

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

Relief Defendants.

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PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S  
MEMORANDUM ON JURISDICTION  
PURSUANT TO THE COURT'S FEBRUARY 3, 2012 ORDER

**I. Introduction**

Wells Fargo Bank's Memorandum on Jurisdiction in Response to the Court's February 3, 2012 Order attempts to create a jurisdictional conflict where one neither exists nor is likely. For three years, this Court and the Receiver it appointed have overseen and conducted the receivership proceedings with both the awareness and cooperation of the criminal court in the Southern District of New York and the United States Attorney ("USAO") for the Southern District. This Court, the Receiver, the Securities and Exchange Commission, the Southern

District, and the USAO all understood that both cases could operate in parallel, with coexisting jurisdiction.

From almost the beginning of the criminal case against Arthur Nadel, the Southern District has involved the Receiver – twice even ordering the Receiver’s participation at key points. The Southern District and USAO employed this concurrent jurisdiction to resolve the Nadel criminal case while allowing the Receiver, as an extension of this Court in the Commission’s suit, to help Nadel’s victims by marshaling assets for their benefit. Far from perceiving any conflict, jurisdictional or otherwise, the Southern District and the USAO recently implemented a stipulated order removing Wells Fargo’s North Carolina parcel from the forfeiture order, and the USAO now indicates it will seek to vacate the entire forfeiture order by next week.

Contrary to Wells Fargo’s contention, this Court does not have to decide what *might* have happened *if* the Southern District or USAO had tried to implement the Southern District’s forfeiture order in a way that caused a jurisdictional or other dispute between the Courts or between the Receiver and the USAO. Even the theoretical possibility of a clash between the two Courts’ jurisdictions is about to vanish, and since receiverships are creatures of equity intended to have flexibility to achieve fair and effective results, the Court should permit Wells Fargo and the Receiver to resolve their claims dispute on the merits within this action.

## **II. Both Courts Have Parallel Jurisdiction.**

This Court and the Southern District derive jurisdiction from different sources, and, as demonstrated by the Southern District and the USAO, this leads to no conflict. On the contrary, the Southern District acknowledged the Receiver’s mission by explicitly including the Receiver

in key parts of the criminal proceedings. The USAO not only had no objection, but communicated extensively with the Receiver on asset and evidence issues.

This Court is “vested with complete jurisdiction and control of all property” in the receivership estate, even if that property is “situated in different districts.” 28 U.S.C. § 754. This means the Court’s jurisdiction over the North Carolina property claimed by Wells Fargo is “as if the property lay wholly within” the Middle District of Florida. 28 U.S.C. 1692. *See also American Freedom Train Foundation v. Spurney*, 747 F.2d 1069, 1073 (1st Cir.1984) (Sections 754 and 1692 give “the appointing court jurisdiction over property . . . wherever such property may be located”). This is consistent with the traditional approach of the court having *in rem* jurisdiction over receivership assets, with the Receiver’s possession of those assets actually “the possession of the court, for the benefit of the parties to the suit and all concerned.” *Ex parte Tyler*, 149 U.S. 164, 181 (1893). *See also Barton v. Barbour*, 104 U.S. 126, 136-37 (1881) (noting power of courts to appoint receivers over property in their jurisdiction and restricting suits against receivers because such actions make it “impossible for the court to discharge its duty to preserve the property and distribute its proceeds . . . .”); *Federal Sav. and Loan Ins. Corp. v. PSL Realty Co.*, 630 F.2d 515, 521 (7th Cir. 1980) (property held by receiver is in legal custody of the appointing court, removed from other courts’ jurisdiction, and remains with court if receiver is discharged without disposing of the asset).

Simultaneously, the Southern District has had *in personam* jurisdiction over Nadel. *U.S. v. Dean*, 835 F. Supp. 1383, 1394 (M.D. Fla. 1993) (“criminal forfeiture is an *in personam* action against the alleged criminal”). *See also United States v. Vampire Nation*, 451 F.3d 189, 198-201 (3d Cir. 2006) (discussing criminal forfeiture orders and acknowledging their *in personam* jurisdictional basis); *United States v. Day*, 524 F.3d 1361, 1378 (D.C. Cir. 2008) (“criminal

