

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION

OFFICE OF THE ATTORNEY
GENERAL, DEPARTMENT OF LEGAL
AFFAIRS, STATE OF FLORIDA,

Plaintiff,

CASE NO.: 51-2010-CA-2912-WS/G

v.

BOTFLY L.L.C., DAVID R. LEWALSKI,
JON J. HAMMILL, and JON J. HAMMILL, P.A.,

Defendants.

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

TABLE OF CONTENTS

BACKGROUND	4
PROCEDURAL BACKGROUND.....	5
THE RECEIVER’S DETERMINATIONS AND FURTHER PLANS FOR ADMINISTERING THE CLAIMS PROCESS	9
I. OVERVIEW OF THE RECEIVER’S DETERMINATION OF CLAIMS AND CLAIM PRIORITY	9
A. Highest Priority.....	12
1. Investor Claims Should Be Allowed Only For The Net Investment Amount.....	14
a. Investor Claimants May Not Recover False Paper Profits	15
b. False Profits Received By An Investor Claimant In Connection With An Investor Account Should Set-Off Losses That Investor Suffered In Connection With Another Investor Account	16
2. Investor Claims For Amounts That Are Inconsistent With The Amounts Reflected In Receivership Records Should Be Allowed Only In The Appropriate Amount Reflected In Receivership Records.....	18
B. Claims Which Should Be Allowed or Allowed In Part But Which Should Be Subrogated To Receive any Distribution When And Only If Other Claimants Have Received a 100% Recovery of Their Allowed Amount.....	19
1. Unsecured Non-Investor Claims.....	20
2. Promoters.....	21
3. Investor Claims Which Received Inequitable Preference Payments.....	22
C. Denied Claims.....	23
1. Investor Claims Which Should Be Denied Because No Losses Were Suffered.....	24
2. Claims Which Should Be Denied For Failure To Cure Deficiencies In Proof Of Claim Forms.....	25
3. Claim Which Should Be Denied Because Claimant Was On Inquiry Or Actual Notice Of Fraud	26
4. Investor Claims Which Should Be Denied Because Claimants Have Ties To Other Investor Accounts, Including Accounts That Experienced False Profits	30
5. Claims Which Should Be Denied Because Claimants Waived Them In Related Transactions With The Receiver.....	31

II. THE RECEIVER’S DETERMINATION OF CLAIMS AND PRIORITY IS FAIR AND EQUITABLE	33
A. Priority Of Claims.....	33
III. ALL ASSETS AND LIABILITIES OF THE RECEIVERSHIP ENTITIES SHOULD BE POOLED TO FORM A SINGLE RECEIVERSHIP ESTATE.....	35
A. Factual Basis For Pooling Assets And Liabilities.....	35
B. Legal Basis For Pooling Assets And Liabilities	36
IV. THE RECEIVER’S PROPOSED PLAN OF DISTRIBUTION, INCLUDING AN INTERIM DISTRIBUTION	39
A. The Receiver’s Plan	39
B. The Receiver’s Plan Is Consistent With Applicable Legal And Equitable Principles.....	40
V. THE PROPOSED PROCEDURE FOR OBJECTIONS IS LOGICAL, FAIR, AND REASONABLE	41
A. The Proposed Objection Procedure	41
B. The Proposed Objection Procedure Is Consistent With Applicable Legal And Equitable Principles	43
CONCLUSION.....	45

Michael Moecker, as Receiver in the above-referenced case, by and through his undersigned counsel and pursuant to the Court's Order Appointing Receiver dated April 1, 2010 (the "**Order Appointing Receiver**"), respectfully moves this Court for an Order: (1) approving his determination and priority of claims as set forth in this Motion and attached **Exhibits B through D**; (2) pooling all assets and liabilities of the receivership entities into one consolidated Receivership estate; (3) approving a plan of distribution; and (4) establishing a procedure for objections to the Receiver's determination of claims and claim priority and plan of distribution.

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

BACKGROUND

On April 1, 2010, the Office of the Attorney General, Department of Legal Affairs, initiated this action to prevent defendants from further perpetrating a Ponzi scheme through the solicitation of investments in Botfly, LLC. That same day, the Court entered an order appointing Michael E. Moecker or his designee employed by Michael Moecker & Associates Inc. as Receiver for Defendants Botfly, L.L.C. ("**Botfly**"), David R. Lewalski ("**Lewalski**"), and Jon J. Hammill ("**Hammill**") and all other entities operated, controlled, or otherwise associated with the Defendants' activities (collectively referred to as the "**Receivership Entities**"). The Receiver

has filed seven reports which contain the case background and status, and information regarding the recovery and disposition of assets. The Receiver incorporates these reports into this Motion.

Lewalski, in complicity with others, operated Botfly as the instrument of a fraudulent Ponzi scheme (the “**Scheme**”) in which money raised from new investors and additional money raised from existing investors was used to: (1) pay fictitious returns to existing investors; (2) pay substantial management, advisory, and/or incentive fees to Lewalski, Hammill and others; and (3) purchase and/or fund additional businesses and other endeavors controlled by Lewalski. While some investors received funds from Receivership Entities, others did not.

Under the Order Appointing Receiver, this Court directed the Receiver to marshal, preserve, protect, maintain, manage, and safeguard the Receivership Entities’ assets in a reasonable, prudent, diligent, and efficient manner ultimately for the benefit of defrauded investors. The Receiver’s goal is, and has been to marshal, liquidate, and then distribute Receivership assets to investors with allowed claims in a fair and equitable manner.

PROCEDURAL BACKGROUND

On or about July 29, 2011, Lewalski entered a plea of guilty to mail fraud pursuant to a plea agreement. *United States v. Lewalski*, case no. 8:10-cr-00501-T-27MAP. In his plea agreement, Lewalski agreed that the following facts were true and that the United States would be able to prove them at trial beyond a reasonable doubt:

The defendant, David R. Lewalski, was the founder, trader, and promoter of Botfly, LLC (hereinafter “Botfly”), a Florida limited liability company incorporated on or about September 13, 2005, with a principal place of business at 12709 Clocktower Parkway, Bayonet Point, in the Middle District of Florida.

The defendant willfully engineered and executed a scheme to defraud by promising victim investors that he could generate returns of up to 10% per month, compounded monthly, through his trading in the foreign currency (“Forex”) market. In fact, the defendant operated a Ponzi scheme. The defendant and others working at his direction raised approximately \$29,851,598.34 from

victim investors, but the defendant used only a small percentage of those funds for Forex trading (approximately \$2.6 million), the vast majority of which he lost.

Instead of trading in the foreign currency market as he promised, the defendant used the bulk of victim investor funds to make payments to other investors in order to perpetuate the scheme and make it appear as if he was generating the promised returns. Specifically, the defendant paid investors \$14,339,887.23 in “returns” that he lead them to believe were generated by his Forex trading when, in reality, he was merely paying them with other victim investors’ funds. The defendant also spent millions of dollars of victim investor funds for personal expenses, including high end real estate, private jet travel, luxury automobiles, computer equipment and jewelry.

On November 17, 2011, a United States District Court Judge sentenced Lewalski to serve a term of twenty years’ imprisonment (the maximum sentence permissible for the crime of conviction).

On December 2, 2011, in the instant case, this Court entered a Consent Final Judgment that was stipulated to by Lewalski in his personal capacity and as President of Botfly and thereby admitted liability on the claims brought by the OAG. In particular, Lewalski admitted that the Botfly investment program was a Ponzi scheme used to defraud investors and agreed to the entry of a judgment in the amount of \$19,240,372.75 representing restitution owed to victims of the Ponzi scheme.

Also on December 2, 2011, this Court entered Summary Final Judgment against Hammill and his company, Jon J. Hammill, P.A. (“**Hammill, P.A.**”), finding that the undisputed facts established that (a) Hammill began working for the Botfly Ponzi scheme as early as December 1, 2008, (b) Hammill solicited investors to invest in Botfly, LLC, and (c) from December 1, 2008 forward, the Ponzi scheme netted the amount of \$12,482,575 from investors.

This Court entered judgment in the amount of \$19,240,372.75 as to Lewalski and Botfly, \$12,482,757.00 as to Hammill; and \$1,283,717.00 as to Hammill, P.A.

On October 4, 2010, the Receiver filed a Motion to (1) Approve Procedure to Administer Claims and Proof of Claim Form, (2) Establish Deadline for Filing Proofs of Claim, and (3) Permit Notice by Mail and Publication (the “**Claims Form Motion**”). On April 28, 2011, the Court granted the Receiver’s motion in its entirety without prejudice to the Receiver seeking additional relief as necessary and appropriate. The Court established a Claim Bar Date of the later of 120 days from the entry of the order or 90 days from the mailing of the Proof of Claim form to known possible Claimants (as the term Claim Bar Date is defined in the Claims Form Motion). Pursuant to the Court’s Order, any person or entity who failed to submit a proof of claim to the Receiver so that it was actually received by the Receiver on or before the Claim Bar Date is barred and precluded from asserting any claim against the Receivership or from participating in any distribution from the Receivership.

The Court’s Order further provided that sufficient and reasonable notice would be given by the Receiver if made (1) by mail to the last known addresses of all known potential claimants, (2) by global publication on one day in The Wall Street Journal and publication on one day in The St. Petersburg Times, and (3) by publication on the Receiver’s website (www.botflyreceivership.com). In compliance with the Court’s Order, on May 5, 2010, the Receiver mailed 733 packages to the last known addresses of known investors, thereby establishing August 26, 2010, as the Claim Bar Date. Each package included a cover letter, the Notice of Deadline Requiring Filing of Proofs of Claim (the “**Notice**”), and a Proof of Claim Form (collectively, the “**Claims Package**”). The Receiver also published the Notice in the global edition of The Wall Street Journal and in The St. Petersburg Times, and posted the Notice and a Proof of Claim Form on his website.

Investor claimant(s) were required to sign under penalty of perjury and return the completed Proof of Claim Form by the Claim Bar Date.¹ Following the submission of Proof of Claim Forms (the “**Claimants**”), over time, the Receiver has corresponded with Claimants notifying them of deficiencies in their respective Proof of Claim Forms and identifying discrepancies between the submitted Claims and other information obtained during the Receiver’s investigation of the Receivership Entities’ affairs. The purpose of these efforts was to give Claimants an opportunity to correct deficiencies in their claim filings which might ultimately affect the recognition of their claim and, where possible, to reach an agreement with the Claimant as to the net loss sustained as a result of the investment in Botfly.

The Receiver received 408 claims (the “**Claims**”). Of the Claims, all but five² were submitted in connection with investor “accounts”³ with Botfly (the “**Investor Claimants**” or “**Investor Claims**”), which represent approximately 78% of all currently known Investor Accounts. Since the beginning of the Claims submission process, the Receiver has worked with Investor Claimants to resolve issues and discrepancies between the filed claims as filed and the other information obtained by the Receiver during the Receivership Proceedings. Based upon this review, the Receiver has reached resolutions of a substantial number of the issues regarding the validity or amount of the filed Claims. The Claims disputed by the Receiver include (1) Claims by investors who were paid false profits, and (2) Claims by investors whose funds are

¹ For the Court’s ease of reference, a copy of a blank Proof of Claim Form is attached as **Exhibit A**.

² The Receiver also received a claim from Lewalski’s mother and from four individuals who invested in Forex Capital Development, Inc., a fraudulent forex trading enterprise conducted by Lewalski prior to the formation of Botfly.

³ Although Botfly did not maintain separate investor accounts, the purported statements they created and distributed referred to fictitious “accounts” (the “**Investor Accounts**”). For ease of reference, this Motion and its Exhibits use the term “account” even though no such accounts actually existed.

commingled in accounts held jointly with investors who were paid false profits, (3) Claims for which a discrepancy exists between the claim and the Receiver's calculation of net loss, (4) Claims without adequate supporting documentation; and (5) Claims by investors who engaged in substantial promotion of other investors or otherwise collaborated or confederated with other promoters to solicit investments for forex trading.

After the filing of this Motion, the Receiver will promptly mail a letter giving notice of this Motion and the time, date, and place it is set to be heard, to all Claimants to the mailing address provided on each of their respective submitted Proof of Claim Forms. The letter will inform the Claimants that this Motion is available on the Receiver's website or, upon request.⁴

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

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

As set forth in the Receiver's Claims Form Motion, any properly completed and timely filed proof of claim should be allowed if it is established that: (1) the Claim arises out of any Receivership Entity's activities; (2) losses resulted from such activities; (3) any alleged Claim and losses are consistent with the books and records gathered by the Receiver; and (4) no other ground exists for denying the Claim.

