

EXHIBIT A

CIRCUIT COURT OF SARASOTA COUNTY, FLORIDA
TWELFTH JUDICIAL CIRCUIT

SCOOP REAL ESTATE, L.P.;)
VALHALLA INVESTMENT PARTNERS, L.P.;)
VICTORY IRA FUND, LTD.;)
VICTORY FUND, LTD.;)
VIKING IRA FUND, LLC; and)
VIKING FUND, LLC, through their Court-)
Appointed Receiver, BURTON WIAND, ESQ.,)

Plaintiffs,)

vs.)

HOLLAND & KNIGHT LLP;)
SCOTT R. MACLEOD;)
AND JOHN DOE 1-10,)

Defendants)

CASE NO. 2009-CA-014887-NC

ORDER

THIS CAUSE came before the Court on the 9th day of March 2010. The Court having considered the pleadings, heard argument of counsel, and otherwise being fully advised in the premises, consistent with this Court's March 11, 2010 Order Correcting the Court's Oral Pronouncement of the Ruling in the Above Styled Case, makes the following rulings regarding the pleadings and applicable law:

Regarding the Motion to Dismiss, the Court is required to accept the factual allegations in the Complaint as true, and to consider those allegations and any inferences to be drawn therefrom in the light most favorable to the Plaintiff - the Receiver acting on behalf of the Funds in this case. The Court may grant a motion to dismiss only when the Defendant demonstrates that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The Court will accept as

true all well-pleaded factual allegations and will view them in the light most favorable to the non-moving party.

The threshold is exceedingly low for a complaint to survive a Motion to Dismiss for failure to state a claim. A Plaintiff is not required to allege a specific fact to cover every element or allege with precision each element of a claim.

In *Freeman et al. v. Dean Witter Reynolds, Inc.*, 865 So.2d 543 (Fla. 2d DCA 2003), an appointed Receiver for a company caught conducting an illegal Ponzi scheme and customers of the company brought suit against the investment corporation's agent and law firm for the company's principal, alleging several claims that included aiding and abetting, fraud, breaches of fiduciary duty, and negligence.

In that case, at page 545, it was said that "[t]he amended complaint that the trial court dismissed with prejudice contains many legal conclusions but few specific factual allegations. It has an opening section with 87 paragraphs that are reincorporated in eight counts. The generic paragraphs are not well tailored to fit the legal theories addressed in the counts. On this court's de novo review, we have been tempted to discard all of the bath water but we fear there may be a baby hidden in some corner of the amended complaint."

The instant Complaint is, in the Court's opinion, well-crafted and lists numerous factual allegations which the Court takes as true. They are much more specific than boilerplate generic paragraphs discussed in the *Freeman* opinion.

On page 550 of *Freeman* there is a discussion of *in pari delicto* which says, "[w]e are inclined to believe that the receiver may also pursue certain claims that would be barred by the defense of *in pari delicto* if pursued by the corporation that was placed in receivership. See *Scholes v. Lehmann*, 56 F3d 750, 754 (7th Cir. 1995).

“....Unfortunately, the case law on this subject is not entirely clear and no single case is dispositive. On one hand there are cases that emphasize that the corporation is not human and that the sins of its principals do not transfer to the corporation. Perhaps the most eloquent statement of this position is Judge Posner’s description in *Scholes*. He states that the corporation in such a Ponzi scheme is a mere ‘robotic tool’ or ‘evil zombie’ of the principal” - in this case, Nadel. *Id.* “Once the receiver” - Wiand - “takes over, the corporation is freed from its spell and returned to good citizenship. It can then sue to recover its losses.” *Id.*

“When the entities in receivership do not include a corporation that has at least one honest member of the board of directors or 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.” *Id.* at 551.

Freeman, at page 553, states that “[a]s to count VIII against the Cottrell law firm, we conclude that this claim also relies upon an alleged duty of the law firm to disclose to the corporation the Grazianos’ wrongdoing. For the same reasons that the claims by the receiver against Dean Witter and Mr. Santangelo failed, this claim also fails. At all relevant times, there was no one within the corporation to whom the law firm could report misconduct to change or alter this scheme.”

