

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SEP 24 2009

By: *James N. Hatten*, Clerk
James N. Hatten, Deputy Clerk

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff

v.

CIVIL ACTION NO.
1:08-CV-11-ODE

COADUM ADVISORS, INC., COADUM
CAPITAL FUND I LLC, COADUM
CAPITAL FUND II LP, COADUM
CAPITAL FUND III LP, MANSELL
CAPITAL PARTNERS III LLC,
MANSELL ACQUISITION COMPANY
LP, JAMES A. JEFFERY, and
THOMAS E. REPKE,

Defendants

ORDER

This case comes before the Court on a motion by the court-appointed receiver ("the Receiver") to approve a proposed plan of distribution of receivership funds ("the Plan") to former investors in Coadum Advisors, Inc. ("Coadum") [Doc. #123].¹ Seven potential claimants to the funds ("the Objectors") objected to the Plan [Doc. #130-131, #133, #135-138]. On September 16, 2009, the Receiver responded to the objections to the Plan [Doc. #141]. On September 18, the Court held a hearing on the matter. At the hearing, three of the Objectors and the Receiver appeared through counsel. For the reasons that follow, the Court GRANTS the

¹ As this Order will indicate, investors apparently did not directly invest in Coadum itself, but rather invested in various corporate entities related to Coadum that Coadum's principals advertised and promoted. In the interest of uniformity, however, this Order will refer to investments in Coadum's related corporate entities as investments in Coadum itself.

Receiver's motion and DIRECTS the Receiver to distribute receivership funds in accordance with the Plan.

I. Factual Background

On January 3, 2008, the Securities and Exchange Commission ("SEC") filed a complaint against Coadum, Coadum Capital Fund 1 LLC ("Coadum 1"), Coadum Capital Fund II LP ("Coadum II"), Coadum Capital Fund III LP ("Coadum III"), Mansell Acquisition Company LP ("MAC"), Mansell Capital Partners III LLC ("Mansell"), (collectively, "the corporate-entity Defendants") James A. Jeffery, and Thomas E. Repke (collectively, "Defendants"), alleging violations of the Securities Act of 1933, 15 U.S.C. § 77a et seq. [Doc. #1]. The SEC alleged that, "[f]rom at least early 2006 through [the date of filing], Coadum and Mansell . . . fraudulently raised approximately \$30 million from investors who purchased interests in" the corporate-entity Defendants and that "Jeffery and Repke control[led] Coadum and Mansell and [directed] the offerings" made by those entities [Doc. #1 at 2].

The SEC alleged that, at the direction of Coadum and Jeffery, Atlanta-area attorney Melanie Mayer wire-transferred a substantial majority of the \$30 million invested in the corporate-entity Defendants to offshore accounts controlled by Exodus Equities, Inc., a Malta-based entity [Doc. #1 at ¶ 41]. Defendants allegedly invested some portion of these funds in the Exodus Platinum Fund, a Bermuda exempted mutual fund company, by depositing the funds at various banks in Switzerland and Malta through Soleil Group Holdings Limited [Doc. #1 at ¶¶ 42-43]. Defendants allegedly transferred the remainder of the invested funds to Coadum itself, which distributed them to various entities affiliated with the

Defendants [Doc. #1 at ¶ 49]. According to the complaint, Exodus Platinum Fund never launched, actively traded, or paid any earnings [Doc. #1 at ¶ 44]. Similarly, Soleil Group Holdings Limited had no active investment program and no earnings [Doc. #1 at ¶ 46].²

The SEC further alleged that Jeffery and Repke "falsely represented in monthly account statements to investors that the investors ha[d] been earning approximately four percent per month and that all or most of their principal [was] in escrow" [Doc. #1 at 3]. Based on these statements, most investors "rolled over" their apparent "profits" or "earnings," keeping them invested in the corporate-entity Defendants from month to month, or invested additional funds in Coadum [Doc. #1 at ¶ 51]. However, some investors occasionally withdrew money from their invested funds as well [Doc. #1 at ¶ 52].

With its complaint, the SEC filed an Emergency Motion for a Temporary Restraining Order and the Appointment of a Receiver to manage Coadum funds and assets to be frozen by the Court [Doc.