The Receiver has carefully and thoroughly reviewed and considered all 408 submitted Claims. The Receiver has determined that each Claim falls within one of three categories:

- (1) Investor Claims which should be allowed (in whole or in part) and should receive the highest priority among Claims;

⁴ To minimize public disclosure of Claimants' financial affairs, the Receiver has assigned each Claim a number. As required by the Court's confidentiality order, by separate sealed filing, the Receiver will file with the Court a list disclosing the identity of each Claimant associated with each claim identified by number in Exhibits B through D.

- (2) Investor Claims and unsecured Non-Investor Claims which should be allowed (in whole or in part), and which should be paid only after defrauded investors' allowed Claims have been paid in full; and
- (3) Claims which should be denied.

As detailed in Exhibits B through D the Receiver has proposed an Allowed Amount for each Claim.⁵ The Receiver's determination of a Claimant's Allowed Amount is not indicative of the amount the Claimant will receive through distributions of Receivership assets. Rather, each claimant holding an allowed Claim with a positive Allowed Amount will be eligible for distributions on a *pro rata* basis depending on the priority of the Claim (unless otherwise discussed in this Motion), and ultimately will likely only receive a percentage of its Allowed Amount, if any, depending on the priority of the Claim.

As of January 21, 2012, the Receiver had approximately \$4.7 million in cash in the Receivership accounts. The Receiver believes that he has sufficient funds to warrant the expense inherent in making an interim distribution.⁶ As discussed in more detail below, the Receiver recommends making an interim distribution as soon as practicable after Claimants have had the opportunity to object as provided in Section V. of this Motion.

It is in the best interests of the defrauded investors with allowed Claims that the proceeds of the Receivership be distributed as expeditiously as possible. The Receiver's success in the recovery of assets has resulted in the Receiver currently holding approximately \$4.7 million in

⁵ "**Allowed Amount**" is the amount of a claim to which the Receiver has determined the Claimant is entitled. The Allowed Amount will serve as the basis for determining a Claimant's ultimate distribution of Receivership assets.

⁶ Some of the personal property recovered during the course of the Receivership proceedings has not yet been liquidated. The aggregate value of this property has not been determined with any certainty but is probably less than \$100,000. In addition, the Receivership has asserted claims to funds totaling approximately \$513,000 held in accounts at Deutsche Bank, and John Hancock Life Insurance Company and expects that the funds will ultimately be recovered for payment of the Claims.

cash deposits for the benefit of the creditors of the Receivership Estate. Although interim distributions to claimants are rare in receivership proceedings, the Receiver believes that it is both appropriate and just to distribute some of these funds to certain Claimants as provided in Section V. below.

Taking into consideration (a) present and anticipated future administrative expenses and (b) the possible allowance in full of disputed Claims, the Receiver has preliminarily calculated that an interim distribution payment of \$3.5 million can be made without jeopardizing the ability of the estate to satisfy the present and future administrative claims, pay necessary amounts to pursue litigation to recover additional assets for the Receivership, and take other necessary actions to successfully conclude this case. To safeguard the payment of the disputed Claims to the extent they become allowed, the Receiver will hold sufficient funds to pay the face amount of each of the disputed Claims, accordingly, the amount of the distribution payment, if any, will depend on the relief granted on the instant motion.

The assets recovered for the Receivership Estate, to date, are not sufficient to pay every valid claim in full. The Receiver anticipates that he will be successful in his on-going efforts to recover additional funds. However, it is unlikely that the Receivership will recover sufficient funds to make full payment of all valid Claims. With this in mind, the Receiver considered each submitted claim to determine the priority that should be afforded among the various Claims submitted for payment, with the goal that distribution of the Receivership's assets be equitable and fair among all Claimants. It is through the Receiver's review and assessment of information each Claimant provided, the books and records of the Receivership Entities, and information obtained from non-parties that the Receiver established the priority of Claims discussed in this Motion to assure fair and equitable treatment.

The Receiver asks the Court to approve his recommended Claim determinations as set forth in Exhibits B through D and, in certain instances, discussed in more detail below. Further, as the Claim Bar Date has passed and all Claimants and other potential creditors have had ample notice of the claims process and an opportunity to file claims and to seek enforcement of any liens or other asserted rights or interests in Receivership property, the Receiver asks the Court to issue an order (1) confirming that no further Claims will be considered and (2) barring any future Claims against Botfly, Receivership property, the Receivership estate, or the Receiver, and any proceedings or other efforts to enforce or otherwise collect on any lien, debt, or other asserted interest in or against Receivership Entities, Receivership property, or the Receivership Estate. Such an order is important to bring finality and to allow distributions to proceed, and is warranted in light of the ample time that has been available to address such matters.

A. Highest Priority

Highest priority should be given to Claims submitted by investors who were victimized by the Scheme and who did not engage in substantial promotion of Botfly or solicitation of others to invest in Botfly. Specifically, these investors invested a principal amount in the Scheme which exceeded any distributions they received from the scheme. The Receiver has determined that 369 Investor Claims should be allowed either in whole or in part. These claims are identified in Exhibit B and are consistent with the Receivership Entities' books and records and other information and documents recovered by the Receiver including the bank records for the Receivership Entities' Accounts (collectively, the "**Receivership Records**"). Accordingly, the Court should allow each of these claims in the Allowed Amounts as set forth in Exhibit B.

Relief in this receivership does not extend to all victims of frauds perpetrated by the same actors. *S.E.C. v. Homeland Commc'ns Corp.*, 2010 WL 2035326, *4 (S.D. Fla. 2010). Four of the Claims set forth on Exhibit B were submitted by investors who invested in a prior fraudulent

Forex trading scheme perpetrated by Lewalski through an entity named Forex Capital Development Inc. Upon review of the transactions underlying the claims, however, it is apparent that Botfly was treated by Lewalski as the successor to Forex Capital Development Inc. Some payments made by these investors were deposited in Botfly accounts and distributions were made to them from Botfly accounts. Accordingly, the Court should allow the Forex Capital Development Inc. investor Claims and afford them the highest priority in payment.

Pursuant to the Court's Order on the Claims Form Motion, any person or entity who failed to submit a proof of claim to the Receiver so that it was actually received by the Receiver on or before the Claim Bar Date is barred and precluded from asserting any claim to Receivership assets. Fourteen claims, listed on Exhibit E, were submitted after the Claims Bar Date (the "**Late-Filed Claims**").

However, the Late-Filed Claims were all received shortly after the Claims Bar and sufficiently prior to the filing of this Motion and any interim distribution. Therefore, allowing the Late-Filed Claims should not cause any appreciable prejudice to other Claimants. Further, the Receiver does not believe it makes financial sense to contest the Late-Filed Claims. Under the circumstances of this Receivership, and specifically the Scheme's impact on defrauded investors with losses, a limited exception should be made for thirteen of these Claims and the Court should allow these thirteen Late-Filed Claims the highest priority in payment. Accordingly, these thirteen claims are included on Exhibit B. On the other hand, however, as specified in Exhibit C, one Late-Filed Claim (Claim No. 406) should be subrogated for the reasons discussed in Section 1. B. 3. below.

The Receiver determined that for various factors, some of the Investor Claims listed on Exhibit B should be not be allowed in the full amount of the Claim as submitted. The Receiver's calculation of the Allowed Amount for Investor Claims was based upon the Claims' net

investment amount (defined below) and was governed by the amounts reflected in the records obtained by the Receiver (including those submitted with the Claims). As noted, the Receiver worked with Investor Claimants to resolve any discrepancies that were detected between the submitted Claim and the Receivership Records and other available information. Most of the questions that were raised regarding the amounts reflected on the Claims were consensually resolved and the Allowed Amount for the Claim reflects an agreed net investment amount for the Claim.

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

As a general matter, an Investor Claimant is not entitled to an Allowed Amount that exceeds its net investment amount. Accordingly, the Court should approve the “**Net Investment Method**” as the appropriate method for determining Allowed Amounts for Investor Claims. The Net Investment Method begins with the “**Net Investment Amount**” for each Investor Account which adds all amounts contributed by the pertinent investor(s) to an account and subtracts all distributions made to that accountholder(s), regardless of whether those distributions were characterized by Botfly as interest, earnings, returns of principal, or by any other terminology.

The Net Investment Amount appropriately does not include any “**False Paper Profits.**” False Paper Profits represent the purported appreciation in an Investor Account from the Botfly’s purported investment activities as reflected in statements sent to investors. False Paper Profits should not factor into the determination of an Allowed Amount because no profits were actually earned by the Botfly. Rather, Botfly was operated as a Ponzi scheme, and the reported profits were a fiction. The fictitious profits were only on “paper” because the investors associated with those accounts did not ask for distributions of those purported profits and thus did not receive any money purportedly representing those fictitious profits. Using the Net Investment Method, the Allowed Amount only takes into account the actual dollars the Claimant “invested” less any

amounts the Claimant already received, regardless of whether it was falsely represented to the Claimant that it had earned profits.

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

a. Investor Claimants May Not Recover False Paper Profits

Inconsistent with the Net Investment Method, several Investor Claims seek False Paper Profits in addition to their Net Investment Amounts. The Receiver’s determination of the Allowed Amounts for each of those Investor Claims reflects each of their associated Investor Account’s Net Investment Amount but does not include their fictitious False Paper Profits.

A Ponzi scheme is an illegal endeavor and thus creates no legal entitlement to profits or interest for its investors. *Warfield v. Carnie*, 2007 WL 1112591, *12-13 (N.D. Tex. 2007) (referencing *In re United Energy Corp.*, 944 F.2d 589, 595 (9th Cir. 1991)). As a fraudulent scheme, a Ponzi scheme has no legitimate investment appreciation or interest, and “recognizing profits or other earnings in claims for distribution would be to the detriment of later investors and would therefore be inequitable.” *CFTC v. Equity Fin’l Group, LLC*, 2005 WL 2143975, *23 (D.N.J. 2005). Early investors would have the benefit of many more months of False Paper Profits to inflate their claim while more recent investors who lost the same amount of actual dollars would have far less of a claim because they had less time to accumulate those purported profits. Further, if such “paper profits” were recognized, early investors could potentially

experience no actual losses as a result of receiving distributions over the years and yet still have a claim to False Paper Profits to the detriment of later investors who did not have the time to recoup their investment or accrue “profits.” Early investors should not benefit at the expense of later ones. *See Cunningham v. Brown*, 265 U.S. 1, 13 (1924); *Abrams v. Eby*, 294 F. 1, 4 (4th Cir. 1923); *In re Bernard L. Madoff Inv. Secs. LLC*, 2011 WL 3568936, *5 (2d Cir. 2011) (if Net Investment Method is not adopted “those claimants who have withdrawn funds from their . . . accounts that exceed their initial investments ‘would receive more favorable treatment by profiting from the principal investments of those claimants who have withdrawn less money than they deposited, yielding an inequitable result’”) (citations omitted). The purported profits or earnings reflected on statements provided to investors were wholly fictitious and arbitrarily determined by Lewalski. The Net Investment Method avoids “the absurd effect of treating fictitious and arbitrarily assigned paper profits as real” and avoids legitimizing the scheme. *In re Madoff*, 2011 WL 3568936 at *5.

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

Also inconsistent with the Net Investment Method, the Receiver received claims for Investor Accounts which had losses but which were associated with investors who received False Profits in connection with one or more additional Investor Accounts. In determining the Allowed Amounts for those claims, the Receiver set-off the claimed losses with the False Profits in the related accounts.⁷ For example, if a claimant has one Investor Account in which it

⁷ For ease of the Court’s and the Claimants’ review, Exhibit B includes both the Claims for losses and the related Claims involving Investor Accounts with False Profits. Entries in the “Recommended Claim Determination” column in Exhibit B for each of these claims identifies which claims should be set-off and the amounts to be set-off. Each claim involving an Investor Account with False Profits necessarily has no loss and thus has an Allowed Amount of “\$0.00.”

invested \$100,000 and received distributions of \$50,000 and another Investor Account in which it invested \$100,000 and received distributions of \$125,000, absent application of the Net Investment Method (including consolidated treatment of the accounts), this claimant would have a claim for \$50,000. Using the Net Investment Method, the claimant's loss of \$50,000 is set-off by the claimant's False Profit of \$25,000, resulting in a net claim amount of \$25,000. Thus, the Net Investment Method yields the actual difference between how much an investor actually paid to Botfly and how much the investor received back from the Scheme.

