

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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**THE RECEIVER'S OPPOSITION TO MOTION OF WELLS  
FARGO BANK, N.A. FOR THE COURT TO CONTINUE THE  
HEARING SCHEDULED FOR MARCH 2, 2012 ON PENDING MOTIONS**

On December 7, 2011, Burton W. Wiand (the “**Receiver**”) filed a claims determination motion (Doc. 675) (the “**Claims Motion**”), which, *inter alia*, proposed a plan to distribute \$18 million to victims of Arthur Nadel’s Ponzi scheme who complied with the claims process requirements and have allowed claims. On February 3, 2012, the Court set a hearing on the Claims Motion for March 2, 2012 at 9:00 a.m. (Doc. 734) – *i.e.*, tomorrow. Yesterday, less than 48 hours before the scheduled hearing, Wells Fargo Bank, N.A. (“**WF**

**Bank**”) filed a motion, based on purported conflicts of interest, seeking to continue the hearing indefinitely (Doc. 765) (the “**Continuance Motion**”). In addition, WF Bank filed a second motion seeking to disqualify both the Receiver and the Receiver’s law firm, Wiand Guerra King, P.L. (“**WGK**”), with respect to the entire Receivership, and not just those discrete matters WF Bank contends are implicated by the purported conflicts (Doc. 766) (the “**Disqualification Motion**” and, collectively with the Continuance Motion, the “**Motions**”) – *i.e.*, disputes between the Receivership and WF Bank.

Importantly, WF Bank filed a claim in the claims process as a secured creditor with respect to only one property in Receivership, but the Receiver determined the claim should be denied due to WF Bank’s misconduct in connection with Nadel’s scheme, including its execution of numerous transactions through “shadow accounts” Nadel used to perpetrate his scheme and its investment in that scheme.<sup>1</sup> *See* Claims Mot. § II.D.2. WF Bank failed to file claims with respect to other properties in Receivership, and the Receiver has taken the position that WF Bank’s failure extinguishes its purportedly secured interests in those properties.<sup>2</sup> The Receiver also recently sued WF Bank because of its misconduct, a case in

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<sup>1</sup> Also as part of this Receivership, in 2010 the Receiver filed a “clawback” case against Wells Fargo Securities International, Ltd., an affiliate of WF Bank. *See Wiand, as Receiver v. Wells Fargo Secs. Int’l, Ltd.*, Case No. Case No. 8:10-cv-243-T-17MAP (M.D. Fla.). In that case, the Receiver was represented by Johnson, Pope, Bokor, Ruppell & Burns, LLP, and not by WGK. The Disqualification Motion conveniently omits this information although it is important: that matter could not raise a conflict for two reasons – (i) because WGK was not involved in the case and (ii) because the case was not against a client of WGK. *Cf.* Disq. Mot. at 8 (arguing that WGK failed to seek conflict waiver relating to that case).

<sup>2</sup> These issues have been the subject of numerous WF Bank filings, which already have delayed these proceedings. *See* Docs. 689, 690, 712, 714, 740, 745, 755, 757, 762.

which, with the Court’s approval, the Receiver is represented by James, Hoyer, Newcomer & Smiljanich, P.A. (“**James Hoyer**”) and not by WGK. Given the Receiver’s lawsuit against WF Bank, the years that WF Bank has known of the matters it now claims present a conflict, the fact that this issue was only raised after the Receiver announced he was going to sue WF Bank, the late-filing of the Motions, their misleading content, the extreme relief they seek, and their failure to identify any harm whatsoever to the Receivership, WF Bank’s motive for filing the Motions is clear: retaliation for the Receiver’s lawsuit against WF Bank and his determination that it is more equitable to pay the \$7.8 million to which WF Bank contends it has an entitlement to defrauded investors than to an entity that enabled Nadel to defraud those investors and then slept on its rights.

The Receiver (and WGK) intend to separately respond to the Disqualification Motion in detail. For purposes of ruling on the Continuance Motion, however, the Receiver impresses two significant points upon the Court: (1) nothing in the Disqualification Motion warrants further delaying a ruling on the Claims Motion with respect to every claim and other matters addressed in that motion except for the single claim submitted by WF Bank – in fact, the Receiver’s response will show that he should not be disqualified from directing Receivership matters with respect to that claim either; and (2) the Disqualification Motion is baseless.

**I. NOTHING IN THE DISQUALIFICATION MOTION WARRANTS ANY ADDITIONAL DELAY IN DECIDING THE CLAIMS MOTION WITH RESPECT TO EVERY MATTER OTHER THAN THE SINGLE CLAIM SUBMITTED BY WF BANK**

Although the Receiver (and WGK) will submit a full response to the Disqualification Motion, the case of *CFTC v. Eustace*, 2007 WL 1314663 (E.D. Pa. 2007), alone

demonstrates the relief sought in that motion is not warranted. At most, to remove any appearance of impropriety, the Court could appoint a substitute Receiver for the limited purpose of overseeing the few discreet matters between the Receivership and WF Bank. As *Eustace* shows, the Court can still proceed now with a final decision on the Claims Determination Motion with respect to every other Claimant.

*Eustace* is analogous to the issues raised in the Disqualification Motion, although it still has several important distinctions (which will be addressed in response to that motion). That case involved a receiver who was represented by his law firm, and a party sued by the receiver raised a conflict of interest involving the receiver and his firm on one hand and a non-party who also was potentially liable for the claims brought by the receiver on the other hand. *See id.* at \*2-4. The potentially liable non-party was an affiliate of the receiver's and his firm's clients, and the concern was that the receiver's failure to also sue that non-party could appear to be favoritism. In contrast, here WF Bank is upset precisely because it was sued and the Receiver has vigorously contested its efforts to obtain Receivership assets.

After noting that neither the same rule of professional conduct that governs conflicts in Florida nor the Bankruptcy Code controlled an equity receiver, the court found the issue should be decided under the following standard:

the Court must balance the lack of disclosure about [the receiver's and his firm's relationship with the non-party] and consider how serious it is in the context of the actual events that have unfolded, and whether any party will be prejudiced or whether the integrity of the proceedings themselves will be subject to question after the case is completed. Considering this matrix of various interests, the Court believes that it should also consider the interests of the investors, the position of the CFTC as the government agency designated by Congress with regulatory authority over futures markets ..., and the interests of the public.

*Id.* at \*6. The court then observed that “disqualification is disfavored;” a change in “[r]eceiver and/or his counsel would require delay ... and additional expense;” the receiver was “highly regarded,” “reputable,” and experienced; and that the receiver’s law firm had done “a very satisfactory job ... as evidenced by a high degree of diligence in the handling of the cases before the Court, with well prepared briefs and highly respectable motions ....” *Id.* at \*10. After considering alternatives for remedying the issue, the court concluded that under the circumstances of that case it should replace the receiver with a substitute receiver only with respect to the specific dispute which raised the conflict issue. *Id.* at \*11-12 (“The Court believes that the above determination of this issue is feasible and fair, and that it will ensure integrity and finality of the proceedings in this Court and that all parties be treated fairly.”).

The *Eustace* court’s observations about disfavoring disqualification, the delay and expense resulting from any disqualification, and the receiver’s and his law firm’s reputation, experience, and work quality apply equally to the Receiver and WGK here. And the equivalent here of the resolution reached by that court would be simply to appoint a substitute receiver to direct only the discreet disputes between the Receivership and WF Bank. Further, in reaching its conclusion, the court explained that it had to “take into consideration the Receiver’s arguments that no significant damage has been done to the receivership efforts in this case ....” *Id.* at \*10. Here too there has been no damage whatsoever to the Receivership and the Disqualification Motion does not even try to identify any. In fact, unlike in *Eustace* there can be no damage here because the Disqualification Motion is based entirely on the fact that the Receiver has pursued claims against WF Bank and has vigorously contested its efforts to receive Receivership assets at the expense of

defrauded investors. See *SEC. v. Mutual Benefits Corp.*, Case No. 0:04-cv-60573, Order Granting Receiver's Mot. For Final Determination Of Allowed Claims at 3 (S.D. Fla. 2008) (attached as **Ex. K** to Claims Mot.) (“[T]his is an SEC enforcement action designed to protect the *investors*, not the creditors....”). In addition, *Eustace* observed that the advocacy of the party that raised the conflict issue deserved “very little weight” because it had “an obvious motive to have [the Receiver] ... discharged ....” *Id.* at \*10 n.9. Here, the issue has been raised by the only party that could plausibly benefit from the Receiver's disqualification, WF Bank. In sum, while the Receiver (and WGK) will address the Disqualification Motion in its entirety in another filing, *Eustace* demonstrates that even assuming *arguendo* that motion has merit, which it does not, the relief sought by WF Bank to further delay a ruling on anything but WF Bank's interests is still not warranted.

When Nadel's scheme collapsed in January 2009, hundreds of investors collectively lost well over \$100 million dollars. In many cases, investors lost all or a large portion of their life savings. Since his appointment, the Receiver and his counsel, including WGK, have always acted in the Receivership's best interests and with utmost integrity, and the Receiver's efforts have always been undertaken in consultation with the Securities and Exchange Commission (“**SEC**”) and subject to this Court's review. To date, those efforts have generated approximately \$30 million of net cash assets for the benefit of defrauded investors, and the Receiver is ready to make an interim distribution of at least \$18 million, which will provide many investors with badly needed funds. WF Bank's eleventh hour posturing should not be allowed to further delay relief to investors. The damage that Nadel inflicted on investors is done, but the same cannot be said for WF Bank.

## **II. THE DISQUALIFICATION MOTION IS FACTUALLY AND LEGALLY BASELESS**

The Disqualification Motion is fundamentally inconsistent with the facts here. The relevant overall concern is that a receiver or other fiduciary may show favoritism to someone with whom the receiver has a relationship. This matter, however, involves the exact opposite scenario: WF Bank is upset that it has not received any favoritism from the Receiver. In other words, while the Disqualification Motion states that it is premised on some unidentified potential damage to the Receivership, in reality, it is premised on the fact that by pursuing WF Bank the Receiver actually refused to damage the Receivership and to breach his obligations to it. This Court tasked the Receiver with marshalling assets for the benefit of defrauded investors, and the Receiver and his different lawyers have at all times exercised those duties in good faith, with utmost integrity, in consultation with the SEC, and under the Court's scrutiny and supervision.

As mentioned above, the Receiver (and WGK) will address the allegations of the Disqualification Motion as soon as possible (which, however, will not be before tomorrow's hearing), but for the purpose of ruling on the Continuance Motion, the Court should know that WF Bank's arguments about a conflict are misleading and, in many respects, false.<sup>3</sup>

Following are just a few examples of why:

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<sup>3</sup> This is not the first time WF Bank has acted with less than good faith in this case. *See* Doc. 690 at 5-6 (falsely arguing the Receiver never made a 28 U.S.C. § 754 filing with respect to the Laurel Mountain Property); Doc. 690 at 7-9 (falsely arguing no notice of the Laurel Mountain Property's inclusion in the Receivership); Doc. 745 at 7-9 (falsely arguing no knowledge that the Laurel Mountain Property was being administered in this Court rather than in Nadel's criminal forfeiture proceedings); Doc. 757 at 9-11 (explaining that WF Bank petitioned NY court in violation of injunction entered in this case and without disclosing it to Receiver or this Court).

- Except for only one small matter in which WF Bank’s motion to dismiss was granted early in the case before it proceeded to discovery – which matter was disclosed to the Court (*see* Doc. 730) – WGK did not represent WF Bank and instead represented Wells Fargo Advisors, LLC (“WFA”), a separate entity with no connection to this Receivership (virtually all of the fees referenced in WF Bank’s Motions were generated from services performed for WFA – not WF Bank). There is no conflict as a result of WGK’s representation of a separate and distinct entity from WF Bank;
- To the extent WGK represented WF Bank in one matter, the Receiver and WF Bank became adverse in this Receivership only at the end of 2011 and in early 2012, and the Receiver then retained the James Hoyer firm (instead of WGK) to represent him in connection with the Receivership’s dealings with WF Bank (*see* Doc. 691);
- The Disqualification Motion assumes, without analyzing facts, that the Receiver appreciated the full scope of WF Bank’s involvement in Nadel’s scheme from the beginning of the Receivership, when that is not the case;
- As noted above in footnote 1, just as with the recent case brought by the Receiver against WF Bank, in the only other previous adverse matter between the Receivership and an WF Bank affiliate, out of an abundance of caution the Receiver retained the Johnson Pope firm (instead of WGK) to represent him in that matter even though there was no conflict because the defendant was a separate entity from WF Bank; and
- No later than January 2011, a senior in-house WF Bank lawyer was fully aware of the Receiver’s involvement in this Receivership, of WGK’s relationship with WFA and its representation of WF Bank in one matter, and of the Receiver’s control of several properties that served as purported collateral for WF Bank loans. Nevertheless, WF Bank never complained and only raised the matters in its Disqualification Motion shortly after the Receiver disclosed in a filing that he was preparing to sue WF Bank (*see* Doc. 691) and WF Bank became upset about that and the press’ reporting of that information.

These are only a few examples of why the Disqualification Motion has no merit, but they further show the Motions are designed to (i) retaliate against the Receiver and WGK for fulfilling their obligations to the Receivership and (ii) indefinitely delay the Court’s resolution of WF Bank’s interests in this Receivership, hoping that down the road everything

will be dropped and WF Bank will walk away with \$7.8 million of Receivership assets at the expense of the victims it enabled Nadel to defraud.

### **CONCLUSION**

For all of these reasons, the Continuance Motion should be denied in full or, at a minimum, the Court should proceed with a ruling on all aspects of the Claims Motion except for the merits of the single claim filed by WF Bank. Under the latter course, the claims process would proceed, relief to defrauded investors would not be further delayed, and the Court could address WF Bank's claim after the Receiver has the opportunity to fully brief the Disqualification Motion.

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on March 1, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I **FURTHER CERTIFY** that on March 1, 2012, I will mail the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

Arthur G. Nadel  
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Respectfully submitted,

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*Attorneys for the Receiver, Burton W. Wiand<sup>4</sup>*

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<sup>4</sup> Wiand Guerra King P.L. participates in this filing only to the extent the continuation of the scheduled hearing on the Claims Motion would impact claims or Receivership property with no relation to Wells Fargo.