The Court is not making a finding of fact but it goes without saying that in the instant case, Holland & Knight alleged in its Memorandum of Law, Part C, pg 11, that Nadel and the Moody’s are inseparable from the Plaintiffs. If that allegation proves to be true, as in *Freeman*, then at all relevant times, there was not an honest or innocent member of the entities Board, to whom Holland & Knight could report any misconduct to change or alter the alleged scheme. However, we have innocent stockholders here.

This case deals with whether or not the Plaintiffs' claims that Holland & Knight breached a fiduciary duty and neglect, professional malpractice, can survive the Motion to Dismiss.

The Receiver in *Freeman* did not allege "any basis to conclude that the law firm had a legal obligation to report matters to a regulatory agency or to law enforcement." *Id.* at 553. That is not the case at all in the instant case where such allegations do appear.

The Plaintiff has alleged in this case, that there are conflicts of interest, which are cited by the Plaintiff to express and to justify the claims brought by the Plaintiff.

"The receiver does not allege," in *Freeman*, "any basis to conclude that the law firm had a legal obligation to report matters to a regulatory agency or to law enforcement" and therefore affirmed the trial court's dismissal of each of the receiver's claims with prejudice. *Id.*

It is alleged in this Complaint, in quite a few paragraphs starting off with ¶71, that Nadel was not a registered investment advisor, but Holland & Knight as lawyers for the investment funds failed to either advise the investment funds or security regulators that Nadel and/or Scoop Management were legally required to so register and were therefore operating illegally as unregistered investment advisors.

Other paragraphs, ¶72, talking about Michael Zucker as CPA; ¶79, during the course of the representation of the investment funds H&K received information that the funds were being illegally sold and marketed and the selling and compensation was being illegally and improperly paid to an individual named Donald Rowe and/or various entities that Rowe solely owned and controlled; ¶80, knowing that violations of the security laws had occurred regarding the sales and distribution of shares in the

investment funds, Holland & Knight, rather than reporting the violations to the appropriate authorities and seeking a rescission of the investments on behalf of the Funds and their investors entered into a settlement with Mr. Rowe whereby he continued to receive improper compensation thinly disguised as public relations payments; ¶82, lists many different allegations that would support the claims put forth by the Plaintiff that there was a breach of fiduciary duty by Holland & Knight, a valid claim for negligence and/or legal misconduct, and the Court accepts all of these allegations as true.

Regarding the specific scienter requirement of aiding and abetting, even accepting everything as alleged in the complaint as true, the Court finds it lacks sufficient elements of bad faith. Those counts will be dismissed, but not with prejudice.

For the foregoing reasons, the Court's rulings are as follows:

1. The Receiver has standing to bring his claims.
2. The Defendants' Motion to Dismiss is DENIED as to Counts I and II of the Amended Complaint, for Breach of Fiduciary Duty and Negligence/Professional Malpractice.
3. The Defendants' Motion to Dismiss is GRANTED, without prejudice, as to Counts III and IV of the Amended Complaint, for Common Law Aiding and Abetting of Fraud and Common Law Aiding and Abetting of Breach of Fiduciary Duty.
4. Plaintiffs have ten (10) days from the date of this Order to notify Defendants whether Plaintiffs will file a Second Amended Complaint. If Plaintiffs notify Defendants that Plaintiffs will not file a Second Amended Complaint, Defendants have twenty (20) days

from the date such notice is received to answer the Amended Complaint as to Counts I and II. If Plaintiffs notify Defendants that they will file a Second Amended Complaint, Plaintiffs shall serve and file their Second Amended Complaint within twenty (20) days of the date of this Order. Defendants shall have twenty (20) days to respond to the Second Amended Complaint.

5. The parties' unopposed requests for judicial notice of the "Complaint for Injunctive and Other Relief" filed on January 10, 2010 as *Securities and Exchange Commission v. Neil V. Moody and Christopher D. Moody*, Case No. 8:10-cv-00053-VMC-TBM (M.D. Fla. 2010) and Arthur G. Nadel's Criminal Indictment and Written Plea Agreement are GRANTED.
6. The Court defers ruling on the Plaintiff's Motion to Expedite which was not argued due to time constraints.

DONE and ORDERED in Chambers in Sarasota County, Florida this

30 day of March 2010.



Rick De Furia
Circuit Judge

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