

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**

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**KENNETH D. BELL, in his capacity as court-appointed  
Receiver for Rex Venture Group, LLC d/b/a  
ZeekRewards.com,**

**Plaintiff,**

**vs.**

**TODD DISNER, in his individual capacity and in his  
capacity as trustee for Kestrel Spendthrift Trust;  
TRUDY GILMOND; TRUDY GILMOND, LLC;  
JERRY NAPIER; DARREN MILLER; RHONDA  
GATES; DAVID SORRELLS; INNOVATION  
MARKETING, LLC; AARON ANDREWS; SHARA  
ANDREWS; GLOBAL INTERNET FORMULA, INC.;  
T. LEMONT SILVER; KAREN SILVER; MICHAEL  
VAN LEEUWEN; DURANT BROCKETT; DAVID  
KETTNER; MARY KETTNER; P.A.W.S. CAPITAL  
MANAGEMENT LLC; LORI JEAN WEBER; and a  
Defendant Class of Net Winners in  
ZEEKREWARDS.COM;**

**Defendants.**

Civil Action No. 3:14-cv-91

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**MEMORANDUM OF LAW IN SUPPORT OF RECEIVER'S  
MOTION FOR CLASS CERTIFICATION**

Kenneth D. Bell, as the Receiver for ZeekRewards (“Receiver” or “Plaintiff”), and through his undersigned counsel, respectfully submits this memorandum of law in support of the Receiver’s motion to certify a defendant class in this action pursuant to Federal Rule of Civil Procedure 23. Class certification is particularly appropriate here because there are approximately 9,400 class members whose liability rests on the central question of whether the Receiver may recover funds fraudulently transferred to the Net Winners of the ZeekRewards Ponzi and/or

pyramid scheme.

### **STATEMENT OF FACTS**

The facts of this case, which are described more fully in the Complaint, are as follows:

Paul Burks, the owner and former top executive of RVG, and other management insiders used Rex Venture Group, LLC (“RVG”) in their operation of a massive Ponzi and pyramid scheme through ZeekRewards (“Zeek”) from at least January 2011 until August 2012. Over 700,000 participants lost over \$700 million dollars in the scheme. Burks and the management insiders used ZeekRewards to promise substantial payouts and outsize returns to all participants, but few actually benefitted. The largest Net Winners (those who received more money from Zeek than they paid in to Zeek) each received well over a million dollars, and many others received hundreds of thousands of dollars.

On August 17, 2012, the Securities and Exchange Commission filed an action in this Court, *Securities and Exchange Commission v. Rex Venture Group, LLC d/b/a ZeekRewards.com and Paul Burks*, Civil Action No. 3:12 cv 519 (the “SEC Action”), to obtain injunctive and monetary relief against Paul Burks, shut down the ZeekRewards Ponzi and pyramid scheme, freeze RVG’s assets, and seek appointment of a receiver for RVG. That same date, in the Agreed Order Appointing Temporary Receiver and Freezing Assets of Defendant Rex Venture Group, LLC (the “Agreed Order”), this Court appointed Kenneth D. Bell as the Receiver over the assets, rights, and all other interests of the estate of Rex Venture Group, LLC, d/b/a www.ZeekRewards.com (“ZeekRewards” or “Zeek”) and its subsidiaries and any businesses or business names under which it does business (the “Receivership Entities”). The order further directed Mr. Bell as RVG’s Receiver to institute actions and legal proceedings seeking the avoidance of fraudulent transfers, disgorgement of profits, imposition of constructive trusts and

any other legal and equitable relief that the Receiver deems necessary and appropriate to preserve and recover RVG's assets for the benefit of the Receivership Estate.

Subsequently, on or about December 20, 2013, the United States Attorney's Office for the Western District of North Carolina filed a Bill of Information (the "Information") against management insiders Dawn Wright-Olivares and Danny Olivares in connection with their role in the Ponzi scheme. Dawn Wright-Olivares has now pled guilty to engaging in a securities fraud conspiracy and tax evasion through the ZeekRewards Ponzi scheme as charged in the Information. Danny Olivares has pled guilty to engaging in the same ZeekRewards Ponzi scheme and securities fraud conspiracy as charged in the Information.

