

EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
Case No. 8:09-cv-87-T-26TBM

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-vs-

2 March 2012
9:00 a.m.
Courtroom 15B

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

Defendants,

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

Relief Defendants.

-----/

TRANSCRIPT OF PROCEEDINGS
(MOTION HEARING)
BEFORE THE HONORABLE RICHARD A. LAZZARA,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

For the Receiver: TERRY ALAN SMILJANICH, ESQUIRE
JONATHAN BETTEN COHEN, ESQUIRE
*James, Hoyer, Newcomer, Smiljanich &
Yanchunis, P.A.*
4830 West Kennedy Boulevard
Suite 550
Tampa, Florida 33609
Phone: (813) 286-4100
Fax: (813) 286-4174
tsmiljanich@jameshoyer.com
jcohen@jameshoyer.com

(appearances continued on next page)

STENOGRAPHICALLY REPORTED
COMPUTER-AIDED TRANSCRIPTION

SHERRILL L. JACKSON, RPR, FPR
Federal Official Court Reporter, U.S. District Court
Middle District of Florida, Tampa Division

BURTON WIAND, ESQUIRE
GIANLUCA MORELLO, ESQUIRE
Wiand, Guerra, King, P.L.
3000 Bayport Drive
Suite 600
Tampa, Florida 33607
Phone: (813) 347-5100
Fax: (813) 347-5155
gmorello@wiandlaw.com

For the Plaintiff
SEC:

SCOTT A. MASEL, ESQUIRE
Securities & Exchange Commission
Miami Branch Office, SERO
801 Brickell Avenue
Suite 1800
Miami, Florida 33131
Phone: (305) 982-6398
Fax: (305) 536-4154
masels@sec.gov

JEFF ALBERTS, ESQUIRE
(appearing via telephone)
United States Attorney's Office
Southern District of New York

ANITA M. CREAM, ESQUIRE
United States Attorney's Office
400 North Tampa Street
Suite 3200
Tampa, Florida 33602
Phone: (813) 274-6000
Fax: (813) 274-6220

For the Defendants:

JOSEPH SHAHEEN, JR., ESQUIRE
STEVEN WIRTH, ESQUIRE
BEN DIAMOND, ESQUIRE
Akerman, Senterfitt
401 East Jackson Street
Suite 1700
Tampa, Florida 33602
Phone: (813) 223-7333
Fax: (813) 223-2837

(appearances continued on next page)

SHERRILL L. JACKSON, RPR, FPR
Federal Official Court Reporter, U.S. District Court
Middle District of Florida, Tampa Division

ANA T. BARNETT, ESQUIRE
*Stearns, Weaver, Miller, Weissler,
Alhadeff & Sitterson, P.A.*
150 Flagler Street
Suite 2200
Miami, Florida 33130
Phone: (305) 789-3514
Fax: (305) 789-3395

ALSO PRESENT

SUSAN SAYLOR (Courtroom Deputy Clerk)
PAUL MILITELLO (Court Security
Officer)

REPORTED BY

SHERRILL L. JACKSON, RPR, FPR
Federal Official Court Reporter
801 North Florida Avenue
Suite 13A
Tampa, Florida 33602
Phone: (813) 301-5041

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(None offered or received)

SHERRILL L. JACKSON, RPR, FPR
*Federal Official Court Reporter, U.S. District Court
Middle District of Florida, Tampa Division*

P R O C E E D I N G S

(9:50 a.m.)

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THE COURT: Call the case.

THE CLERK: The case now before the Court is
8:09-cv-87-T-26TBM, *Securities and Exchange Commission vs.*
Arthur Nadel, et al.

THE COURT: Let's do it real slow for the benefit
of the reporter.

MR. SMILJANICH: Yes. Terry Smiljanich for the
James, Hoyer, Newcomer, Smiljanich & Yanchunis law firm,
representing the receiver, Mr. Wiand.

MR. MORELLO: Gianluca Morello of Wiand, Guerra,
King here on behalf of the receiver.