This approach is warranted because any amount an Investor Claimant received in excess of the amount invested in an Investor Account was not the result of any legitimate business or investment activity, but was a fraudulent transfer of funds deposited by new and existing investors. Thus, if an Investor Claimant who received more than the actual dollars invested in connection with one Investor Account is allowed to claim losses in another Investor Account without setting off the profit and the loss, that Investor Claimant will receive a disproportionate share of any distribution. Put differently, to allow investors to retain False Profits while simultaneously recognizing a claim for losses would be inequitable to investors who did not profit in any account. Accordingly, the Net Investment Method as proposed by the Receiver above and as reflected in the Exhibits is the appropriate method for determining Allowed Amounts for Investor Claims.

Setting off losses in one account with False Profits paid for a related account is equitable and regularly adopted by receivership courts. *See Equity Fin'l Grp.*, 2005 WL 2143975 at *12, 26 (upholding Receiver's determination to consolidate accounts). Courts have consistently held that an investor's claim should be limited to the total dollar amount of its investment reduced by any funds it received. *In re Old Naples*, 311 B.R. 607, 616 (M.D. Fla. 2002) (citing *In re C.J.*

Those False Profits claims are only included in Exhibit B for purposes of set-off and otherwise would have been in the Exhibit listing denied claims because they had no loss.

Wright & Co., 162 B.R. 597 (Bankr. M.D. Fla. 1993)); *Warfield*, 2007 WL 1112591 at *12- 13; *Homeland Communic'ns Corp.*, 2010 WL 2035326 at *3; *Credit Bancorp*, 2000 WL 1752979 at *40; *In re Madoff*, 2011 WL 3568936 at *3-5. As these cases show, this is the most equitable and practical approach for determining investor claim amounts and a common approach for handling investor claims in a receivership involving a fraudulent investment scheme. See *In re Madoff*, 2011 WL 3568936 at *3-5. As discussed above, netting Investor Accounts held by a Claimant where at least one account received False Profits is necessary under the Net Investment Method and avoids the inequitable possibility of allowing a Claimant to profit at the expense of similarly situated investors. Indeed, in determining which Botfly investors should be sued by the Receiver for False Profits, where applicable the Receiver offset losses and False Profits for investors with multiple Investor Accounts and only sued if the Investor Accounts collectively had a False Profit.

Accordingly, the Court should (1) find the Net Investment Method as proposed above and as reflected in the Exhibits is the appropriate method to use in determining Allowed Amounts for investors and (2) allow all of the foregoing claims for the Allowed Amounts as set forth in Exhibit B.

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

Some of the Investor Claims have amounts that are inconsistent with Receivership Records and should be allowed only in the appropriate amount reflected in those records. The Receiver has thoroughly reviewed those claims, relevant Receivership Records, and the information submitted with the Claims, and those records show the figures and Allowed Amounts set forth in Exhibit B for each of those Claims accurately reflect their Net Investment Amount. Some Claims included purported cash payments which were not substantiated in the

Receivership Records or otherwise adequately corroborated. Such cash payments are not included in the Receiver's calculation of the Net Investment Amount for Claims. Accordingly, the Court should allow each of those claims only for the Allowed Amounts specified in Exhibit B.

B. Claims Which Should Be Allowed or Allowed In Part But Which Should Be Subrogated To Receive any Distribution When And Only If Other Claimants Have Received a 100% Recovery of Their Allowed Amount.

The Receiver's claim determinations are governed by equity. The claims process in this Receivership is focused on defrauded investors. Due to the limited assets available to satisfy the valid claims of defrauded investors and the fact that all of the assets recovered are traceable to the Scheme, it is appropriate that first priority in payment be given to the defrauded investors. Accordingly, certain Claims that are allowed in whole or in part should only receive a distribution from the Receivership after the Allowed Amount of the Claims of the defrauded investors have been paid in full. In particular, the Court should equitably subordinate the Allowed Amount for Claims of (1) unsecured non-investor creditors, (2) Claimants who engaged in substantial promotion of other investors or otherwise collaborated or confederated with other promoters to solicit investments for the Scheme, and (3) Claimants who received inequitable preference payments.

"Subordination is an equitable power and is therefore governed by equitable principles." *Westgate Cal. Corp.*, 642 F.2d at 1177. "Courts equitably subordinate claims when the claimant has engaged in some type of inequitable conduct and the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant." *Picard v. Katz*, 2011 WL 4448638, *6 (S.D.N.Y. 2011) (internal quotations omitted). "Inequitable conduct encompasses conduct that may be lawful but is nevertheless contrary to equity and good conscience." *Id.* (internal quotation omitted). Courts have applied equitable subordination to

instances like this case where claimants seek recovery following the collapse of a Ponzi scheme. *See In re Bernard L. Madoff Inv. Secs. LLC*, 2011 WL 4434632, *19-20 (Bankr. S.D.N.Y. 2011) (holding that in SIPA liquidation, claims of Madoff family members should be subordinated); *Picard*, 2011 WL 4448638 at *6 (holding that “while the Trustee cannot disallow the defendants’ claims against the Madoff Securities’ estate, he can potentially subordinate them by proving that the defendants invested with Madoff Securities with knowledge, or in reckless disregard, of its fraud”).

1. Unsecured Non-Investor Claims

In equity receiverships, investors should receive priority over general creditors. *See, e.g., Quilling v. Trade Partners, Inc.*, 2006 WL 3694629, *1 (W.D. Mich. 2006) (“As an equitable matter in receivership proceedings arising out of a securities fraud, the class of fraud victims takes priority over the class of general creditors with respect to proceeds traceable to the Fraud.”); *SEC v. Byers*, 637 F. Supp. 2d 166,184 (S.D.N.Y. 2009) (“The Receiver’s proposal to treat differently those involved in the fraudulent scheme when distributions are being made is eminently reasonable and is supported by caselaw.”); *SEC v. Megafund Corp.*, 2007 WL 1099640, *2 (N.D. Tex. 2007) (holding that general creditors will not be paid until all defrauded investors are fully compensated.”); *C.F.T.C. v. PrivateFX Global One*, 778 F. Supp. 2d 775, 786-87 (S.D. Tex. 2011 (Recognizing that “courts regularly grant defrauded investors a higher priority than defrauded creditors”). Only one unsecured claim was submitted by a Non-Investor. In general such a claim should be receive lowest priority among Allowed and Allowed In Part claim, such that those claims are paid only after the allowed amounts of all Investor Claims have been paid in full. However, the claim in question, Claim 705, was submitted by Lewalski’s mother for a purported loan that she made to Lewalski for start up costs for Botfly should be denied for the reasons discussed below in section I. C. 1.

2. Promoters

In furtherance of the Scheme, certain investors were paid commissions or referral fees in the amount of 10% of funds paid by new investors. Certain investors also arranged to have some of the guaranteed interest paid for the investment of other investors allocated to their own accounts thereby receiving payment of the Commission and of a portion of the interest that purportedly accrued monthly for the investment. Other investors collaborated or confederated with the members of Treadstone Consulting Group, LLC (“**Treadstone**”), a shell corporation used as a conduit for the payment of commissions and interest by Botfly, to recruit investors in anticipation of payment of Commissions for every new investor and a percentage of the purported accrued monthly interest for the investment.

For purposes of the claims process, it is fair and equitable that this conduct result in subordination of the Claims of those who extensively promoted the Scheme to further enrich themselves by the payment of a commission or affiliated themselves with Treadstone with the intention of doing so. *See, e.g., Byers*, 637 F. Supp. 2d at 184 (“The Receiver’s proposal to treat differently those involved in the fraudulent scheme when distributions are being made is eminently reasonable and is supported by caselaw.”); *Basic Energy & Affiliated Res.*, 273 F.3d at 660 (affirming distribution plan that prohibited defendants from recovering at all, and reduced recovery of employees based on level of involvement in fraudulent scheme); *S.E.C. v. Merrill Scott & Assocs.*, 2006 WL 3813320, *6–7 (D. Utah 2006) (excluding from distribution party who referred clients to defendant).

The Receiver has identified seven claims filed by Claimants that received credit for Commissions resulting from soliciting five or more investors to the Scheme or who affiliated themselves with Treadstone with the intention of doing so. Five of the Claims should be should be allowed. These claims are identified on Exhibit C. However, principles of equity and

fairness dictate that these Claimants should only be paid when the Allowed Amounts for the first priority Investor Claims are paid in full. The other two such claims should be denied for the reasons discussed in Section I. C. 1. and 3. below.

3. Investor Claims Which Received Inequitable Preference Payments

Two Investor Claims should be allowed only in part because the Claimants received inequitable preference payments immediately prior to the entry of the injunction resulting in recovery of substantially all of their principal investments. Specifically, during the week prior to the commencement of the Enforcement Action and the entry of the injunction barring further transfers of funds, these claimants received large payments that resulted in the redemption of the majority of their invested principle. In particular, on March 26, 2010, Botfly paid \$432,000 to the Claimant asserting Claim No. 406, resulting in the redemption of 80% of the principal investment, and on March 29, 2010, Botfly paid \$95,000 to the Claimant asserting Claim No. 19, resulting in the redemption of 95% of the principal investment.

The payments that Lewalski made to the two Claimants were inequitable preference payments that amounted to a return to the Claimants of the majority of its principal investment under inequitable circumstances. As such, that transfers effectively should be treated as “advances” on claims process distributions, and the Claimants should not be allowed to participate in any further distributions *unless and until* all Investor Claimants receive a percentage of their Allowed Amounts equaling the percentage of the principal investment paid to these Claimants respectively. In other words, no distributions would be made for Claim No. 406 until 80% was paid on the Allowed Amount of the Investor Claims, and no distributions would be made for Claim No. 19 until 95% was paid on the Allowed Amount of the Investor Claims.

The U.S. Supreme Court has held that no Ponzi scheme victim may keep a preference. *See Cunningham*, 265 U.S. at 12 (holding “[t]hose who were successful in the race of diligence. .

. secured an unlawful preference” and violated “the principle that equality is equity”). Other courts have adopted and applied the Supreme Court’s reasoning. *See S.E.C. v. George*, 426 F.3d 786, 799 (6th Cir. 2005) (“The mere coincidence that the [perpetrators] . . . chose the . . . defendant[-investors] (instead of others) to receive funds contributed by other investors in order to delay the discovery of this scheme does not entitle the . . . defendant[-investors] to preferential treatment.”); *Elliott*, 953 F.2d at 1570 (“As all of the former securities owners occupied the same legal position, it would not be equitable to give some of them preferential treatment in equity. In fact, the equities weigh against allowing some to benefit from the fortuity that [the scheme’s perpetrator] had not sold all of the securities.”). Further, the Claimant received “funds contributed by other investors in order to delay the discovery of [Lewalski’s] scheme,” and this “mere coincidence” and fortuitous timing should not elevate it above similarly situated investors. *George*, 426 F.3d at 799.

Because the preference payment transferred to the Claimants substantially all of their principal investment, it should not be allowed to participate in any further distributions *unless and until* all Investor Claims recover the applicable percentage of their Allowed Amounts. As set forth in Exhibit C, to allow the Claimants to receive additional Receivership distributions without such a restriction would give them a greater recovery than other investors and would be inequitable because the Claimants received a preference payment.

C. Denied Claims

Thirty-five of the 408 submitted claims should be denied. These claims are identified in Exhibit D and discussed below. The Receiver need only demonstrate that denial of a claim would be fair and equitable. *See SEC v. Elliot*, 953 F. 2d 1560, 1566 (11th Cir. 1992) (court has “broad powers and wide discretion” to assure equitable distributions). For the reasons discussed below, the Claimants should not receive any payment from the Receivership Estate.

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

Eleven Investors filed Claims which should be denied because the Investor Claimants submitting those claims did not experience any losses. In fact, ten of those eleven Investor Claims were submitted by Investor Claimants who are overall net “winners.” This means that when considering all Investor Accounts associated with each of those Investor Claimants, each Investor Claimant had an overall False Profit. Consistent with the legal authority discussed in Section I. A. 1. a. above, claims by Investor Claimants who have not experienced an overall loss should be denied. It would be inequitable and inconsistent with precedent to allow an Investor Claimant to recover for a loss in one Investor Account when the Investor Claimant has received False Profits greater than that loss in connection with another Investor Account. These claims should be denied as set forth in Exhibit D.