² As in most Ponzi schemes, Jeffery and Repke transferred investors' funds between numerous corporate entities, business ventures, accounts, and countries. Funds invested in Coadum were even used to commission the production of a large statue, entitled *To Lift A Nation*, honoring firefighters who lost their lives in the terrorist attacks of September 11, 2001 [Doc. #24 at 18]. The statue now stands in Emmitsburg, Maryland, on the grounds of the National Fire Academy and near the National Fallen Firefighters Memorial Park [Doc. #24-13 at 2].

A more complete summary of how Jeffery and Repke moved investors' funds during the Coadum Ponzi scheme can be found in the Receiver's interim reports filed with the Court during the ongoing investigation of the scheme [Doc. #24, #27, #46, #82, and #109].

#2]. The Court granted this motion and appointed Pat Huddleston II as the temporary Receiver for "all assets acquired for the benefit of Coadum and/or Mansell, and/or Coadum 1, and/or Coadum II, and/or Coadum III and/or MAC and any entities or assets owned by them" ("the Receiver Estate") [Doc. #3 at 10-11].³ The Court gave the Receiver "all powers and rights to efficiently administer and manage the Receiver Estate," enumerating specific powers that the Receiver would have with regard to seizing, controlling, and disposing of the Receiver Estate [Doc. #3 at 11-12].

On April 25, 2008, after some months of investigation into the assets and holdings of the Defendants, the Receiver filed a "Motion to Approve Claim Form and Establish a Bar Date for Filing Claims" to any recovered Coadum funds [Doc. #28]. At that time, "\$2.4 million [was] being held by the Receiver in an interest-bearing Receivership account at the Bank of North Georgia," and the Receiver was "pursuing [the] return of more than \$18 million in investor funds transferred overseas to Malta and to Switzerland" [Doc. #28 at 3]. To his motion the Receiver attached a sample Proof of Claim Form, which all potential claimants to recovered Coadum funds would be required to complete and return to the Receiver before July 11, 2008 [Doc. #28-2]. On June 4, the

³ On January 25, 2008, the Court entered an "Order of Permanent Injunction Against Defendants Coadum, MCP3, Jeffery, Repke, Coadum 1, Coadum 2, Coadum 3 and MAC, and Other Relief," again naming Huddleston as the Receiver, "with the same scope and authority as set forth in" the Court's January 3 order [Doc. #17 at 11]. On August 15, on motion by the Receiver, the Court re-appointed Huddleston as the Receiver "unless and until the Court order[ed] otherwise" [Doc. #47 at 2].

Court granted the Receiver's motion, and the claim submission process began [Doc. #33].

After the Court approved the Receiver's proposed claim submission process and Proof of Claim Form, "the Receiver mailed out 186 Claim Forms - 174 to investors and 12 to creditors" of Coadum [Doc. #46 at ¶ 100]. The Receiver received "201 claims by the claims bar date [of July 11, 2008]-199 from investors and 2 from vendors" [Doc. #123 at 5]. "The Receiver's staff verified each claim by examining the supporting documents forwarded by each claimant, comparing that data to bank records and resolving any discrepancies by interviewing the claimant and/or seeking additional information" [Doc. #123 at 5]. Though submitted claims to recovered Coadum funds totaled \$39,387,187, the Receiver "verified [claims in the amount of] \$38,252,110-195 claims representing \$37,782,118 in general investor claims, four claims representing \$454,233 from commissioned salesmen, and \$15,759 from two vendors" [Doc. #123 at 5].

The Receiver verified claims to funds invested in four of the corporate-entity Defendants. Specifically, the Receiver verified nine claims to funds previously invested in Coadum I, 135 claims to funds previously invested in Coadum II, forty-one claims to funds previously invested in Coadum III, and twenty-nine claims to funds previously invested in Mansell [Doc. #123 at 6]. The Receiver verified no claims to funds previously invested in Coadum itself or in MAC [Doc. #123 at 6]. Thirteen verified claims represented investments in more than one of the corporate-entity Defendants [Doc. #123 at 6]. Additionally, the Receiver concluded

that "Coadum paid \$5,728,585 in [pre-receivership] withdrawals to 59 claimants" [Doc. #123 at 6].

The Receiver sent claim acknowledgment letters that stated the Receiver's calculated amount of each claimant's Coadum investment and pre-receivership withdrawals, if any [Doc. #123 at 5]. Nine claimants responded to their claim acknowledgment letters with questions for the Receiver, but "none of the claimant responses resulted in a change in the aggregate investment or pre-receivership withdrawal amounts" that the Receiver had calculated [Doc. #123 at 6].

