UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No. 8:09-cv-0087-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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UNOPPOSED 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.

Pursuant to Rule 66 of the Federal Rules of Civil Procedure and Local Rule 3.01, Burton W. Wiand, as Receiver, moves the Court for leave to retain the law firm James, Hoyer, Newcomer & Smiljanich, P.A. ("**James Hoyer**") on a contingency basis for the limited purpose of pursuing claims by entities in Receivership against Wachovia Bank, N.A. n/k/a Wells Fargo Bank, N.A. ("**Wachovia**"). The Receiver believes that: (1) pursuing such claims would be in the best interest of the Receivership, (2) James Hoyer would be effective

counsel, and (3) the attached contingency fee agreement is fair and reasonable (*see* **Exhibit A**).[1]

The Wachovia Shadow Accounts

On January 21, 2009, the Court appointed Mr. Wiand as Receiver over Relief Defendants Scoop Real Estate, L.P. ("**Scoop Real Estate**"); Valhalla Investment Partners, L.P. ("**Valhalla Investment Partners**"); Victory IRA Fund, Ltd. ("**Victory IRA Fund**"); Victory Fund, Ltd. ("**Victory Fund**"); Viking IRA Fund, LLC ("**Viking IRA Fund**"); and Viking Fund, LLC ("**Viking Fund**") (collectively, the "**Hedge Funds**"). (Order Appointing Receiver (Doc. 8).)[2] Documents previously filed in this Securities & Exchange Commission enforcement action set forth the details of the fraudulent investment scheme that underlies this action (the "**scheme**"). (*See, e.g.*, Receiver's Ninth Interim Report (Doc. 647).) Arthur Nadel ("**Nadel**") used a series of "shadow" bank accounts at Wachovia to perpetrate his scheme and to conceal it from the staff of the Hedge Fund "managers". Specifically, he used the Wachovia shadow accounts to commingle money invested in the Hedge Funds and to

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[1] Although the Order Appointing Receiver authorizes the Receiver to initiate actions and proceedings for the benefit of Receivership Entities and their investors and creditors without the Court's approval (*see* Doc. 8 ¶ 2), the Receiver brings this matter to the Court's attention and seeks the Court's approval because this matter could be significant to the Receivership and its beneficiaries.

[2] The Court has appointed Mr. Wiand as Receiver over other entities as well, including 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; the Marguerite J. Nadel Revocable Trust UAD 8/2/07; the Laurel Mountain Preserve Homeowners Association, Inc.; the Guy-Nadel Foundation, Inc.; Lime Avenue Enterprises, LLC; A Victorian Garden Florist, LLC; Viking Oil & Gas, LLC; Home Front Homes, LLC; and Traders Investment Club. (*See* Docs. 8, 17, 44, 68, 79, 140, 153, 172 & 454.)

move it in and out of the Hedge Funds' "official" trading accounts to satisfy redemptions after the close of each calendar quarter. Indeed, because regulatory and contractual considerations – designed to prevent money laundering and other illegal activities – prohibited money from being directly transferred between trading accounts, Nadel could not have perpetrated his scheme without the shadow accounts.

The shadow accounts not only included accounts opened in the name of Scoop Real Estate and Victory Fund, which Nadel had authority to do, but also two accounts which Nadel opened in a "doing business as" capacity to mimic the name of the three Hedge Funds of which Neil and Christopher Moody (the "**Moodys**") were the principals. Specifically, Nadel was not an officer, director, or principal of Valhalla Investment Partners, Viking Fund, or Viking IRA Fund and otherwise did not have authority to open accounts on their behalf. As a result, he opened Wachovia shadow accounts for those funds in the name of "Arthur Nadel dba Valhalla Investments" and "Arthur Nadel dba Viking Fund." This alone alerted Wachovia of "red flags" because Wachovia knew of the Hedge Funds and Nadel's role, and knew that Nadel had no legitimate reason whatsoever to open two "dba" accounts to mimic names of Hedge Funds. Indeed, one of the "dba" accounts mimicked the name of Viking Fund, a Hedge Fund that Wachovia knew intimately, including that the Moodys – not Nadel – were the principals of the fund and that Nadel was simply the investment adviser, because, as discussed below, Wachovia invested in it.

Despite the above and numerous additional transactions which raised red flags for Wachovia, Nadel was able to perpetrate his scheme using the Wachovia shadow accounts until the scheme collapsed in early 2009. The additional transactions that raised red flags

included – but were not limited to – Nadel's repetitive periodic transfers of large sums of money between the Wachovia shadow accounts and Nadel's initiation of numerous wires from trading accounts which Wachovia accepted into shadow accounts that bore an account name that was different from the deposit account name attached to the wires. Notably, Nadel was a longstanding customer of Wachovia (and of a predecessor entity), and also for this reason Wachovia knew Nadel's involvement and role in the Hedge Funds. Thus, Wachovia was aware that in the Wachovia shadow accounts Nadel was improperly commingling and transferring money invested with the Hedge Funds and making deposits that should not have been made. Indeed, not only was Wachovia aware, but it was performing all of the transactions.

