UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

COMMODITY FUTURES TRADING COMMISSION,

Case No. 8:19-CV-886-T-33SPF

Plaintiff,

v.

OASIS INTERNATIONAL GROUP, LIMITED; OASIS MANAGEMENT, LLC; SATELLITE HOLDINGS COMPANY; MICHAEL J DACORTA; JOSEPH S. ANILE, II.; RAYMOND P MONTIE III; FRANCISCO "FRANK" L. DURAN; and JOHN J. HAAS,

Defendants;

and

MAINSTREAM FUND SERVICES, INC.; BOWLING GREEN CAPITAL MANAGEMENT LLC; LAGOON INVESTMENTS, INC.; ROAR OF THE LION FITNESS, LLC; 444 GULF OF MEXICO DRIVE, LLC; 4064 FOUNDERS CLUB DRIVE, LLC; 6922 LACANTERA CIRCLE, LLC; 13318 LOST KEY PLACE, LLC; and 4 OAKS LLC,

Relief Defendants.
_____/

THE RECEIVER'S MOTION TO APPROVE
PRE-SUIT CLAWBACK SETTLEMENT PROCEDURE

Burton W. Wiand, as receiver over the assets of the above-captioned defendants and relief defendants (the "**Receiver**" and the "**Receivership**" or "**Receivership Estate**") moves

the Court to approve a procedure for pre-suit resolution of "clawback" claims, which the Receiver hopes will conserve resources and avoid unnecessary litigation.

BACKGROUND

At the request of the Commodity Futures Trading Commission ("**CFTC**"), the Court appointed the Receiver on April 15, 2019 and directed him, in relevant part, to "[t]ake exclusive custody, control, and possession of the Receivership Estate," which includes "all the funds, properties, premises, accounts, income, now or hereafter due or owing to the Receivership Defendants, and other assets directly or indirectly owned, beneficially or otherwise, by the Receivership Defendants." Doc. 7 at p. 14, ¶ 32 & p. 15, ¶ 30.b. On July 11, 2019, the Court entered a Consolidated Receivership Order (Doc. 177) (the "**Consolidated Order**"), which combined and superseded two prior orders (Docs. 7 & 44) and is now the operative document governing the Receiver's activities.

The Court found that entry of the Consolidated Order was necessary and appropriate for the purposes of marshaling and preserving all assets, including in relevant part, assets that "were fraudulently transferred by the Defendants and/or Relief Defendants." Doc. 177 at 2. The Court also authorized the Receiver "to sue for and collect, recover, receive and take into possession all Receivership Property" (*id.* ¶ 8.B.) and "[t]o bring such legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging his duties as Receiver" (*id.* ¶ 8.I.). Similarly, the Court authorized, empowered, and directed the Receiver to "prosecute" actions "of any kind as may in his discretion, and in consultation with the CFTC's counsel, be advisable or proper to recover and/or conserve Receivership Property." *Id.* ¶ 43.

> Subject to his obligation to expend receivership funds in a reasonable and cost-effective manner, the Receiver is authorized, empowered, and directed to investigate the manner in which the financial and business affairs of the Receivership Defendants were conducted and (after obtaining leave of this Court) to institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Estate, as the Receiver deems necessary and appropriate. The Receiver may seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits, asset turnover, avoidance of fraudulent transfers, rescission and restitution, collection of debts, and such other relief from this Court as may be necessary to enforce this Order. Where appropriate, the Receiver should provide prior notice to counsel for the CFTC before commencing investigations and/or actions.

Id. ¶ 44. To recover fraudulent transfers in a cost-effective manner, the Receiver is asking the Court to approve the pre-suit resolution procedure discussed below. The Receiver hopes that the procedure will avoid unnecessary litigation, given the Receiver's clear right to recover fraudulent transfers under governing and well-settled law.