The other Claim in this category was filed by a charitable organization which did not invest any money in the Scheme and, therefore, did not sustain any loss. A charitable organization submitted a claim based on losses it purportedly sustained for an account that was created as a donation from another Investor and funded by way of credits of false profits reflected in Botfly’s records as having accrued on the donating Investor’s account. That claim should be denied because the Claimant had no right to those funds in the first place. In other words, the Claimant’s interest in the account is worthless as it is not entitled to any money in this claims process because under the Net Investment Method the Claimant did not suffer any actual loss.

Moreover, the Claimant cannot satisfy the affirmative defense to a fraudulent transfer claim provided by Florida Statutes Section 726.109, which requires it to demonstrate that (1) it received the transfers in “good faith” and (2) that it provided equivalent value for the transfers. *See Fla. Stats. §§ 726.109(1), (2)(b)*. Specifically, the Claimant did not provide anything of value

to the Botfly in exchange for the donations – hence, their characterization as “charitable donations” – so they are avoidable fraudulent transfers regardless that the Claimant is a charitable organization. *See Scholes v. Lehman*, 56 F.3d 750, 761 (7th Cir. 1995) (“The statute makes no distinction among different kinds of recipient of fraudulent conveyances. Every kind is potentially liable.”); *Hecht v. Malvern Preparatory Sch.*, 716 F. Supp. 2d 395, 402 (E.D. Pa. 2010) (holding that receiver was entitled to recover donation made with funds of innocent investors in Ponzi scheme); *In re C.F. Foods, L.P.*, 280 B.R. 103, 111 (Bankr. E.D. Penn. 2002) (“In perpetrating the Ponzi scheme, [the Perpetrator] had to know that the monies from investors would eventually run out and that the payments to charities would contribute to the eventual collapse of the stratagem. Knowledge that future investors will not be paid is sufficient to establish actual intent to defraud them.”). Because the Claimant did not invest money that it had a right to receive or keep, its Claim Number 494 should be denied as reflected on Exhibit D.

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

Three Investor Claims (Claim Nos. 103, 401 and 416) should be denied because they failed to cure deficiencies or provide additional documentation requested by the Receiver. The Receiver sent these Investor Claimants letters explaining the deficiencies but despite the Receiver’s request, the Claimants did not provide any additional documentation in support of the Claims. Accordingly, these claims should be denied as set forth in Exhibit D.

With respect to two of the Claims (Claim Nos. 103 and 416) the Receiver wanted the Claimant to provide proof that the investment was (1) made with money that was not proceeds of the scheme or (2) not simply credited on the books without actual receipt of funds. The Claimants did not provide any supporting documentation as required by the Proof of Claim Form. The other Claim, Claim No. 401, did not provide the requisite documentation, was incomplete, and sought the payment of False Paper Profits. The Claimants failed or ignored

Receiver's request that they provide additional documentation or information in order to reconcile the claims with the Receivership Records and to verify the Claimants' entitlement to distribution. Accordingly, the Claims should be denied as specified in Exhibit D.

3. Claim Which Should Be Denied Because Claimant Was On Inquiry Or Actual Notice Of Fraud

One claim, Claim No. 239, was filed by a sophisticated financial consulting firm which, at a minimum, should have recognized at least some of the numerous "red flags" surrounding Lewalski and Botfly. In turn, it should have conducted a diligent and reasonable investigation, which would have uncovered fraud or, at a minimum, failed to ameliorate suspicions. As a consequence, it was on inquiry notice of fraud. Under principles of equity, the Claimant should not receive any Receivership assets. Accordingly, the claim should be denied.

In its role as a court of equity, the Court has broad powers and wide discretion to fashion appropriate relief, including in devising a plan for distribution of receivership assets. In resolving claims submitted in a claims process, courts consider a wide variety of factors with the ultimate goal of fashioning an equitable system that treats similarly situated claimants equally. *See, e.g., Homeland Commc'ns. Corp.*, 2010 WL 2035326 at *2 ("[I]n deciding what claims should be recognized and in what amounts, the fundamental principle which emerges from case law is that any distribution should be done equitably and fairly, with similarly situated investors or customers treated alike. . . .") (quotation omitted); *Cunningham*, 265 U.S. at 13 (as among "equally innocent victims, equality is equity"); *Elliot*, 953 F.2d at 1570 (same). One consideration is whether the claimant acted in "good faith" or, put differently, whether the claimant knew or should have known of fraud. *See, e.g., Megafund Corp.*, 2007 WL 1099640 at *2 (claims disallowed because claimants did not show they acted in good faith).

In pertinent part, the concept of good faith derives from fraudulent conveyance statutes, including the Florida Uniform Fraudulent Transfer Act, Fla. Stats. §§ 726.101 *et seq.*

(“FUFTA”). Under FUFTA, the Receiver may recover transfers for the benefit of the Receivership estate that were made with “actual intent to hinder, delay, or defraud” creditors (Fla. Stats. § 726.105(1)(a)), which intent is established as a matter of law when a transfer is made during a Ponzi scheme. *See, e.g., In re Christou*, 2010 WL 4008191, *3 (Bankr. N.D. Ga. 2010) (“Any transfers made during the course of a Ponzi scheme are presumptively made with intent to defraud.”); *Wing v. Horn*, 2009 WL 2843342 at *4-5 (D. Utah 2009) (“[I]nference of fraudulent intent applies to all transfers from a Ponzi scheme”; categorizing transactions “is inconsistent with fraudulent transfer law’s focus on the transferor”); *Quilling v. Schonsky*, 247 Fed. App’x 583, 586 (5th Cir. 2007) (“[T]ransfers made from a Ponzi scheme are presumptively made with intent to defraud”); *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) (same). FUFTA provides an affirmative defense, however, under which the Receiver may not recover a transfer if the transferee can demonstrate: (1) that it received the transfer in “good faith” and (2) that it provided reasonably equivalent value for the transfer. *See Fla. Stats. §§ 726.109(1), (2)(b)*.

Just as “winning” investors (*i.e.*, investors who received False Profits) who cannot satisfy the good faith standard are not entitled to retain any distributions they received under FUFTA, it would be inequitable to allow Claimants who cannot satisfy the good faith standard to receive distributions of Receivership assets. *See PrivateFX Global One*, 2011 WL 888051 at *9-10 (“Sitting in equity, the district court is a court of conscience.”) (quotations omitted); *S.E.C. v. Sunwest Mgmt., Inc.*, 2009 WL 3245879, *9 (D. Or. 2009) (“In approving a plan of distribution in an SEC receivership case, the court must determine the most equitable distribution result for all claimants, including investors.”); *Megafund Corp.*, 2007 WL 1099640 at *2 (overruling objection to magistrate’s recommendation that claim be denied due to claimant’s lack of good faith).

Good faith is an objective standard. *See Terry v. June*, 432 F. Supp. 2d 635, 641 (W.D. Va. 2006). “The relevant inquiry is what the transferee objectively knew or should have known instead of examining the transferee’s actual knowledge from a subjective standpoint.” *See Quilling v. Stark*, 2007 WL 415351, *3 (N.D. Tex. 2007). “[I]f the circumstances would place a reasonable person on inquiry notice of a debtor’s fraudulent purpose, and *diligent* inquiry would have discovered the fraudulent purpose, then the transfer is fraudulent.” *In re World Vision Entertainment, Inc.*, 275 B.R. 641, 659 (Bankr. M.D. Fla. 2002) (emphasis added). “Importantly, a transferee may not remain willfully ignorant of facts which would cause it to be on notice of a debtor’s fraudulent purpose, and then put on ‘blindness’ prior to entering into transactions with the debtor and claim the benefit of [the good faith defense].” *Id.* (internal citations and quotations omitted). In turn, a diligent inquiry “must ameliorate the issues that placed the transferee on inquiry notice in the first place” and cannot consist of merely inquiring with the transferor about the suspicious circumstances. *In re Bayou Group*, 396 B.R. 810, 846 (Bankr. S.D.N.Y. 2008). In short, if a Claimant’s reasonable conduct would have revealed any questions or concerns about Botfly Entity or Lewalski or anyone else associated with Botfly, that Claimant could not have acted in good faith unless it subsequently conducted a diligent and reasonable inquiry which ameliorated those questions or concerns. Without satisfying these obligations, the Claimant was on inquiry notice of fraud.

The Claimant was a sophisticated financial consulting company that, had it acted in a reasonable manner, would have recognized at least some red flags and subsequently would have had to investigate Lewalski and Botfly. Had it done so, it would have readily discovered fraudulent conduct. Given the numerous and easily discoverable red flags, this Claimant did not act in good faith. *See, e.g., In re Pearlman*, 440 B.R. 569, 577 (Bankr. M.D. Fla. 2010) (lenders to Ponzi scheme that ignored red flags did not act in good faith); *S.E.C. v. Basic Energy &*

Affiliated Res., 273 F.3d 657, 660 (6th Cir. 2001) (affirming distribution plan that prohibited defendants from recovering at all, and reduced recovery of employees based on level of involvement in fraudulent scheme).

The red flags were numerous and easily discoverable. For example, before perpetrating the Scheme, on Lewalski had filed for Chapter 7 bankruptcy in October 2005. On his bankruptcy petition, Lewalski listed the total amount of his assets as \$1,600, including the value of his personal vehicle, a 1993 Honda Accord with 265,000 miles. Lewalski was living in his mother's home. He had litigation pending against him in Alachua County Circuit Court brought by Commercial Credit, and had numerous money judgments entered against him including a money judgment in the amount of \$531,000 in the United States District Court, District of Arizona, where the underlying allegations related to fraud. All of this information was available in the public record.

There were also many red flags directly connected to Botfly that were either disclosed to investors and potential investors or that would readily be discovered with the exercise of any diligence, including the following:

- Neither Botfly nor Lewalski were registered in any capacity with the U.S. Securities and Exchange Commission or the Florida Office of Financial Regulation
- Botfly's principal place of business was listed as Lewalski's mother's home;
- Botfly guaranteed a rate of return that far exceeded the interest rate that would be paid on an ordinary loan;
- The guaranteed return far exceeded the return experienced on other investments;
- The sole evidence of the investment was a promissory note that was not recorded or secured.

Because this Claimant would have discovered red flags had they acted in a reasonable and diligent manner, it was on inquiry notice of fraud. *In re Old Naples Securities, Inc.*, 311 B.R. at 612-13; *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 23 (S.D.N.Y. 2007) (sophisticated

claimant cannot claim ignorance to support its argument that it acted in good faith); *In re M & L Business Machine Co.*, 84 F.3d at 1330, 1339 (10th Cir. 1996) (experienced investor should have realized excessive annual returns as a red flag, and acted in accordance with such information). Accordingly, as also reflected on Exhibit D, the Claimant's Claim should be denied as it would be inequitable to share Receivership assets with it in light of its failure to act in good faith. If the Claim is not denied, it should be equitably subordinated to the Allowed and Allowed In Part Claims of all other Claimants. "Equitable subordination does not deal with the existence or non-existence of the debt, but rather involves the question of order of payment." *In re Lockwood*, 14 B.R. 374, 380–81 (Bankr. E.D.N.Y. 1981). "The fundamental aim of equitable subordination is 'to undo or offset any inequality in the claim position of a creditor that will produce injustice or unfairness to other creditors. . . .'" *Id.* (quoting *In re Westgate Cal. Corp.*, 642 F.2d 1174, 1177 (9th Cir. 1981)).

4. Investor Claims Which Should Be Denied Because Claimants Have Ties To Other Investor Accounts, Including Accounts That Experienced False Profits

As indicated on Exhibit D, seven Investor Claims have been associated with other accounts that received False Profits. The Receiver has pursued litigation or is considering initiating litigation to recover the False Profits paid for the accounts that have been associated with these seven claims. As discussed in Section I. A. 1. above, the Net Investment Method should be utilized to set off losses suffered in one "account" with profits enjoyed from another. Otherwise, that Claimant will receive a disproportionate share of any distribution. Put differently, to allow investors to retain False Profits while simultaneously recognizing a claim for losses would be inequitable to investors who did not profit in any account. Accordingly, no payments should be made for the purported losses suffered for the seven Claims identified on Exhibit D because the Receivership Records indicate that False Profits were paid in associated

accounts and the amount of the False Profits exceeds the purported losses. The Net Investment Method as proposed by the Receiver above and as reflected in the Exhibits is the appropriate method for determining Allowed Amounts for Investor Claims.