forfeiture is a sanction against the individual defendant rather than a judgment against the property itself . . . . [with] the sanction following the defendant). These *in personam* forfeiture proceedings proceeded in parallel with the *in rem* receivership proceedings in this Court. See generally, *Penn General Casualty Co. v. Pennsylvania ex rel. Shnader*, 294 U.S. 189, 195-196 (1935) (*in personam* and *in rem* actions have concurrent jurisdiction). The Southern District action, including the forfeiture proceedings, determined Nadel's criminal liability, the amount Nadel owed, and whether (and when) Nadel forfeited to the United States any right he had in property under this Court's jurisdiction. See *Riehle v. Margolies*, 279 U.S. 218, 223-24 (1929) (comparing and distinguishing *in rem* receivership and other, *in personam* proceedings, and finding no problem in the two types of proceedings progressing simultaneously). The receivership court "deals directly with the property," and fixes "the time and manner of distribution." *Id.* at 224.

That is exactly what is happening here. The criminal court determined through its judgment against Nadel that he forfeited his rights in property under this Court's jurisdiction to the United States. *U.S. v. Nadel*, 1:09-MJ-00169-UA, (S.D.N.Y. Dec. 2, 2010, D.E. 78, ¶12). This Court still has to determine the ultimate disposition of the property; the United States would be but one participant in that process if the USAO chose to complete the forfeiture litigation and obtain a judgment it could enforce (and, as discussed above, the USAO has indicated it will not do this). The United States' acquisition of the "right to share in property" under this Court's control would "in no way interfere with the possession and control" of this Court. *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 478 (1936); *Riehle*, 279 U.S. at 224. As the Supreme Court has recognized, "[t]he establishment of a claim constituting the basis of the right

to participate in the distribution of property in the possession of one court is often conclusively determined by a judgment obtained in another court.” *Id.* at 225.

### **III. There Was No Jurisdictional Clash Because the Southern District and USAO Knew About and Included the Receiver in Their Proceedings**

The USAO and Southern District have known since the almost the beginning of the criminal case that this Court had appointed a Receiver, and that he was busily seeking assets funded by Nadel’s crimes. As the Receiver’s memorandum details, starting early in the Nadel prosecution, the Receiver had in-depth communications with the USAO regarding assets. It is also significant the Southern District included the Receiver in Nadel’s criminal case, focusing on the Receiver’s hunt for assets.

Early in the Nadel prosecution, as reflected in minutes entered on the criminal docket, the Southern District ordered Nadel as part of his bail conditions to “cooperate with the receiver and the SEC to *trace all of the financial transactions, to uncover any assets and recover any assets.*” *U.S. v. Nadel*, (February 25, 2009) (emphasis added). Several months later, the Southern District requested the Receiver to send a representative to Nadel’s bail hearing and asked the USAO to inform the Receiver of that order. *Id.* at D.E.30 (July 9, 2009). The Southern District also addressed a dispute between the USAO and the Receiver over the procedure and costs for providing the USAO copies of the extensive documentary evidence the Receiver had obtained. *Id.* at D.E. 36 (September 9, 2009). Finally, Nadel included receivership reports and filings from this Court in his own submissions to the Southern District. This also deflates Wells Fargo’s description of a “secret” agreement between the Receiver and USAO, since the Southern District and the USAO openly included the Receiver in the criminal proceedings, with no doubt as to the Receiver’s ongoing role in seeking assets.

There is no jurisdictional conflict. Not only did both courts overseeing litigation against Nadel preside over their cases at the same time, but the Southern District approved of the Receiver's pursuit of assets.

Furthermore, the USAO's actions indicate a lack of any jurisdictional conflict. As in other cases, if the USAO pursued the forfeiture proceedings and obtained a judgment, it would be entitled to "enforce a right to specific property in the possession of a receiver . . . upon application to the court which appointed [the receiver]." *Riehle*, 279 U.S. at 224. The United States could then enforce its forfeiture order by asserting a claim against the receivership estate in this Court or taking some other action to seize the assets its forfeiture judgment covers. *See Wolff v. Cash 4 Titles*, 351 F.3d 1348 (11th Cir. 2003) (plaintiffs who obtained RICO judgment in Florida district court against defendants still needed to apply to receivership court in Illinois to enforce that judgment against defendants' assets); *SEC v. United Fin. Group, Inc.*, 576 F.2d 217, 222-23 (9th Cir. 1978) (holding that California state court's judgment of liability "cannot control the manner or timing of distributions by the receivership court," therefore the receivership court must "fashion appropriate procedures for payment" of the judgment).<sup>1</sup>

