Securities and Exchange Commission v. Nadel et al Doc. 671

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v. Case No. 8:09-cv-87-T-26TBM

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

Defendants,

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 SECOND UNOPPOSED
MOTION FOR PERMISSION TO APPEAL

Burton W. Wiand, as 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**"),[1] moves this Court for permission to appeal

[1] Mr. Wiand was also appointed Receiver for Scoop Capital, LLC; Scoop Management, Inc.; Valhalla Management, Inc.; Viking Management, LLC; Venice Jet Center, LLC; Tradewind, LLC; Laurel Mountain Preserve, LLC; Laurel Preserve, LLC; Laurel Mountain (footnote cont'd)

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three orders compelling arbitration, entered by the Honorable Elizabeth A. Kovachevich on November 18, 2011 in the following cases:

- *Wiand as Receiver v. Munson et al.*, Case No. 8:10-cv-206-T-17MAP (M.D. Fla.), Order Granting Motion (Doc. 47);
- *Wiand as Receiver v. Munson Family Partners, Ltd.*, Case No. 8:10-cv-221-T-17MAP (M.D. Fla.), Order Granting Motion (Doc. 47); and
- *Wiand, as Receiver v. Wang*, No. 8:10-cv-112-T-17MAP (M.D. Fla. .), Order Granting Motion (Doc. 30) (collectively, the "**Orders**").

Copies of the Orders are attached hereto as **Exhibits A, B and C**, respectively. Judge Kovachevich granted the three motions to compel arbitration for the same reasons specified in her September 29, 2011 Order Adopting Report And Recommendation In Toto, which applied to 23 other "clawback" cases brought by the Receiver. The Receiver sought this Court's permission to appeal Judge Kovachevich's September 29th Order in 21 of those 23 cases (two had settled amicably) (Doc. 668), and on October 31, 2011, the Court granted the Receiver permission to do so (Doc. 669). For various procedural reasons, the three cases underlying this motion were not briefed at the same time as the other cases in which defendants have moved to compel arbitration, but they present identical issues on appeal and are subject to the identical order compelling arbitration.

Specifically, the Receiver's appeal will address matters raised by the Orders with a focus on the inherent conflict between arbitration, on the one hand, and the purpose of 28

Preserve Homeowners Association, Inc; Marguerite J. Nadel Revocable Trust UAD 8/2/07; Guy-Nadel Foundation, Inc.; Lime Avenue Enterprises, LLC; A Victorian Garden Florist, LLC; Viking Oil and Gas, LLC; Home Front Homes LLC; and Traders Investment Club (all of the entities in receivership are referred to collectively as the "**Receivership Entities**"). However, Mr. Wiand did not assert claims in the lawsuits underlying this motion on behalf of these additional Receivership Entities.

U.S.C. §§ 754 and 1692 ("**Section 754**" and "**Section 1692**", respectively), on the other. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985) (holding that "legal constraints external to the parties' agreement [may] foreclose[] the arbitration of" claims); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("constraint" foreclosing arbitration includes contrary congressional command, which may be "deducible . . . from an inherent conflict between arbitration and the statute's underlying purposes").

In that regard, Sections 754 and 1692's underlying purpose (as well as their explicit purpose) is to provide district courts overseeing receiverships with "complete jurisdiction and control" over receivership property, including all disputes regarding such property. Arbitration directly conflicts with that purpose because it divests a receivership court of its jurisdiction and control, and transfers control to private arbitrators. A thorough discussion of this issue, including the fact that the money the Receiver seeks to recover from clawback defendants is receivership property, is at pages 4 through 23 of The Receiver's Objections To The Magistrate Judge's June 8, 2011 Omnibus Report & Recommendation, a copy of which is attached hereto as **Exhibit D**. Compelling arbitration is especially inequitable in instances like this one for several reasons. First, because it allows individuals at the heart of the scheme, here Arthur Nadel and his "business partners," Neil and Christopher Moody, through documents written at their direction, to determine where these disputes will be heard. Second, because those documents, which included the pertinent arbitration language,

purported to create the very securities at the heart of the scheme underlying this case and were used by Nadel and the Moodys to attract money to the scheme.[2]

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. Vose,* 156 F.2d 464, 468 (10th Cir. 1946)). This rule, however, is not jurisdictional in nature, and there is no authority to suggest that filing this motion tolls or otherwise extends the deadline for filing Notices of Appeal under Rule 4 of the Federal Rules of Appellate Procedure. *See Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274, 1276-77 (7th Cir. 1997). The Receiver's deadline to file Notices of Appeal is December 18, 2011.