II. The Plan

On July 29, 2009, the Receiver moved the Court for permission "to pay out up to \$6 million pursuant to the terms" of the Plan [Doc. #123 at 4]. The exact amount to be distributed pursuant to the Plan will depend on the outcome of ongoing negotiations "for the repatriation of the vast majority of the \$4.5 million in assets frozen in accounts at Credit Suisse in Geneva" ("the Swiss funds") [Doc. #123 at 3]. If the Receiver successfully repatriates the Swiss funds prior to mailing distribution checks, up to \$6 million could be distributed pursuant to the Plan [Doc. #123 at 4-5]. If repatriation proves impossible prior to the distribution, the Receiver will distribute approximately \$2 million pursuant to the Plan and up to \$4 million upon eventual repatriation of the Swiss funds [Doc. #123 at 5].

The Plan proposes to distribute the majority of recovered funds based on the "Rising Tide" distribution method.⁴ Pursuant to that distribution method, the Receiver would first calculate the pro rata multiplier ("PRM") that would apply in a given round of distributions by dividing the total funds available for that distribution round by the sum of the total allowed claims made in that distribution round [Doc. #123 at 8].⁵ Second, the Receiver would calculate each claimant's pro rata share of funds to be distributed ("pro rata share") by multiplying the PRM by that claimant's total personal investment in Coadum.⁶ Finally, the

⁴ Not all recovered funds would be distributed pursuant to the Rising Tide method. The Plan provides that three classes of claims to recovered funds would be paid in full prior to implementing the Rising Tide method: (1) claims for expenses of administering the receivership, (2) claims for expenses related to tax liabilities of the receivership, and (3) claims of general investors to funds invested after the institution of the receivership by the Court on January 3, 2008 [Doc. #123 at 25-27].

Once these classes of claims were paid in full, the Plan would disburse remaining funds, pursuant to the Rising Tide method, to six classes in descending order of priority: (1) general investors, (2) commissioned Coadum salesmen, (3) general investors who filed verified late or defective claims, (4) commissioned Coadum salesmen who filed verified late or defective claims, (5) creditors of Coadum, and (6) creditors of Coadum who filed verified late or defective claims.

⁵ Here, $PRM = \text{Funds Available for Distribution Round} / \text{Sum of Total Allowed Claims}$.

For instance, if \$1,000,000 were available for distribution, but the total allowed claims sought to recover \$10,000,000, the PRM for that distribution round would be ten percent.

⁶ Funds invested in Coadum were completely commingled, rendering "tracing" a particular investor's funds from the common res back to that investor impossible [Doc. #123 at 10-11]. For

Receiver would deduct the amount of each claimant's pre-receivership withdrawals,⁷ if any, from that claimant's pro rata share.⁸ A negative or zero result would indicate that a particular claimant had already received pre-receivership withdrawals in an amount greater than or equal to that claimant's pro rata share. Any such claimant would not participate in that round of distributions, but could potentially participate in later distribution rounds.⁹

this reason, the Receiver proposed calculating each investor's net distribution amount by using a pro rata formula common to all claimants, rather than "tracing" any claims to any particular portion of the recovered funds.

⁷ The Receiver would define "pre-receivership withdrawals" as any sum of money received by any Coadum investor from the single Coadum pool of funds at any time prior to the Court's institution of the receivership, regardless of how Coadum represented those funds to the investor and regardless of what each investor understood those funds to be. For example, the Receiver would equally regard, as pre-receivership withdrawals, \$10,000 consciously withdrawn by Investor A from his invested Coadum funds and \$10,000 mailed to Investor B by Coadum officials who represented that money as Investor B's "profits" or "earnings."

⁸ The Rising Tide method can thus be represented by the following formula: (Total Dollars Invested x PRM) - Pre-Receivership Withdrawals = Net Distribution Amount.

⁹ For instance, if funds remained after the first round of distributions, the Receiver would hold a second round of distributions. Given the reduced amount of funds to be distributed in the second round as compared to the first round, the PRM in the second round would be lower, and each claimant's pro rata share would drop as a result.