Setting off losses in one account with False Profits paid for a related account is equitable and regularly adopted by receivership courts. *See Equity Fin'l Grp.*, 2005 WL 2143975 at *12, 26 (upholding Receiver's determination to consolidate accounts). Courts have consistently held that an investor's claim should be limited to the total dollar amount of its investment reduced by any funds it received. *In re Old Naples*, 311 B.R. 607, 616 (M.D. Fla. 2002) (citing *In re C.J. Wright & Co.*, 162 B.R. 597 (Bankr. M.D. Fla. 1993)); *Warfield*, 2007 WL 1112591 at *12- 13; *Homeland Communic'ns Corp.*, 2010 WL 2035326 at *3; *Credit Bancorp*, 2000 WL 1752979 at *40; *In re Madoff*, 2011 WL 3568936 at *3-5. As these cases show, this is the most equitable and practical approach for determining investor claim amounts and a common approach for handling investor claims in a receivership involving a fraudulent investment scheme. *See In re Madoff*, 2011 WL 3568936 at *3-5. As discussed above, netting Investor Accounts held by a Claimant where at least one account received False Profits is necessary under the Net Investment Method and avoids the inequitable possibility of allowing a Claimant to profit at the expense of similarly situated investors. Indeed, in determining which Botfly investors should be sued by the Receiver for False Profits, where applicable the Receiver offset losses and False Profits for investors with multiple Investor Accounts and only sued if the Investor Accounts collectively had a False Profit.

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

After filing their Proof of Claim Forms, Investor Claimants asserting ten Investor Claims waived their Claim in connection with the settlement of demands by the Receiver for the recovery of False Profits or withdrew their Claims after the Receiver made inquiries into the

factual support for the Claims. *See* Exhibit D. Accordingly, as set forth in Exhibit D, each of those ten Investor Claims should be denied.

6. Claims Which Should Be Denied Because Claimants Benefited From Fraudulent Transfers Paid to Entities Unrelated to Investments in Botfly

Two Claims, Claim Nos. 314 and 585, should be denied because the Claimants benefited from fraudulent transfers made of Botfly Funds. As previously noted, sitting in equity, this Court has broad powers and wide discretion to fashion appropriate relief, including in devising a plan for distribution of receivership assets. *See, e.g., Elliot*, 953 at 1566. In resolving claims submitted in a claims process, courts consider a wide variety of factors with the ultimate goal of fashioning an equitable system that treats similarly situated claimants equally. Botfly investor funds were paid to entities under the control of each of the Claimants. The payments were made as “investments” in those entities. In connection with Claim No. 314, on June 1, 2009, Lewalski transferred \$60,000 to the Entity asserting the Claim for the purchase of a 1% interest in an oil well for Lewalski’s son, Christian Fredrickson. In connection with Claim No. 585, Hammill P.A. made two transfers to an entity for which the Claimant is one of the managing members. Those two transfers, made for the purchase of a 49% interest in a start up video production company were of the proceeds of the Scheme and together totaled \$175,000. Although the Claimants directly or indirectly benefited from the payments of Botfly funds, Botfly did not receive any corresponding benefit.

Under FUFTA, the Receiver may recover transfers for the benefit of the Receivership estate, that were made with “actual intent to hinder, delay, or defraud creditors” (Fla. Stat. § 726.105(1)(a)), which intent is established as a matter of law when a transfer is made during a Ponzi scheme. *See, e.g., In re Christou*, 201 WL 4008191, *3 (Bankr. N.D. Ga. 2010) (“Any transfers made during the course of a Ponzi scheme are presumptively made with intent to defraud.”). Under these circumstances, it would be inequitable to allow the Claimants any

distribution from the Receivership unless and until the transfers made by Botfly are recovered in full.

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

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

A. Priority Of Claims

As discussed above, the Receiver has established the following categories of claims: (1) Investor Claims which should be allowed (in whole or in part) and should receive the highest priority among claims; (2) Claims which should be allowed (in whole or in part), and which should be paid only after defrauded investors' allowed claims have been paid in full; and (3) Claims which should be denied. From these categories, the Receiver has determined the fair and equitable priority for each of these claims' participation in distributions of Receivership assets. The highest priority ("Class 1") should be afforded to all Investor Claims which are Allowed in whole or in part (Exhibit B). Each Claimant holding a Class 1 claim will receive a *pro rata* share of its respective claim's Allowed Amount from the total aggregate distribution as discussed in more detail below in Section IV.

Second priority ("Class 2") should be afforded to Claims Allowed in whole or in part but which equity requires be subrogated to the claims of the defrauded investors' allowed claims have been paid in full (Exhibit C). Claimants holding Class 2 claims will only participate in a distribution of Receivership assets after all Allowed Amounts for Class 1 claims have been satisfied in full.

The remaining claims (“**Class 3**”) are those which should be denied in full or which have been waived (Exhibit D). Claimants holding Class 3 claims will not receive any distribution of Receivership assets.

The Court’s power to approve the Receiver’s claim determinations and priority of claims is settled. *See S.E.C. v. Elliot*, 953 F. 2d 1560, 1566 (11th Cir. 1992) (court has “broad powers and wide discretion” to assure equitable distributions). Further, courts have consistently found that treating similarly-situated parties alike in claims processes is fair and equitable. *Id.* at 1570; *United States v. Petters*, 2011 WL 281031, *7 (D. Minn. 2011) (*citing S.E.C. v. Credit Bancorp, Ltd.* 2000 WL 1752979, *28 (S.D.N.Y. 2000)). There is no requirement, however, that all claimants be treated in the same manner; rather, fairness only requires that similarly situated claimants should be treated alike. *See, e.g., Quilling v. Trade Partners, Inc.*, 2006 WL 3694629, *1 (W.D. Mich. 2006) (distinguishing between fraud victims and general creditors); *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 184 (S.D.N.Y. 2009) (“The Receiver’s proposal to treat differently those involved in the fraudulent scheme when distributions are being made is eminently reasonable and is supported by caselaw.”). Further, no specific method of distribution is required; the method of distribution should simply be “fair and equitable.” *S.E.C. v. P.B. Ventures*, 1991 WL 269982, *2 (E.D. Pa. 1991). In the end, “[a]n equitable plan is not necessarily a plan that everyone will like.” *Credit Bancorp*, 2000 WL 1752979 at *29. Indeed, “when funds are limited, hard choices must be made.” *Byers*, 637 F. Supp. 2d at 176 (quoting *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 84 (2d Cir. 2006)).

Investor Claims from investors who were not on inquiry or actual notice of fraud should be given highest priority. Typically, payment to claimants whose property was unlawfully taken from them, such as investors who had no reason to know of the scheme, is given a higher priority

than payment to general creditors. *S.E.C. v. HKW Trading LLC*, 2009 WL 2499146, *3 (M.D. Fla. 2009); *Trade Partners, Inc.*, 2006 WL 3694629 at *1 (“As an equitable matter in receivership proceedings arising out of a securities fraud, the class of fraud victims takes priority over the class of general creditors with respect to proceeds traceable to the fraud.”); *see also* III Clark on Receivers § 667 at 1154 (Anderson 3d ed. 1959). This is the appropriate priority because “[t]he equitable doctrine of constructive trusts gives ‘the party injured by the unlawful diversion a priority of right over the other creditors of the possessor.’” *Id.* (quoting Clark on Receivers § 662.1 at 1174); *see also S.E.C. v. Megafund Corp.*, 2007 WL 1099640, *2 (N.D. Tex. 2007) (holding that general creditors “will not be paid until all defrauded investors are fully compensated”); *C.F.T.C. v. PrivateFX Global One*, 778 F. Supp. 2d 775, 786-87 (S.D. Tex. 2011) (overruling objection of bank that extended line of credit and adopting receiver’s argument that “courts regularly grant defrauded investors a higher priority than defrauded creditors”).

III. ALL ASSETS AND LIABILITIES OF THE RECEIVERSHIP ENTITIES SHOULD BE POOLED TO FORM A SINGLE RECEIVERSHIP ESTATE.

A. Factual Basis For Pooling Assets And Liabilities

From 2005 through 2010, Lewalski, Hammill, and others acting in complicity with them, raised approximately \$30 million from hundreds of investors as part of a single, continuous Ponzi scheme. The Receiver discovered that, although Botfly referred to separate Investor Accounts in communications with investors, in reality physically separate accounts did not exist. All investor funds were commingled in various accounts controlled or managed by Lewalski and/or Hammill.

Lewalski grossly overstated the trading results of resulting from Forex trading in Botfly account. Despite only trading a very small portion of the money purportedly under management and achieving substantial yields (*i.e.*, trading losses) on the Forex trading, Lewalski, Hammill and others falsely communicated to investors and potential investors, through monthly

“statements,” and other communications, that investments were generating positive returns and, in most cases, yielding 10% a month.

To perpetrate and perpetuate this scheme, Lewalski caused Botfly to pay investors interest based upon purported gains resulting from Forex trading. The funds used to pay these purported trading gains were not generated from trading activities; rather they were generated from new or existing investors. Lewalski further caused Botfly to pay commissions or referral fees as an incentive to Investors and others to promote new investments in the Scheme. Those commission or fees were improperly and wrongfully paid. The negative cash flow of Botfly made the eventual collapse of the scheme inevitable.

Here, pooling all Receivership Entities’ assets is appropriate because Lewalski operated Botfly as part of a single, continuous Ponzi scheme, and he, Hammill, and Hammill, P.A. were improperly and wrongfully paid with money that Lewalski improperly diverted from Botfly. Further, Lewalski treated Botfly as a single source of money, and the investors’ money was commingled in Botfly’ accounts and other accounts controlled by Lewalski.

Consistent with legal authority discussed in the next Section, Lewalski’s treatment of the investors’ money warrants pooling all assets of the Receivership Entities. Specifically, all money and other assets that constitute Receivership assets, regardless of how they were previously allocated, should be held to constitute one fund and used in a collective manner to pay the collective liabilities of the Receivership Entities, in accordance with the plan discussed in this Motion. Pooling the assets and liabilities of the Receivership Entities is the most cost effective and equitable approach, and is warranted by the facts.

B. Legal Basis For Pooling Assets And Liabilities

Treating all Receivership assets as a single fund to pay all collective liabilities of the Receivership Entities benefits all Claimants and, as noted in the previous Section, is consistent

with the manner in which Lewalski operated those entities. Further, this requested relief is well within the Court's broad power to administer this Receivership. *See Elliott*, 953 F.2d at 1566 ("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"); *HKW Trading LLC*, 2009 WL 2499146 at *2; *see also S.E.C. v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986); *Basic Energy & Affiliated Resources, Inc.*, 273 F.3d at 668. The primary purpose of an equity receivership is to promote the orderly and efficient administration of the estate for the benefit of the creditors. *See Hardy*, 803 F.2d at 1038. Consolidating all of the assets and liabilities of the Receivership Entities best serves this purpose.

Courts routinely permit equity receivers to pool assets. *See, e.g., HKW Trading*, 2009 WL 2499146 at *6 ("The Court directs that all assets and liabilities of the Receivership Entities be consolidated for all purposes."); *S.E.C. v. Credit Bancorp, Ltd.*, 290 F.3d 80, 91 (2d Cir. 2002) (affirming district court's equitable authority to treat all fraud victims alike and order *pro rata* distribution of assets); *Basic Energy*, 273 F.3d at 663 (adopting receiver's plan to create single pool of assets for all investors); *Elliott*, 953 F.2d at 1584 (approving district court's decision to reject tracing and treat three companies as single entity); *S.E.C. v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 332 (5th Cir. 2001) (affirming district court's order approving receiver's plan to distribute funds to all Claimants on *pro rata* basis even though funds invested by two claimants were segregated by fraudster and traced to separate account); *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1115-16 (9th Cir. 1999) (affirming district court's adoption of receiver's plan to treat three companies involved in scheme as one for purposes of paying claims because each entity appeared to be alter ego of the other); *Quilling v. Trade Partners, Inc.*, 2008 WL 4283359, *4 (W.D. Mich. 2008) ("In [r]e receivership cases where the fraud has features that are similar or common to all victims, and at least some commingling of funds occurred, *pro rata* distribution of

pooled assets has been the standard. . . .”); *S.E.C. v. Amerifirst Funding, Inc.*, 2008 WL 919546, *5 (N.D. Tex. 2008) (concluding “the most equitable approach is to pool the assets” of three receivership entities and distribute funds on *pro rata* basis even in absence of specific instances of commingling because entities were used similarly to further fraudulent scheme); *U.S. v. Durham*, 86 F.3d 70, 72-73 (5th Cir. 1996) (approving receiver’s plan to distribute money to claimants on *pro rata* basis even though majority of money could be traced to one claimant); *see also U.S. v. Real Property Located at 13328 & 13324 State Hwy.*, 89 F.3d 551, 553 (9th Cir. 1996) (approving district court’s finding that “[i]nstead of engaging in a tracing fiction, the equities demand that all [defrauded] customers share equally in the fund of pooled assets in accordance with the SEC plan”).