Defendant Anile's Guilty Plea and the Ponzi Payments

On August 8, 2019, defendant Joseph Anile, II pled guilty to three counts involving the scheme – (1) conspiracy to commit wire and mail fraud; (2) engaging in an illegal monetary transaction; and (3) filing a false income tax return. *See United States of America v. Joseph S. Anile, II,* Case No. 8:19-cr-334-T-35CPT (M.D. Fla.) (the "**Anile Criminal Action**" or "**ACA**"). A copy of Anile's plea agreement is attached as **Exhibit A** and includes the following admissions:

> From at least as early as November 2011, through and including at least April 18, 2019, in the Middle District of Florida, the defendant, Joseph S. Anile, II, conspired with others to commit wire fraud and mail fraud. The defendant and coconspirators made false and fraudulent representations to victim-investors and potential investors to persuade them to transmit their funds, via wire and mail, to entities and accounts controlled by conspirators to be traded in the foreign exchange market ("FOREX"). In fact, the defendant and coconspirators used only a portion of the victim-investors' funds for FOREX trading, and the trading resulted in losses which conspirators concealed. **They**

> **used the balance of the victim-investors' funds to make Ponzi-style payments, to perpetuate the scheme**, and for their own personal enrichment.
>
> ….
>
> In soliciting investments, the defendant and coconspirators made multiple false and fraudulent representations and material omissions in their communications to victim-investors and potential investors. In particular, they promoted one of the conspirators as an experienced FOREX trader with a record of success, but concealed the fact that he had been permanently banned from registering with the CFTC and was prohibited from soliciting U.S. residents to trade in FOREX and from trading FOREX for U.S. residents in any capacity. They also fraudulently represented that: (a) conspirators did not charge any fees or commissions; (b) investors were guaranteed a minimum 12 percent per year return on their investments; (c) conspirators had never had a month when they had lost money on FOREX trades; (d) interest and principal payments made to investors were funded by profitable FOREX trading; (e) conspirators owned other assets sufficient to repay investors' principal investments; and (f) an investment with conspirators was safe and without risk.

Ex. A at 26-28 (emphasis added). These fraudulent representations are typical of Ponzi schemes and are consistent with the Receiver's review of the defendants' communications with investors, including emails, promotional materials, and recorded marketing calls.

Similarly, on December 17, 2019, a federal grand jury returned a two-count indictment against defendant DaCorta, alleging conspiracy to commit wire and mail fraud as well as engaging in an illegal monetary transaction. *See United States of America v. Michael J. DaCorta,* Case No. 8:19-cr-605-T-02CPT (M.D. Fla.) (the "**DaCorta Criminal Action**" or "**DCA**"). A copy of the indictment is attached as **Exhibit B**. According to the grand jury, as early as November 2011, DaCorta entered into a conspiracy to defraud investors by making numerous fraudulent representations. *See* DCA Doc. 1 ¶ 14b.-d.

> It was a further part of the conspiracy that conspirators would and did use funds "loaned" by victim-investors to: (i) conduct trades, via an offshore broker, in the FOREX market, which trades resulted in catastrophic losses;

> (ii) **make Ponzi-style payments to victim-investors**; (iii) pay expenses associated with perpetuating the scheme; and (iv) purchase million-dollar residential properties, high-end vehicles, gold, silver, and other liquid assets, to fund a lavish lifestyle for conspirators, their family members and friends, and otherwise for their personal enrichment.

Id. at ¶ 14k (emphasis added). While an indictment is not evidence, the grand jury's allegations are consistent with Anile's guilty plea and admissions.

The Receiver's Investigation Confirms Anile's Plea and DaCorta's Indictment

The Receiver's forensic accountants have conducted a preliminary analysis of a bank account managed by relief defendant Mainstream Fund Services, Inc. ("**Mainstream**").[1] Tens of millions of dollars flowed through that account (0764 – the "**Account**") to and from investors to perpetrate the fraudulent scheme. According to the preliminary analysis:

- the sole source of inflows to the Account appears to have been money, directly or indirectly, from defrauded investors;
- certain defendants (acting through defendant OIG) transferred more than $18 million from the Account to ATC Brokers Ltd. ("**ATC**") – the entity through which fraudulent and unprofitable trading occurred;
- ATC never transferred any money back to the Account, which is reflected in both Mainstream's and ATC's records – in other words, there were no profits;
- nevertheless, Mainstream transferred millions of dollars from the Account to the defendants and other insiders;
- Mainstream also transferred millions of dollars from the Account to relief defendants and others to buy real estate (in which certain defendants resided at the investors' expense) and gold and silver, which transactions were inconsistent with OIG's stated purpose; and finally

[1] The accountants have substantially completed reconstructions of 25 bank accounts and analyzed more than 3,400 deposits and 23,000 withdrawals to or from those accounts. This involved reviewing relevant bank statements and underlying documentation, including canceled checks, wire transfer receipts, and deposit receipts and then compiling the information into a database.

- Mainstream transferred millions of dollars to investors from the Account, despite the lack of any trading profits from ATC.

In other words, Mainstream (in connection with certain defendants) appears to have used investor money to make payments to other investors without ever processing any actual trading profits. That is the definition of a Ponzi scheme. *See, e.g., Wiand v. Lee*, 753 F.3d 1194, 1201 (11th Cir. 2014) ("A Ponzi scheme uses the principal investments of newer investors, who are promised large returns, to pay older investors what appear to be high returns, but which are in reality a return of their own principal or that of other investors.").

The Receiver's forensic accountants have generally determined the amount of funds contributed by each investor to the scheme and the amount of funds paid to each investor from the scheme.[2] Amounts received in excess of amounts invested are typically referred to as "**false profits**" because the so-called profits were not derived from legitimate activity but from other investors' principal investment amounts. To date, the Receiver he has identified approximately 122 investors who received a total of approximately $3.36 million in false profits. These numbers might increase or decrease as the Receiver seeks additional information through subpoenas and other means, including the process set forth below.

The Proposed Pre-Suit Resolution Procedure

The Receiver proposes sending each investor who received false profits from the scheme a letter in the form attached as **Exhibit C** (the "**Letter**").[3] The Receiver will offer to

[2] The Receiver lacks this information with respect to certain investors but believes the records in his possession are sufficient to begin the process described in this motion.

[3] The Letter references its own "Exhibit A" but that form is not attached to the Letter because it will be different for each investor.

settle his fraudulent transfer claims against the investor for the repayment of 90% of the investor's false profits. The Receiver will also agree not to seek prejudgment interest, which is applicable to fraudulent transfer claims under pertinent law.[4] The investor will have a limited time to respond to the Receiver's offer, and the Receiver will not negotiate individual settlements. The Receiver has used this procedure successfully in other receiverships to avoid unnecessary litigation. If any investor refuses to settle pre-suit, the Receiver will analyze the merits of instituting formal litigation against the investor. If the Receiver determines that litigation is necessary, he will seek 100% of the investor's false profits and prejudgment interest from the date(s) of the pertinent transfer(s).

ARGUMENT

I. THE REQUESTED RELIEF IS CONSISTENT WITH THE COURT'S EQUITABLE POWERS AND WILL CONSERVE RESOURCES

Importantly, the Receiver is not asking the Court to decide ultimate issues of fact or law through this motion; he is only asking the Court to preapprove the proposed settlement and the pre-suit resolution procedure, given the principles discussed below. The requested relief is consistent with the Court's extremely broad power to supervise this equity Receivership and to determine the appropriate actions to be taken in the administration of the Receivership. *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). The Court's wide discretion derives from the inherent

[4] The Receiver reserves the right to exclude certain individuals or entities from this offer. Specifically, the Receiver does not intend to make the offer to the defendants or anyone who actively participated in the scheme. Claims against insiders will be evaluated and addressed on an individualized basis.