An Appeal Of The Orders Is In The Best Interests Of The Receivership

The Receiver believes an appeal of the Orders is in the best interests of this Receivership as it is intended to maximize the estate for defrauded investors, who are the central focus of this Receivership and the Receiver's efforts to marshal assets. *See Marion v. TDI, Inc.*, 2006 WL 3742747, *2 (E.D. Pa. 2006) ("The whole purpose of the SEC

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[2] The Receiver recently was forced to initiate an arbitration proceeding against the defendant in *Wiand, as Receiver v. Linstead*, Case No. 8:10-cv-162-T-17MAP (M.D. Fla.). That defendant resides in the United Kingdom and moved to dismiss the Receiver's clawback claims for lack of personal jurisdiction. After conducting jurisdictional discovery, the Receiver voluntarily dismissed his complaint because information produced by the defendant did not support this Court's personal jurisdiction. In light of the Order and an impending statute of limitations deadline, the Receiver had no choice but to institute an arbitration against that defendant to preserve the Receivership's claims against him. The Receiver is considering the best way to approach that arbitration.

proceeding is to remedy violations of the securities laws for the benefit of investors."). Specifically, the Orders require the Receiver to arbitrate all claims in the pertinent cases, but arbitration would be costly and inefficient. The different Hedge Funds' documents have arbitration language that would require arbitration in New York, Illinois, and Florida through either the AAA or JAMS arbitration organizations. Under the rules of those organizations, the arbitrations would require payment of (1) administrative fees that could exceed $40,000 (collectively) and (2) the arbitrators' hourly fees for work on the arbitrations, which would likely be in the six figures and could be multiple hundreds of thousands of dollars (again, collectively across all arbitrations). Both the administrative fees and arbitrators' hourly fees would not be incurred if those matters proceeded in Court rather than in arbitration. Although typically an appealing feature of arbitration is reduced costs, in this Receivership that is simply not the reality. In fact the opposite is true: the Receivership will incur significant added costs to arbitrate.

On the other hand, the Receiver estimates the appeals would cost the Receivership substantially less than the added costs of pursuing all those matters in arbitration. Further, the defendants in the cases compelled to arbitration received False Profits (*i.e.*, the amount received from the scheme in excess of the amount deposited) of approximately $1 million and total distributions from the scheme of almost $7 million. As such, it is in the best interests of this Receivership to pursue the claims asserted against them by the Receiver, even through an appeal.

Grounds For The Receiver's Appeal

As previously noted, the Receiver's appeal would primarily focus on arbitration's inherent conflict with the purpose of Sections 754 and 1692 to consolidate in this Court all disputes relating to Receivership property, because for a subset of those disputes – those involving the cases in which the Orders were entered (and the other 21 cases on appeal) – arbitration would divest the Court's jurisdiction and control in favor of private arbitrators in Illinois, New York, and Florida. This argument appears to be a matter of first impression.[3] However, courts have found in other contexts focused on administering failed enterprises, that arbitration inherently conflicts with the statutes governing those contexts. Specifically, courts have held that arbitration of (1) core claims in bankruptcy and (2) disputes relating to failed federal credit unions inherently conflicts with the Bankruptcy Act and the Federal Credit Union Act, respectively. *See, e.g.*, *In re White Mountain Mining Co., LLC*., 403 F.3d