#### *The Receiver's Action Against Net Winners*

Like all classic Ponzi and pyramid schemes, the vast majority of the Zeek winners' money came from Zeek losers rather than legitimate business profits. At least \$845 million was paid in to Zeek. No more than \$6.3 million (less than 1%) came from retail bid purchases by non-participants. In total, the Zeek database records show that over 92% of the money paid in to Zeek came from Net Losers rather than Net Winners, and Zeek's Net Winners received over \$283 million in net winnings.

Because Zeek's Net Winners "won" (the victims') money in an unlawful combined Ponzi and pyramid scheme, the Net Winners are not permitted to keep their winnings and must return the fraudulently transferred winnings to the Receiver for distribution to Zeek's victims. Accordingly, the Plaintiff Receiver filed this action on February 28, 2014, asserting claims of relief against Defendants for: (1) Fraudulent Transfer of Rex Venture Group "RVG" Funds in Violation of the North Carolina Uniform Fraudulent Transfer Act; (2) Common Law Fraudulent Transfer; and (3) Constructive Trust.

## **THE PROPOSED DEFENDANT CLASS AND PRECERTIFICATION NOTICE**

In this action, the Receiver seeks to assert claims pursuant to Federal Rules of Civil Procedure 23(a) and (b)(1)(A) and (B) against a class consisting of all persons or entities who were Net Winners in ZeekRewards (as defined below) of more than one thousand dollars (\$1,000) (the “Net Winner Class”). Excluded from the Net Winner Class are persons or entities that have entered into a settlement agreement already approved or to be approved by this Court or who resided outside of the United States at the time of their participation in ZeekRewards.<sup>1</sup>

For the purposes of inclusion in the Net Winner Class, a Net Winner is a participant in ZeekRewards who received more money from RVG/ZeekRewards (as “profit payments,” “commissions,” “bonuses” or any other payments) than was paid in to RVG/ZeekRewards for the purchase of “bids,” monthly “subscriptions,” “memberships,” or other fees. Payments to or from third parties other than RVG/ZeekRewards are not included in the calculation of the amount of a ZeekRewards participant’s net winnings for this purpose.

As a preliminary matter, this class is sufficiently definite to make it administratively feasible to determine whether a given individual is a member of the class. *See Roman v. ESB, Inc.*, 550 F.2d 1343, 1348 (4th Cir. 1976); 7A CHARLES ALAN WRIGHT, AURTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1760. Each of the Net Winners sued by name in this action are part of the class and won in excess of \$900,000 (either individually or together with another family member or through their shell corporation). Over 9,400 Net Winners are part of the proposed class who won more than \$1,000. Upon filing this action, the Receiver published a list of those individuals falling under the class definition on the Receivership website ([www.zeekrewardsreceivership.com](http://www.zeekrewardsreceivership.com)), which has since been updated.

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<sup>1</sup> Claims against Net Winners who resided outside the United States at the time of their participation in ZeekRewards will be brought in a separate action.

Additionally, the Receiver will email a copy of this motion to the proposed Net Winners in the class and publish a copy of the motion on the Receivership website as precertification notification to the proposed class members.

### **ARGUMENT**

A defendants' class is particularly appropriate for these unique circumstances. Indeed, it is hard to conceive of any other fair, effective and reasonable procedure to resolve the Receiver's claims against the more than 9,400 Net Winners who won more than \$1,000 in the ZeekRewards' Ponzi/pyramid scheme. A defendants' class is specifically authorized under Fed. R. Civ. P. 23(a), which provides "[o]ne or more members of a class may sue *or be sued* . . . ." Fed. R. Civ. P. 23(a) (emphasis added); *see also Henson v. E. Lincoln Twp.*, 814 F.2d 410, 412 (7th Cir. 1987) ("It is apparent from the words of Rule 23(a) ('sue or be sued as representative parties') that suits against a defendant class are permitted."). Defendant class actions have been certified when, as here, there is a need for a "procedural device that allows one who has a common grievance against a multitude of persons to resolve . . . the dispute by using only a few members of the class." *Broadhollow Funding Corp. v. Fitzmaurice (In re Broadhollow Funding Corp.)*, 66 B.R. 1005, 1007 (Bankr. E.D.N.Y. 1986). "The use of a defendant class avoids costly multiple litigation and the danger of inconsistent adjudication of the same issue." *Id.*

Thus, the policies underlying Rule 23 will be fully satisfied by certifying a defendant class in this case because of the thousands of Defendants and the common determination of whether ZeekRewards was a Ponzi and/or pyramid scheme and whether Net Winner Defendants received a fraudulent transfer.

