UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARTHUR NADEL,
SCOOP CAPITAL, LLC,
SCOOP MANAGEMENT, INC.,

Defendants. CASE NO.: 8:09-cv-0087-T-26TBM

SCOOP REAL ESTATE, L.P.,
VALHALLA INVESTMENT PARTNERS, L.P.,
VALHALLA MANAGEMENT, INC.,
VICTORY IRA FUND, LTD,
VICTORY FUND, LTD,
VIKING IRA FUND, LLC,
VIKING FUND, LLC, AND
VIKING MANAGEMENT, LLC.

Relief Defendants.
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THE RECEIVER'S UNOPPOSED MOTION FOR PERMISSION TO PROSECUTE APPEAL

Burton W. Wiand, as Receiver (the "**Receiver**") for Valhalla Investment Partners, L.P.; Viking Fund, LLC; Viking IRA Fund, LLC; Victory Fund, Ltd.; Victory IRA Fund, Ltd.; and Scoop Real Estate, L.P. (collectively, the "**Hedge Funds**"), moves this Court for permission to proceed with an appeal regarding final orders entered by the Honorable James D. Whittemore on February 9, 2015 in *Wiand, as Receiver v. Wells Fargo Bank, N.A.*, Case No. 8:12-cv-557-JDW-EAJ (M.D. Fla.) (the "**Wells Fargo Litigation**") (*See* Dkts. 21 (Order

denying remand) and 325 (Order granting summary judgment against the Receiver)). The pertinent Orders are attached as Exhibits A and B.

ARGUMENT

"It is a well-established rule that as an officer of the court, 'a receiver may not ordinarily appeal without first obtaining authority from his creator, the court appointing him.'" *Holland v. Sterling Enters., Inc*. 777 F.2d 1288, 1291-92 (7th Cir, 1985) (quoting *Hatten v. Rose*, 156 F.2d 464, 468 (10th Cir. 1946).

The Receiver originally filed his complaint against Defendants Wells Fargo Bank, N.A. ("**Wells Fargo**" or "**the Bank**") and Timothy Ryan Best ("**Best**") in the Circuit Court for the Twelfth Judicial Circuit in Sarasota County.

The Bank removed the action to this Court and the Receiver moved to remand to Sarasota County. The Court denied the Receiver's motion for remand. (Wells Fargo Litigation at Dkt. 21). As illustrated below, in the Order denying the Receiver's motion for remand ("**Order Denying Remand**"), Judge Whittemore found that federal jurisdiction was proper because he concluded this Court specifically directed the Receiver to commence the Wells Fargo Litigation.

The Bank Accounts. The record evidence shows that, during the period in which Arthur Nadel operated his fraudulent scheme, he opened and controlled several bank accounts at SouthTrust Bank and its successor Wachovia Bank, N.A. and used the accounts to divert Hedge Fund monies in furtherance of his scheme, all without the knowledge of the investors. This included Nadel's opening of two personal accounts which he titled as Nadel D/B/A Valhalla Investments and Nadel D/B/A Viking Fund, respectively. These accounts

were personal accounts of Nadel and he titled them to mimic the names of two Hedge Funds for which he had no authority to open corporate accounts, and he used the accounts to perpetrate his scheme. Nadel even fraudulently identified each of the relevant two Hedge Funds as sole proprietorships in the account opening documents even though in reality the Hedge Funds were separate corporate entities. The Bank's policies and procedures did not require Nadel to present any documentation establishing that he was authorized to open any account on behalf of those two Hedge Funds -- such as a certificate of authority or corporate resolution -- much less that he had any authority or basis to open personal accounts titled to mimic the names of those two Hedge Funds – such as fictitious name registrations,. Rather, the Bank only required that Nadel present a driver's license. Nadel used these accounts to commingle and launder money in order to satisfy redemptions.

The Bank Invested In The Scheme. Nadel not only used Wells Fargo bank accounts to perpetrate his scheme, but the Bank actually invested in two of the Hedge Funds: Viking Fund, LLC and Scoop Real Estate, L.P. It received the Private Placement Memoranda, Executive Summaries for these Hedge Funds, which included purported historical returns for each of the Hedge Funds showing they never had a negative quarter and yet described an investment strategy that could not possibly achieve such performance; conducted monthly analyses of the Hedge Funds' performances yet apparently failed to recognize the too-good-to-be-true purported returns, and its agents were in contact with Viking Fund director Chris Moody. After the Bank learned that there were no audited financial statements for these Hedge Funds, the investments were redeemed—just months before Nadel's Ponzi scheme inevitably collapsed.

The District Court's Orders. In the Order granting summary judgment against the Receiver ("**Summary Judgment Order**"), the Court correctly found that the Bank invested in two of the Hedge Funds: Viking Fund, LLC and Scoop Real Estate, L.P. However, in spite of this finding, the Order further concluded that: (1) the Defendant had no legal duty to comply with banking industry standards; (2) as a matter of law, the Defendant satisfied FUFTA's affirmative defense of "good faith"; and (3) as a matter of law, the Defendant was not unjustly enriched.