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[3] Sometimes receivers do not assert "clawback" claims, like claims to recover fraudulent transfers, but instead assert "common law tort claims against third parties to recover damages in the name or shoes of the corporation for the fraud perpetrated by the corporation's insiders . . . ." *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 551 (Fla. 2d DCA 2003). Unlike the Receiver's fraudulent transfer and unjust enrichment claims in the clawback suits, such tort claims do not involve receivership property and are subject to greater limitations. *Id.* All but one of the published decisions found by the Receiver in which receivers have been compelled to arbitrate involved these types of claims and not fraudulent transfer or unjust enrichment claims like those in the Receiver's clawback cases, or any other claim seeking recovery of receivership property. *See Javitch v. First Union Secs., Inc.*, 315 F.3d 619 (6th Cir. 2003); *U.S. Small Bus. Admin. v. Coqui Capital Mgmt., LLC*, 2008 WL 4735234 (S.D.N.Y. 2008); *Capital Life Ins. Co. v. Gallagher*, 47 F.3d 1178 (10th Cir. 1995); *Phillips v. Lincoln Nat'l Health & Casualty Ins. Co*., 774 F. Supp. 1297 (D. Col. 1991); *Moran v. U.S. Bank*, 2007 WL 1023447 (S.D. Ohio 2007). Only *Moran v. Svete*, 366 Fed. App'x 624 (6th Cir. 2010), involved a fraudulent transfer claim (and a number of "damages" claims), but there is no indication the court in that case considered Sections 754 and 1692 and their inherent conflict with arbitration.

164, 169 (4th Cir. 2005) ("Congress intended to centralize disputes about a debtor's assets and legal obligations in the bankruptcy courts," and "[a]rbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights 'contingent upon an arbitrator's ruling' rather than the ruling of the bankruptcy judge assigned to hear the debtor's case."); *Nat'l Credit Union Admin. Board v. Lormet Comm. Fed. Credit Union*, 2010 WL 4806794, *2 (N.D. Ohio 2010) ("[R]equiring plaintiff to defend creditor claims in arbitration would defeat a primary purpose of the statute, *i.e.*, centralizing the claims process and preserving the limited assets of the defunct credit union."). In light of the pertinent parallels between this Receivership, on the one hand, and Bankruptcy and processes to address failed credit unions, on the other hand, the Receiver is hopeful an appeal would be successful. In turn, that would benefit the Receivership by preventing defendants from disrupting efforts to adjudicate disputes over receivership property in this Court and, ultimately, efforts to lower costs while maximizing recoveries.

The Receiver Must Treat The Orders As Final Orders

As the Receiver noted at the October 26th Status Conference, there is some chance the Eleventh Circuit would consider the Orders as interlocutory orders, which would require certification for an appeal under 28 U.S.C. § 1292(b), rather than as final appealable orders. According to the Federal Arbitration Act ("**FAA**"), an interlocutory order "granting a stay of any action under section 3" or "directing arbitration to proceed under section 4" of the FAA is not appealable. 9 U.S.C. § 16(b). On the other hand, a "final decision with respect to an arbitration" is appealable. 9 U.S.C. § 16(a)(3). The United States Supreme Court has held that a final decision relating to arbitration occurs when an order "plainly dispose[s] of the

entire case and le[aves] no part of it pending before the court." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 80 (2000). A number of Circuit Courts are split, however, with respect to whether an order must dismiss all claims before the court in favor of arbitration to be considered final or whether a stay of such claims pending the confirmation of an arbitration award is sufficient. The Eleventh Circuit has not yet clearly addressed this issue. Here, the Orders stay (rather than dismiss) the claims (the Receiver sought a stay for several reasons).

For example, in *Dialysis Access Center, LLC v. RMS Lifeline, Inc*. 638 F.3d 367, 372 (1st Cir. 2011), the First Circuit held that "[w]hether an order compelling arbitration is interlocutory or final depends on whether the district court chooses to stay litigation pending arbitration or instead to dismiss the case entirely." "If the district court stays litigation, parties wishing to challenge the case's arbitrability must normally wait until the arbitrator resolves the matter on the merits and the district court enters a final judgment." *Id.* The Eighth Circuit reached a similar conclusion. *See PRM Energy Systems, Inc. v. Primenergy, L.L.C.*, 592 F. 3d 830, 833 n.2 (8th Cir. 2010) (holding that "district court's interlocutory order directing arbitration and staying the proceeding was not an immediately appealable 'final order.' It became 'final' with the meaning of [the FAA], and thus appealable, upon the later dismissal of the claims."). On the other hand, the Seventh Circuit has held that if a court stays but does not dismiss a case and "that if *all* the judge is retaining jurisdiction for is to allow the arbitrator's award to be confirmed without need for the filing of a separate lawsuit, the order to arbitrate is final (final enough might be the better way to put it) and

therefore immediately appealable." *American Int'l Specialty Lines Ins. Co. v. Elec. Data Sys. Corp.*, 347 F.3d 665, 668 (7th Cir. 2003).