Wachovia's Additional Tie To The Hedge Funds

As previously noted, Wachovia invested in two Hedge Funds in connection with a financial transaction tied to the returns paid by those Hedge Funds. Those investments were in Scoop Real Estate and Viking Fund, and they were covered with red flags. For example, before perpetrating the scheme, the following relevant information was in the Sarasota County public records – the same county in which the Hedge Funds were based:

- Nadel had been disbarred in New York State for engaging in "dishonesty, fraud, deceit and misrepresentation" by misusing money that had been deposited in his escrow account;
- Nadel had at least eight money judgments entered against him in courts in Sarasota County for failure to pay amounts owed; and
- Nadel had gone through a divorce in which he: was alleged to have defrauded "numerous individuals and/or businesses"; swore he was a "self-employed" "musician" and later unemployed represented to the court that he was "financially impoverished" and had "no assets, no

liquidity, no money in the bank, and no resources of any kind; and represented that he was insolvent."

Following the commencement of the first Hedge Fund, numerous other red flags appeared, including:

- for the 63 months during which Viking Fund was in existence before Wachovia's investment, that fund only reported one month with a negative return (and at -0.31%, it was barely negative) – in contrast, the S&P index had 22 months of negative returns during the same period;

- for the 35 months during which Scoop Real Estate was in existence before Wachovia's investment, that fund only reported one month with a negative return (and at -0.25%, it was barely negative) – in contrast, the S&P index had 11 months of negative returns during the same period;

- for the approximately 21 months during which the pertinent investment in Viking was in place, the fund did not report a single month with a negative return – in contrast, the S&P index had 11 months of negative returns during the same period;

- for the approximately 18 months during which the pertinent investment in Scoop Real Estate was in place, the fund did not report a single month with a negative return – in contrast, the S&P index had 8 months of negative returns during the same period;

- neither Viking Fund nor Scoop Real Estate ever reported a single quarter with a negative return; and

- the purported accountant for Viking Fund, Scoop Real Estate, and the rest of the Hedge Funds had been the subject of an investigation and a cease and desist notice from regulators for improperly identifying himself as a CPA – in reality, his CPA license had been "null and void" since 1989. All of this was in the public records.

In sum, the Receiver believes Wachovia's conduct is actionable on several grounds, and that it is in the best interest of this Receivership to pursue claims against it.[3]

The Receiver's Claims Against Wachovia

On December 21, 2011, Wachovia filed an objection (the "**Objection**") (Doc. 689) to the Receiver's motion relating to claims determinations and the claims process (Doc. 675). The Objection includes three arguments for why, according to Wachovia, the Receiver could not succeed with his claims against it. Although in connection with the matters underlying this motion the appropriate time to address those arguments will be in the Receiver's lawsuit against Wachovia, those arguments are very briefly addressed here since Wachovia has introduced them into the record.

Essentially, Wachovia's three arguments are that: (1) the Receiver lacks standing to assert claims on behalf of investors; (2) the Receiver is barred from asserting damages claims (in contrast to claims to recover transfers of scheme proceeds, such as those in the Receiver's "clawback" suits) by the *in pari delicto* defense; and (3) Wachovia has no liability because it purportedly owed no fiduciary duty to receivership entities. *See* Obj. at 4-8. As an initial and notable matter, the first two arguments are the exact same ones that were made by Holland & Knight, LLP (and that are routinely made by joint tortfeasors under similar circumstances) in its two motions to dismiss the Receiver's claims against it. Those motions were denied, and that case is proceeding to trial. Those arguments had no merit in that case

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[3] As the Receiver did with Goldman Sachs Execution & Clearing, L.P. (*see* Doc. 679), he attempted to amicably resolve these matters with Wachovia without having to resort to litigation and retaining James Hoyer. Those efforts have been completely unsuccessful, and the Receiver has no choice but to proceed with a lawsuit.

and they have no merit here. Without going into specifics, Wachovia's standing argument fails because it misses the point: as noted above and as the Receiver has done in every case he has filed, he will be asserting claims on behalf of Receivership Entities and not on behalf investors or other creditors of the Receivership estate. Unquestionably, the Receiver has standing to assert claims on behalf of Receivership Entities. *See, e.g., Obermaier v. Arnett*, 2002 WL 31654535, *3 (M.D. Fla. 2002) (receiver lacks standing to assert claims on behalf of defrauded investors, but has standing to assert claims on behalf of receivership entities); *Perlman v. Wells Fargo Bank, N.A.*, 2011 WL 5873054, *3-4 (S.D. Fla. 2011).