## **A. Rule 23(a) Class Requirements**

To be certified, a defendant class must meet four prerequisites: (1) numerosity; (2) commonality; (3) typicality; and (4) fair and adequate representation. Fed. R. Civ. P. 23(a). The Receiver satisfies this burden as discussed below.

### ***1. The Numerosity Requirement Is Satisfied Because the Proposed Class Is Comprised Of 9,400 Members Who Are Geographically Dispersed In Every Federal Judicial District Across The United States.***

With a class comprised of over 9,400 Net Winner Defendants geographically dispersed across all federal districts in the United States, the numerosity requirement is clearly satisfied. Rule 23(a)(1) provides that the class must be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Courts have recognized that joinder need not be impossible, but rather impracticable. *In re Itel Sec. Litig.*, 89 F.R.D. 104, 112 (N.D. Cal. 1981). “[F]or convenience and economy reasons, the joinder impracticability aspect of the Rule 23(a)(1) criterion is applied more flexibly for defendant classes than plaintiff classes;’ and, ‘assuming other class actions [*sic*] prerequisites are satisfied, the joinder impracticability test is rarely a stumbling block for upholding a defendant class action.” *In re Cardinal Indus.*, 105 B.R. 834, 843 (Bankr. S.D. Ohio 1989) (quoting H. Newburg, *Newburg on Class Actions* §4.55 at 395 (2d ed. 1985)) (holding that putative defendant class of more than 265 lenders in different states met the numerosity requirement because joinder was impracticable).

Here, the proposed class is comprised of over 9,400 Net Winners who received more than \$1000 as a result of a fraudulent transfer from ZeekRewards’ operation of a Ponzi and pyramid scheme. The members of the class are spread across every federal judicial district of the United States. Joinder of a group of this size and diverse geographical location would be nearly impossible and certainly impracticable. *See Weinman v. Fid. Capital Appreciation Fund (In re*

*Integra Realty Res., Inc.*), 179 B.R. 264, 270 (Bankr. D. Colo. 1995) (a class of 6,300 defendants was found to meet the numerosity requirement in a case involving recovery of fraudulent conveyances to shareholders). Accordingly, the number of proposed class members satisfies the numerosity requirement.

***2. The Commonality Requirement Is Satisfied Because Common Issues Exist Among The Class Members Concerning Whether ZeekRewards Operated As A Ponzi And/or Pyramid Scheme And Whether Funds Transferred To The Defendant Class Should Be Disgorged.***

The second prerequisite for class certification is that there are “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Here, the common questions are whether ZeekRewards operated as a Ponzi and/or pyramid scheme and whether net winnings received by the Defendants should be returned. “It is not required that all factual or legal questions raised in the lawsuit be common so long as a single issue is common to all class members.” *Weinman*, 179 B.R. at 270; *see also In re Cardinal Indus.*, 105 B.R. at 843 (citing Newburg on Class Actions § 3.10) (“There need only exist one significant issue or fact common to all members of the putative class.”).

In analogous defendant class actions, the commonality requirement has been met simply by having a common question of law that will determine the rights of the proposed class. For example, in another case involving fraudulent transfers, a class of defendants who were all beneficiaries of the same enhanced pension plan was considered to be a “mandatory defendant class.” *Pension Transfer Corp. v. Beneficiaries Under the Third Amendment to Fruehauf Trailer Corp. Ret. Plan No. 003*, 319 B.R. 76, 79 (D. Del. 2005) (holding an amendment to the retirement plan to be a fraudulent transfer).

The common questions presented in this case are similar to those identified in *Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 179 B.R. at 270. In

*Weinman*, the Court certified a defendant class action involving approximately 6,300 defendant shareholders after the bankruptcy of the Integra hotel company. *Id.* The court found that the commonality requirement was met based on whether a spinoff of stock to the shareholders constituted a fraudulent transfer, which was the central issue in determining the defendants' liability. *Id.* The class certification in *Weinman* was upheld by the Tenth Circuit on two separate occasions. *See Weinman v. Fid. Capital Appreciation Fund*, 354 F. 3d 1246 (10th Cir. 2004); *Weinman v. Fid. Capital Appreciation Fund*, 262 F. 3d 1089 (10th Cir. 2001).