As discussed more in depth below, the Receiver believes the conclusions reached in both Orders are erroneous. First, the Order Denying Remand misinterprets this Court's Orders Reappointing the Receiver and the Order granting leave to retain counsel to represent the Receiver in the Wells Fargo Litigation, neither of which "directed" the Receiver to sue Wells Fargo, and it also misconstrues 28 U.S.C. §1348. Second, the Summary Judgment Order, among other things, misinterprets relevant legal authority and failed to properly consider the impact on the Receiver's claims of the Bank's investment in the scheme, including this Court's earlier determination that institutional investors, such as the Bank, were on inquiry notice of Nadel's fraud (*see* Dkt. 1061).

The Order Denying Remand

The Order Denying Remand concluded that federal jurisdiction existed under 28 U.S.C. § 1348, which provides:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, **or by direction of any officer thereof**, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of

> the Currency, or any receiver acting under his direction, as provided by such chapter.

(emphasis supplied). Specifically, the Order Denying Remand concluded that that there was "little question that this action was commenced by direction of Judge Lazzara." Order Denying Remand at p. 3. The Court reasoned that, by virtue of the Order Reappointing the Receiver[1], which "authorized, empowered and directed" the Receiver to "[I]nstitute such actions and legal proceedings on behalf of the Receivership Entities…" and the Order granting the Receiver's Motion for Leave to Retain the James Hoyer Law Firm to Pursue Claims Against Wachovia Bank, N.A. N/K/A Wells Fargo Bank, N.A.[2], this Court directed the Receiver to initiate the Wells Fargo Litigation.

The Order Reappointing the Receiver, however, merely provides broad directions to the Receiver to investigate and take whatever actions are necessary on behalf of the Receivership Entities. It does not direct the Receiver to sue any party in particular and did not reference Wells Fargo at all. The Order Denying Remand conflates a broad directive to investigate and pursue claims with a specific order to commence litigation against a specific entity.

Furthermore, the Order Reappointing the Receiver was issued on September 23, 2010 – months before the Receiver determined that the Wells Fargo Litigation was necessary, and a year-and-a-half before the Receiver initiated the case against Wells Fargo in February 2012. Therefore, logic dictates that this Court could not have directed the Receiver to sue Wells Fargo in September 2010.

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[1] *See* Dkt. 493.
[2] *See* Dkt. 696.

Lastly, the Receiver respectfully submits that the Order Denying Remand misinterprets this Court's Order granting him leave to retain James, Hoyer, Newcomer & Smiljanich, P.A. ("**James Hoyer**"). Of note, this Court was considering the Receiver's motion to retain counsel and approve the contingency fee arrangement, not a motion to approve his determination to pursue claims against the Bank.

Motions for leave to retain professionals are commonplace in receivership actions and the Receiver has filed other such motions in this Receivership[3]. These motions do not request, and the Orders granting them do not contain, a directive to the Receiver to commence litigation against a defendant, and the Orders also are not judicial endorsement of the contemplated action. Rather, the Orders merely approve prior to initiating litigation (i) the Receiver's retention of a specific law firm and (ii) the billing structure under which that law firm will be compensated in accordance with Paragraph of the Order Reappointing Receiver. *See Saga Bay Gardens Condominium Association, Inc. v. For App't of Blanket Receiver*, 127 So.3d 800, 802 at n. 2 (Fla. 3DCA 2013) ("It would be in the best interests of both receivers and attorneys for the receiver to obtain court approval prior to retaining legal services.") *see also Creative Prop. Mgmt., Inc. v. Gen. Elec. Credit Corp. of Ga*., 314 So.2d 807, 808 (Fla. 3d DCA 1975) (recognizing that "the better practice would be for the receiver to obtain approval of the court prior to the engaging of counsel and rendition of services by him," even though such approval is not required) (*citing Lewis v. Gramil Corp*., 94 So.2d 174, 177 (Fla.1957)). The Receiver believes Judge Whittemore erred in construing the Order

[3] *See e.g., S.E.C. v. Arthur Nadel, et al*., Case No. 8:09-cv-87-RAL-TBM (Dkt. 174) (approving Receiver's motion to retain the law firm of Johnson, Pope, Bokor, Ruppel & Burns, LLP, on a contingency basis for the limited purpose of pursuing claims by the entities in Receivership against Holland & Knight, LLP).

authorizing him to retain counsel for the Wells Fargo Litigation as a directive from the Court to sue the Bank.