Despite the ability to enforce the forfeiture order, the Southern District and the USAO refrained from doing so, preferring to allow the Receiver to collect assets to benefit investors. The USAO saw no inconsistency between the Receivership proceedings and its ability to address the forfeiture. Seeing no need to continue parallel forfeiture and receivership proceedings, the

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<sup>1</sup> Even considering the "relation-back" doctrine Wells Fargo cites, the government would have to pursue additional legal steps before it was entitled to possession of the North Carolina parcel after entry of the forfeiture order. "[A]dditional judicial proceedings were then necessary to reduce [the Government's] ownership interest to a right to possession" because while "the forfeiture takes effect immediately upon the commission of the act," the right to the property then vests in the United States, although their title is not perfected until judicial condemnation . . ." *U.S. v. Bailey*, 419 F.3d 1208, 1217 (11<sup>th</sup> Cir. 2005). As discussed above, the USAO chose *not* to take such actions, since it knew the Receiver already controlled the relevant assets.

USAO is now preparing to seek permission to vacate the forfeiture order.<sup>2</sup> Additionally, when the Southern District asked the USAO to comment on whether the Southern District or this Court was more appropriate to adjudicate the status of the Wells Fargo North Carolina property, the USAO stipulated to removing that parcel from the Southern District's forfeiture order and concluded it was "not aware of any reason for the status of the property to be further adjudicated before" the Southern District. *U.S. v. Nadel*, D.E. 94 (February 12, 2012). The cases against Nadel in the Southern District and this Court have progressed with parallel jurisdiction, and with the USAO seeking to vacate the forfeiture order there, there is now not even a possibility of a jurisdictional dispute.

#### **IV. The Court Should Allow Receivership Claims to Proceed on their Merits Based on the Imminent Vacating of the Forfeiture Order and the Equitable Nature of Receiverships.**

Even assuming hypothetically there once had been an incongruity between the jurisdictions of the two Courts presiding over Nadel's cases, this Court should reject Wells Fargo's contention that the Receiver's actions were a nullity. Now that the USAO not only has removed Wells Fargo's parcel from the ambit of the forfeiture order but is seeking to vacate the forfeiture order completely, Wells Fargo's approach would epitomize putting form over substance. Neither the Southern District nor the USAO ever implemented the forfeiture order, and to now force the Receiver to revisit all the actions he took to marshal, preserve, and liquidate assets would cause a huge waste of money more rightfully distributed to those investors Nadel defrauded.

A Receiver is a neutral court officer appointed by the district court, which has supervision over the Receiver and jurisdiction over the property in receivership. *Atlantic Trust*

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<sup>2</sup> On February 22, 2012, undersigned counsel confirmed the USAO's position with Assistant United States Attorney Jeffrey Alberts, who explained the only reason he has not sought such an order is that he has been seriously ill for the last few days.

*Co. v. Chapman*, 208 U.S. 360, 371 (1908); *Tyler*, 149 U.S. at 181; *American Freedom Train Foundation v. Spurney*, 747 F.2d at 1073; *see also*, 1 Clark on Receivers, § 11(a) (3d ed. 1959) (“A receiver appointed by the court is an arm or hand of the court”). District Courts have “broad powers and wide discretion to determine relief in an equity receivership . . .” derived “from the inherent powers of an equity court to fashion relief.” *SEC v. Elliot*, 953 F.2d 1560, 1566 (11<sup>th</sup> Cir. 1992) (citations omitted). “The government’s and parties’ interests in judicial efficiency underlie the use of a single receivership proceeding.” *Id.* (citing *Smith v. American Indust. Research Corp.*, 665 F.2d 397, 399 (1<sup>st</sup> Cir. 1981)). In determining if the receivership process adequately protects a claimant’s interests, courts “look at the actual substance, not the name or form, of the procedure . . . .” *SEC v. Elliot*, 953 F.2d at 1567. The Court can ensure Wells Fargo enjoys all the procedural protections to which it is entitled while avoiding a pointless drain on the investor funds the Receiver has been augmenting for three years.

WHEREFORE, the Commission urges the Court to overrule Wells Fargo’s jurisdictional objection, and consider the claims disputes on the merits.

February 23, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 23, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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I further certify that on the same date I mailed the foregoing document and the notice of electronic filing by U.S. Mail or as indicated below to the following non-CM/ECF participant:

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