The proposed class members in this action are linked by a common set of facts, which includes whether ZeeksRewards' operation was a Ponzi and/or pyramid scheme. All class members had or controlled usernames and accounts with ZeekRewards through which they received funds from RVG. Further, each class member received more money from RVG than they paid into RVG (their "net winnings") during the course of their participation as affiliates in the ZeekRewards program. These common factual threads unite the class members. And, even if Defendants argue that they were uncommon in some respect, Rule "23(a)(2) does not require a class of clones in which members are identical in all respects" so long as there is a common issue. *In re Broadhollow Funding Corp.*, 66 B.R. at 1009 (citing *In re REA Express, Inc.*, 10 B.R. 812 (Bankr. S.D.N.Y 1981)).

There is also a common question of law that exists as in the *Weinman* and *Pension Transfer* cases: whether the payments from ZeekRewards to class members are fraudulent transfers that must be disgorged and repaid. The resolution of these common issues of fact and law will determine the liability of the entire class, and thereby satisfies the commonality requirement.

**3. *The Typicality Requirement Is Satisfied Because The Defenses Of The Proposed Class Representatives Are Inevitably The Same As The Defenses Of The Unnamed Class Members Because Liability For Repayment Of Fraudulent Transfers Does Not Depend On Personal Circumstances.***

Rule 23(a)(3) requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). The third prerequisite shifts the focus from the characteristics of the class members to the characteristics of the named class representatives. *See In re Broadhollow*, 66 B.R. at 1009. The Receiver proposes that one or more of the following named Defendants serve as Class Representatives: Trudy Gilmond and Trudy Gilmond, LLC; Jerry Napier; Darren Miller; Rhonda Gates; Innovation Marketing, LLC; Aaron Andrews; Shara Andrews; Global Internet Formula, Inc.; T. LeMont Silver; Karen Silver; and Durant Brockett.

The typicality requirement is satisfied here because the defenses of the class representatives are the same as the defenses of class members. *In re Broadhollow*, 66 B.R. at 1009. The ZeekRewards scheme and the money received by Defendants are the events and/ or course of conduct that unites the class and gives rise to similar defenses.

This requirement does not mandate that the defenses be completely identical or perfectly coextensive. *See Oneida Indian Nation v. New York*, 85 F.R.D. 701, 705 (N.D.N.Y. 1980); *Weinman*, 179 B.R. at 270. Rather, it is sufficient if the defenses are substantially similar and “there is a nexus between class representatives/claims or defenses and common questions of fact or law which unite the class.” *Weinman*, 179 B.R. at 270.

Like the named class representatives, each of the proposed Net Winner class members participated in the same event and course of conduct that has given rise to the defendant class; that is, they all participated in and received profits from the ZeekRewards scheme. Because the class representatives participated in the same ZeekRewards scheme, they inevitably share the

same defenses against liability for repayment of the fraudulent transfers made to the class, which does not depend on the personal circumstances of particular affiliates. *See Weinman v. Fid. Capital Appreciation Fund*, 354 F. 3d at 1265.

In *Weinman*, the Tenth Circuit emphasized that “unlike the typical class action damage case, where the individual circumstances of each class member are typically of material importance, it is virtually never the case that the proceeds of a single fraudulent transfer . . . would be recoverable from one defendant . . . but not from another.” *Id.* The U.S. District Court for the Northern District of Illinois commented on the Tenth Circuit opinion noting that class certification was proper because there were:

no unique arguments that any single defendant could raise that would yield a different result for that defendant. In fact, one might argue that certifying the defendant class actually *benefited* the class members because it enabled their interests to be represented while sparing them the expense of hiring counsel and appearing.

*Weinman v. Fid. Capital Appreciation Fund*, 2008 WL 753958, at \*2 (N.D. Ill. March 18, 2008).

The same logic applies to the ZeekRewards litigation. In light of the central issue of whether a fraudulent transfer occurred due to ZeekRewards’ operation of a Ponzi/pyramid scheme, there are no unique arguments that any one defendant could raise that would yield a different result for that defendant. And, it is similarly true that many of the members of the defendant class will benefit by certification of the defendant class because they will be spared the expense of defending individual actions.