Wachovia's *in pari delicto* argument also fails for three independent reasons. First, because that defense may not apply at all to equity receivers. *See, e.g., Pearlman*, 2011 WL 5873054 at *7-8 (noting that Florida law is unclear on whether equity receiver is ever subject to *in pari delicto* defense). Second, because even if it does apply to receivers, it does not apply when, like here, the receivership entities on whose behalf claims are brought had innocent stakeholders – here, innocent stakeholders include hundreds of investors, who held equity interests in the Hedge Funds. *See, e.g., Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 551 (Fla. 2d DCA 2003) ("[W]hen the entities in receivership do not include a corporation that has . . . an innocent stockholder, we do not perceive a method to separate the fraud and intentional torts of the insiders from those of the corporation itself."); *In re Wiand*, 2007 WL 963165, *6-7 (M.D. Fla. 2007) (noting that *in pari delicto* defense may bar receivers from pursuing damages claims only in "cases where there is not at least one honest member[] of the board of directors or an innocent stockholder" (internal quotations omitted)). And third, because the Receiver may very well assert fraudulent transfer claims against

Wachovia, which unquestionably are not subject to an *in pari delicto* defense. *See, e.g., In re Wiand*, 2007 WL 963165 at *7 ("[T]he defense of *in pari delicto* does not bar a FUFTA claim by the Receiver . . . .").

Finally, Wachovia's argument relating to its purported lack of fiduciary duties also fails because it too misses the point. Even assuming Wachovia is correct – which it is not for reasons which need not be discussed here – there are numerous other claims the Receiver could assert.[4] *See, e.g., Perlman*, 2011 WL 5873054 at *8-16 (denying Wachovia's motion to dismiss receiver's claims for aiding and abetting breach of fiduciary duty, aiding and abetting conversion, and violations of FUFTA, and noting receiver also had claim for breach of contract). In short, Wachovia's arguments rely on a very incomplete analysis of pertinent legal principles; a full analysis establishes the clear viability of the Receiver's claims against Wachovia.

The James Hoyer Firm & The Receiver's Retention Of Counsel

In selecting counsel to represent him in the matters addressed in this motion, the Receiver communicated with a number of law firms to gauge interest and relevant expertise, and ultimately solicited contingency fee proposals from three of them. Two of the law firms,

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[4] *Perlman* is just one example of an instance in which an equity receiver has been found to have viable claims against a financial institution (indeed, in that case it was Wachovia just as it is here). But that case demonstrates that Wachovia's broad contention in its Objection (at pages 6 and 7) – that dismissal of claims brought by the Bernard Madoff Ponzi scheme liquidating trustee against financial institutions shows that the equity Receiver here has no claims against Wachovia – is plainly untrue. There are significant factual and legal distinctions between the Madoff cases and the Receiver's dispute with Wachovia and also between the statutory trustee in the Madoff scheme (who operates under the Securities Investor Protection Act) and the equity Receiver in the matters here.

including James Hoyer, submitted fee proposals that were substantively identical and the third firm submitted one that was less advantageous to the Receivership. Although the Receiver believes each of the three pertinent law firms are highly qualified to represent the Receiver in this matter, after carefully considering the contingency fee proposals and the law firms' experience, he has selected James Hoyer and, in particular, attorney Terry A. Smiljanich, to represent the Receivership in the efforts discussed in this motion. James Hoyer has acted in a representative capacity in more than eighty class action lawsuits and other complex matters representing plaintiffs alleging fraudulent or deceptive practices, including in lawsuits against financial institutions. Mr. Smiljanich has over 35 years of experience as a criminal and civil litigator, and has served as an Assistant United States Attorney in this district and as Associate Counsel for the United States Senate in its investigation of the "Iran/Contra" affairs. In short, the Receiver believes retaining James Hoyer is in the best interest of this Receivership.

Finally, the Receiver believes pursuing these claims on a contingency basis is also in the best interest of the Receivership. Doing so will avoid a commitment of Receivership cash or capital to litigation against Wachovia other than for payment of costs and fees of any expert or consultant retained by the Receivership. The Receiver, however, does not expect those fees and costs to be significant. As previously noted, the Receiver solicited contingency fee proposals from three separate law firms, and the substantive terms of the contingency fee agreement submitted by James Hoyer were tied for the most advantageous ones. (*See* Ex. A.) The Receiver believes the terms in the attached agreement are fair and

appropriate. (*See* Ex. A.) The Receiver thus requests that the Court grant him leave to retain James Hoyer on a contingency basis pursuant to the terms set forth in Exhibit A.

The Court's Authority

The Court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad. *SEC v. Elliott,* 953 F.2d 1560, 1566 (11th Cir. 1992); *SEC v. First City Fin. Corp.,* 890 F.2d 1215, 1230 (D.C. Cir. 1989). The Court's wide discretion derives from the inherent powers of an equity court to fashion relief. *Elliott* at 1566 (citing *SEC v. Safety Fin. Serv., Inc.,* 674 F.2d 368, 372 (5th Cir. 1982)).

Based on (1) the Court's wide discretion, (2) the Receiver's independent investigation into the matters discussed herein, (3) the skill and competency of James Hoyer to prosecute those matters, and (4) the reasonableness of the contingency fee agreement (Ex. A), the Receiver requests that the Court grant the Receiver leave to retain James Hoyer to pursue claims against Wachovia on behalf of the Hedge Funds (or any other entity that has been placed into this receivership) under the terms of the attached agreement.

LOCAL RULE 3.01(g) CERTIFICATION

The Receiver has conferred with counsel for the Securities and Exchange Commission and is authorized to represent that the Commission does not oppose the relief requested in this motion.

CERTIFICATE OF SERVICE

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

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

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