A claimant who received pre-receivership withdrawals would receive funds in the second round of distribution, even if they received no funds in the first round, if their pre-receivership withdrawal amount was less than their second-round pro rata share

The Receiver concluded that "[t]his method preserves assets for those claimants who have received nothing thus far, and recognizes that some claimants have already recovered a substantial percentage of their investment" [Doc. #123 at 7]. The Receiver considered the Rising Tide distribution method the "most equitable" under the circumstances [Doc. #123 at 7]. Once the initial distribution pursuant to the Rising Tide method occurred, the Receiver predicted that "99.3% of claimants [would] have either received a pre-receivership withdrawal or a distribution payment" [Doc. #123 at 13].

The Receiver considered several alternative distribution methods. For instance, the Receiver considered "tracing" each claimant's funds to the common res and attempting to return to each claimant their specific funds invested, but the commingling of all Coadum investors' funds made this approach impossible [Doc. #123 at 10-11]. In addition, the Receiver considered ignoring pre-receivership withdrawals altogether, but concluded that this method "would result in a wide disparity of recovery percentages among claimants and an inequitable windfall to those whose pre-receivership withdrawals represent a substantial percentage of their investment" [Doc. #123 at 11]. The Receiver also considered demanding the return of all pre-receivership withdrawals, with a

[Doc. #123 at 9]. In this way, the Rising Tide method does not shut out claimants who have received pre-receivership withdrawals from participating in any distributions. It merely gives distribution priority to those who have not received pre-receivership withdrawals, permitting those individuals to come closer, in terms of total funds received, to individuals who already received pre-receivership withdrawals.

redistribution of all collected funds to eligible claimants thereafter [Doc. #123 at 11]. However, the Receiver rejected this approach as "unduly costly," instead pursuing only those individuals whose pre-receivership withdrawals constituted more than 50% of their total investment in Coadum [Doc. #123 at 11-12]. See generally Huddleston v. Souri, Civil Action No. 1:09-CV-02132-ODE (N.D. Ga. 2009).¹⁰

Finally, the Receiver considered and rejected the method of distribution that the Objectors advocate: the "Net Investment" method [Doc. #123 at 12]. Pursuant to this method, the Receiver would determine each investor's net investment by subtracting that investor's pre-receivership withdrawals, if any, from their total amount invested in Coadum [Doc. #123 at 12]. The Receiver would then calculate the PRM using a slightly different formula from the one in the Rising Tide method described above: by dividing the total funds available for distribution by the sum of all investors' net investments [Doc. #123 at 12].¹¹ The Receiver would multiply each investor's net investment by this PRM to determine each investor's net distribution amount.¹²

¹⁰ Aside from this pending litigation, the Receiver has accepted settlement offers from some of the claimants who received pre-receivership withdrawals in excess of 50% of their total investment in Coadum [Doc. #123 at 6 n.3]. Those offers represent \$686,637 that the Receiver expects to bring into the pool of available receivership funds [Doc. #123 at 6 n.3].

¹¹ Here, then, $PRM = \text{Funds Available for Distribution} / \text{Sum of Investors' Net Investments}$.

¹² The Net Investment method can thus be represented by the following formula: $(\text{Total Dollars Invested} - \text{Pre-Receivership})$

Under the Net Investment method, unless an investor's pre-receivership withdrawals were greater than or equal to their total amount initially invested, every investor would participate to some extent in all distribution rounds. The Net Investment method is thus the clear preference of those investors who received pre-receivership withdrawals in an amount less than their total investments; rather than finding themselves possibly "skipped over" in the Receiver's proposed distribution, those investors would participate to some extent in all distribution rounds.¹³

III. Discussion

Having considered the objections to the Plan, the Court agrees with the Receiver that, under these circumstances, the Rising Tide distribution method is the most equitable means of distributing receivership funds.¹⁴ At the outset, the Court notes

Withdrawals) x PRM = Net Distribution Amount.

¹³ It is unsurprising, therefore, that all of the Objectors to the Plan "are . . . claimants who received [pre-receivership] withdrawal payments" [Doc. #141 at 6].