Indeed, the proposed Class Representatives have already established through their filed answers that they share typical and common defenses. The proposed Class Representatives have asserted nearly identical defenses in their respective answers (some of which are joint answers), and many used the exact same or similar language to assert those defenses, which include laches,

waiver, estoppel, unclean hands, good faith and for value, and setoff. *See* Doc. No. 27, Answer and Affirmative Defenses to Complaint and Counterclaims by Innovation Marketing, LLC, Aaron Andrews and Shara Andrews, pages 20-22; Doc. No. 22, Durant Brockett’s Motion Pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6) and 9(b) to Dismiss Complaint, Answer and Affirmative Defenses to Complaint and Counterclaims, pages 56-58; Doc. No. 32, Answer, Affirmative Defenses, and Counterclaims by Rhodes Gates, page 20-22; Doc. No. 33, Answer and Counterclaim of Defendant Trudy Gilmond and Trudy Gilmond, LLC, pages 33-34; Doc. No. 35, Answer and Counterclaim of Defendant, Darren Miller, page 31-33; Doc. No. 34, Answer and Counterclaim of Defendant, Jerry Napier, pages 32-33.

Some proposed Class Representatives also asserted additional similar defenses, such as lack of subject matter jurisdiction, lack of standing, lack of capacity and failure to join necessary parties, and failure to state a claim. *See generally* Doc. No. 33, Answer and Counterclaims of Defendant Trudy Gilmond and Trudy Gilmond, LLC; Doc. No. 35, Answer and Counterclaim of Defendant, Darren Miller; Doc. No. 34, Answer and Counterclaim of Defendant, Jerry Napier; Doc. No. 28. In light of the proposed Class Representatives’ recognition through their answers that they have typical and similar defenses, the Court should find that the typicality element necessary for class certification is satisfied.

***4. The Proposed Class Representatives And Their Counsel Will Provide Fair And Adequate Representation Of the Defendant Class’s Interests Because Their Interests Align With The Class Members, They Were Among The Largest Net Winners And Counsel Is Competent And Experienced.***

Fed. R. Civ. P. 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). In determining whether a named representative in a class action is “a fair and adequate representative,” some courts have applied a two-pronged test: 1) the representative must be able to conduct the litigation; and 2) the

representative's interests must not be antagonistic to those of the class members. *See Weinman*, 179 B.R. at 270-71; *see also Baehr v. Creig Northrop Team*, 2014 WL 346635 at \*9 (D. Md. January 29, 2014) (noting representation is adequate if the named representatives' interests are not opposed to those of the other class members, and the attorneys are "qualified, experienced and able to conduct the litigation") (citing *Mitchell-Tracey v. United Gen. Title Ins. Co.*, 237 F.R.D. 551, 558 (D. Md. 2006)); *Harris v. Rainey*, 2014 WL 352188, at \*3 (W.D. Va. Jan. 31, 2014).

Courts also examine the extent of the named representatives' financial interest in the class action. *See In re Broadhollow*, 66 B.R. at 1011; *see also Weinman*, 262 F.3d at 1112 (rejecting challenges to the adequacy of the class representative and noting that the class representative's potential liability "far exceeded that of any other class member" and "its interests were aligned with those of the other class members in that all concerned wished to limit their liability to the lowest possible amount.").

Here, the proposed Class Representatives' interests are not antagonistic to, but rather aligned with, the interests of the unnamed class members because they share the common objective to defend against having to return funds received from ZeekRewards as demanded by the Receiver. Thus, there is no conflict which would defeat adequacy of representation. *See Harris v. Rainey*, 2014 WL 352188 at \*3 (W.D. Va. January 31, 2014) (recognizing that "[a] conflict must be fundamental to defeat adequacy of representation; a conflict is not fundamental when all class members 'share common objectives and the same factual and legal positions and have the same interest in establishing the liability of defendants.'") (citing *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) and *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 431 (4th Cir. 2003)).

