UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

ORAL ARGUMENT REQUESTED

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

Defendants,

CASE NO.: 8:09-0087-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.
_____/

MOTION OF WELLS FARGO BANK, N.A. (I) TO DISQUALIFY RECEIVER, (II) TO DISQUALIFY WIAND GUERRA KING P.L. AND (III) TO DISALLOW ALL FEES PAYABLE TO THE RECEIVER AND HIS COUNSEL

Wells Fargo Bank, N.A. ("Wells Fargo"),[1] a valid secured creditor and party in interest herein, hereby files this motion (the "Motion") seeking (i) to disqualify Burton W. Wiand as Receiver, (ii) to disqualify the law firm of Wiand Guerra King P.L. ("WGK") as counsel to the Receiver, and (iii) to disallow, at minimum, all fees payable

[1] Wells Fargo is successor by merger to Wachovia Bank, N.A.

to the Receiver and WGK for any work related to Wells Fargo in this case. In support of this Motion, Wells Fargo states as follows:

SUMMARY OF THE ARGUMENT

Burton W. Wiand, Esq. and his law firm WGK should be disqualified from this case for conflicts of interest with Wells Fargo and its affiliate Wells Fargo Advisors, LLC ("WFA"), who were significant clients of WGK until mid-February 2012 when the law firm was terminated for conflicts of interest. Significantly, the Receiver failed to disclose these conflicts of interest to the Securities and Exchange Commission and, until recently, this Court. Specifically, from December 2009 until early February 2012, WGK was representing Wells Fargo and WFA in a number of significant matters. In fact, over the last two years, Wells Fargo and its affiliate paid WGK approximately **$1.04 Million** for services rendered. Wells Fargo believes the Receiver and WGK's failure to disclose these representations and their taking materially adverse positions against Wells Fargo in this case violates Wells Fargo's conflict of interest policies and the Florida Rules of Professional Conduct, to which both the Receiver and WGK are bound. More importantly, the Receiver's failure to disclose his firm's ongoing representation of Wells Fargo and its affiliate violates the much higher fiduciary responsibilities of a court-appointed receiver, which requires disclosure of any facts that would demonstrate even the mere appearance of impropriety, whether or not any actual conflict exists. Wells Fargo submits that the Receiver and WGK's failure to disclose these ongoing representations and their conflicts of interest herein warrant disqualification as Receiver

and counsel for Receiver in this case.[2] In addition, the Court should deny any additional fees payable to the Receiver and WGK related to their work on matters related to Wells Fargo, and require them to disgorge any amounts previously paid in connection with these matters.

BACKGROUND

A. The Receivership Case

On January 21, 2009, the Securities and Exchange Commission (the "Commission") initiated this action to prevent the defendants from further defrauding investors of hedge funds operated by them.

That same day, the Commission filed an emergency motion seeking the appointment of a receiver (Doc. No. 6). In that motion, the SEC indicated that "Mr. Wiand has informed the Commission that no conflict of interest exists in this matter, and he is ready, willing and able to serve as Receiver." *Id.* at p. 3 (emphasis supplied).[3] Based upon these and other representations, the Court entered an order appointing Burton W. Wiand as Receiver for Defendants Scoop Capital, LLC and Scoop Management, Inc. and Relief Defendants Scoop Real Estate, L.P.; Valhalla Investment Partners, L.P.;

[2] In the event that this Court concludes that the Receiver and/or WGK are barred from continuing in this action by a conflict of interest, then the Court and the parties should investigate whether that conflict has tainted the law firm of James, Hoyer, Newcomer & Smiljanich, P.A. (the "James Hoyer Firm"). Based on the timing and depth of the complaint filed by the James Hoyer Firm and the fact that the Receiver remains in place and continues to direct the litigation against Wells Fargo in this Court, as well as in connection with the "shadow account" case filed in the Circuit Court for Sarasota County on February 9, 2012 (the "Complaint"), the Receiver and WGK have presumably exchanged, at minimum, significant documents, communications, and attorney-work product with the James Hoyer Firm, until at least early February 2012. In fact, given the specificity and detail in the Complaint, it appears highly likely that a significant amount of work on the Complaint was performed by the Receiver and WGK.

[3] At the time the Receiver was appointed, Mr. Wiand was a partner at the law firm of Fowler White Boggs, one of Wells Fargo's largest outside counsel in Florida. Upon information and belief, the majority of attorneys at WGK are also transplants from Fowler White Boggs.

Valhalla Management, Inc.; Victory Fund, Ltd.; Victory IRA Fund, Ltd.; Victory IRA Fund, LLC; Viking Fund, LLC; and Viking Management, LLC (the "Order Appointing the Receiver"). (*See generally* Order Appointing Receiver (Doc. No. 8)). The Court subsequently granted several motions to expand the scope of the Receivership Entities to include other entities owned or controlled by Arthur Nadel ("Nadel"). (*See generally* Doc. Nos. 17, 44, 68, 81, 153, 172, 454).

B. Wells Fargo's Status as a Significant Secured Creditor and Party in Interest Herein

Wells Fargo and the other Secured Creditors (defined below) have valid secured claims against, and security interests in, the following properties: (1) 841 South Main Street, Graham, North Carolina (the "Rite Aid Property"); (2) approximately 420 acres near Asheville, North Carolina in Buncombe and McDowell counties (the "Laurel Mountain Property"); (3) 30393 Upper Bear Creek Road, Evergreen, Colorado (the "Evergreen Property"); and (4) 464 Golden Gate Point, Unit 703, Sarasota, Florida (the "Sarasota Property").

Well Fargo is a first priority secured lender with respect to the Rite Aid Property and is currently owed approximately $3,147,427.00. Wells Fargo is a first priority secured lender, pursuant to a deed of subordination dated May 2, 2008, with respect to the Laurel Mountain Property and is currently owed approximately $2,046,256.50. Wells Fargo is loan servicer for Freddie Mac on a first priority secured loan with respect to the Evergreen Property and Freddie Mac is currently owed approximately $389,407.16. Wells Fargo is loan servicer for Bank of America, N.A. ("BOFA") on a first priority secured loan with respect to the Sarasota Property and BOFA is currently owed

approximately $1,183,530.66. Lastly, Wells Fargo is a second priority secured lender with respect to the Sarasota Property and is owed approximately $1,060,812.55.[4] As a result of these loan transactions, Wells Fargo is a significant secured creditor and party in interest in this case, and is responsible for enforcing over **$7.8 Million** in loans collateralized by properties in the possession of the receivership.

C. WGK's Simultaneous Representation of Wells Fargo and the Receiver

From WGK's inception in mid-November 2009 through February 2012, WGK represented Wells Fargo and WFA in connection with approximately **twenty-eight (28)** matters.[5] These matters included, but were not limited to, arbitration proceedings, securities actions, general litigation, legal inquiries and subpoenas, commercial lending transactions, and brokerage account matters. During this time, Wells Fargo and its affiliate paid WGK approximately **$1.04 Million** for services rendered. *See* Heiser Decl., ¶3. Thus, Wells Fargo and/or its affiliate have been clients of WGK for over two years (and since the firm's formation) and their attorney-client relationship has involved a number of significant and costly representations. During all relevant times, WGK also represented the Receiver and, as discussed more fully below, each has taken materially adverse positions against Wells Fargo in this case.

D. Discovery of the Conflict of Interest by Wells Fargo

The fact that Wells Fargo was a significant secured creditor of the receivership estate has been known by the Receiver for at least three years. *See, e.g.*, Doc. No. 44

[4] Freddie Mac, BOFA and Wells Fargo are collectively referred to herein as the "Secured Creditors".

[5] *See* Declaration of Kevin J. Heiser, Senior Counsel, Legal Department, at Wells Fargo Bank, N.A., in support of the Motion (the "Heiser Decl."), ¶3, a copy of which is annexed hereto as Exhibit A.

(order dated February 11, 2009 expanding receivership to include Laurel Mountain Property); Doc. No. 103-2 (Receiver's First Interim Report dated April 3, 2009, at pp. 24, 32 -- discussing encumbrances on Laurel Mountain and Rite Aid Properties); Doc. No. 713-6 (letter dated March 17, 2009 from former counsel to Wells Fargo to the Receiver discussing promissory note and deed of trust regarding the Laurel Mountain Property). Nonetheless, the Receiver chose to ignore these facts; instead deciding not to bring these significant potential conflicts to the Court's attention until recently. However, the Receiver and WGK's conflicts of interest were not fully realized by Wells Fargo until approximately December 2011/January 2012, after WGK filed the Receiver's claims determination motion (Doc. No. 675) and explained in some detail for the first time the purported "shadow account" claims the Receiver intended to pursue against the bank. *See* Heiser Decl., ¶5. On investigation of facts regarding these types of claims, Wells Fargo's internal counsel became aware for the first time that WGK was representing Wells Fargo and WFA, and at the same time asserting positions directly adverse to Wells Fargo. *Id.* Thereafter, internal counsel for Wells Fargo raised the issue to WGK in a series of telephone calls culminating in WGK's request for waiver and Wells Fargo's denial of that request.[6] *Id.*

[6] It should be noted that a client's awareness of a conflict and subsequent inaction do not constitute informed consent. *See Florida Ins. Guar. Ass'n v. Carey Canada, Inc.*, 749 F. Supp. 255, 260 (S.D. Fla. 1990). In *Carey Canada*, a law firm wrote a letter to a client's employee explaining a potential conflict of interest, but failed to detail the nature and scope of the conflict. The court held that the client was not precluded from raising the conflict issue a year later. "Consent can come only after consultation -- which the rule contemplates as full disclosure . . . . [The lawyer] must explain to them the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to [withhold consent]." *Id.* Similarly, a client's failure to object to conflicting representation does not constitute consent. *See Florida Bar v. Dunagan*, 731 So. 2d 1237 (Fla. 1999). It is not the client's responsibility to raise the issue of the conflict because consent is the responsibility of the lawyer undertaking the representation. *See Snyderburn v. Bantock*, 625 So. 2d 7, 14 (Fla. 5th DCA 1993). Here, despite the

E. Wells Fargo's Policy Regarding Legal Conflicts of Interest

Wells Fargo's legal department has adopted a policy regarding legal conflicts of interest resulting from a law firm's current or former representation of Wells Fargo, including the subsidiaries of Wachovia Corporation. *See* Heiser Decl., ¶4; Policy Regarding Legal Conflicts of Interest, Revision of October 14, 2010, a copy of which is annexed hereto as Exhibit B (the "Policy"). The purpose of the Policy is to provide Wells Fargo's general consent to some common conflicts of interest (none of which are applicable here), but more importantly, to identify those conflicts of interest to which Wells Fargo will not consent and to provide a procedure for requesting consent to other conflicts. *See id.*; Policy, Introduction. Wells Fargo requires that its outside firms and lawyers who represent Wells Fargo adhere to this policy. *Id.* Pursuant to the Policy, "a law firm must obtain Wells Fargo's specific consent before commencing any representation which would result in a Conflict of Interest for the firm, whether the Conflict of Interest arises as the result of a Transaction or Dispute." Policy, ¶1[7]; *see also* Heiser Decl., ¶4. The Policy even specifies the required format of any such request. *Id.* ("Any request for specific consent must be submitted by e-mail to the Wells Fargo Conflicts Counsel identified on Exhibit D for the Wells Fargo Line of Business which is involved in the Transaction or Dispute causing the Conflict of Interest, and be

---

numerous and substantial conflicts of interest, WGK did not seek a waiver until January 13, 2012 (*see* Section I *infra*), and, as noted, Wells Fargo did not fully realize these conflicts until in or about December 2011/January 2012.

[7] Under the Policy, "Conflict of Interest" "means a conflict of interest arising under any applicable rules of professional conduct as a result of a law firm's past, present or proposed representation of Wells Fargo or an Adverse Party." *See* Policy, Exhibit "A". "Dispute" "means a pending, threatened, or likely litigation, arbitration, bankruptcy, adversary proceeding, contested motion, alternative dispute resolution process or loan workout, including, without limitation, any foreclosure or collection action." *Id.*

substantially in the form of Exhibit B.") (emphasis in original); Policy, Exhibit "B" thereto.

F. The Receiver's Lawsuit Against Wells Fargo Securities International, Ltd.

On January 29, 2010, the Receiver filed an amended complaint against Wells Fargo Securities International, Ltd. ("Wells Fargo Securities International") f/k/a Wachovia Securities International, Ltd. and Carrelage Multi-Strategy Offshore Fund, Ltd. ("Carrelage") to recover sums received by the defendants in excess of the funds the defendants invested in two Nadel-related hedge funds (the "Carrelage Action"). On June 9, 2011, the Receiver filed a motion to approve settlement agreement among the Receiver, Wells Fargo Securities International and Carrelage (Doc. No. 639), which was approved by this Court the next day (Doc. No. 640). Pursuant to the settlement agreement, among other things, the defendants agreed to pay the Receiver $426,610.55 in resolution of the Carrelage Action. While WGK did not represent Wells Fargo Securities International at that time, it did represent Wells Fargo (as of May 2010) and WFA. WGK did not ask Wells Fargo for a waiver despite the apparent conflict. It should be noted that Wells Fargo Securities International was only a nominal defendant; the real dispute was with one of its customers.

G. The Receiver's Claims Determination Motion

On December 7, 2011, the Receiver filed *Receiver's Unopposed Motion to (1) Approve Determination and Priority of Claims, (2) Pool Receivership Assets and Liabilities, (3) Approve Plan Distribution, and (4) Establish Objection Procedure* (Doc. No. 675). Pursuant to that motion, the Receiver and WGK asserted materially adverse

positions against their client, Wells Fargo, specifically seeking to disallow the bank's secured claims related to the Rite Aid Property. *Id.* at pp. 55-59. The Receiver and WGK also asserted materially adverse positions against Wells Fargo regarding purported "shadow" account claims and the bank's alleged investment in two Nadel-related hedge funds. *Id.* The Motion also implicitly seeks to disallow the secured claims related to the Evergreen, Sarasota, and Laurel Mountain Properties, because no proofs of claim were filed with respect to those secured claims. In subsequent pleadings the Receiver has clearly taken the position that Wells Fargo's claims should be disallowed in their entirety because no proofs of claim were filed in this case.[8] (*See* Doc. Nos. 712, 714, 728, 755).

Specifically, although not intended as an exclusive list, the Receiver has asserted the following, which are materially adverse to Wells Fargo: (i) that "Wachovia Bank was, at a minimum, on inquiry notice of fraud," *see* Doc. No. 675, p. 55; (ii) "Wachovia Bank, however, did not comply with its obligations and thus did not act in good faith. Indeed, by honoring and executing all of these transactions Wachovia Bank actively helped Nadel perpetrate the scheme and convert and misappropriate scheme proceeds." *see* Doc. No. 675, p. 57; (iii) that Wachovia Bank's claims should be equitably subordinated if not denied, *see* Doc. No. 675, p. 59, n.20; (iv) "Receiver recommends that the Court deny Wells Fargo's claim due to, among other reasons, Wells Fargo's knowledge of 'red flags' and other improprieties and its consummation of numerous improper transactions which were part of Nadel's scheme" *see* Doc. No. 714, p. 2; (v) "Wachovia's conduct

[8] However, the Receiver recently indicated in a pleading with this Court that he intends to remain current on the Freddie Mac loan with respect to the Evergreen Property and to satisfy the loan when property is sold. *See* Doc. No. 755, n.1.

constitutes, at a minimum, severe recklessness rather than mere negligence" *see* Doc. No. 714, p. 7; (vi) "Wells Fargo's claimed security interests are void" *see* Doc. No. 728, p. 3; (vii) "Wells Fargo cannot show that it acted in 'good faith,' thus the transfer to it of its claimed security interests were fraudulent" *see* Doc. No. 728, p. 4; and (viii) "Wells Fargo's extensive relationship with Nadel's scheme overlaps with Wells Fargo's admitted willful failure to implement federally mandated policies and mechanisms to stop money-laundering activities such as those Nadel consistently used to perpetrate his scheme." *see* Doc. No. 728, p. 4.

Finally, the Receiver has asserted that he had a "private understanding"[9] with the United States Attorney's Office for the Southern District of New York, that effectively rendered the forfeiture proceeding in New York mere window dressing, thus rendering any claim filed therein regarding the Laurel Mountain Property meaningless. The Court has not yet ruled on the Receiver's claims determination motion, nor has it addressed the jurisdictional issues regarding the pending forfeiture action.

H. The Receiver's Motion to Sell the Rite Aid Property

On January 6, 2012, the Receiver filed a *Verified Motion to Approve Sale of Real Property Located in Graham, Alamance County, North Carolina* (the "Sale Motion") (Doc. No. 706). Pursuant to the Sale Motion, the Receiver sought to sell the Rite Aid Property at a price significantly below market value ($2.4 Million) and well below the total amount of Wells Fargo's secured claim, which currently aggregates approximately

[9] Existence of this "private understanding" came to light for the first time in the Receiver's Reply in Opposition to TRSTE's and Wells Fargo's Objection (Doc. No. 712). Under this "private understanding" the government would essentially feign a forfeiture proceeding (implicitly without the Court's knowledge) to serve the interests of the Receiver.

$3,147,427.00. Prior to filing the Sale Motion, Wells Fargo specifically advised the Receiver and his counsel that a sale of the Rite Aid Property under these circumstances was inappropriate. Nonetheless, the Receiver filed the Sale Motion, yet again taking a materially adverse position against a then current client of his law firm, WGK.

On January 19, 2012, Wells Fargo filed a comprehensive objection to the Receiver's Sale Motion (the "Objection") (Doc. No. 718), asserting that motion should be denied. On that same date, Wells Fargo filed a motion to lift the Court's injunction against the Rite Aid Property or, in the alternative, to compel the Receiver the abandon the Rite Aid Property to Wells Fargo (the "Abandonment Motion") (Doc. No. 719).

On January 24, 2012, the Court denied the Sale Motion because the Receiver failed to comply with the mandated procedural safeguards set forth in 28 U.S.C. § 2001(b), which, among other things, require the Court to appoint three disinterested persons to appraise the property prior to approving any private sale (Doc. No. 726).

On February 1, 2012, the Receiver filed a response in opposition to the Abandonment Motion (Doc. No. 728), again taking materially adverse positions against the bank while simultaneously representing Wells Fargo and its affiliate on significant other matters. The Court has not yet ruled on the Abandonment Motion.[10]

[10] On February 8, 2012, the Receiver filed a motion to appoint professionals pursuant to 28 U.S.C. § 2001(b) to appraise the Rite Aid Property and facilitate the sale thereof (Doc. No. 739). After the parties conferred, on February 14, 2012, the Receiver advised Wells Fargo that he rejected each and every one of the appraisers recommended by the bank. In this regard, Wells Fargo requested that the Receiver include with his submission to the Court the fact that Wells Fargo suggested the alternative appraisers in lieu of two of the Receiver's suggested appraisers, and that the Receiver rejected Wells Fargo's submissions. For whatever reason, the Receiver failed to include this information with his filing with the Court (Doc. No. 747). As such, Wells Fargo requested that the Court consider, as replacements for two of the Receiver's submissions, the alternative appraisers submitted by Wells Fargo (Doc. No. 748).

I. WGK's Admitted Conflicts of Interest and Belated Request for Waiver from Wells Fargo

Although the request was extremely belated, on January 13, 2012, WGK specifically asked Wells Fargo for a waiver in this case and the bank refused. *See* letter from George L. Guerra of WGK to Demian J. Betz, Esq. of the Wells Fargo Legal Department, dated January 13, 2012, which is annexed hereto as Exhibit C (the "WGK Conflict Letter"). In the WGK Conflict Letter, Mr. Guerra admits that the Receiver is taking a "clearly" adverse position against the bank's claim in this receivership proceeding. *Id.* at p. 1 ("The Receiver's assessment of Wachovia's claim, however, took into account its role as the depository institution where Nadel maintained certain 'shadow accounts.'"); p. 2 (. . . "the interests of the parties are clearly adverse."). Moreover, Mr. Guerra admits there is an actual conflict: "As I mentioned to you, I believe that my representation of the Bank in *NAC Group, Inc. vs. Wells Fargo Bank, N.A.*, in the United States District Court for the Middle District of Florida, Case No. 8:11-CV-01967-SDM-EAJ, represents an actual conflict that requires a waiver or WGK's withdrawal." *Id.* at p. 2. Mr. Guerra then admits that WGK had no procedures in place to prevent conflicts of interest such as those in this case and instead proposes "creating an internal policy to maintain separation between lawyers handling any matters adverse to any Wells affiliate and those handling Receivership matters potentially adverse to Wells Fargo." *Id.* at p. 3.[11] Wells Fargo denied WGK's belated request for a conflict waiver and maintains that all members of WGK, including the Receiver, should be disqualified from this case.

[11] Regardless, Rule 4-1.10(b) of the Rules Regulating the Florida Bar does not contain an ethical wall or screening procedure. *See Birdsall v. Crowngap, Ltd.*, 575 So. 2d 231, 232 (Fla. 4th DCA 1991); *In re*

J. The Receiver's Letter to the Court

Significantly, the day after WGK filed the Receiver's response in opposition to the Abandonment Motion – again taking another materially adverse position against their client, Wells Fargo – the Receiver filed a letter with this Court in a futile effort to minimize the impact of his and WGK's (i) significant breaches of their fiduciary duties to Wells Fargo and the receivership estate, (ii) repeated violations of the Florida rules of professional responsibility, to which both the Receiver and WGK are bound, and (iii) failure to disclose conflicts of interest with Wells Fargo to the Commission and this Court (Doc. No. 730). In fact, as noted above, prior to filing his letter with the Court, WGK specifically asked Wells Fargo for a waiver in this case and the bank refused. As discussed more fully below, the Receiver and WGK's conflicts and ethical violations are myriad and, as a result, the integrity of this entire proceeding has potentially been compromised.

K. The Receiver's Lawsuit Against Wells Fargo

On February 9, 2012, the Receiver filed a sixty-two (62) page complaint (the "Complaint") against Wells Fargo, who was his firm's client until mid-February 2012, as a result of significant work performed by the Receiver while Wells Fargo remained a significant client of WGK.

Pursuant to the Complaint, the Receiver is seeking **$168 Million** in damages from Wells Fargo, alleging the following causes of action: (1) aiding and abetting common

---

Outdoor Prods. Corp., 183 B.R. 645 (Bankr. M.D. Fla. 1995) (once it is demonstrated that attorney participated in the matter in a meaningful way at former firm, there is irrebuttable presumption that confidences were shared and those confidences are imputed to new firm; disqualification despite Chinese Wall, because no ethical wall provisions apply to Rule 4-1.10(b)).

law fraud; (2) aiding and abetting breach of fiduciary duty; (3) aiding and abetting conversion; (4) common law negligence; (5) violations of the Uniform Fraudulent Transfer Act; and (6) unjust enrichment.[12] Pursuant to Count V of the Complaint, the Receiver seeks to avoid, as purported fraudulent conveyances, a number of Wells Fargo loans, including the loans related to the Rite Aid Property, the Sarasota Property and the Laurel Mountain Property. The Complaint also improperly threatens the imposition of punitive damages.

MEMORANDUM OF LAW

A. Standard for a Motion to Disqualify.

Motions to disqualify are governed by two sources of authority: (1) the local rules of the court in which the federal district court is situated; and (2) the standards developed under federal law. *See FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304 (5th Cir. 1995); *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1383 (10th Cir. 1994) (both cited with approval by *Herrmann v. Gutterguard, Inc.*, No. 06-11306 (11th Cir. Sept. 11, 2006 (unpublished)). The national standard is reflected by the ABA Model Rules of Professional Conduct, *see id.*, which Florida has adopted. *See McPartland v. ISI Investment Servs., Inc.*, 890 F. Supp. 1029, 1030 (M.D. Fla. 1995).

B. The Court Should Disqualify the Receiver and His Counsel, WGK, From This Case.

The Rules Regulating the Florida Bar impose strict limits on Florida attorneys in dealing with potentially conflicting representations, and the Rules govern the professional

[12] *See* http://www.heraldtribune.com/article/20120209/ARTICLE/120209504/2055/NEWS?Title=Receiver-in-Nadel-case-sues-Wells-Fargo.

conduct of all members of the bar of this Court, including the Receiver. *See* Local Rule 2.04(d); *see also* discussion *infra* regarding *SEC v. Kirkland*. Under the Rules Regulating the Florida Bar, members of the Florida Bar owe a duty of confidentiality and loyalty to all of their clients, including present and former clients. *See* R. Regulating Fla. Bar 4-1.6(a), 4-1.7, 4-1.9, 4-1.10. Rule 4-1.7 mandates that "a lawyer shall not represent a client if: (1) the representation of one client will be directly adverse to another client; or (2) there is substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Moreover, Rule 4-1.10 requires that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rule 4-1.7 or 4-1.9 . . . " Indeed, once the attorney-client relationship is established, the rules create an irrebutable presumption that confidences were shared with all members of the firm. *See Health Care and Retirement Corp. of Am., Inc. v. Bradley*, 944 So. 2d 508, 511 (Fla. 4th DCA 2006); *In re Skyway Commc'ns Holding Corp.*, 415 B.R. 859, 865 (Bankr. M.D. Fla. 2009). Thus, Rule 4-1.10 imputes the disqualification to all other lawyers associated in a law firm with the disqualified lawyer. *Cf. In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328, 338 n.11 (E.D. Pa. 1982) (concluding that the disqualification of one member of the law firm results in the disqualification of all members of the firm); *In re Southern Diversified Props., Inc.*, 110 B.R. 992, 995 (Bankr. N.D. Ga. 1990) (same).

Further, when there exists a conflict or potential conflict between clients in a particular matter, or even the appearance of a potential conflict, a receiver and counsel for

the receiver must disclose the potential conflict to the court. The general principles set forth by federal courts require transparency by the Receiver:

> A receiver, as 'an officer or arm of the court,' is a trustee with the highest kind of fiduciary obligations. He owes a duty of strict impartiality, of 'undivided loyalty,' to all persons interested in the receivership estate, and must not 'dilute' that loyalty. He is 'bound to act fairly and openly with respect to every aspect of the proceedings before the court. The court, as well as all interested parties,' have 'the right to expect that all its officers,' including the receiver, will not 'fail to reveal any pertinent information or use their official position for their own profit or to further the interests of themselves or any associates.'

Phelan v. Middle States Oil Corp., 154 F.2d 978, 991 (2d Cir. 1946) (emphasis added). The Receiver and WGK's non-disclosure of these conflicts also violates the spirit of integrity which is at the heart of SEC receivership proceedings. *C.f. In re Century Plaza Assocs.*, 154 B.R. 349, 352-53 (Bankr. S.D. Fla. 1992); *see also Commodity Futures Trading Comm. v. Eustace*, Nos. 05-2973, 06-1944, 2007 WL 1314663, at *9-11 (E.D. Pa. May 3, 2007) (noting importance of full disclosure of conflicts); *Fugazy Travel Bureau, Inc. v. State by Dickinson*, 188 So. 2d 842, 844 (Fla. 4th DCA 1966) ("A receiver is not a party in the cause. The receiver is an officer of the court and is subject to the supervision and control of the court."); *SEC v. Loving Spirit Found. Inc.*, 392 F.3d 486, 490 (D.C. Cir. 2004).

The Receiver and WGK should be disqualified for these violations of the conflict of interest rules. Specifically, WGK was until mid-February representing Wells Fargo and its affiliate on a number of significant matters, while at the same time the Receiver and WGK were taking materially adverse positions against Wells Fargo in this case. At

the same time, the Receiver, who is a named partner with WGK, has been appointed to act as receiver for the receivership entities, controlling all of their assets, offices, and papers. WGK is also acting as Receiver's counsel in this matter. Here, the sharing of confidential information among Wells Fargo and WGK and each of its attorneys, including the Receiver, is irrefutably presumed.[13] *See Health Care and Retirement Corp. of Am., Inc.*, 944 So. 2d at 511; *In re Skyway Commc'ns Holding Corp.*, 415 B.R. at 865. Thus, Rule 4-1.10 imputes the disqualification to all other lawyers associated with WGK, including Mr. Wiand, with the disqualified lawyer. Accordingly, the Receiver's claim that he did not work directly on any Wells Fargo matters while at WGK is a red herring and should be disregarded.[14] At bottom, the Receiver and WGK's loyalty to Wells Fargo cannot coexist with the loyalty they owe to other creditors and investors of the receivership estate. As a result of these myriad conflicts and ethical violations, the integrity of this entire proceeding has potentially been compromised. At minimum, these significant ethical violations and conflicts, which are solely the result of the actions and inactions of the Receiver and his law firm, WGK, will undoubtedly cause the receivership estate significant additional financial harm as a result of the attendant litigations costs associated therewith. These conflicts and ethical violations will also

[13] In fact, WGK admits that it has an actual conflict of interest in its representation of Wells Fargo in the case styled *NAC Group, Inc. vs. Wells Fargo Bank, N.A.*, pending in the United States District Court for the Middle District of Florida, Case No. 8:11-CV-01967-SDM-EAJ. *See* WGK Conflict Letter at 2. WGK also concedes that the interests of the Receiver and Wells Fargo with respect to the Rite Aid and Laurel Mountain Properties, asserted through two lawyers at WGK, are "clearly adverse." *Id.*

[14] The Receiver also concedes in his letter to the Court that he worked directly on a Wells Fargo affiliated matter while he was a member of Fowler White Boggs (Doc. No. 730). *See Brotherhood Mut. Ins. Co. v. National Presto Indus.*, 846 F. Supp. 57 (M.D. Fla. 1994) (working on plaintiff's case for only a few hours at former firm enough to disqualify attorney and new firm from representing defendant).

likely severely undermine the Receiver and WGK's impartiality and credibility going forward. Accordingly, it is in the best interests of the receivership estate and its investors and creditors, to disqualify the Receiver and WGK from this case.

In *SEC v. Founding Partners*, Judge Steele disqualified the receiver and her law firm from the entire case because the firm, where the receiver was a partner, was currently providing lobbying services to an affiliate and factoring client of a relief defendant. *See SEC v. Founding Partners Capital Mgmt.*, No. 2:09-cv-229-ftM-29SPC (M.D. Fla. May 13, 2009).[15] In that case, Judge Steele determined that the affiliate-client was "sufficiently intertwined with the issues in the case so that its presence is not marginal." *Id.*, at p. 8. In disqualifying the receiver and her law firm from the entire case, Judge Steele specifically noted that "it sees no reason to begin a $550 million case with a Receiver who has potential conflict issues that may undermine the confidence in her actions or lead to unproductive, collateral litigation, which can be avoided altogether by the appointment of a substitute receiver." *Id.* Judge Steele further noted that "the short answer is that the Court would not have appointed … [the] Receiver if the connection with [the firm's client] had been revealed." *Id.* at p. 7.[16] Here, just as in *SEC v. Founding Partners*, the Receiver failed to disclose his and WGK's relationship with

[15] A copy of the Opinion and Order dated May 13, 2009 is annexed hereto as Exhibit D.

[16] In *Kirkland*, Judge Antoon noted the difficulties involved when an attorney is appointed as receiver and suggested that the SEC should consider appointing appropriate business personnel instead to avoid conflicts of interest. *See SEC v. Kirkland*, No. 6:06–cv–183–Orl–28KRS, 2008 WL 4144424, at *8, n.7 (M.D. Fla. Sept. 5, 2008) ("It would behoove the SEC in future applications for appointment of a receiver to seek a business professional experienced in the business of a company to be placed in receivership rather than seeking appointment of an attorney as the receiver. The experienced business professional would be able to retain counsel as needed to assist with legal work.").

Wells Fargo, a significant secured creditor and party in interest herein.[17] Wells Fargo's interest is certainly not marginal in this case, as it is responsible for enforcing over **$7.8 Million** in loans collateralized by properties in possession of the receivership. In fact, the circumstances here are much more egregious than in *SEC v. Founding Partners*, as the Receiver and WGK have taken materially adverse positions against Wells Fargo in this very case, while at the same time WGK was representing the bank in significant other matters. As noted, over the last two years, Wells Fargo and its affiliate have paid WGK approximately **$1.04 Million** in fees in connection with its representation of Wells Fargo and WFA. These actions not only create substantial conflicts of interests, but are obvious violations of the Rules Regulating the Florida Bar. Undoubtedly, these conflict issues and ethical violations will undermine the confidence in the Receiver's actions going forward and lead to further unproductive, collateral litigation. Accordingly, disqualification of the Receiver and WGK from the entire case is appropriate.

Moreover, in *SEC v. Kirkland*, No. 6:06-cv-183-Orl-28KRS (M.D. Fla. Jan. 31, 2008), Magistrate Judge Spaulding issued an Order to Show Cause to the SEC requesting that it demonstrate why the receiver should not be removed from the entire case as a result of her law firm's representation of a significant secured creditor on unrelated

[17] Significantly, the Receiver failed to disclose these inherent conflicts of interest over three years ago while at Fowler White Boggs, where this case originated, and failed to disclose these adverse interests when he changed firms. *See, e.g., In re Film Ventures Int'l, Inc.*, 75 B.R. 250 (B.A.P. 9th Cir. 1987) (noting that there is a continuing and affirmative duty on behalf of the attorney to monitor any and all conflicts and to disclose such conflicts to the court); *In the Matter of Sauer*, 191 B.R. 402, 408 (Bankr. D. Neb. 1995) (duty to disclose adverse interest is continuing); *In re Prudhomme*, 152 B.R. 91, 105 (Bankr. W.D. La. 1993), *aff'd*, 43 F.3d 1000 (5th Cir. 1995) (same). In fact, it appears that the only disclosure made to the Court after the Receiver formed WGK was through two vanilla notices of change of law firm filed with the Court on November 13 and 16, 2009 (Doc. Nos. 229, 232).

matters.[18] In *SEC v. Kirkland*, Judge Spaulding first determined that the Rules Regulating the Florida Bar govern all members of the bar of this Court, including the receiver, pursuant to Local Rule 2.04(d). *See* Order to Show Cause, at p. 3. The receiver, a partner at the law firm, then asserted that she did not have a conflict of interest precluding her from acting as the receiver in a dispute with the firm's client because she "is a neutral agent of the Court, making business judgments concerning the Receivership Estate rather than representing the interests of any particular party." Order to Show Cause, at p. 5 (internal quotations and citation omitted). In rejecting this argument and recommending disqualification of the receiver from the entire case, Judge Spaulding noted the lack of legal support for this position, and analogized the receiver's conflict issues with cases involving trustees appointed under the Securities and Investors Protection Act ("SIPA") and the Bankruptcy Code.[19]

For instance, the court in *In re Blinder, Robinson & Co., Inc.*, 131 B.R. 872 (D. Colo. 1991) considered the objection to the retention of a bankruptcy trustee, where the objector argued that the trustee was not "disinterested" as that term is defined under SIPA because the trustee's law firm represented a potential creditor. Reviewing several bankruptcy court opinions, the court noted that a trustee is held to an "exacting standard." *Id.* at 877; *see also, In the matter of Perry, Adams & Lewis Securities, Inc.*, 5 B.R. 63 (Bankr. W.D. Mo. 1980); *Handelman v. Weiss*, 368 F. Supp. 258 (S.D.N.Y. 1973). He "must be divested of any scintilla of personal interest which might be reflected in his

[18] A copy of the Order to Show Cause dated January 31, 2008 is annexed hereto as Exhibit E.

[19] Federal courts of equity often look to bankruptcy law for guidance in the administration of receivership estates. *See SEC v. Capital Consultants, LLC*, 397 F.3d 733,745 (9th Cir. 2005); *SEC v. Basic Energy & Affiliated Res.*, 273 F.3d 657, 665 (6th Cir. 2001).

decision concerning estate matters." *In re Blinder*, 131 B.R. at 877 (citing *SEC v. Schreiber Bosse & Co., Inc.*, 368 F. Supp. 24 (N.D. Ohio 1973)). Ultimately, the court concluded that "even the appearance of impropriety may merit disqualification." *Id.* at 878. In analyzing whether there was any appearance of impropriety, the court noted that the trustee and his law firm "were not forthright in disclosing this potential problem for independent court review before their appointment. This, in itself, presents an appearance of impropriety." *Id.* at 881. The court's analysis in *In re Blinder* is instructive in the instant case because the Receiver did not inform the Court of his potential conflicts of interest in this case until over three years after his appointment as Receiver, and well after the Receiver had taken materially adverse positions against Wells Fargo, his law firm's client.

Similarly, in *In re Southern Diversified Properties, Inc.*, 110 B.R. at 993, a chapter 11 trustee learned on the day after his appointment of a potential conflict of interest from one of his law partners. Notwithstanding the possible disqualifying conflict, the trustee began a "simultaneous investigation" of the possible conflict of interest and the facts of the chapter 11 case. *Id.* at 994. The trustee eventually concluded that he had an actual conflict of interest because his law firm previously represented two of the creditors; two days later, the trustee stepped down from the position. Initially, the court observed that the lawyer "acted properly by declining to serve as trustee once he concluded a conflict of interest existed and he was not disinterested." *Id.* However, the court noted that upon learning that he had a potential conflict of interest, the lawyer "should have made its resolution his first priority." *Id.* Finding "no satisfactory

explanation" for the delay, the court found that had the lawyer promptly reviewed the schedules he "could have verified the conflict and declined the trustee appointment before any services were performed." *Id.* at 995. The court held that the trustee was not entitled to payment of $1,890.00 for 13.5 hours of professional legal services for his work as trustee because he was disqualified from the representation due to the conflict, he was not disinterested under the Bankruptcy Code, and therefore his services were not compensable.

The Receiver's actions in the instant case are far more egregious than the trustee's actions in *Southern Diversified Properties*. The Receiver did not disclose this conflict of interest for over three years, during which time he took materially adverse positions against Wells Fargo, his law firm's client. His belated disclosure to the Court in a letter to the Court and the parties does not excuse him from acting improperly and in violation of his ethical and fiduciary duties. As Judge Spaulding noted in *SEC v. Kirkland* and as the above-referenced cases conclude, a Receiver must maintain his disinterestedness and avoid even the appearance of impropriety. The Receiver has not met this standard and therefore should be disqualified from this case.

While the secured creditor in *SEC v. Kirkland* ultimately signed a limited waiver regarding the conflict (No. 6:06-cv-183-Orl-28KRS, Doc. No. 416-2), as noted by Judge Spaulding, the only exception to Rule 4-1.7 of the Rules Regulating the Florida Bar is where, among other requirements, "each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing." *Kirkland*, Doc. No. 409, p. 3. As the Receiver is well aware, Wells Fargo has not given its informed consent.

In fact, prior to filing his February 2, 2012 letter with the Court, the Receiver specifically asked Wells Fargo for a waiver and the bank refused. *See* Heiser Decl., ¶5. In addition, as the Receiver is an arm of this Court, this Court has not given informed consent. Indeed, this Court, as well as the thousands of investors and creditors in this case, were, upon information and belief, not made aware of this conflict until the Receiver submitted his letter to the Court. Moreover, in the Commission's motion seeking the appointment of a receiver, the SEC specifically noted that "Mr. Wiand has informed the Commission that no conflict of interest exists in this matter, and he is ready, willing and able to serve as Receiver." Doc. No. 6 at p. 3 (emphasis supplied). At minimum, WGK and Receiver Wiand's failure to disclose their conflict of interest should result in their disqualification.

The Eleventh Circuit in *Stepak v. Addison*, 20 F.3d 398, 406 (11th Cir. 1994) explained why a conflict such as that present in this case is so problematic.

> It would be unrealistic to expect a lawyer or law firm to unlearn that which it had already learned about a case and then to reinvestigate, rediscover, and relearn that same information, all without betraying the interests of either the former or the present client. So long as it is assumed that the conflicted law firm would observe its ethical obligation of confidentiality in the conduct of its investigation, a board's selection of that firm as the primary investigator is tantamount to a decision to forego "material information reasonably available." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). Only if the board were entitled to assume that the conflicted law firm would violate its duty to its former clients might it be reasonable to give that firm control over the investigation; even so, the problem of divided and lingering loyalties remains unmitigated. We conclude that it would be unreasonable and, in fact, grossly negligent, for a board of directors to assume or expect a law firm to violate such a well established ethical obligation.

Similarly, it would also be unreasonable for this Court, the parties, and the investors to assume that the Receiver and WGK could resolve these undivided loyalties to the satisfaction of all parties. For the stated reasons, Wells Fargo requests that the Court disqualify the Receiver and WGK from this case. In addition, the Court should impose a litigation hold against WGK and the James Hoyer Firm, and appoint a special master to review the communications between the Receiver's law firms to determine whether confidential Wells Fargo client communications were shared between the WGK and the James Hoyer Firm. *See* note 2 *supra*.

C. The Receiver and WGK's Fees Should Be Disallowed In This Case.

As a result of the foregoing conflicts of interest and breaches of fiduciary duty by the Receiver and WGK, this Court should, at minimum, deny all fees payable to the Receiver and WGK for work related to Wells Fargo matters. *See SEC v. Kirkland*, No. 6:06-cv-183-ORL-28KRS, 2008 WL 4144424, at *6-7 (M.D. Fla. Sept. 5, 2008) (Antoon, J.).[20] The Court should also require the Receiver and WGK to disgorge all amounts previously paid to the Receiver and his firm regarding any Wells Fargo matters. *See id.* at n.6; *Snyderburn v. Bantock*, 625 So. 2d 7, 15 (Fla. 5th DCA 1993) (affirming trial court's denial of fees relating to prosecution of claims adverse to former clients); *Fed. Trade Comm'n v. Certified Merchant Servs., Ltd.*, 126 F. App'x 651, 654 (5th Cir. 2005) (affirming 20% disgorgement of receiver's fees for breach of fiduciary duty).

[20] In fact, in *SEC v. Kirkland*, the Receiver and her law firm ultimately did not seek compensation for any work performed in connection with the firm's client, notwithstanding the fact that they received a conflict waiver from the client (Case No. 6:06-cv-00183-JA-KRS, Doc. No. 625).

CONCLUSION

WHEREFORE, Wells Fargo respectfully requests that this Court enter an order (i) disqualifying the Receiver and WGK from this case; (ii) denying all fees payable to the Receiver and WGK herein; (iii) impose a litigation hold against WGK and the James Hoyer Firm, (iv) appoint a special master to review the communications between the Receiver's law firms to determine whether confidential Wells Fargo client communications were shared between WGK and the James Hoyer Firm; and (v) granting Wells Fargo such other and further relief as the Court deems just and proper.

Dated this 29th day of February, 2012 in Tampa, Florida.

Respectfully submitted,

AKERMAN SENTERFITT

/s/L. Joseph Shaheen, Jr.
L. Joseph Shaheen, Jr.
Florida Bar No.: 212385
Email: joseph.shaheen@akerman.com
Steven R. Wirth
Florida Bar No.: 170380
Email: steven.wirth@akerman.com
401 East Jackson Street, Suite 1700
Tampa, Florida 33602
Telephone: (813) 223-7333
Facsimile: (813) 223-2837

Counsel for Wells Fargo, N.A.

LOCAL RULE 3.01(g) CERTIFICATION

Counsel for Well Fargo has conferred with counsel for the Receiver and counsel for the Securities and Exchange Commission, and each indicated that they objected to and would oppose the relief requested in this Motion.

CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following:

Arthur G. Nadel
FCI BUTNER LOW
Federal Correctional Institution
P.O. Box 999
Butner, NC 27509

/s/L. Joseph Shaheen, Jr.
Attorney