The Summary Judgment Order

The Receiver also believes the Summary Judgment Order is likewise erroneous for several reasons. First, it concludes that the Bank had no duty under Florida law to comply with standards in the banking industry. This ruling directly contradicts Judge Whittemore's numerous previous legal determinations that, under Florida law, the Bank owed duties of care to both customer and non-customer Hedge Funds. (*See* Wells Fargo Litigation at Dkt. 37, p. 4 ("Contrary to Defendants' arguments, these funds were Wachovia customers, to whom a duty was owed"); *see also Id*. at Dkt. 77, p.10 ("The Receiver states a claim for negligence on behalf of the customer hedge funds); *Id*. at Dkt. 212, p. 10 ("Not only does Florida common law dictate the imposition of a duty on Wachovia, but the Fifth Circuit's *Chaney* exception does, as well….Nadel's creation of a shadow account in the name of Viking Fund is but one of many allegations supporting the imposition of a legal duty on Wachovia.") *Id*. at Dkt. 221, p. 9 (denying Bank's motion to strike Receiver's banking expert because her "testimony is relevant to establishing the applicable standard of care for the negligence claims and will assist the jury in that respect.")).

Second, the Summary Judgment Order's FUFTA analysis applied a wrong standard for evaluating the Bank's "good faith" defense to the Receiver's FUFTA claims and did not consider relevant record evidence – had Judge Whittemore performed the proper analysis, he, like the Honorable Richard Lazzara, would have concluded that that institutional investors like the Bank were on inquiry notice of Nadel's fraud. *See* Dkt. 1061 at 12 ("[m]any red

flags were waiving in 2008" and "there is no doubt that institutional investors…were placed on inquiry notice and cannot show good faith."). This issue is highly relevant not only because the Receiver asserted FUFTA claims, but because the Bank's inquiry notice of Nadel's fraud had ramifications for the Bank's duty under the Receiver's negligence claims which Judge Whittemore did not consider.. *See Wiand v. Waxenberg*, 611 F.Supp.2d 1299, 1319 (M.D. Fla. 2009). (Test is whether the transferee "had knowledge of such facts or circumstances as would have induced an ordinarily prudent person to make inquiry, and which inquiry, if made with reasonable diligence, would have led to the discovery of the [transferor's] fraudulent purpose."); *See also In re World Vision Entm't Inc*., 275 B.R. 641, 659 (Bankr. M.D. Fla. 2002) ("transferee may not remain willfully ignorant of facts which would cause it to be on notice of a debtor's fraudulent purpose."). In short, one important aspect of the Receiver's appeal will focus on the fact that, in relevant part, while Judge Whittemore's Summary Judgment Order relied exclusively on its conclusion that the Bank had no duty to monitor Nadel's and the Hedge Funds' accounts at the Bank, it nowhere considered the impact on the Bank's duty and consequent liability from the fact that the Bank was, at minimum, on inquiry notice of fraud from the Bank's investment in the scheme.

The Receiver believes that, in light of the entire universe of facts, the Bank had a duty to comply with banking industry standards, among other duties, and that it cannot satisfy FUFTA's good faith requirement when it: (1) allowed Nadel to open personal accounts clearly titled as "d/b/a" some of the Hedge Funds without verifying his authority to open the accounts, or to divert investor monies into them; (2) received the transfers in violation of the standards of care within the banking industry; and (3) invested in both Scoop Real Estate and

Viking Fund. The Receiver asserts that this will be an issue of first impression for the Eleventh Circuit because the cases cited in the Summary Judgment Order are distinguishable from this case, where the Bank had a lengthy relationship with Nadel, issued loans to his entities (including Scoop Real Estate) and invested in the Hedge Funds. The Receiver further contends that Nadel's fraudulent scheme could not have worked without the Bank, that Wells Fargo bears legal responsibility for the losses to the Hedge Funds, and that an appeal of Judge Whittemore's Orders is meritorious.

Retention Of James Hoyer To Pursue Appeal. The Receiver intends to retain James Hoyer to litigate the appeal. Because James Hoyer represented the Receiver since the beginning of the Wells Fargo Litigation, its attorneys are familiar with the facts, issues, and legal theories underlying the case. As such, the Receiver believes it will be significantly more economical to retain James Hoyer to represent him on the appeal than it would be to retain separate counsel, who would have to spend valuable Receivership resources in order to gain sufficient understanding of the complexities of this case. James Hoyer has agreed to be compensated on an hourly fee basis at rates which are identical to those charged by the Receiver's primary counsel, Wiand Guerra King P.L. As part of this compensation arrangement, the Receiver and James Hoyer have agreed that, should the Receiver's appeal be successful, and the Wells Fargo Litigation result in either a favorable jury verdict or settlement, any contingency fee it is awarded will be offset by the hourly fees it will have been paid to represent the Receiver in the appeal.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests the Court to grant him permission to prosecute an appeal of the Orders in the Wells Fargo Litigation.

LOCAL RULE 3.01(g) CERTIFICATION

Counsel for the Receiver has conferred with counsel for the Securities and Exchange Commission and is authorized to represent to the Court that this motion is unopposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 10, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

Dated: March 10, 2015

JAMES, HOYER, NEWCOMER & SMILJANICH, P.A.

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