Further, the named class representatives were among the largest Net Winners of the ZeekRewards scheme. Each received over \$900,000 from RVG (either individually or together with another family member or through their shell corporation). The proposed Class Representatives are not likely to abandon or return these substantial sums without obtaining experienced counsel and mounting a vigorous defense. Already, the proposed Class Representatives have retained competent counsel who have filed extensive answers and motions to dismiss. One of the proposed Class Representatives, Trudy Gilmond, also made numerous filings in the SEC Action, working with counsel to contest the Court's appointment of a receiver, moving for the release of seized funds, and even petitioning the court for the appointment of an Examiner to "*represent the collective interests* of the Affiliates and all creditors of the receivership estate." SEC Action, Doc. No. 77 (emphasis added).

Finally, counsel retained by the proposed Class Representatives are experienced and qualified attorneys, fully capable of protecting the interests of their clients and consequently the class. They range from a former assistant director of the SEC's Enforcement Division to white collar criminal defense attorneys with significant experience defending similar suits involving fraudulent transfers. Counsel for the proposed Class Representatives also have experience in securities fraud cases involving both the SEC and United States Futures Trading Commission, *see SEC v. Hanson*, 3:09-cv-336 (W.D.N.C. 2009); *CFTC*, 3:09-cv-335 (W.D.N.C. 2009); in health care fraud cases brought by the United States Attorney's Office under the False Claims Act; in fraud cases by the SEC involving Ponzi schemes of truly historic proportions, *see S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 326 (N.D. Tex. 2011); and significant experience in class action suits. *See* Alexander Ricks PLLC website, *available at* [www.alexanderricks.com/mary-k-mandeville](http://www.alexanderricks.com/mary-k-mandeville) (July 11, 2014) ("Notable Engagements").

The majority of the retained attorneys have litigated numerous times in federal court in the Western District of North Carolina. They are members in good standing and have been the subject of no known bar complaints. They have displayed a “capability [and] familiarity with the local pleading practice, case management practice, and indeed the law in this jurisdiction.” *Weinman*, 354 F.3d at 1256 (affirming the bankruptcy court’s designation of lead counsel in defendant class action suit). “Absent contrary proof, class counsel are presumed competent and sufficiently experienced to prosecute the action on behalf of the class.” *Matthews v. Buel, Inc.*, 2012 WL 1825273, at \*2 (D.S.C. May 18, 2012) (citing *Hewlett v. Premier Salons Int’l, Inc.*, 185 F.R.D. 211, 218 (D. Md. 1997)).

Considering all of this, the Court should find that the proposed Class Representatives will fairly and adequately protect the interests of the class.

**B. Class Certification under Rule 23(b)(1).**

Once all the prerequisites enumerated in Rule 23(a) are met, the analysis turns to the requirements of Rule 23(b). The Receiver seeks to certify the ZeekRewards Net Winner Class under Rule 23(b)(1). Rule 23(b)(1) permits class certification in instances where prosecuting separate actions would either create:

- (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
- (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

Fed. R. Civ. P. 23(b)(1).

### 1. 23(b)(1)(A)

Under Rule 23(b)(1)(A), certification of a class is authorized if separate actions run the risk of “inconsistent or varying adjudications with respect to individual class members which would establish incompatible standards of conduct for the party opposing the class.” Rule 23(b)(1)(A); *see also Gray v. Shapiro (In re Dehon, Inc.)*, 298 B.R. 206, 216 (Bankr. D. Mass. 2003). In actions involving voidable preferences and fraudulent conveyances, courts have certified classes pursuant to Rule 23(b)(1)(A) “to insure that separate proceedings would not result in inconsistent adjudication of the common issues, thus leaving the trustee in a stalemated position.” *In re Broadhollow*, 66 B.R. at 1013 (finding certification under 23(b)(1)(A) warranted and adopting reasoning in *Guy v. Abdulla*, 57 F.R.D. 14 (N.D. Ohio 1972)).

Here, separate actions against 9,400 Defendants would plainly risk inconsistent and varying adjudications. The Defendants’ liability is premised on whether a fraudulent transfer occurred from ZeekRewards’ operation of a Ponzi/pyramid scheme and not on the individual circumstances of the Net Winner Defendants. If one court found that a fraudulent transfer occurred, but another court did not, then those inconsistent decisions would place the Receiver in a stalemated position. If the Receiver attempted to enforce a valid judgment against a Defendant, that Defendant might refuse to pay because other Defendants similarly situated were not held to be liable for the same underlying conduct related to ZeekRewards. An additional layer of inconsistency would arise if the Receiver attempts to settle a lawsuit, but the Net Winner Defendant is not willing to compromise since that Defendant is already aware of the inconsistent adjudication based on the same set of facts. These anomalous results would leave the Receiver in an untenable position and are precisely why class actions exist. *See Guy v. Abdulla*, 57 F.R.D. at 17-18.