powers of an equity court to fashion relief. *Elliott*, 953 F.2d at 1566; *S.E.C. v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5th Cir. 1982). A court imposing a receivership assumes custody and control of all assets and property of the receivership, and it has broad equitable authority to issue all orders necessary for the proper administration of the receivership estate. *See S.E.C. v. Credit Bancorp Ltd.*, 290 F.3d 80, 82-83 (2d Cir. 2002); *S.E.C. v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980). The court may enter such orders as may be appropriate and necessary for a receiver to fulfill his duty to preserve and maintain the property and funds within the receivership estate. *See, e.g., Official Comm. Of Unsecured Creditors of Worldcom, Inc. v. S.E.C.*, 467 F.3d 73, 81 (2d Cir. 2006). Any action taken by a district court in the exercise of its discretion is subject to great deference by appellate courts. *See United States v. Branch Coal*, 390 F. 2d 7, 10 (3d Cir. 1969). Such discretion is especially important considering that one of the ultimate purposes of a receiver's appointment is to provide a method of gathering, preserving, and ultimately liquidating assets to return funds to creditors. *See S.E.C. v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 (5th Cir. 1982) (court overseeing equity receivership enjoys "wide discretionary power" related to its "concern for orderly administration") (citations omitted). The Receiver believes the relief requested in this motion is consistent with both his mandate under the Consolidated Order and the Court's equitable powers. He also believes it will result in cost-effective recoveries for the Receivership Estate and avoid unnecessary litigation.

II. THE ELEVENTH CIRCUIT HAS EXPRESSLY ADOPTED THE PONZI PRESUMPTION AND RECOGNIZED A RECEIVER'S RIGHT TO RECOVER FALSE PROFITS

Again, the Receiver is not asking the Court to decide ultimate issues of fact or law through this motion. This section is included only to demonstrate that the Receiver's claims

are well-founded and that the proposed pre-suit settlement is fair and reasonable. As noted above, "[a] Ponzi scheme uses the principal investments of newer investors, who are promised large returns, to pay older investors what appear to be high returns, but which are in reality a return of their own principal or that of other investors." *See, e.g., Lee*, 753 F.3d at 1201. Given Anile's guilty plea[5] and his own investigation, the Receiver believes the scheme underlying this action qualifies as a Ponzi scheme.[6] The Eleventh Circuit has expressly adopted the "Ponzi presumption," which provides that transfers from Ponzi schemes are recoverable under pertinent fraudulent transfer law:

> Other circuits have held that in a receiver's suit under a state uniform fraudulent transfer law, proof that a transfer was made from an entity used to perpetrate a Ponzi scheme is sufficient to establish the transfer was made with actual fraudulent intent without a consideration of the badges of fraud. *See Donell v. Kowell,* 533 F.3d 762, 770 (9th Cir. 2008) (applying California's

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[5] Anile's plea carries substantial evidentiary value. *See, e.g., In re Bernard L. Madoff Inv. Sec. LLC*, 445 B.R. 206, 221 (Bankr. S.D.N.Y. 2011) ("'[A] debtor's admission, through guilty pleas and a plea agreement admissible under the Federal Rules of Evidence, that he operated a Ponzi scheme with the actual intent to defraud his creditors conclusively establishes the debtor's fraudulent intent….'") (quotation omitted); *Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1995) ("Admissions—in a guilty plea …, as elsewhere—are admissions; they bind a party; and the veracity safeguards surrounding a plea agreement that is accepted as the basis for a guilty plea and resulting conviction actually exceed those surrounding a deposition."); *In re Rothstein Rosenfeldt Adler, P.A.*, 2010 WL 5173796, at *5 (Bankr. S.D. Fla. Dec. 14, 2010) ("[C]riminal convictions based on operating a Ponzi scheme establish fraudulent intent for the purposes of the fraudulent transfer provisions."); *In re McCarn's Allstate Finance, Inc.,* 326 B.R. 843, 851 (M.D. Fla. 2005) ("Even if the information or indictment did not specifically label the fraud a 'Ponzi scheme,' if the allegations in the information establish that the debtor ran a scheme whereby the debtor intended to defraud the debtor's creditors, evidence of a guilty verdict or plea agreement admitting the charges can establish the existence of a Ponzi scheme."). Although several of the cases cited above are bankruptcy cases, their holdings do not rely on bankruptcy law. Ponzi schemes are often adjudicated in bankruptcy court.

