement on this Court retaining continuing and exclusive jurisdiction over the Settlement Agreement and the order.

38. Federal courts have recognized provisions for retention of jurisdiction as appropriate and enforceable as long as the District Court's judgment incorporates the settlement agreement and the District Court expressly consents to such continuing jurisdiction. *Kokkonen v.*

Guardian Life Insurance Co., 511 U.S. 375, 381-82 (1994); *Flanagan*, 143 F.3d at 547. Accordingly, the Court is requested to retain such exclusive, continuing jurisdiction here.

39. The Receiver has discussed the proposed settlement provisions with the attorney for the CFTC, and she indicated that the CFTC had no objection to the settlement or this motion.

40. After the Court has considered the merits of the settlement and any objections thereto, the Receiver requests that the Court approve the settlement with TEAGUE as fair and equitable and enter the proposed order approving the attached settlement agreement, authorizing implementation of its terms, and permanently enjoining and barring Shasta members and the specified defendants from commencing or continuing claims against TEAGUE that arise out of or relate to the conduct described above in paragraph 3.

DATED: December 27, 2006

Respectfully submitted,

STEPHEN T. BOBO
Equity Receiver

By: s/ Jeffrey A. Carr
One of his attorneys

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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,

Relief Defendants.
_____/

[PROPOSED] ORDER

This matter having come before the Court on motion by Burton W. Wiand, as Receiver ("Receiver") for Scoop Capital, LLC, Scoop Management, Inc., Scoop Real Estate, L.P., Valhalla Investment Partners, L.P., Victory IRA Fund, Ltd., Victory Fund, Ltd., Viking IRA Fund, LLC, Viking Fund LLC, Valhalla Management, Inc., Viking Management, LLC, Venice Jet Center, LLC, Tradewind, LLC, Laurel Mountain Preserve, LLC, Laurel Preserve, LLC, Laurel Mountain Preserve Homeowners Association, Inc., Marguerite J. Nadel Revocable Trust UAD 8/2/07, Guy-Nadel Foundation, Inc., Lime Avenue Enterprises, LLC, A Victorian Garden Florist, LLC, Viking Oil & Gas, LLC, Traders Investment Club, and Home Front

Homes, LLC, and all other entities subject to receivership pursuant to the Court's orders appointing and reappointing Receiver and expanding receivership in the proceeding styled Securities & Exch. Comm'n v. Arthur Nadel, et al., Case No. 8:09-cv-87-T-26TBM (M.D. Fla.) (the "SEC Receivership Action") (collectively, the "Receivership Entities"), to approve the Settlement Agreement with Goldman Sachs Execution and Clearing, L.P. (formerly known as Spear, Leeds & Kellogg, L.P.) ("GSEC") (Dkt. [___]);

And due and proper notice of the motion having been given to all interested persons;

And the Court having considered the moving papers and any other filings relating to the Receiver's motion;

UPON DUE CONSIDERATION, it is **ORDERED AND ADJUDGED** that the Receiver's Motion to Approve Settlement (Dkt. [___]) is **GRANTED**.

IT IS FURTHER ORDERED THAT the Court specifically approves the written Settlement Agreement entered into between the Receiver and GSEC that is attached to the Receiver's motion as Exhibit A (the "Settlement Agreement") and incorporated herein by reference;

IT IS FURTHER ORDERED THAT the Court finds that the settlement between the Receiver and GSEC presented to the Court is a fair, equitable, reasonable, adequate, and good faith settlement of all claims the Receivership estate and the Receivership Entities may have against GSEC;

IT IS FURTHER ORDERED THAT the Receiver is authorized to enter into and complete the settlement with GSEC in accordance with the requirements of the Settlement Agreement;

IT IS FURTHER ORDERED THAT all individuals or entities who invested money in a Receivership Entity, as well as all persons or entities who may have liability to the Receiver, the Receivership Entities, or such investors arising or resulting from the fraudulent scheme underlying the SEC Receivership Action, together with their respective heirs, trustees, executors, administrators, legal representatives, agents, successors and assigns, are permanently enjoined and barred from commencing or pursuing a claim, action or proceeding of any kind and in any forum against GSEC that arises from or relates to the clearing, execution, and/or prime brokerage services that GSEC performed for Receivership Entities, including the Relief Defendants, or the allegations of the SEC Receivership Action;

IT IS FURTHER ORDERED that said injunction bars all claims against GSEC for contribution, indemnity, or any other cause of action arising from the liability of any person or entity to the Receiver or to any of the Receivership Entities or their investors (including claims in which the injury is the liability to the Receiver or any of the Receivership Entities or their investors or where damages are calculated based on liability to the Receiver or any of the Receivership Entities or their investors), in whatever form and however denominated, and that such person or entity shall be entitled to such set-offs or judgment reductions as permitted by law, if any, as a result of said injunction;

IT IS FURTHER ORDERED that the releases included in the Settlement Agreement have been given in good faith, and that the Settlement Agreement therefore discharges GSEC from all liability for contribution to any other tortfeasor pursuant to, at a minimum, Fla. Stat. § 768.31(5) and 15 U.S.C. § 78u-4(f)(7); and

IT IS FURTHER ORDERED that under the circumstances of this matter, including the need to bring finality to the resolution of potential claims between the Receiver and GSEC so

that payment of the amount contemplated by their settlement can be made to the receivership estate for the benefit of defrauded investors with allowed claims, there is no just reason for delay of entry of a final judgment approving the Settlement Agreement. Accordingly, the Clerk of the Court is directed to enter this Order as a final judgment.

DONE AND ORDERED at Tampa, Florida, on January ___, 2012.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record