Indeed, courts have held that “any comingling is enough to warrant treating all the funds as tainted.” *Byers*, 637 F. Supp. 2d at 177. Because “money is fungible” it is “impossible to differentiate between ‘tainted’ and ‘untainted’ dollars. . . .” *S.E.C. v. Lauer*, 2009 WL 812719, *4-5 (S.D. Fla. 2009). “Once proceeds become tainted, they cannot become untainted.” *United States v. Ward*, 197 F.3d 1076, 1083 (11th Cir. 1999). In addition, “when tainted funds are used to pay costs associated with maintaining ownership of [a] property, the property itself and its proceeds are tainted by the fraud.” *Lauer*, 2009 WL 812719 at *3 (citing *United States v. One Single Family Residence Located at 15603 85th Ave. North, Lake Park, Palm Beach County, Fla.*, 933 F.2d 976, 982 (11th Cir. 1991)). In short, the most equitable and efficient approach is to pool all assets and liabilities of the Receivership Entities into one consolidated estate. *See S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) (“[I]n a case involving a Ponzi scheme, the interests of the [r]eceiver are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy”).

IV. THE RECEIVER'S PROPOSED PLAN OF DISTRIBUTION, INCLUDING AN INTERIM DISTRIBUTION

A. The Receiver's Plan

As of January 21, 2012, total cash held by the Receivership is approximately \$4.7 million. The Receiver seeks leave to make distributions on a *pro rata* basis, and he expects to make a first interim distribution of \$3.5 million to holders of Allowed Claims in the near future. If approved by the Court, all distributions will be made in accordance with applicable parameters set forth in this Motion, including those relating to priorities. The Receiver has proposed a procedure in Section V. below for Claimants to object to the claims determinations made by the Court based on this Motion. The procedure provides, in relevant part, that each Claimant will have 14 days from the date the Receiver mails notice to each Claimant of the Court's order on this Motion to serve the Receiver with an objection to his, her, or its claim determination. After this fourteen-day objection period expires and the Receiver completes an initial review of any objections, the Receiver intends to file a motion for approval of a first interim distribution in the amount of \$3.5 million less any reserves necessitated by any timely served objections. The Receiver will make these reserves where necessary so that objections do not delay a first interim distribution.⁸ In other words, the anticipated \$3.5 million distribution will be reduced by the amount reserved, if any. Any reserves will be in the amount of the *pro rata* share of the interim distribution allocated to the objected claim based on the full claim amount. The reserves will be held until the claim objection is resolved. If the objection is resolved for less than the full claim amount, the unpaid reserves will be distributed on a *pro rata* basis in a subsequent distribution.

The Receiver believes that an interim distribution of \$3.5 million, less any possible reserves for objected claims, will provide a sufficient amount of money to Claimants to warrant

⁸ Although the Receiver will make every effort to make a prompt interim distribution, depending on the nature of any timely objection received by the Receiver, this proposed interim distribution may have to be modified or delayed until any objection warranting such delay is resolved.

the expense of the distribution. Further, the proposed interim distribution amount will leave enough funds in the Receivership to cover the expenses of (1) addressing any claims disputes, (2) administering the Receivership, and (3) paying the Receiver's professionals for services already and yet to be provided. To the extent possible and feasible, the Receiver will make additional interim distributions before making a final distribution at the close of the Receivership. Before making any distribution, the Receiver will seek leave from the Court, and at that time will provide further specifics about the distribution. In this Motion, however, the Receiver seeks approval of a distribution plan which provides that, subject to applicable exceptions, priorities, and other parameters discussed in this Motion, Claimants receive a fixed percentage of their Allowed Amount from the aggregate amount distributed to Claimants in any particular distribution based upon the following formula: each claim's Allowed Amount divided by the total Allowed Amount of all Allowed Claims multiplied by the aggregate distribution amount.

B. The Receiver's Plan Is Consistent With Applicable Legal And Equitable Principles

As previously noted, the evidence in the Receiver's possession demonstrates that all investor funds were commingled and transferred among various accounts for the Botfly, and Lewalski's personal accounts, and other accounts controlled by Lewalski; Botfly did not maintain separate investor accounts; and investors were defrauded in the same manner. Accordingly, all Claimants with allowed claims should share equally (on a *pro rata* basis) in the pooled assets recovered by the Receiver, subject to the claim priorities and other applicable limitations discussed in this Motion and ultimately established by the Court. The Receiver recommends the Court approve the distribution of funds on a *pro rata* basis according to the formula set forth in the previous Section.

The Court has wide latitude in exercising inherent equitable power in approving a plan of distribution of receivership funds. *Forex*, 242 F.3d at 331 (affirming district court's approval of

plan of distribution because court used its discretion in “a logical way to divide the money”); *Quilling v. Trade Partners, Inc.*, 2007 WL 107669, *1 (W.D. Mich. 2007) (“In ruling on a plan of distribution, the standard is simply that the district court must use its discretion in a logical way to divide the money” (internal quotations omitted)). In approving a plan of distribution in a receivership, “the district court, acting as a court of equity, is afforded the discretion to determine the most equitable remedy.” *Forex*, 242 F.3d at 332. The Court may adopt any plan of distribution that is logical, fair, and reasonable. *Wang*, 944 F.2d at 83-84; *Basic Energy*, 273 F.3d at 671; *Trade Partners*, 2007 WL 107669 at *1. “Therefore, ‘[a]ny action by a trial court in supervising an equity receivership is committed to his sound discretion and will not be disturbed unless there is a clear showing of abuse.’ ” *S.E.C. v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 373 (5th Cir.1982) (quoting *S.E.C. v. Ark. Loan & Thrift Corp.*, 427 F.2d 1171, 1172 (8th Cir.1970)).

Consistent with the features of the scheme, “courts have favored *pro rata* distribution of assets where, as here, the funds of defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders.” *Credit Bancorp*, 290 F.3d at 88; see *Trade Partners*, 2007 WL 107669 at *2 (“The use of a *pro rata* distribution plan is specially appropriate for fraud victims of a Ponzi scheme, in which earlier investors’ returns are generated by the influx of fresh capital from unwitting newcomers rather than through legitimate investment activity.”). A logical, fair, and reasonable distribution plan may provide for reimbursement to certain claimants while excluding others. See *Wang*, 944 F.2d at 84; *Basic Energy*, 273 F.3d at 660-61. The proposed plan of distribution set forth in this Section is logical, fair, and reasonable.

V. THE PROPOSED PROCEDURE FOR OBJECTIONS IS LOGICAL, FAIR, AND REASONABLE

A. The Proposed Objection Procedure

For efficiency, the Court should adopt a formal procedure to handle instances where a Claimant does not agree with the Receiver's recommended determination of the Claimant's claim or objects to claim priority or the plan of distribution as approved by the Court. The procedure recommended below allows the Receiver to (1) address any disputed matters in a fair and efficient manner and (2) present any unresolved objections to the Court in an organized and, if appropriate, consolidated manner which will be efficient and, to the extent possible, avoid the Court's receipt of objections on a piecemeal basis. The procedure also provides each Claimant with notice and an opportunity to be heard in accordance with applicable due process obligations. The Receiver respectfully requests the Court adopt the following procedure (the "**Proposed Objection Procedure**"):

- a) Within three (3) business days of the date of the Order on this Motion, the Receiver will post the Order on his website, ww.botflyreceivership.com. A copy of this Motion will be posted soon after it is filed.
- b) Within seven (7) days after the date of the Order on this Motion, the Receiver will mail each Claimant by United States First Class Mail at the address provided on the Proof of Claim Form a letter setting forth the procedure for objecting to the Receiver's determination of a claim (the "**Receiver's Claim Determination**"), claim priority, or plan of distribution as approved by the Court. The letter will provide notice that the Court's Order on this Motion is available on the Receiver's website. The letter will further provide that a Claimant may contact the Receiver's office for a copy of the Motion and/or Order in the event a Claimant does not have access to the internet or cannot otherwise access the Motion and/or Order.
- c) Any Claimant that is dissatisfied with the Receiver's Claim Determination, claim priority, or plan of distribution must serve the Receiver with a written objection no later than fourteen (14) days after the date of mailing of the Receiver's letter advising the Claimant of the Order on this Motion. All objections must be served on the Receiver c/o Karen Cox, Esq., Bush Ross, P.A., 1801 North Highland Ave., Tampa, FL 33602. Such objections shall clearly state the nature and basis of the objection, and provide all supporting statements and documentation the Claimant wishes the Receiver and the Court to consider.

- d) Failure to properly and timely serve an objection to the Receiver's Claim Determination, claim priority, or plan of distribution shall permanently waive the Claimant's right to object to or contest the Receiver's Claim Determination, claim priority, and plan of distribution and the final claim amount shall be set as the Allowed Amount determined by the Receiver as set forth in the Exhibits attached to this Motion as approved by the Court.
- e) Although each objecting Claimant previously submitted to this Court's jurisdiction by filing a claim with the Receiver, by serving an objection the objecting Claimant shall be deemed to have confirmed submission to the jurisdiction of this Court. A person serving an objection to the Receiver's Claim Determination, claim priority, or plan of distribution, shall be entitled to notice, but only as it relates to adjudication of the particular objection and the claim to which the objection is directed.
- f) The Receiver may attempt to settle and compromise any claim or objection subject to the Court's final approval.
- g) At such times as the Receiver deems appropriate, he shall file with the Court: (1) the Receiver's further determination of a claim with any supporting documents or statements he considers are appropriate, if any; (2) any unresolved objections, with supporting statements and documentation, as served on the Receiver by the Claimant; and (3) any settlements or compromises that the Receiver wishes the Court to rule upon.
- h) The Court may make a final determination based on the submissions identified in the previous paragraph or may set the matter for hearing and, following the hearing, make a final determination. The Claimant shall have the burden of proof. The Receiver will provide notice of such hearing as provided in paragraph e) above.

This Proposed Objection Procedure promotes judicial efficiency, reduces litigation costs for the Receivership, is logical, fair, and reasonable, and is in the Receivership's best interest.

B. The Proposed Objection Procedure Is Consistent With Applicable Legal And Equitable Principles

The Proposed Objection Procedure satisfies due process. Due process essentially requires that the proceeding be fair and that affected parties be given notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Elliott*, 953 F.2d at

1566. The use of summary proceedings to implement claims procedures is customary in receiverships and satisfies due process requirements when claimants receive an opportunity to be heard, to object to their claim determination, and to have their claims considered by a court. *See Elliott*, 953 F.2d at 1566; *Basic Energy*, 273 F.3d at 668-671. The Proposed Objection Procedure achieves each of these requirements.

FDIC v. Bernstein noted:

One common thread keeps emerging out of the cases involving equity receiverships – that is, a district court has extremely broad discretion in supervising an equity receivership and in determining the appropriate procedures to be used in its administration.

In keeping with this broad discretion, “the use of summary proceedings in equity receiverships as opposed to plenary proceedings under the Federal Rules of [Civil Procedure] is within the jurisdictional authority of a district court.” Such procedures “avoid formalities that would slow down the resolution of disputes. This promotes judicial efficiency and reduces litigation costs to the receivership,” thereby preserving receivership assets for the benefit of creditors.

786 F. Supp. 170, 177-78 (E.D.N.Y. 1992) (citations omitted). Under applicable law, this Court should approve the Proposed Objection Procedure because it satisfies due process and is logical, fair, and reasonable. *See Elliott*, 953 F.2d at 1567 (summary proceedings are appropriate where party has full and fair opportunity to present claims and defenses). Specifically, the Proposed Objection Procedure provides for (1) notice to Claimants of the Receiver’s determination of their claims, claim priority, and plan of distribution; (2) the opportunity for Claimants to object to these matters; and (3) the review of unresolved objections by the Court.

Importantly, the Proposed Objection Procedure eliminates the need for any objections to be filed with the Court in direct response to this Motion. In turn, that will preclude inefficient piecemeal presentation and adjudication of objections by the Court. Such a piecemeal process would result in an inefficient claims process for both the Court and the Receivership. As such,

the Proposed Objection Procedure promotes judicial efficiency; reduces litigation costs for the Receivership; is logical, fair, and reasonable; and meets due process requirements.