[6] Even if it did not, fraudulent transfers are nevertheless recoverable using statutory "badges of fraud." *See, e.g., Lee*, 753 F.3d at 1200.

> UFTA); *S.E.C. v. Res. Dev. Int'l, LLC,* 487 F.3d 295, 301 (5th Cir. 2007) (applying Texas's UFTA); *Warfield v. Byron,* 436 F.3d 551, 558-59 (5th Cir. 2006) (applying Washington's UFTA); *see also Wing v. Dockstader,* 482 Fed. Appx. 361, 363 (10th Cir. 2012) (applying Utah's UFTA). This court has embraced the so-called "Ponzi scheme presumption" in applying the Bankruptcy Code's fraudulent transfer provisions. *Perkins v. Haines,* 661 F.3d 623, 626 (11th Cir.2011) ("With respect to Ponzi schemes, transfers made in furtherance of the scheme are presumed to have been made with the intent to defraud for purposes of recovering the payments under [11 U.S.C.] §§ 548(a) and 544(b)."") (citations omitted). We now clarify that, under FUFTA's actual fraud provision, proof that a transfer was made in furtherance of a Ponzi scheme establishes actual intent to defraud under § 726.105(1)(a) without the need to consider the badges of fraud.

Lee, 753 F.3d at 1200-01. Courts recognize a receiver's right to recover, at minimum, "false profits" from investors because "[t]he investors who profited … did not receive income from their investments, but received principal funds from other investors." *Id.* at 1200; *see also Wiand v. Lee*, 2012 WL 6923664, at *17 (M.D. Fla. Dec. 13, 2012), *adopted* 2013 WL 247361 (M.D. Fla. Jan. 23, 2013) ("[A]s the Receiver indicates, it is well-settled that a receiver is entitled to recover from winning investors profits above the initial outlay, also known as 'false profits,' and an investor in a scheme does not provide reasonably equivalent value for any amounts received from [the] scheme that exceed the investor's principal investment."); *Perkins v. Haines*, 661 F.3d 623, 627 (11th Cir. 2011) ("Any transfers over and above the amount of the principal—*i.e.,* for fictitious profits—are not made for 'value' because they exceed the scope of the investors' fraud claim and may be subject to recovery…."). Given Anile's guilty plea, the Receiver's own investigation, and this well-settled, governing law, the Receiver believes that the pre-suit resolution mechanism set forth in this motion is fair and reasonable. He hopes it will avoid unnecessary litigation and conserve resources, including those of the Court and of potential clawback defendants.

CONCLUSION

For the foregoing reasons, the Court should preapprove the proposed settlement and the pre-suit resolution procedure so that the Receiver can begin to recover false profits, hopefully with minimal need for litigation.

LOCAL RULE 3.01(G) CERTIFICATION

Counsel for the Receiver has conferred with counsel for the CFTC and is authorized to represent to the Court that the CFTC has no objection to the requested relief. The United States (as an intervening party) takes no position on this motion. Defendants Anile and Duran do not oppose the relief sought in the motion. Defendant DaCorta takes no position on the motion but requested that the undersigned inform the Court that he believes these matters should be resolved after the conclusion of his criminal trial. The Court, however, has already exempted the Receiver's activities from the stay. Defendants Montie and Haas oppose the relief requested in the motion, but pursuant to footnote 4, the Receiver does not intend to extend this offer to the defendants and other insiders. All other entities (except Satellite Holdings, which is associated with defendant Haas) have defaulted and are under the Receiver's control.

Relief defendant Mainstream does not object to the requested relief but disagrees with the Receiver's characterization of its activities. Mainstream requested that the Receiver make certain edits to the motion or attach a letter its counsel sent the undersigned. Although not required by Local Rule 3.01(g), that letter is attached as **Exhibit D** in the hope that doing so will minimize motion practice and allow the Receiver to begin to pursue settlements.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, and also served the following non-CM/ECF participants by mail and/or email:

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Respectfully submitted,

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