¹⁴ The Court notes that its decision to permit the Receiver to implement the Rising Tide method places the Court in accord with numerous other district courts that have done the same. See, e.g., Commodity Futures Trading Comm'n v. Equity Fin. Group, LLC, No. Civ. 04-1512 RBK AMD, 2005 WL 2143975, at *24-25 (D.N.J. Sept. 2, 2005), Commodity Futures Trading Comm'n v. Hoffberg, No. 93 C 3106, 1993 WL 441984, at *2-3 (N.D. Ill. Oct. 27, 1993), Commodity Futures Trading Comm'n ex rel. Kelley v. Skorupskas, Civil No. 83-CV-1885-DT, 1988 U.S. Dist. LEXIS 18649, at *1-8 (E.D. Mich. Aug, 22, 1988). But see SEC v. Byers, No. 08 Civ. 7104(DC), 2009 WL 2185491, at *13-14 (S.D.N.Y. July 23, 2009) (applying Net Investment distribution method), SEC v. AmeriFirst Funding, Inc., Civil Action No. 3:07-CV-1188-D, 2008 WL 919546, at *6 (N.D. Tex. Mar. 13, 2008) (same), Commodity Futures Trading Comm'n v.

that it possesses "broad powers and wide discretion to determine relief in an equity receivership." SEC v. Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992) (citing SEC v. Safety Fin. Serv., Inc., 674 F.2d 368, 372 (5th Cir. 1982)). "This discretion derives from the inherent powers of an equity court to fashion relief." Id. (citing Safety Fin. Serv., Inc., 674 F.2d at 372). Consistent with the Court's goal of fashioning equitable relief, "any distribution of assets by . . . a receiver is to be done equitably and fairly-with similarly situated investors or customers treated similarly." SEC v. Credit Bancorp, Ltd., 194 F.R.D. 457, 464 (S.D.N.Y. 2000) (citing Elliott, 953 F.2d at 1569).

A. An Illustrative Example

The equities promoted by the Rising Tide method can best be demonstrated with an example involving two hypothetical investors, Investor A and Investor B, and the outcomes that would result by applying either the Rising Tide method or the Net Investment method. Both Investor A and Investor B, but no other investors, invested \$100,000 apiece in Coadum. Unlike Investor A, however,

Franklin, 652 F. Supp. 163 (W.D. Va. 1986), rev'd on other grounds sub nom. Anderson v. Stephens, 875 F.2d 76 (4th Cir. 1989) (same).

The problem faced by those courts, and also faced by the Court in this case, is that "[e]very investor who responded to the Plan urges that we authorize a 'fair' distribution, but there [is] a sharp split of opinion as to what that means in this case." Hoffberg, 1993 WL 441984, at *4. Whether the Court chooses the Rising Tide distribution method or the Net Investment distribution method, some Coadum investors will recover fewer receivership funds, and other investors will recover more. In these circumstances, "fairness" is a relative concept. The Court concludes that the Rising Tide method results in the most equitable distribution possible given these competing, and irreconcilable, positions.

Investor B withdrew \$20,000 of his investment from Coadum prior to the Court instituting the receivership in January 2008. Investor A made no pre-receivership withdrawals. Coadum's first distribution of recovered funds involves, hypothetically, \$40,000 in funds to be disbursed.

1. The Rising Tide Method Applied

Under the Rising Tide method, the applicable PRM would be twenty percent.¹⁵ Thus, each investor's pro rata share would be \$20,000, as both Investor A and Investor B invested \$100,000 apiece in Coadum. As Investor A made no pre-receivership withdrawals from his Coadum investment, no deductions would be made from his \$20,000 recovery under the Rising Tide method. However, because Investor B received pre-receivership withdrawals in an amount equal to his pro rata share of \$20,000, Investor B would receive no money in this distribution round. At the end of the first distribution round, Investor A would have received \$20,000 in recovered funds—twenty percent of his initial investment—and Investor B would have received no recovered funds, but still would have previously received a pre-receivership withdrawal of \$20,000—twenty percent of his initial investment.

After the first round of distributions, \$20,000 would remain for distribution among the investors. The PRM in the second distribution round would thus be ten percent, and each investor's pro rata share in this round would be \$10,000. Because neither investor would have any pre-receivership withdrawals not already

¹⁵ That is, the \$40,000 available for distribution in this distribution round divided by the \$200,000 in total claims asserted by Investor A and Investor B.

offset in earlier distribution rounds, each investor would receive their \$10,000 pro rata share in this second distribution round.

At the end of both distributions, then, Investor A would have received \$30,000 overall in funds formerly held in the common Coadum pool, and Investor B would also have received \$30,000 overall in funds formerly held in the common Coadum pool-his \$20,000 pre-receivership withdrawal and \$10,000 recovered in the second round of distributions. Each investor would have recovered thirty percent of their initial investment as a result of the Rising Tide method.