In *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1288 (11th Cir. 2005), the Eleventh Circuit applied the framework of *Green Tree* and held that an order compelling arbitration was appealable under the FAA because it plainly disposed of the entire case and left no part of it pending before the district court. The court distinguished between "a stay pending the result of arbitration," which the court found to be interlocutory, and a "final decision with respect to an arbitration," which the court found to be appealable. *Id.* While the Eleventh Circuit focused its conclusion that the pertinent order was a final order on the fact that "[t]he district court order made a final decision that arbitration was compelled under the [FAA]," the district court had dismissed the case rather than stayed it. *Id.* As such, there is potential for an argument that the Eleventh Circuit's *Hill* decision does not mean that an order compelling arbitration is a final appealable order when the court stays rather than dismisses the case pending arbitration.

As previously noted, here the Orders stayed, rather than dismissed, the Receiver's clawback actions in favor of arbitration. It is the Receiver's position that irrespective of whether the Orders stayed or dismissed the cases, the Orders "disposed of the entire case on the merits and left no part of it pending before the court" because there is nothing left for this Court to do but confirm any resulting arbitration awards. *See Green Tree*, 531 U.S. at 80; *American Int'l Specialty Lines*, 347 F.3d at 668. Nevertheless, because of the potential for an argument that the Orders are not final appealable orders, the Receiver has no choice but to treat the Orders as final orders under the FAA. To do otherwise would risk forfeiture of the

Receiver's appellate rights upon the expiration of the December 18, 2011 deadline to file Notices of Appeal.

However, for efficiency the Receiver intends to do the following in these three cases: the Receiver intends to file Notices of Appeal on December 18, 2011. In an abundance of caution, before filing the Notices of Appeal, the Receiver intends to file motions for certification to file interlocutory appeals pursuant to 28 U.S.C. § 1292(b). If the certification motions are granted, then all pertinent matters will be before the Eleventh Circuit simultaneously.[4] Under that scenario, if the Eleventh Circuit finds the Orders are interlocutory, it would still have the Receiver's request to permit an interlocutory appeal for consideration. Without pursuing this process, there could be a significant delay in the resolution of the Receiver's appeals if the Eleventh Circuit determined the Orders were not final orders because after that span of time, the Receiver would have to seek certification from the District Court, and, if granted, then wait for the Eleventh Circuit to decide whether to allow the appeal before addressing the merits. Instead, under the Receiver's process, the questions of whether the Orders are final and, if not, whether to permit interlocutory appeals would be before the Eleventh Circuit simultaneously. The Receiver believes this process could potentially save significant time for a final resolution of the Receiver's appeals.

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[4] Even if Judge Kovachevich does not rule on the certification motions before the Receiver files Notices of Appeal, the filing of the Notices of Appeal will not preclude her from deciding those motions. *See Hoffenberg v. United States*, 2004 WL 2338144, *4 (S.D.N.Y. 2004) ("[E]ven if [plaintiff's] appeals are proper and the Court of Appeals is vested with jurisdiction as to the subject matter of his appeals, [plaintiff's] motion for a certificate of appealability may be considered and decided by this Court in aid of the appellate jurisdiction of the Court of Appeals and in the interest of judicial economy.").

CONCLUSION

For the foregoing reasons, the Receiver respectfully asks the Court to grant him permission to appeal the Orders to the Eleventh Circuit.

LOCAL RULE 3.01(g) CERTIFICATE OF COUNSEL

Counsel for the Receiver has conferred with counsel for the Securities and Exchange Commission (the "**SEC**"), and the SEC does not object to the relief requested in this Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 22, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on November 22, 2011, I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

Arthur Nadel
Register No. 50690-018
FCI BUTNER LOW
Federal Correctional Institution
P.O. Box 999
Butner, NC 27509

s/Gianluca Morello

Gianluca Morello, FBN 034997
gmorello@wiandlaw.com
Michael S. Lamont, FBN 0527122
mlamont@wiandlaw.com
Jared J. Perez, FBN 0085192
jperez@wiandlaw.com
WIAND GUERRA KING P.L.
3000 Bayport Drive
Suite 600
Tampa, FL 33607
Tel.: (813) 347-5100
Fax: (813) 347-5198

Attorneys for the Receiver, Burton W. Wiand