CONCLUSION

For these reasons, the Receiver respectfully requests the Court enter an order:⁹

1. Approving the Receiver's determination of claims as set forth in this Motion and in attached Exhibits B through D;

2. Authorizing the Receiver to consolidate all Receivership Entities' assets and liabilities for all purposes, including for payment of administrative costs, for receipt of third party recoveries, and for making distributions to holders of allowed claims;

3. Approving the Net Investment Method as set forth above and in the attached Exhibits as the proper method for calculating allowed amounts for investors;

4. Approving the plan of distribution as set forth above in Section IV.;

5. Approving the Proposed Objection Procedure as set forth above in Section V. for objections to the plan of distribution and the Receiver's claim determinations and claim priorities as set forth in this Motion and attached Exhibits B through D; and

6. Precluding further claims against Receivership Entities, Receivership property, the Receivership estate, or the Receiver by any Claimant, taxing authority, or any other public or private person or entity and precluding any proceedings or other efforts to enforce or otherwise collect on any lien, debt, or other asserted interest in or against Receivership Entities, Receivership property, or the Receivership estate.

WHEREFORE, the Receiver requests that this Court enter an order approving the Motion and granting such other and further relief as the Court deems just and proper.

⁹ For the Court's convenience, a copy of a proposed order granting this Motion is attached as Exhibit F.

Dated: Tampa, Florida
February 10, 2012

BUSH ROSS, P. A.
Post Office Box 3913
Tampa, Florida 33601-3913
(813) 224-9255
(813) 223-9620 (telecopy)
Counsel for Receiver

By: Karen Cox
Jeffrey W. Warren
Florida Bar No. 0150024
Karen Cox
Florida Bar No. 456667

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered
this 10 day of February, 2012 to the below named parties in the manner indicated below:

Via E-Mail and U.S. Mail

Gregory S. Slemp, Esq.
R. Scott Palmer, Esq.
Nicholas J. Weilhammer, Esq.
PL-01: The Capitol
Tallahassee, Florida 32399-1050

Via U.S. Mail


David R. Lewalski
Register No. 64121-054
USP Canaan
U.S. Penitentiary
P.O. Box 300
Waymart, PA 18472

Via U.S. Mail

Jon J. Hammill
Register No. 54487-018
FPC Pensacola
Federal Prison Camp
P.O. Box 3949
Pensacola, FL 32516

Via E-Mail and U.S. Mail

Gabriel Mazzeo, Esquire
285 Ocklawaha Circle
Quincy FL 32351



Karen Cox, Esq.

DATE: May 5, 2011

**RE: CLAIMS FOR PAYMENT FROM RECEIVERSHIP OVER ASSETS OF BOTFLY, LLC,
DAVID R. LEWALSKI AND JON J. HAMMILL**

ATTENTION:

The Honorable Stanley R. Mills of the Circuit Court of the Sixth Judicial Circuit in and for Pasco County Florida appointed Michael E. Moecker as Receiver of BOTFLY, LLC ("Botfly"), DAVID R. LEWALSKI, AND JON J. HAMMILL (collectively, the "Receivership Entities"). The estates for the Receivership Entities have been consolidated into a single Receivership administered by the Receiver principally for the payment of valid claims by Botfly investors.

On April 28, 2011, the Court issued an order establishing a Claim Bar Date for all claims against the Receivership Entities and approving this Proof of Claim Form and the basic procedures to administer claims against the Receivership Entities. *The proper filing of this completed claim form may entitle you to receive a distribution from the Receivership.*

The information provided in this Proof of Claim Form will be used determine whether you will receive any distribution from the Receivership. The Receiver has the right to dispute and/or verify any information you have provided in order to determine the proper distribution amount, if any, to which you may be entitled.

It is your responsibility to advise the Receiver of any change in your address after you submit a Proof of Claim so that the Receiver may contact you as necessary regarding the Proof of Claim.

WHO MUST FILE A PROOF OF CLAIM

If you think you may have a claim against Botfly, LLC, or David Lewalski or Jon Hammill arising out of or relating in any way to the acts, conduct or activities of Botfly, LLC, you must file a Proof of Claim and, if applicable provide the Receiver with pertinent documentation, to share in distributions from the Receivership.

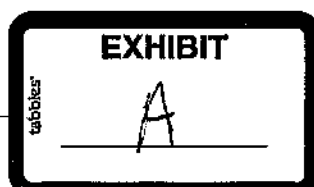
WHERE AND WHEN TO FILE

All Proofs of Claims must be delivered by U.S. mail or other means so that the claim is **received on or before Friday, August 26, 2011**, at the following address:

Michael E. Moecker, Receiver
c/o Michael Moecker & Associates, Inc.
3613 N. 29th Ave.
Hollywood, FL 33020

CONSEQUENCES OF FAILURE TO FILE PROOF OF CLAIM

Any holder of a claim or potential claim that fails to file a Proof of Claim on or before **Friday, August 26, 2011** will be forever **barred, estopped, and enjoined from asserting such claim** against Botfly, LLC, its successors, its respective property, the Receiver, or the Receivership estate, **and from participating in any distribution** from the Receivership.



PROOF OF CLAIM FORM

Name of Defendants:

Pasco County Circuit Court Case Number:

**BOTFLY, LLC, DAVID R. LEWALSKI,
JON J. HAMMILL, and JON J. HAMMILL,
P.A.**

51-2010-CA-2912-WS/G

GENERAL INSTRUCTIONS

Answer each and every question as fully as possible.

If you need additional space to complete an answer, please attach a separate sheet of paper and indicate the number of the question for which you are providing the additional information.

- 1. Name, address, telephone number(s), and email address for claimant.**

- 2. If Proof of Claim is completed by person other than claimant, name, address telephone number(s) and email address for person completing form and the basis for the authority to act on the Claimant's behalf. Submit documentation demonstrating authority to file Proof of Claim with the Proof of Claim.**

- 3. Name and address where correspondence, notices, and any other communications from the Receiver relating to the claim should be sent (if different from claimant).**

- 4. Name and address for where payment should be sent (if different from claimant).**

5. Basis for Claim.

State the reason for your claim for payment from the Receivership (for example, as to claims against Botfly — investor, beneficiary to deceased investor, assigned from another party, sold to you by another party, goods or services rendered to Botfly, Lewalski or Hammill for which payment was not received; as to claims against Botfly, Lewalski or Hammill — goods or services rendered for which payment was not received or other claims based on the acts or omissions of Botfly, Lewalski or Hammill, even if the claims are not now mature, fixed, liquidated or certain).

6. Funds Paid to Botfly.

Did you or anyone on your behalf make any investments in or loans to Botfly? _____ Yes _____ No.

If “Yes” (a) provide information regarding each payment below and (b) enclose copies of all checks, bank or other financial account statements, wire transfer confirmations, and other documents substantiating the payments with the Proof of Claim. (Use additional sheet if necessary).

	Amount paid	Payment date	Type of Payment (check, cashiers check, wire transfer, cash, or other)	Account name, account number and financial institution from which payment was made
1				
2				
3				
4				
5				
6				
7				
8				
9				

10				
11				
12				

Did you receive a promissory note or notes from Botfly? Yes No.

If "Yes" submit copies of all promissory notes with the Proof of Claim.

Did you receive any statements that reflected the payments made to Botfly, either in paper or by way of on-line access to account statements? Yes No.

If "Yes" submit copies with the Proof of Claim and provide the Botfly account number(s) associated with the payment(s).

7. Funds Received from Botfly

Did you receive any payments from Botfly? Yes No.

Did any person or entity other than yourself receive payments made by Botfly on your behalf or at your direction? Yes No.

If the answer is "Yes" to either of the two preceding questions, (a) provide information regarding each payment and (b) enclose copies of all checks, bank or other financial account statements, wire transfer confirmations, 1099's, correspondence (including e-mail correspondence) and any other documentation reflecting the payments with the Proof of Claim. Include any payments made to you or made to another person on your behalf that resulted from the referral or origination of investments by others in Botfly. (Use additional sheet if necessary).

	Amount of Payment	Payment date	Person or Entity receiving payment	Type of Payment (check, cashiers check, wire transfer, cash, or other)	Reason for payment
1					
2					
3					
4					
5					

6					
7					
8					
9					

8. Anything of value received from the Receivership Entities

In addition to the payments listed in section 7, have you received anything else of value either directly or indirectly from Botfly, LLC, David R. Lewalski or Jon J. Hammill (for example, promissory notes, shares of stock, interest in business ventures, and personal property) at any point in time? _____ Yes _____ No.

Did any person or entity other than yourself receive anything else of value from Botfly, LLC, David R. Lewalski or Jon J. Hammill on your behalf or at your direction at any point in time? _____ Yes _____ No.

If the answer is "Yes" to either of the two preceding questions, explain the circumstances and reasons for the transfer and identify what was received, who received it, when it was received, and where it came from.

By signing below, I certify under penalty of perjury pursuant to Florida Statute that the information provided in this form is true and correct. I further acknowledge I understand that claimants who submit claims for distribution from the Receivership on this Proof of Claim, are subject to the exclusive jurisdiction of the Circuit Court of the Sixth Judicial Circuit in and for Pasco County Florida for all purposes, including, without limitation, as to any claims, objections, defenses, or counterclaims that could be or have been asserted by the Receiver against such claimant or the holder of such claim in connection with this Receivership, including those arising out of (1) any dealing or business transacted by or related to Botfly or (2) any dealing or business transacted that relates in any way to any the Receivership property and waive any right to a jury trial with respect to such claims, objections, defenses, and counterclaims.

Sign: _____

Print Name: _____

Date: _____

Title (if any): _____

EXHIBIT B

Class I Claims - Allowed

Claim No.	Allowed Amount
3	\$20,000.00
4	\$128,800.00
6	\$8,400.00
12	\$50,000.00
14	\$25,000.00
15	\$0.00
23	\$20,000.00
25	\$20,000.00
29	\$38,000.00
31	\$100,000.00
32	\$53,500.00
34	\$40,600.00
36	\$193,628.00
37	\$17,000.00
39	\$24,000.00
41	\$25,000.00
42	\$10,000.00
43	\$99,000.00
47	\$80,000.00
48	\$43,000.00
50	\$25,000.00
53	\$110,000.00
55	\$64,000.00
57	\$6,135.00
59	\$15,000.00
64	\$20,000.00
65	\$75,000.00
68	\$30,000.00
71	\$37,500.00
72	\$25,000.00
74	\$40,000.00
75	\$10,500.00
77	\$19,000.00
79	\$4,000.00
81	\$25,000.00
82	\$30,000.00
83	\$40,000.00
84	\$30,000.00

EXHIBIT B

Class I Claims - Allowed

86	\$25,000.00
91	\$25,000.00
95	\$48,000.00
98	\$32,000.00
100	\$37,000.00
101	\$5,000.00
104	\$25,000.00
105	\$155,000.00
108	\$1,400.00
109	\$25,000.00
113	\$100,000.00
118	\$25,000.00
120	\$22,500.00
126	\$35,000.00
128	\$9,000.00
129	\$17,000.00
130	\$50,000.00
131	\$20,000.00
132	\$32,000.00
133	\$10,000.00
134	\$11,127.11
135	\$129,100.00
137	\$10,000.00
138	\$50,000.00
140	\$64,600.00
141	\$22,750.00
143	\$20,000.00
144	\$25,000.00
145	\$10,000.00
146	\$195,900.00
149	\$100,180.10
150	\$40,000.00
151	\$30,000.00
152	\$50,000.00
155	\$47,000.00
156	\$111,930.00
161	\$15,500.00
162	\$42,000.00
163	\$25,000.00
164	\$40,000.00
167	\$2,800.00

EXHIBIT B

Class I Claims - Allowed

170	\$50,000.00
171	\$100,000.00
173	\$58,350.00
176	\$10,000.00
177	\$10,000.00
178	\$30,000.00
180	\$14,000.00
181	\$25,000.00
182	\$25,000.00
183	\$10,000.00
184	\$38,000.00
186	\$10,000.00
187	\$31,595.00
188	\$200,335.66
190	\$20,000.00
194	\$25,000.00
196	\$25,000.00
197	\$10,000.00
201	\$23,000.00
202	\$13,000.00
204	\$20,000.00
207	\$75,000.00
210	\$10,000.00
211	\$100,000.00
212	\$35,000.00
215	\$20,000.00
219	\$247,500.00
222	\$170,511.00
224	\$12,000.00
225	\$35,000.00
227	\$25,000.00
228	\$25,000.00
230	\$30,000.00
232	\$23,000.00
233	\$20,000.00
235	\$25,000.00
236	\$13,700.00
240	\$33,000.00
243	\$75,000.00
244	\$25,000.00