2. The Net Investment Method Applied

The Net Investment method would subtract Investor B's pre-receivership withdrawals from his total invested amount prior to determining his pro rata share, leaving Investor B with an \$80,000 net investment. In contrast, Investor A would have nothing subtracted from his initial \$100,000 investment. Then, the Receiver would calculate the PRM by dividing the funds available for distribution by the sum of the investors' net investments, reaching a PRM of 22.22 percent.¹⁶ Finally, to determine each investor's net distribution amount, the Receiver would multiply that PRM by each investor's net investment: Investor A would recover \$22,222 from the recovered Coadum funds, and Investor B would recover \$17,778.

At the end of this distribution, then, Investor A would have received \$22,222 overall in funds formerly held in the common

¹⁶ That is, the \$40,000 available for distribution divided by \$180,000, which represents the sum of the net investments of Investor A and Investor B.

Coadum pool, and Investor B would have received his pre-receivership withdrawal of \$20,000 and \$17,778 in recovered Coadum funds, leaving Investor B with \$37,778 in total funds recovered. Investor A would thus recover 22.2% of his initial investment, while Investor B would have recovered, based on his pre-receivership withdrawal and the money recovered in the Net Investment distribution, 37.8% of his initial investment.

3. An Equitable Result

The varying recovery percentages for Investor A and Investor B indicate the equities promoted by the Rising Tide distribution method and the inequities promoted by the Net Investment method. The Rising Tide method would provide those investors who received no pre-receivership withdrawals during the Coadum scheme with the opportunity to "catch up" with those investors who received money from the common Coadum pool of funds prior to the institution of the receivership in January 2008. Under the Net Investment method, in contrast, investors who received pre-receivership withdrawals "would benefit at the expense of other investors by retaining the benefit of the full amount of [their] withdrawal[s] plus a distribution calculated on the basis of net funds invested, rather than the recommended distribution amount *adjusted* to take into account all amounts already received." Equity Fin. Group, LLC, 2005 WL 2143975, at *87-88 (emphases added).

As shown in the example, those investors who received pre-receivership withdrawals would only be "skipped over" in the Rising Tide distribution rounds to the extent necessary to narrow the gap in total funds recovered that currently exists between investors who have yet to receive any money from the Coadum pool

of funds and those who received pre-receivership withdrawals. Once the Receiver's distributions sufficiently narrow that gap, those investors who received the fewest pre-receivership withdrawals may begin to participate in distributions of recovered funds, followed by the investors who received incrementally greater pre-receivership withdrawals than those investors, and so on.

Multiple Objectors received money from Coadum prior to the Court's institution of the receivership, but decided to reinvest that money in Coadum shortly thereafter or retain some of the money and reinvest the rest [Doc. #131 at 1-2, #133 at 1]. These Objectors argue that it would be inequitable for the Receiver to consider these "temporary withdrawals" as pre-receivership withdrawals for purposes of implementing the Rising Tide method pursuant to the Plan [Doc. #131 at 2, #133 at 1-2].

These Objectors fail to acknowledge that, notwithstanding what any money received from Coadum prior to the receivership was represented by Coadum or understood by a given investor to be, such money was cash in hand that the Objectors could have spent, saved, or invested in any manner that they saw fit. Merely because certain Objectors quickly reinvested those funds in Coadum does not mean that the money was any less theirs to invest elsewhere, save, or spend. The Rising Tide method would equitably favor those investors who never had money from the common Coadum fund to spend as they wished while limiting other investors' distributions only to the extent necessary to narrow the gap in total funds recovered that exists between the two groups.

Other Objectors thought that money received from Coadum constituted "profits" or "earnings" mailed in error, rather than

having been "rolled over" to the next month's investment cycle, and promptly returned those funds to Coadum representatives [Doc. #133 at 1].¹⁷ These Objectors make the strongest argument that the Rising Tide method, which would treat such disbursements as pre-receivership withdrawals, would be inequitable as applied to them.