## 2. 23(b)(1)(B)

Also, certification of a class of defendants under Rule 23(b)(1)(B) is appropriate in the context of a fraudulent transfer. In fact, Rule 23's Advisory Notes indicate that a "fraudulent conveyance" is exactly the type of situation where a class should be certified because separate adjudication "will necessarily or probably have an adverse practical effect." Fed. R. Civ. P. 23 advisory committee's note. Moreover, the Tenth Circuit in *Weinman* upheld class certification under Rule 23(b)(1)(B) in a class action involving questions of whether a fraudulent transfer occurred and whether there was an unlawful dividend distributed. *Weinman*, 354 F. 3d at 1263–64. The Tenth Circuit noted that the first suit against a defendant or group of defendants could be dispositive of all remaining suits and would decide the rights of absent defendants "without the class action's assurance that they be adequately represented." *Id.* at 1264. The court reasoned that, as here, a defendant "has only a small number of possible individual defenses" and "the primary legal and factual issues in the first case would not only form the basis for the application of *stare decisis* in subsequent cases; they would almost inevitably prove dispositive in those cases." *Id.* (relying upon *Lynch Corp. v. MII Liquidating Co.*, 82 F.R.D. 478, 483 (D.S.D. 1979) and *Abdulla*, 57 F.R.D. at 18 (certifying a defendant class in a bankruptcy trustee's action to recover voidable preferences and fraudulent conveyances)).<sup>2</sup>

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<sup>2</sup> Notably, the underlying class certification order issued by the bankruptcy court referenced a prior experience in *In re Hedged Investments*, Case No. 90-15399 PAC, to justify certification under 23(b)(1). *Weinman*, 179 B.R. at 271. As detailed in the Plaintiff Appellee's Response Brief to the Tenth Circuit, *In re Hedged Investments* was a bankruptcy proceeding where "early precedent may have adversely affected the abilities of later defendants to protect their interests against 'Ponzi' scheme avoidance actions." See 2002 WL 34499534, at \*25 (August 26, 2002). The *Weinman* case, particularly the reliance upon the Bankruptcy court's experience in *In re Hedged Investments*, highlights the real danger that early precedent in litigation involving questions of a Ponzi scheme or fraudulent transfer will be dispositive and will adversely affect the ability of later Defendants to protect their interests.

Once the issues of whether ZeeksRewards operated as a Ponzi/pyramid scheme and whether the funds received by the Defendants resulted from a fraudulent transfer are adjudicated, the outcome will affect all parties. The first suit would then be effectively dispositive of the class interests. A class certification under Rule 23(b)(1)(B) avoids that result.

Moreover, a defendant class ensures that even those Defendants who received smaller amounts from RVG are adequately protected without having to endure the burden of hiring counsel and mounting a defense. Again, one of the proposed Class Representatives has already acknowledged that it would be “impractical for the Affiliates to each retain counsel and appear in this case” and asked for someone to “represent the collective interests of the Affiliates.” SEC Action, Doc. No. 77, “Motion to Appoint Representative for Affiliates,” page 1.

Overall, a defendant class action certified under Rule 23(b)(1) will be most fair to the Defendants, particularly relatively small Net Winners. Thus, the efficiency of one action in which all parties can argue their case and assert their rights will benefit both the Receiver and small winners and supports the intent behind both Rule 23(b)(1)(A) and (b)(1)(B).

### **CONCLUSION**

For the reasons stated above, Plaintiff respectfully requests that the Court grant Plaintiff’s motion to certify the proposed defendant class pursuant to Fed. R. Civ. P. 23.

Dated: July 30, 2014

Respectfully submitted,

/s/ Irving M. Brenner

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 30, 2014, I electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF RECEIVER'S MOTION FOR CLASS CERTIFICATION** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record. The Receiver will also email a copy of this motion to the proposed class members and publish a copy of the Receiver's public website [zeekrewardsreceivership.com](http://zeekrewardsreceivership.com).

This the 30<sup>th</sup> day of July, 2014.

s/ Irving M. Brenner

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