EXHIBIT B

Class I Claims - Allowed

245	\$9,000.00
247	\$41,000.00
250	\$5,000.00
252	\$25,000.00
253	\$42,000.00
255	\$15,000.00
256	\$25,000.00
259	\$45,000.00
262	\$50,000.00
264	\$125,000.00
265	\$10,000.00
266	\$300,000.00
267	\$30,000.00
268	\$50,000.00
269	\$24,000.00
270	\$95,000.00
274	\$51,000.00
275	\$5,000.00
277	\$59,500.00
278	\$50,000.00
281	\$25,000.00
283	\$20,000.00
284	\$10,000.00
285	\$100,000.00
288	\$101,000.00
290	\$25,000.00
291	\$7,500.00
292	\$25,000.00
293	\$20,000.00
300	\$11,000.00
302	\$5,000.00
303	\$14,000.00
305	\$75,000.00
306	\$50,000.00
308	\$20,000.00
311	\$7,000.00
313	\$93,500.00
315	\$7,000.00
316	\$7,500.00
319	\$19,400.00
320	\$13,300.00

EXHIBIT B

Class I Claims - Allowed

322	\$25,000.00
323	\$47,500.00
325	\$25,000.00
327	\$16,000.00
329	\$60,000.00
330	\$34,000.00
333	\$25,000.00
334	\$7,000.00
336	\$40,000.00
337	\$34,000.00
339	\$50,000.00
344	\$12,500.00
347	\$127,120.17
348	\$12,500.00
349	\$25,000.00
350	\$190,000.00
351	\$25,000.00
352	\$10,000.00
353	\$620,000.00
356	\$38,000.00
357	\$200,000.00
362	\$58,386.00
365	\$74,000.00
366	\$30,000.00
368	\$13,500.00
369	\$10,000.00
372	\$25,000.00
375	\$35,500.00
377	\$10,000.00
379	\$37,000.00
380	\$60,000.00
383	\$49,000.00
388	\$21,000.00
390	\$30,000.00
391	\$30,000.00
392	\$29,000.00
393	\$10,000.00
395	\$54,000.00
396	\$17,000.00
397	\$25,000.00
400	\$62,000.00
402	\$60,000.00

EXHIBIT B

Class I Claims - Allowed

403	\$15,000.00
405	\$205,000.00
408	\$18,000.00
410	\$66,075.00
411	\$60,000.00
414	\$23,000.00
418	\$18,700.00
420	\$21,000.00
421	\$50,000.00
422	\$109,000.00
424	\$25,000.00
426	\$25,000.00
427	\$27,500.00
428	\$25,000.00
429	\$30,000.00
431	\$42,800.00
432	\$8,000.00
433	\$30,000.00
436	\$10,000.00
437	\$40,000.00
441	\$59,000.00
442	\$35,000.00
443	\$110,000.00
445	\$5,000.00
448	\$20,000.00
449	\$268,675.02
450	\$25,000.00
451	\$25,000.00
454	\$10,000.00
458	\$6,000.00
459	\$75,000.00
462	\$25,000.00
463	\$22,500.00
464	\$107,000.00
465	\$3,000.00
466	\$10,000.00
467	\$25,000.00
468	\$20,000.00
472	\$25,000.00
473	\$10,000.00
475	\$6,000.00
477	\$20,000.00

EXHIBIT B

Class I Claims - Allowed

480	\$49,000.00
481	\$4,500.00
482	\$10,500.00
486	\$15,000.00
492	\$100,000.00
493	\$58,000.00
496	\$35,000.00
497	\$100,000.00
498	\$45,000.00
502	\$0.00
504	\$12,000.00
505	\$50,000.00
510	\$25,000.00
513	\$19,328.00
515	\$112,000.00
517	\$27,500.00
519	\$255,000.00
522	\$50,000.00
523	\$4,000.00
524	\$16,900.00
526	\$88,300.00
529	\$40,000.00
530	\$27,000.00
532	\$18,000.00
534	\$31,000.00
535	\$20,000.00
537	\$45,000.00
539	\$12,000.00
540	\$15,000.00
541	\$130,000.00
542	\$69,600.00
543	\$3,000.00
544	\$100,000.00
546	\$15,000.00
548	\$100,000.00
549	\$33,000.00
550	\$100,000.00
552	\$25,000.00

EXHIBIT B

Class I Claims - Allowed

553	\$20,000.00
554	\$83,005.64
555	\$30,000.00
558	\$60,000.00
560	\$10,000.00
562	\$141,000.00
563	\$11,000.00
564	\$25,000.00
566	\$31,000.00
569	\$50,000.00
570	\$30,800.00
575	\$10,400.00
576	\$12,000.00
578	\$25,000.00
583	\$25,000.00
584	\$53,000.00
587	\$30,000.00
589	\$95,000.00
590	\$20,000.00
591	\$24,500.00
592	\$10,000.00
593	\$10,000.00
595	\$29,000.00
597	\$257,898.00
600	\$9,800.00
602	\$25,000.00
611	\$40,500.00
613	\$245,000.00
614	\$27,500.00
615	\$10,000.00
616	\$7,000.00
617	\$245,000.00
618	\$25,000.00
619	\$41,450.00
621	\$46,000.00
622	\$57,500.00
624	\$42,000.00
626	\$100,000.00
627	\$25,000.00
628	\$357,330.00

EXHIBIT B

Class I Claims - Allowed

629	\$175,000.00
630	\$74,000.00
631	\$50,000.00
632	\$45,000.00
634	\$40,000.00
636	\$250,000.00
640	\$25,000.00
642	\$213,000.00
643	\$25,000.00
647	\$23,000.00
649	\$9,000.00
651	\$45,359.00
652	\$10,000.00
653	\$35,000.00
654	\$25,000.00
55	\$54,000.00
282	\$12,500.00
506	\$7,275.98
707	\$19,500.00
658	\$100,000.00
666	\$21,080.00
667	\$25,000.00
668	\$9,021.00
670	\$20,000.00
671	\$16,500.00
672	\$42,000.00
673	\$48,000.00
679	\$12,000.00
683	\$36,000.00
684	\$46,000.00
687	\$13,500.00
688	\$10,000.00
690	\$15,000.00
691	\$24,500.00
692	\$56,500.00
693	\$100,000.00
694	\$0.00
695	\$15,000.00
696	\$10,000.00
697	\$10,000.00

EXHIBIT B

Class I Claims - Allowed

698	\$6,914.52
700	\$180,000.00
701	\$49,150.00
702	\$15,000.00
703	\$30,000.00
706	\$50,000.00
708	\$20,000.00
	<u>\$17,306,910.20</u>

EXHIBIT C

CLASS 2 CLAIMS - ALLOWED

Claim No.	Claim Amount	Grounds for Recommended Claim Determination	Allowed Amount
10	200,000	promoter (affiliated with Treadstone)	200,000
19	5,000	preference	5,000
46	6,000	promoter (12 commissions)	6,000
294	58,000	promoter (7 commissions)	58000
343	135,500	promoter (5 commissions)	135,500
406	84,500	preference	84500
409	62,000	promoter (10 investors)	62000

EXHIBIT D
Class 3 Claims - Denied

Claim No.	Claim Amount	Allowed Amount
9	claim reflects a net gain	None
13	\$10,000	None
20	\$13,000	None
22	\$2,500	None
27	\$20,000	None
51	\$12,000	None
63	\$6,400	None
80	claim reflects a net gain	None
103	\$42,000	None
127	\$7,000	None
158	\$17,000	None
198	claim reflects a net gain	None
208	\$0	None
239	\$492,350	None
261	\$23,200	None
299	\$2,500	None
309	\$20,000	None

EXHIBIT D
Class 3 Claims - Denied

314	\$436,000	None
374	\$555,960	None
381	\$10,000	None
401	?	None
416	\$14,000	None
457	?	None
494	\$31,000	None
538	\$10,000	None
585	\$9,100	None
596	?	None
606	\$40,500	None
637	claim reflects net gain	None
656	\$32,500	None
657	\$10,000	None
669	\$11,300	None
699	\$0	None
704	\$18,000	None
705	\$21,730	None

Late-Filed Claims

Claim No.	Claim Amount
129	\$17,000.00
167	\$2,800.00
180	\$14,000.00
207	\$75,000.00
210	\$10,000.00
275	\$5,000.00
315	\$7,000.00
380	\$60,000.00
406	\$84,500.00
463	\$22,500.00
467	\$25,000.00
543	\$3,000.00
554	\$83,005.64
632	\$45,000.00

EXHIBIT F

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION

OFFICE OF THE ATTORNEY
GENERAL, DEPARTMENT OF LEGAL
AFFAIRS, STATE OF FLORIDA,

Plaintiff,

CASE NO.: 51-2010-CA-2912-WS/G

v.

BOTFLY L.L.C., DAVID R. LEWALSKI,
JON J. HAMMILL, and JON J. HAMMILL, P.A.,

Defendants.

ORDER

This Cause came on to be heard on February 24, 2012 for consideration of the Receiver's Motion to (1) Approve Determination and Priority of Claims, (2) Pool Receivership Assets and Liabilities, (3) Approve Plan of Distribution, and (4) Establish Objection Procedure (the "**Receiver's Motion**") and of the Plaintiff's Motion for Interim Distribution of Funds Held by the Receiver (the "**Plaintiff's Motion**") (collectively, the "**Motions**").

Having considered the Motions and being otherwise fully advised, it is **ORDERED AND ADJUDGED** that the Motions are GRANTED. Accordingly,

1. The Receiver's determination of claims and claim priorities as set forth in the Receiver's Motion and in Exhibits B through D attached to the Receiver's Motion is fair and equitable and is approved;

2. For the reasons discussed in the Receiver's Motion, the Receiver is authorized to consolidate all Receivership Entities' (as the term is defined in the Motion) assets and liabilities for all purposes, including for payment of administrative costs, for receipt of third-party recoveries, and for making distributions to holders of allowed claims;

3. For the reasons discussed in the Receiver's Motion and under the circumstances of this Receivership, the Net Investment Method as set forth in the Receiver's Motion and its Exhibits is the appropriate method for calculating allowed amounts for investors' claims;

4. The plan of distribution as set forth in Section IV of the Receiver's Motion is logical, fair, and reasonable and is approved;

5. The Proposed Objection Procedure as set forth in Section V of the Receiver's Motion for objections to the plan of distribution and the Receiver's claim determinations and claim priorities is logical, fair, and reasonable and is approved, and any and all objections to claim determinations, claim priorities, or the plan of distribution shall be presented to the Receiver in accordance with the Proposed Objection Procedure as set forth in Section V of the Motion. After any unresolved objections are filed with the Court by the Receiver, the Court shall determine whether a hearing is necessary and set the date and time of any such hearing;

6. As soon as practical after the expiration of the deadline for bringing objections to the Receiver's claim determinations and claim priorities, the Receiver is authorized to make an interim distribution to Allowed Claims subject to the Court's review and approval of the amounts of the interim distribution; and

7. To bring finality to these matters and to allow the Receiver to proceed with distributions of Receivership assets, any and all further claims against Botfly, Receivership property, the Receivership estate, or the Receiver by any Claimant, taxing authority, or any other public or private person or entity and any and all proceedings or other efforts to enforce or otherwise collect any lien, debt, or other asserted interest in or against Receivership Entities, Receivership property, or the Receivership estate are hereby barred and enjoined absent further order from this Court.

DONE AND ORDERED in New Port Richey, Pasco County, Florida on this _____
day of _____, 2012.

The Honorable Stanley R. Mills
CIRCUIT JUDGE

Copies furnished to:

Karen Cox, Esq.
Bush Ross, P.A.
P.O. Box 3913
Tampa, FL 33601-3913

Gregory S. Slemp, Esq.
R. Scott Palmer, Esq.
Nicholas J. Weilhammer, Esq.
PL-01: The Capitol
Tallahassee, Florida 32399-1050

David R. Lewalski
Register No. 64121-054
USP Canaan
U.S. Penitentiary
P.O. Box 300
Waymart, PA 18472

Jon J. Hammill
Register No. 54487-018
FPC Pensacola
Federal Prison Camp
P.O. Box 3949
Pensacola, FL 32516

Gabriel Mazzeo, Esquire
285 Ocklawaha Circle
Quincy FL 32351