However, those Objectors do not indicate why it would be relatively more equitable to apply the Net Investment method as an alternative. The Net Investment method would not differentiate between investors that thought funds were mistakenly sent to them, and thus promptly returned those funds, and investors that made pre-receivership withdrawals fully aware that such money would be theirs to keep and spend elsewhere. The Court declines to adopt the Net Investment method, even though that method might be arguably more equitable as applied to a very small group of investors who thought they received disbursed funds from Coadum in error, when applying that method would prejudice those investors

¹⁷ In opting to implement the Net Investment method, the court in Franklin emphasized the mis-characterization that Ponzi scheme organizers often employ when they return funds to investors, denoting those payments as "profits" when in fact they are merely recycled capital from other investors. See Franklin, 652 F. Supp. at 169. Although investors who receive pre-receivership withdrawals mis-characterized as "profits" or "earnings" did not consciously withdraw those funds, the Rising Tide method would inequitably penalize those individuals, according to the Franklin court, by equating those withdrawals with other investors' conscious pre-receivership withdrawals. Id.

However, the Net Investment method, which permits "an investor who received 'profits' to state a claim from principal not withdrawn[,] most accurately treats the bogus 'profits' as actual profits and thus ignores the reality of the Ponzi scheme." Skorupskas, 1988 U.S. Dist. LEXIS 18649, at *6.

who have thus far received nothing from Coadum and provide a windfall to a significant group of investors who consciously made substantial pre-receivership withdrawals and benefitted immediately from having that money on hand.

To the extent that the minority of Coadum investors received pre-receivership withdrawals-regardless of how they spent or reinvested those withdrawals-the Court concludes that it would be inequitable to permit those investors to participate in distributions of recovered Coadum funds without first giving priority to the majority of Coadum investors who never received any of their invested Coadum funds. The Rising Tide distribution method most equitably balances the competing interests of those investors who received pre-receivership withdrawals and those investors who did not by distributing funds to the latter and temporarily excluding the former only to the extent that such exclusion remains necessary to narrow the gap between the two differently-situated groups of investors.

B. Supportive Caselaw

The rationale supporting the Rising Tide method is not new to American equity jurisprudence. Eighty-six years ago, the Fourth Circuit Court of Appeals faced a scheme conducted by Frank Young where customers paid into a "blind pool" to have Young, he assured them, invest their money in securities traded on the New York Stock Exchange. In re Young, 294 F. 1, 2 (4th Cir. 1923). Young's plan grew into a pyramid scheme, and Young occasionally sent falsified statements to each customer "showing on their face large profits to [Young's] credit." Id. Of course, Young made no profits as a result of securities trading, and actual payments made to

investors were simply shams disbursed "for the purpose and with the effect of deceiving [the] customers, and enticing others into the net." Id. at 3. Young commingled his customers' payments into a single fund, from which he made payments to certain customers, always falsely characterizing them as investment profits. Id.

One customer, Michael Abrams, deposited a total of \$4,000 into Young's scheme over three years. Id. By March 23, 1923, Abrams had received "profits" from Young totaling \$2,283.02. Id. That day he also withdrew \$2,000 of his supposed principal. Id. His account was cancelled, and he received an additional \$513.80 in "profits" on his final \$2,000 withdrawal. Id.

Faced with massive losses, Young's scheme soon collapsed. The Fourth Circuit applied principles of equity to determine whether Abrams, having withdrawn his entire amount of invested principal from the common fund, could nonetheless share in the distribution of Young's bankruptcy estate. Id. The court concluded that Abrams could not, reasoning as follows:

We have, then, a common enterprise, a common fund, contributed by all the customers, a manager common to all, his breach of trust common to all, losses common to all. It follows that all sums paid as profits to one adventurer from the common fund, when there was no profit, was an unjust enrichment of that adventurer from the fund belonging to all in common, sufficient to pay but a small dividend on the capital sums actually paid in. Equity therefore requires that he should account for all sums paid to him as profit before he can share with others in the application of the funds on hand to the debts due for sums actually paid in.

Id. at 4.

The proposed Rising Tide method would distribute recovered Coadum funds in a manner recognized as equitable several decades

ago by the Fourth Circuit in Young. Here, equity demands that those Coadum investors who received no pre-receivership withdrawals during the scheme take temporary distribution priority over those investors who received such withdrawals, thus narrowing, to the maximum extent possible, the disparity in the recovery percentages of those differently-situated groups of investors.

IV. Conclusion

Having considered the objections to the Plan, the Court agrees with the Receiver that the proposed Rising Tide distribution method is the most equitable method for distributing the receivership funds detailed in the Plan. Therefore, the Receiver's motion to approve the Plan [Doc. #123] is GRANTED, and the Court DIRECTS the Receiver to distribute receivership funds in accordance with the Plan.

SO ORDERED, this 24 day of September, 2009.



ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE