UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

CASE NO.: 8:09-cv-0087-T-26TBM

Defendants,

SCOOP REAL ESTATE, L.P.,
VALHALLA INVESTMENT PARTNERS, L.P.,
VALHALLA MANAGEMENT, INC.,
VICTORY FUND, LTD,
VIKING IRA FUND, LLC,
VIKING FUND, LLC, AND
VIKING MANAGEMENT, LLC.

Relief Defendants.

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THE RECEIVER'S RESPONSE IN OPPOSITION TO WELLS FARGO BANK, N.A.'S MOTION (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

The Receiver, Burton W. Wiand (the "**Receiver**") opposes the Motion of Wells Fargo Bank, N.A. ("**WF**") (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 (the "**Motion**") (Doc. 766).[1] In opposition to this Motion, the Receiver states as follows:

On January 21, 2009, the Court appointed the Receiver and granted him "full and exclusive power, duty and authority to: administer and manage the business affairs, funds, assets, choses in action and any other property of the Defendants and Relief Defendants; marshal and safeguard all of the assets of the Defendants and Relief Defendants; and take whatever actions are necessary for the protection of the investors[.]" (Doc. 8) Since his appointment and subsequent reappointments, the Receiver has done exactly that. (Docs. 140, 316, 493) During the past three years, the Receiver has diligently and efficiently fulfilled his obligation to marshal assets for the benefit of defrauded investors in cooperation with the Securities and Exchange Commission (the "**SEC**") and under the scrutiny and supervision of this Court.

To date, the Receiver has successfully instituted multiple lawsuits and marshaled Receivership assets in excess of $30 million. (Doc. 685; Wiand Decl. at ¶ 3) He has seized, marketed and sold real and personal property on behalf of the Receivership Entities. *Id.* He has reached settlement agreements with Wells Fargo Securities International, Ltd. ("**WF Securities**"); Goldman Sachs Execution & Clearing, LP; and hundreds of other entities and individuals, including profiteers. *Id.* He continues to pursue multiple clawback cases against additional profiteers and others who received Ponzi scheme proceeds. (Wiand Decl. at ¶ 5) Presently, the Receiver is pursuing a malpractice action against the Receivership Entities' former

[1] Because WF's Motion seeks to disqualify both the Receiver and the law firm of Wiand Guerra King P.L. ("**WGK**"), the Court authorized WGK to concurrently file its own response to the Motion as it pertains to WGK. (Doc. 775) Accordingly, the instant objection will not address sections (II) or (III) of the Motion to the extent these sections specifically relate to WF's requests to disqualify WGK and to disallow all fees payable to WGK, but may address them herein to the extent necessary to support the Receiver's position.

law firm and a separate action against WF for its role in the Ponzi scheme, alleging $168 million in damages. *Id*. As a direct result of the Receiver's dedication and efforts, a partial distribution of at least $18 million is ready to be made to defrauded investors with allowed claims and has received preliminary approval from the Court. (Doc. 776) Despite all of the Receiver's accomplishments, one of the Receivership's creditors – WF – seeks to derail the entire Receivership process by having the Receiver removed from all aspects of the Receivership, not just those discrete matters WF contends are implicated by the purported conflicts. (Doc. 766) In reality, the Receiver has no conflict. WF's Motion is a transparent effort to retaliate against the Receiver for thoroughly exercising his duties, which have included vigorously contesting WF's claims to Receivership assets and pursuing litigation against WF or one of its affiliates, first, to claw back false profits received through participation in an investment in the scheme, and more recently for its complicity in the Ponzi scheme.

The purported conflict of the Receiver raised by WF is baseless. First and foremost, in his role as Receiver, Wiand does not represent anyone so the conflict of interest rules provided in the Florida Rules of Professional Conduct and raised by WF are inapplicable. Rather, the Receiver himself is represented by the attorneys of his choosing, in accordance with this Court's Order. (Doc. 8) At the outset of this case the Receiver – as is typical in this context – hired his own law firm, Fowler White Boggs, P.A., to represent him and later replaced it with WGK when he and most of the lawyers, paralegals and staff who had dedicated significant time to this Receivership moved to that firm. During the course of the proceedings, there have arisen three separate occasions when it became necessary for the Receiver to take positions adverse to WF or one of its affiliates. On each occasion, out of an abundance of caution the Receiver retained outside counsel other than WGK and disclosed that fact to the Court. (Docs. 175, 696) First,

when the Receiver determined that WF affiliate WF Securities (a U.K. broker/dealer) needed to be sued to recover "false profits" (i.e., the amount received in excess of the amount invested in the scheme) in connection with certain investments in Receivership Entities, he turned to another firm, Johnson, Pope, Bokor, Ruppel & Burns, LLP, ("**Johnson Pope**"), rather than WGK, to bring the necessary lawsuit, which was subsequently settled. (Docs. 174, 175) Second, when the Receiver determined from facts uncovered during the proceedings that WF had potential liability as a partner in the crimes of Nadel and his Ponzi scheme, he separately retained the firm of James, Hoyer, Newcomer & Smiljanich, P.A. ("**James Hoyer**") to evaluate and prosecute such action, rather than WGK. (Docs. 691, 696) Third, when WF objected to his proposals for claims determination as they pertained to WF's own claims, the Receiver extended the retention of James Hoyer to assist him in addressing all those matters too. (Doc. 730)

Notably, WF's Motion fails to identify any damage to the Receivership stemming from the Receiver's purported conflict. This is because the Receivership has not been damaged in any way, shape or form. Specifically, the Receivership was not damaged by the Receiver's rejection of WF's claims to Receivership assets or his fully-warranted pursuit of litigation against WF or its affiliates for profits, other transfers, and damages resulting from its investment and partnership in Nadel's scheme. WF's belated complaint about the fact that WGK previously handled unrelated matters for Wells Fargo Advisors, LLC ("**WFA**") – a separate entity with no connection to this Receivership – and one unrelated dispute for WF is pure and simple retaliation against the Receiver's determination that WF's claim to the Rite Aid Property should be denied due to WF's misconduct in connection with Nadel's scheme, the Receiver's opposition to WF's attempts to take Receivership assets without having filed claims, and the Receiver's initiation of litigation against WF regarding its direct involvement in the scheme. Significantly, WF

terminated WGK's representation of WFA and WGK withdrew from its representation of WF prior to filing the Motion.[2] The Receiver has at all times acted in a professional and ethical manner in fulfilling his obligations to the Court, to the SEC, and to the hundreds of innocent defrauded investors. Accordingly, the Motion should be seen for what it is – an act of desperate retaliation – and denied so that the Receiver may continue towards the successful conclusion of all Receivership matters.

I. THE FLORIDA RULES OF PROFESSIONAL CONDUCT REGARDING CONFLICTS OF INTEREST DO NOT APPLY TO RECEIVERS

WF seeks to disqualify the Receiver based on a false assumption that an attorney acting solely as a receiver is subject to the conflict of interest rules provided in the Florida Rules of Professional Conduct (the "**Rules**"). This assumption not only contradicts the language and purpose of the Rules, it is also unsupported by any case law cited by WF. The Receiver is not acting as an attorney representing a client. Rather, he is serving in a nonrepresentational role as an officer of the Court whose obligations are exclusively to the Court. Therefore, the Receiver's role does not implicate the conflict of interest rules.

"Although lawyers are often appointed as receivers, they assume a neutral position and are not serving in their typical role of advocate." 1 Ralph E. Clark, Treatise on the Law and Practice of Receivers § 35 (1992) (footnotes omitted). "[S]trictly speaking, [a receiver] is not… the representative or agent of any such person or party… A receiver is, rather,… a ministerial officer and representative of the court having charge of the receivership, and accountable to such court, and has been referred to in some cases as an 'arm,' in other cases as a 'hand,' of the court, and in still others as a part of its 'machinery.'" 75 C.J.S. Receivers § 139 (2007).

[2] To the extent there ever was a conflict, there is absolutely no potential for a future conflict given that WGK does not currently represent WF, WFA or any other affiliate of WF.

Accordingly, Florida courts have held that a receiver is an officer of the court, taking on a nonrepresentational role where he does not act for any party and is subject to the orders of the court. *See S.E.C. v. Kirkland*, 2008 WL 4144424, 4 (M.D. Fla. 2008) ("The receiver is an officer of the court, and subject to its directions and orders.") (citing *Stuart v. Boulware*, 133 U.S. 78, 81–82 (1890)); *In re Chira*, 343 B.R. 361, 368 (Bkrtcy. S.D. Fla. 2006) ("Florida law is clear that a receiver is the custodian for the court, through which the court controls the receivership estate."); *In re Zayas*, 347 B.R. 446, 448-449 (Bkrtcy. M.D. Fla. 2006) ("[T]he receiver does not act as the agent of the creditors or of any of the other parties.").[3] In fact, this Court has previously discussed the Receiver himself in this way:

> A receiver, like Wiand, is a creature of equity. *Gulf Ref. Co. of La. v. Vincent Oil Co.*, 185 F. 87 (5th Cir. 1911). Appointed by the court and considered an officer of the court, the receiver's task is to take control and custody of the subject property and manage it within 28 U.S.C. § 959(b)'s broad confines, namely: "in the same manner that [its] owner or possessor thereof would be bound to do if in possession thereof." Nonetheless, the receiver's authority is tied to the court's equitable perceptions.

In re Wiand, 2011 WL 4530203, 7 (M.D. Fla. 2011) (footnotes omitted).

An attorney acting as a receiver is actually more akin to a client than an attorney, as he is usually represented by attorneys himself. Receivers do not represent clients, and the mere fact that a receiver is also an attorney does not change that. As such, it is illogical to suppose that an attorney acting as a receiver would be subject to the Rules specifically focused on the regulation of attorneys in representational roles. While the Rules are designed to cover all of the ethical situations in which an attorney might find himself, not every ethical rule can or should apply in

[3] *See also In re International Forum of Florida Health Ben. Trust*, 607 So.2d 432, 438 (Fla.App. 1 Dist. 1992) ("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."); accord *Edenfield v. Crisp*, 186 So.2d 545, 549 (Fla. 2d DCA 1966) (a receiver is the agent of the court).

every situation. Certainly, the ethical rules addressing representational roles do not all apply when an attorney is performing a nonrepresentational function, such as serving as a receiver.

As explained by the district court in *CFTC v. Eustace*, 2007 WL 1314663 (E.D. Pa. 2007), a situation involving an alleged conflict of interest of a receiver and his counsel does not fit precisely under the state's code of professional conduct:

> The issue here is not whether the Stradley firm took on a representation adverse to an affiliate of an existing client. The Stradley firm is representing the Receiver, who was for many years a partner in the firm and is now Senior Counsel and Mr. Hodgson still does work for clients of the Stradley firm, and previously did work for UBS Financial Services. Although a client, the Receiver is also an attorney with the firm. Thus, Stradley's attorney-client relationship with the Receiver presents no conflict or even a potential conflict between the Stradley firm and any other clients. The Court cannot look at this matter exclusively as an issue of whether the Receiver in his role as an attorney and the Stradley firm have a conflict.

Id. at 6. Therefore, the rules on conflicts of interest under a state's code of professional conduct "can only provide a reference, but not a final answer, as to whether the Receiver and his firm met their duties of disclosure to this Court." *Id*.

Consistent with this view, the Preamble to the Rules makes clear that a lawyer serving a nonrepresentational function does not implicate all of the same ethical rules as when the lawyer serves a representational role:

> In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., rules 4-1.12 and 4-2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See rule 4-8.4.

Preamble to Chapter 4: Florida Bar Rules of Professional Conduct.

Noticeably absent from the Preamble's examples of rules that apply to lawyers in nonrepresentational roles are the conflict of interest rules. *See id*. In fact, the Preamble later clarifies that "*[m]ost* of the duties flowing from the client-lawyer relationship attach *only after* the client has requested the lawyer to render legal services and the lawyer has agreed to do so," whereas some duties like confidentiality can attach before any client-lawyer relationship is established. *Id*. (emphasis added). So if an attorney has no client and thus no client-lawyer relationship, such as when the attorney is acting as a receiver, most of the duties flowing from a client-lawyer relationship do not attach.

Among those duties that do not attach until after the client and lawyer have agreed on a relationship are the duties involving the avoidance of a conflict of interest. *See* Rules 4-1.7 (conflict of interest regarding current clients), 4-1.8 (conflict of interest regarding prohibited and other transactions), 4-1.9 (conflict of interest regarding former client), and 4-1.10 (imputation of conflicts of interest, general rule). As the rules pertaining to conflicts of interest make clear, a conflict of interest only exists when an attorney has a current client whose interests are adverse to another current or former client's interest or to the attorney's own interests.[4] Since an attorney who is acting as a receiver is not representing any client and has no current client-lawyer relationship, it follows that the attorney cannot be subject to the conflict of interest rules in his role as receiver – there is no current client with whom to have a conflict of interest.

Accordingly, the Receiver does not implicate and cannot possibly violate the conflict of interest rules in his role as Receiver since he has no client. Therefore, he cannot possibly be in violation of the conflict of interest rules.

[4] For example, Rule 4-1.9 on Conflict of Interest with Former Clients lists three ways a lawyer can have a conflict of interest with a former client, all of which involve the representation of another client. The Comment to the rule clarifies this, stating that after terminating a client-lawyer relationship with a former client, "a lawyer may not represent another client except in conformity with this rule."

II. BANKRUPTCY LAW DOES NOT GOVERN RECEIVERSHIPS AND DOES NOT REQUIRE DISQUALIFICATION OF THE RECEIVER

WF relies on multiple bankruptcy cases for its unsupported proposition that the Receiver and his law firm are equally subject to all of the conflict of interest rules as "members of the bar of this Court" and should be disqualified. However, bankruptcy law does not govern receivership cases. *See, e.g., Quilling v. Trade Partners, Inc.*, 2007 WL 107669, at *1 (W.D. Mich. Jan. 9, 2007) ("This proceeding is a federal equity receivership and the Bankruptcy Code does not apply.").[5] Moreover, the majority of the bankruptcy cases cited by WF are inapplicable to whether the Receiver should be disqualified.

All but two of the bankruptcy cases WF relies on focus on the ethical obligations of an *attorney* representing a trustee or a debtor and not the ethical obligations of the trustee.[6] Thus, even assuming bankruptcy cases governed receiverships, which they do not, those cases still would not govern the Receiver, who is more akin to a trustee than to trustee's counsel. *See*

[5] *See also, e.g., SEC v. TLC Inv. & Trade Co.*, 147 F. Supp. 2d 1031, 1039 (C.D. Ca. 2001) ("Therefore, balancing the Applicants' position against the need to protect and marshal the assets of the Receivership estate, protect defrauded and innocent investors, and judicial economy, the Court DENIES the Applicants' request to require the Receiver to follow all aspects of the bankruptcy code."); *S.E.C. v. Sunwest Mgmt., Inc.*, 2009 WL 3245879, *8 (D. Or. 2009) ("Federal equity receivership courts are not required to exercise bankruptcy powers nor to strictly apply bankruptcy law."); *Eustace*, 2008 WL 471574 at *6 ("When an equity receivership is involved, case law concerning equity receiverships is generally more applicable than bankruptcy case law."); *S.E.C. v. Forex Asset Mgmt LLC*, 242 F.3d 325, 332 (5th Cir. 2001) ("[W]e need not rely on bankruptcy law for this non-bankruptcy case."); *S.E.C. v. Heartland Group, Inc.*, 2003 WL 1089366, *1 n.1 (N.D. Ill. 2003) (rejecting argument that "receivership actions are different from other forms of litigation and are more akin to bankruptcy court proceedings"); *S.E.C. v. Capital Consultants LLC*, 453 F.3d 1166, 1170 n.4 (9th Cir. 2006) ("Although similarities between receivership and bankruptcy proceedings certainly exist, differences exist as well."); *Marion v. TDI, Inc.*, 2006 WL 3742747, *2 (E.D. Pa. 2006) ("a bankruptcy proceeding differs significantly from an equity receivership imposed at the request of a government agency such as the SEC.").

[6] *See* Doc. 766, p. 13 (citing *In re Matter of Outdoor Prods. Corp.*, 183 B.R. 645 (M.D. Fla. 1995) (addressing disqualification of firm representing trustee because firm hired a lawyer who previously rep'd defendant in same case)); p. 15 (citing *In re Skyway Commc'ns Holding Corp.*, 415 B.R. 859 (Bankr. M.D. Fla. 2009) (discussing conflict of interest of attorneys representing debtor); *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328 (E.D. Pa. 1982) (addressing disqualification of an attorney representing a trustee for not being disinterested)); p. 16 (citing *In re Century Plaza Assocs.*, 154 B.R. 349 (Bankr. S.D. Fla. 1992) (discussing compensation paid to an attorney representing a debtor)); p. 19 (citing *In re Film Ventures Int'l, Inc.*, 75 B.R. 250 (B.A.P. 9th Cir. 1987) (addressing disinterestedness and disclosure obligations of attorney representing debtor); *In the Matter of Sauer*, 191 B.R. 402 (Bankr. D. Neb. 1995) (addressing disinterestedness obligation of attorney representing debtor); *In re Prudhomme*, 152 B.R. 91 (Bankr. W.D. La. 1993) (discussing disinterestedness and disclosure obligations of attorney representing debtor)); and p. 20 (citing *In the Matter of Perry, Adams & Lewis Securities, Inc.*, 5 B.R. 63 (Bankr. W.D. Mo. 1980) (discussing disqualification of law firm representing trustee)).

F.D.I.C. v. O'Melveny & Myers, 61 F.3d 17, 19 (9th Cir. 1995) (A receiver, like a bankruptcy trustee and unlike a normal successor in interest, does not voluntarily step into the shoes of the bank; it is thrust into those shoes."); *Janssen v. Bank of Pittsburgh Nat Ass'n*, 115 F.2d 19, 20 n. 9 (3d Cir. 1940) ("It seems hardly necessary to cite the many cases wherein the courts have referred to receivers as trustees and receiverships as akin to express trusts. These cases include both banks and ordinary corporations."). Both bankruptcy and receivership cases distinguish between the role of an attorney and that of a trustee or receiver, clarifying that the services performed by trustees and receivers "are not legal services at all" and are distinct from the "professional services" performed by the attorney representing them. *See In re Mabson Lumber Co.*, 394 F.2d 23, 24 (2d Cir. 1968) (bankruptcy case where Judge explained that, "No allowance for compensation shall be made to any attorney for a trustee except for professional services… Judge Learned Hand went out of his way to dispel the curious notion, apparently widespread then too, that an attorney may recover for what are not legal services at all.") (internal citations omitted); *In re Eureka Upholstering Co., Inc*., 48 F.2d 95, 96 (2d Cir. 1931) (receivership case where Judge Learned Hand stated, "Any truly legal services [the receiver] may require are indeed in another class, but his attorney, when he has one, cannot take on his duties, and then recover for them under the guise of legal services, which they are not. It is true that the line is not always easy to draw, but it is there, and referees should draw it straitly [sic]…"). Accordingly, the bankruptcy cases relied on by WF that focus on the ethical obligations of a trustee's attorney are not relevant to this Court's assessment of the Receiver.

As previously mentioned, WF cites two bankruptcy cases that do address ethical obligations and conflicts of interest of the trustee himself. (Doc. 766, p. 20-22) (citing *In re Blinder, Robinson & Co., Inc.*, 131 B.R. 872 (D. Colo. 1991); *In re Southern Diversified*

Properties, Inc., 110 B.R. 992 (Bkrtcy. N.D. Ga. 1990)). While these cases are generally comparable to the ethical obligations of a receiver, "this is obviously not a bankruptcy proceeding" so "case law concerning receivers is therefore most applicable." *Eustace*, 2007 WL 1314663, at 6. Moreover, WF neglected to include the distinguishing facts for one of the cases and conveniently omitted the outcome for the other. Even if these cases could dictate the issues in the instant case, neither indicates that this Court should disqualify the Receiver.

In *In re Southern Diversified Properties, Inc*., an attorney appointed as a Chapter 11 trustee learned of a potential conflict of one of his law partners the day after his appointment, but he took five days to realize that the partner had a conflict of interest and seven days to decline to serve as trustee. 110 B.R. at 994. Despite the potential conflict, the attorney/trustee spent a number of hours working on the case, providing both "fiduciary services" in his capacity as trustee *and* legal services in his capacity as an attorney. *Id*. WF is correct that the court held that the attorney/trustee was not entitled to payment of $1,890.00 for the 13.5 hours of legal services he performed.[7] *Id*. at 996. However, WF omitted an important reason for the court's decision – no firm or attorney had been appointed by the court to perform legal services for the trustee. *Id*. at 995. Although the court looked upon the conflict of interest very negatively, the court clarified that it would have refused to compensate the attorney for his legal services under those circumstances even without any conflict of interest: "Even if there had been no conflict, neither Mr. Anderson nor any other member of his firm was authorized to provide legal services to the trustee. Without court approval and appointment, an application for compensation for professional services may be denied." *Id*. at 996.

[7] Importantly, the court's opinion did not address whether the trustee should have been compensated for his fiduciary services as trustee in spite of the conflict of interest, as "no allowance [was] sought for such trustee services." 110 B.R. at 994. Therefore, the case has no bearing on whether the Receiver should be compensated for services as the Receiver, should the Court find a conflict of interest exists between the Receiver and WF.

The instant case differs from *In re Southern Diversified Properties, Inc*. in several ways. First, the Receiver has never acted as an attorney or performed legal services for the Receivership. Rather, he has acted solely as a receiver and performed exclusively fiduciary services for the Receivership. So while the trustee in *In re Southern Diversified Properties, Inc.* may have implicated the conflict of interest ethical rules by acting as an attorney on the case in which he was appointed as trustee, the Receiver has not done the same. Second, a receiver's counsel does not have to be formally approved by the court like a trustee's counsel does under bankruptcy law. The Court has implicitly approved WGK as the Receiver's counsel by approving the firm's motions for attorneys' fees throughout these proceedings.[8] (Docs. 130, 165, 201, 266, 395) Therefore, the court's main reason for refusing to compensate the attorney/trustee in *In re Southern Diversified Properties, Inc.* is not an issue here. Third, as explained in WGK's separate objection to the Motion, the Receiver's firm has no existing conflict with WF like the trustee's law partner did in *In re Southern Diversified Properties, Inc.* to justify disqualification or the disallowance of compensation. Accordingly, *In re Southern Diversified Properties, Inc.* should have no impact on these proceedings and lends no support to WF's Motion.

In *In re Blinder, Robinson & Co., Inc.*, the court found that the trustee and the law firm representing him were not disinterested, as the firm represented a potential creditor in pending litigation against the debtor at the time the firm became the trustee's counsel. 131 B.R. at 880. However, as WF conveniently failed to mention, the court in that case did not disqualify the trustee or the law firm. *Id*. at 883. Importantly, the law firm and trustee cured any conflict that existed – the law firm withdrew from representation of the potential creditor within two months

[8] In its Order appointing the Receiver, this Court permitted the Receiver to select the counsel of his choosing. (Doc. 8, p. 5) ("The Receiver, and any counsel whom the Receiver may select…"). The Receiver's counsel, who were first at Fowler White and subsequently at WGK, notified the Court of his choice of counsel by filing their respective notices of appearance, which the Court has acknowledged. (Docs. 10, 11, 12, 240; Wiand Decl. at ¶ 6)

of becoming counsel for the trustee, and the trustee assured the court that he would employ special counsel to evaluate any claim of that creditor against the debtor. *Id*. at 880. Furthermore, the court emphasized that "the liquidation proceedings have progressed to the point that appointing a new Trustee and counsel would be a major disruption" such that "more rather than less damage would be done by reversing the bankruptcy court" and disqualifying them. *Id*. at 881. Although the court found that "the conduct of the Trustee and his firm was not exemplary," the court upheld the bankruptcy court's decision to not disqualify them, "given the exigencies of modern legal practice, the firm's subsequent withdrawal from the Diamond Vision case, and the disruption that would be caused by replacement of the Trustee." *Id*. at 883.

As in *In re Blinder, Robinson & Co., Inc.,* the Receiver's law firm has no current or future potential for a conflict of interest with WF, as WGK has ceased representing WFA (which never had any connection to this Receivership) and has not represented WF itself beyond the single instance the Receiver previously disclosed to the Court.[9] (Doc. 730) Similar to *In re Blinder, Robinson & Co., Inc.,* the Receiver, in an abundance of caution, has retained and will continue to retain outside counsel – the law firms of James Hoyer and Johnson Pope – to represent him in connection with any dealings the Receivership has/had with WF. By doing so, the Receiver has eliminated the potential for any current or future conflicts between WGK and WF. Moreover, both the Receiver and WGK have provided invaluable services to this Receivership for more than three years. (Docs. 8, 10, 11, 12) Thus, if this Court finds a conflict between the Receiver or WGK and WF, the same reasons that led the court to keep the receiver and his counsel in *In re Blinder, Robinson & Co., Inc.* are present here with equal force and should justify retention of the Receiver and WGK despite any prior alleged conflict.

[9] WGK's prior relationship with and/or representation of WF and WFA is fully addressed by WGK in the firm's own response in opposition to the Motion.

III. ANY ALLEGED PAST CONFLICT HAS NOT INJURED THE RECEIVERSHIP, WHILE DISQUALIFICATION WOULD INJURE THE RECEIVERSHIP

Regardless of whether any conflict of interest actually existed between the Receiver and/or WGK and WF, this Court must take into consideration that any alleged conflict of interest has caused no injury to the Receivership. *See Eustace*, 2007 WL 1314663, at 10 ("[T]his Court must take into consideration the Receiver's arguments that no significant damage has been done to the receivership efforts in this case."). To date, the Receiver and WGK have generated approximately $30 million in net cash assets for the benefit of defrauded investors, and the Receiver is ready to make an interim distribution of more than $18 million to the victims of Nadel's scheme. (Wiand Decl. at ¶ 3) Moreover, the Receiver's conduct toward WF has been in the best interests of the Receivership and has shown no special treatment to WF. To the contrary, the Receiver has treated WF like any other claimant of the Receivership Entities. In fact, the Receiver sued WF last month for its complicit enabling of Nadel's Ponzi scheme, seeking to recoup from WF the damages resulting from the Ponzi scheme for the purpose of returning the recovered monies to the defrauded investors. The Receiver also determined that WF's claim on the Rite Aid Property should be denied due to WF's role in Nadel's scheme, and opposed WF's motion to determine that it was not obligated to file proof of claims on additional real properties within the Receivership Estate and alternative motion for leave to file late claims. (Doc. 755) Nothing about the Receiver's or WGK's past or present relationship with WF could be construed as harmful to the Receivership.

However, if WF's motion to disqualify the Receiver and WGK were granted, the Receivership will certainly suffer. It is a well-known proposition that disqualification of a receiver and/or his counsel is disfavored. *See Eustace*, 2007 WL 1314663, at 10. A change in the receiver and/or his counsel requires "delay in the progress and ultimate termination of the

case and additional expense incurred by appointment of a new receiver." *Id*. Delay in the outcome of a receivership would have a "detrimental impact" on the investors. *Id*. at 11.

The Receiver and his counsel have devoted more than three years to this Receivership. Appointing a new receiver and counsel would be costly and do nothing more than disrupt and delay the proceedings. Where, as here, the Receiver has had no actual conflict of interest and has cured any potential conflict with his firm's discontinuance of representation and hiring outside counsel, the Receiver's disqualification is unjustified and would only harm the Receivership.

IV. THE RECEIVER RETAINED OUTSIDE COUNSEL WHEN TAKING POSITIONS ADVERSE TO WF OR ITS AFFILIATES

Since the Receivership's inception in January 2009, there have been three instances where the Receiver has taken positions adverse to the interests of WF or a WF affiliate. (Wiand Decl. at ¶¶ 11-19) In each instance the Receiver, erring on the side of caution, retained outside counsel.

A. The Receiver Retained Outside Counsel To Sue WF Securities For False Profits.

After learning that a brokerage account held in a nominal capacity by Wachovia Securities International, Ltd.[10] had participated in investments in two of the Hedge Funds at the center of Arthur Nadel's Ponzi scheme – Scoop Real Estate and Viking Fund, LLC – and had received false profits in the amount of $426,610.55 in connection with those investments, the Receiver determined that he needed to bring a clawback action against WF Securities. Although WF Securities was not and never had been a client of WGK, erring on the side of caution, the Receiver retained Johnson Pope to represent him in that matter.[11] On January 20, 2010, Johnson Pope filed the clawback case styled *Wiand v. Wells Fargo Securities International, Ltd., et al*,

[10] WF Securities is successor-in-interest to Wachovia Securities International, Ltd. and an affiliate of WF.

[11] The Receiver had sought (Doc. 174) and obtained (Doc. 175) this Court's permission to retain Johnson Pope to assert claims against Holland & Knight LLP, and since that representation made Johnson Pope knowledgeable about this Receivership, for efficiency the Receiver retained that firm to represent him in the matter against WF Securities.

No. 8-10-cv-00243-EAK-MAP, in the U.S. District Court for the Middle District of Florida on behalf of the Receiver. WGK did not represent the Receiver in the clawback case. Indeed, from the filing of the complaint through the eventual Court-approved settlement of this action on June 10, 2011 (Doc. 640), Johnson Pope exclusively represented the Receiver and litigated all aspects of the case on his behalf.

B. The Receiver Retained Outside Counsel To Sue WF For Participating In The Ponzi Scheme.

While performing his duties of marshaling and safeguarding the assets of the Defendants and Relief Defendants, the Receiver concluded that WF played an active role in facilitating and furthering Nadel's Ponzi scheme. At the request of the SEC, the Receiver attempted to address the damages stemming from the shadow bank accounts[12] with WF outside of court. However, those efforts were not productive, leaving the Receiver with no choice but to initiate legal action. After requesting proposals from multiple law firms, the Receiver elected to retain James Hoyer to represent him in a lawsuit against WF. On December 22, 2011, the Receiver filed a Motion for Leave to Retain the James Hoyer Law Firm to Pursue Claims Against Wachovia Bank, N.A. N/K/A Wells Fargo Bank, N.A. (Doc. 691), which the Court approved on December 27, 2011. (Doc. 696) Thereafter, James Hoyer researched and evaluated the merits of claims against WF, and then drafted and filed a complaint against WF and relationship manager Timothy Ryan Best in the Twelfth Judicial Circuit of Sarasota County for their respective and complicit roles in: (a) allowing Nadel to open shadow bank accounts (some in a "doing business as" capacity) he was not authorized to open; (b) ignoring discrepancies in account opening documents; (c) failing to implement adequate account monitoring programs and guidelines; (d) failing to audit dormant

[12] Because each of the Hedge Funds managed by Nadel held a corresponding bank account at Northern Trust Bank, where Fund investors were directed to wire investment deposits and where checks from investors in the Fund were deposited, and Nadel specifically opened the Wachovia accounts to conceal his scheme from the Hedge Funds' staff, all of the Hedge Fund-related accounts opened by Nadel at Wachovia are referred to as "shadow accounts."

accounts; (e) ignoring Nadel's background; (f) participating in and profiting from investments in Scoop Real Estate and Viking Fund; (g) lending money to Nadel for real estate transactions; (h) allowing, facilitating and executing the commingling of monies across the Hedge Fund shadow accounts; (i) allowing, facilitating and executing wire transfers from trading accounts to non-matching shadow accounts; (j) allowing, facilitating and executing transfers between non-profit and business accounts; (k) allowing, facilitating and executing transfers between personal and business accounts; and (l) allowing, facilitating and executing large transfers in rounded denominations. James Hoyer has represented and will continue to represent the Receiver in all aspects of this litigation, including, but not limited to, corresponding with WF's counsel. WGK has not represented the Receiver in this litigation against WF and never will.

C. The Receiver Retained Outside Counsel To Represent Him In All Receivership Matters Involving WF.

On December 7, 2011, 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 Nadel's Ponzi scheme who complied with the claims process requirements and have allowed claims. WF filed a claim in the claims process as an allegedly secured creditor regarding only one property in the Receivership. However, the Receiver determined that the claim should be denied due to WF's misconduct in connection with Nadel's scheme, as outlined above, and expounded upon this determination within the Claims Motion. *See* Claims Mot. § II.D.2. WF filed an objection to the Claims Motion on December 21, 2011 (Doc. 690) and other submissions relating to Receivership property. (Doc. 718, 719) As WF's filings confirmed that the Claims Motion would be met with adversity from WF, the Receiver asked James Hoyer to expand its representation to include all Receivership matters involving WF. On February 2, 2012, the Receiver notified the Court of his decision to retain James Hoyer for this purpose. (Doc. 730)

Since entering notices of appearance, James Hoyer has handled all matters in the instant case involving WF, including, but not limited to, representing the Receiver at the hearing held before this Court on March 2, 2012, and filing the Receiver's Motion to Appoint Appraisers Pursuant to 28 U.S.C. §2001 to Appraise Receivership Real Property in Graham, North Carolina (Doc. 739); Receiver's Opposition to Motion of Wells Fargo Bank, N.A. (I) for Determination That the Filing of Proof of Claims Herein Is Not Necessary to Preserve Secured Creditors' Valid State Law Security Interests in, and Claims Against, Collateral in the Receiver's Possession, or, in the Alternative, (II) for Leave to File Late Claims Pursuant to Federal Rule of Civil Procedure 60(b) (Doc. 755); Receiver's Memorandum on Jurisdiction and Response to Wells Fargo Bank and TRSTE's Memorandum on Jurisdiction[13] (Doc. 757); 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 (Doc. 767); Notice of Filing the Government's Application for an Order Vacating the Preliminary Order of Forfeiture (Doc. 768); and Receiver's Notice of Selection of Appraiser Pursuant to Court Order Dated March 2, 2012 (Doc. 781). Again, WGK did not represent the Receiver in connection with the above matters.

Hiring separate counsel, as the Receiver has done, solves any problems, and there is no need to hire a "special receiver" to act in connection with WF primarily because, assuming *arguendo* that there was a conflict, there unquestionably is none now. Neither WF, nor WFA, nor any other Bank affiliate is a client of WGK anymore, and there has been no transfer to the Receiver of any knowledge or confidential information about WF that is remotely relevant to or that could be used against WF in this Receivership. (*See* p. 25, lines 21-25 and p. 26, lines 1-4 of Transcript of Hearing held on March 2, 2012, attached hereto as Exhibit A; Wiand Decl., ¶ 8)

[13] This memorandum was jointly filed by James Hoyer and WGK because the issues raised by the Court with respect to jurisdiction could have impacted Receivership property unrelated to WF.

Moreover, there is no hint or suggestion that the Receiver has shown any favoritism to WF. No other party, creditor, debtor or defrauded investor has complained. Only WF itself has complained, and its motives are transparent. And in any event, it has not been able to identify or articulate any damage to the Receivership whatsoever. When this Court asked WF's counsel at the March 2, 2012 hearing for any evidence that suggests a negative impact on the Receiver as a result of the alleged conflicts, WF's counsel said, "Judge, I can't sit here and tell you today that I can identify a specific issue there." (Ex. A, p. 20, lines 20-21) With no damage to the Receivership, no appearance of impropriety by the Receiver, and no possibility of present or future conflict with the termination of the relationship between WGK and WF and WFA, hiring a "special receiver" is unnecessary and would only add to the cost of the Receivership to the detriment of the innocent and defrauded investors.

To summarize, in the three instances wherein it became clear to the Receiver that his dealings with WF or its affiliates were going to take an antagonistic route, in an abundance of caution, the Receiver retained outside counsel to represent him.[14]

V. PAYMENT OF FEES

A receiver is entitled to reasonable compensation and reasonable out-of-pocket expenses incurred in preserving the estate. *See S.E.C. v. Kirkland*, 2007 WL 470417, 2 (M.D. Fla. 2007); *Motion Dynamics, Inc. v. Nu-Best Franchising, Inc*., 2006 WL 1050639, 4 (M.D. Fla. 2006). While the receiver's "results are always relevant," *S.E.C. v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992) (citing *SEC v. Moody*, 374 F.Supp. 465 (S.D. Tex. 1974), *aff'd*, 519 F.2d 1087 (5th Cir. 1975)), a receiver is entitled to compensation as long as he reasonably and diligently discharges his duties. *Id.* ("Even though a receiver may not have increased, or prevented a

[14] See WGK's concurrently filed Response in Opposition to the Motion for WGK's discussion of how it has no current conflict of interest resulting from its prior relationship with and/or representation of WF and WFA. Also see *supra* section I beginning on p. 5 for why the Receiver has no conflict of interest with any former client.

decrease in, the value of the collateral, if a receiver reasonably and diligently discharges his duties, he is entitled to compensation."); *see also S.E.C. v. Aquacell Batteries, Inc.*, 2008 WL 276026, 4 (M.D. Fla. 2008) (awarding receiver's full fee request of a fourth of existing estate assets based on difficulty in identifying and marshaling the assets, even though much of receiver's efforts did not yield significant results and were met with resistance).

As outlined above, the Receiver's work to date has tremendously benefited the Receivership. Accordingly, the Receiver is entitled to continue receiving reasonable compensation at the Court-approved rates for the results he has secured and will strive to continue to secure on behalf of the Receivership. (Docs. 130, 165, 201, 266, 395) (approving full payment of fees, costs and reimbursement to Receiver and his professionals). As long as the Receiver continues to utilize special counsel when dealing with WF, there is no question of impropriety affecting the compensation to which the Receiver is entitled.

VI. CONCLUSION

There is no current or future conflict between the Receiver and WF. In his capacity as an attorney at WGK, Wiand does not represent WF or any of its subsidiaries in any legal matters. Moreover, as explained in WGK's opposition to the Motion, WF is not a current client of WGK.

WHEREFORE, the Receiver respectfully requests that the Court deny the 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, so that the Receiver can continue to fulfill his obligation of marshaling and safeguarding the Receivership assets to the benefit of innocent and defrauded investors without further delay.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 14, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on March 15, 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
Register No. 50690-018
Butner Low
Federal Correctional Institution
P.O. Box 999
Butner, NC 27509

s/ Jonathan B. Cohen
Jonathan B. Cohen, FBN 0027620
jcohen@jameshoyer.com
Terry A. Smiljanich, FBN 145349
tsmiljanich@jameshoyer.com
Megan E. Davis, FBN 0068584
mdavis@jameshoyer.com
JAMES, HOYER, NEWCOMER
& SMILJANICH, P.A.
One Urban Centre, Suite 550
4830 West Kennedy Blvd.
Tampa, FL 33609
Tel: (813) 397-2300
Fax: (813) 397-2310

Attorneys for the Receiver, Burton W. Wiand