MR. WIAND: Burton Wiand as the receiver.

MR. MASEL: Scott Masel representing the
Commission.

MR. COHEN: Jonathan Cohen from the James, Hoyer,
Newcomer & Smiljanich law firm, for the receiver.

THE COURT: Who is on the phone?

MR. ALBERTS: This is Jeff Alberts in the Southern
District of New York. I am actually having a very difficult
time hearing anybody speaking.

THE COURT: All right, let's do this: I want you
just to remain seated unless you're using the lectern and
then speak into the mike.

Can you hear me, Mr. Alberts? Mr. Alberts, can

1 you hear me?

2 MR. ALBERTS: Yes, I can hear you.

3 THE COURT: How are you feeling?

4 MR. ALBERTS: Better, Your Honor.

5 THE COURT: Have a seat, gentlemen.

6 All right.

7 MR. SHAHEEN: Joe Shaheen representing
8 Wells Fargo.

9 MS. BARNETT: Ana Barnett representing
10 Wells Fargo.

11 MR. WIRTH: Steven Wirth representing Wells Fargo
12 Bank.

13 MS. CREAM: Anita Cream, Your Honor, for the
14 United States, Middle District of Florida.

15 THE COURT: Who's this gentlemen over here at the
16 end?

17 MR. DIAMOND: Ben Diamond with the Akerman,
18 Senterfitt on behalf of Wells Fargo Bank.

19 THE COURT: Is anybody here from LandMark Bank?

20 (No response.)

21 THE COURT: Docket 761. I guess you pronounce it
22 Hoeck, H-O-E-C-K, Notice of Intent to Rely on Brief. That
23 was on behalf of Interested Party American Momentum, as
24 successor to LandMark Bank of Florida. So, I -- I guess
25 they just opted out of being here. That's fine.

1 So, as not to take up the time of Mr. Alberts,
2 who's appearing by phone as Assistant United States Attorney
3 from the Southern District of New York, I want or take up
4 out of order this whole issue of jurisdiction that
5 apparently was raised by Wells Fargo.

6 Mr. Shaheen, have you seen the filing of
7 Miss Cream and Mr. Alberts in this case?

8 MR. SHAHEEN: Yes, Your Honor. That matter is
9 being handled by Ms. Barnett, who's been handling that
10 particular property.

11 THE COURT: Well, Miss Barnett, what say you? I
12 mean, there was a suggestion in some of your filings there
13 was some type of secret agreement here, in violation of
14 certain duties. It's clear to me that the judge in the
15 Southern District of New York was well aware of the
16 receiver's appearance in this whole matter. Correct?

17 MS. BARNETT: Your Honor, it's clear that the
18 judge was well aware that there was a receivership here in
19 Tampa, yes.

20 THE COURT: Be careful what you say in your
21 filing.

22 I just checked PACER. How do you pronounce the
23 judge's name? Is it Koeltl?

24 MR. ALBERTS: That's correct, Judge.

25 THE COURT: I checked PACER, and no order has been

1 entered. Do you have any indication from his chambers staff
2 as to when he may rule on your motion?

3 MR. ALBERTS: I have not yet received any
4 indication, Your Honor.

5 THE COURT: All right.

6 MS. BARNETT: Your Honor, if I may, the -- the
7 inference was raised at the secret agreement or the
8 confidential understanding based on a pleading that was
9 filed by the receiver that refers to an understanding
10 between the office as something which has not been -- none
11 of us had been made aware of until that filing, and that was
12 different --

13 THE COURT: All you had to do was go online and
14 check out the filings involving Arthur Nadel.

15 So, you know, I am convinced that this whole
16 jurisdictional argument has no merit. All right? And I'm
17 proceeding on here. I am persuaded that, you know, I have
18 in rem jurisdiction here, and I see no reason to delay these
19 proceedings because of this so-called jurisdictional issue.
20 So, I have no need for Mr. Alberts to be on the phone unless
21 there's anything more you care to add, Mr. Alberts.

22 MR. ALBERTS: I will rest on the written
23 submissions that I sent in yesterday.

24 THE COURT: Well, I appreciate you appearing by
25 phone. Thank you.

1 MR. ALBERTS: Thank you very much.

2 (Speakerphone hung up.)

3 MS. CREAM: Your Honor, may I be excused as well?

4 THE COURT: Sure.

5 All right. Mr. Muench.

6 MR. MUENCH: How you doing?

7 THE COURT: Good to see you.

8 Who's going to argue the motion to continue this
9 hearing?

10 MR. SHAHEEN: At the podium or stay here?

11 THE COURT: Mr. Castillo says it's a lectern, not
12 a podium. Go ahead to the lectern.

13 Is there anybody else here who has an interest in
14 this proceeding as a claimant or any attorney representing
15 them?

16 (No response.)

17 THE COURT: Go ahead, Mr. Shaheen.

18 MR. SHAHEEN: Your Honor, we have moved to
19 continue this hearing based upon the filing of the motion to
20 disqualify Mr. Wiand as receiver and his firm as counsel to
21 the receiver. The basis of that motion is their violation
22 of the Florida Rules of Professional Conduct, their
23 violation of Wells Fargo's conflict-of-interest policy for
24 its outside counsel, and most --

25 THE COURT: So, you have your own

1 conflict-of-interest policy. Does that carry the force of
2 law?

3 MR. SHAHEEN: It's important, Your Honor, because
4 it clarifies to outside counsel who Wells Fargo considers to
5 be the client.

6 THE COURT: Let me ask you a question: If
7 Mr. Wiand had said, "We will honor the claim of
8 Wells Fargo," would we be here on this motion?

9 MR. SHAHEEN: I don't know if we'd be here or not.
10 I suspect we'd still have to raise the issue.

11 Your Honor, this issue -- let me back up and
12 explain to the Court how this came about. We are here
13 before the Court on three different Wells Fargo loans. They
14 are administered by loan officers --

15 THE COURT: Aren't there four?

16 MR. SHAHEEN: There are four, but one of them they
17 don't contest. One of them they take the position it will
18 be paid and won't be part of this contested proceeding.

19 THE COURT: That property will ultimately have to
20 be sold, won't it?

21 MR. SHAHEEN: I don't know if they intend to sell
22 the property or not, Your Honor. We have been told they
23 intend to pay off the loan. So, Your Honor, we have a
24 property -- two properties in North Carolina, one
25 administered by a loan officer in Tampa, another

1 administered by a loan officer in North Carolina, and then
2 the Sarasota condominium, which is administered by someone
3 in Des Moines. The issue from the Wells Fargo Bank
4 perspective is that these folks were dealing with a
5 receiver, dealing with the receiver's attorneys, and weren't
6 aware of the fact that that receiver actually represented
7 Wells Fargo. It was only when they got threatened with suit
8 and the matter had to go up through the legal department in
9 Wells Fargo when this issue was discovered. This became a
10 complicated issue because this law firm has represented
11 Wells Fargo in 28 different matters, 27 of them Wells Fargo
12 investors and affiliates, one of them actually with the
13 Wells Fargo Bank.

14 Arrangements had to be made to replace them in
15 these cases. To be honest, Your Honor, I don't think
16 they're aware of that process taking place. We've been
17 trying to work through this process before we filed this
18 motion. The issue is very clear: They, in their response,
19 indicate they represent the bank in one matter and that's
20 not a conflict. We feel it's clearly a conflict.

21 But the reality is, there is one case where they
22 clearly represent Wells Fargo Bank. They dismiss it as a
23 small business. They have been paid almost \$50,000 in that
24 small case, and it remains pending. It's a clear conflict.
25 It's a clear violation --

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Federal Official Court Reporter, U.S. District Court
Middle District of Florida, Tampa Division

1 THE COURT: Is that the one before Judge Merryday?

2 MR. SHAHEEN: Judge, I don't know who it's before.

3 It may be. I don't know, Judge. There's still pending a
4 motion to dismiss. I understand there was some mediation
5 going on and they're being replaced in that case.

6 THE COURT: They've already been replaced.

7 Am I correct, Mr. Morello?

8 MR. MORELLO: Wiand, Guerra, and King are no
9 longer of record in that case.

10 THE COURT: All right.

11 MR. SHAHEEN: And it's the bank's intent,
12 Your Honor, to replace them in all cases. That is in
13 process. The problem here, Your Honor, is that they have
14 been adverse to this bank for months, if not years.

15 The correspondence on this motion will show that
16 over a year ago when my firm first became involved in this
17 case, there was correspondence from counsel for the -- for
18 Mr. Wiand, his own firm, basically insisting that
19 Wells Fargo reduce its claim.

20 The correspondence is going to show that for a
21 year, two years, for a variety of reasons -- a variety of
22 reasons, before the shadow counts even arose, they were
23 taking positions that basically said to Wells Fargo, "You
24 have to reduce your claim because of some equitable
25 position."

1 THE COURT: So, why don't I just -- if your motion
2 has merit, why don't I just replace Mr. Wiand with another
3 substitute trustee with respect to Wells Fargo matters only?

4 MR. SHAHEEN: Because, Your Honor --

5 THE COURT: Do you know the expense that it would
6 cost this receivership and these defrauded investors to
7 bring in a new trustee -- I mean, a new receiver at this
8 stage of the proceedings? Are you well aware of that?

9 MR. SHAHEEN: I'm well aware of that.

10 THE COURT: And you're willing to just go ahead
11 and dissipate the receivership estate when I can just
12 appoint another receiver, assuming your motion has merit?

13 MR. SHAHEEN: First of all, Your Honor, they have
14 not offered to do that. They opposed the motion in its
15 entirety. So, that issue --

16 THE COURT: No. That's one of the suggestions.

17 Mr. Smiljanich, did I read your response wrong?

18 MR. SMILJANICH: No, Your Honor. We don't believe
19 there was --

20 THE COURT: That that's even an alternative?

21 MR. SMILJANICH: That's certainly an alternative
22 the Court has, yes, Your Honor.

23 MR. SHAHEEN: Your Honor, it's not offered in the
24 brief. We suggested that they might not go forward with the
25 argument with regard to Wells Fargo until that issue was

1 addressed. It was suggested that that might be an
2 alternative.

3 THE COURT: Well, whether they suggested it or
4 not, what if I suggest it? I'm not just going to sit up
5 here being spoonfed.

6 MR. SHAHEEN: We think that the violations of the
7 Code of Ethics are so severe that the Court needs to
8 consider whether or not it should allow this receiver to
9 continue with this case. If you look at the case that they
10 rely on --

11 THE COURT: I also have to balance the equity
12 here.

13 MR. SHAHEEN: I agree with that, Your Honor. The
14 Court has discretion to determine what is in the best
15 interest of the receivership in taking these issues into
16 account, which I think is an important part of it.

17 THE COURT: What if I disagree with their
18 position? What if I say you're a secured creditor, and
19 the -- the reason -- the mere fact you didn't file a claim
20 doesn't dissipate your security interest, you know? Because
21 it's -- I really struggled with this.

22 I cannot believe this issue has not arisen in some
23 other SEC receivership case where a secured creditor doesn't
24 file a claim and then all of a sudden as a result of that
25 their security interest is wiped out. I've never -- have

1 you found a case?

2 MR. SHAHEEN: Well, there are old U.S. Supreme
3 Court cases that are equity receiverships that are the
4 equivalent of the SEC receiverships that basically stand for
5 the proposition that the security interest is presumed valid
6 and the receiver has to take some action like filing a
7 lawsuit.

8 THE COURT: I agree with that. He takes the
9 property as it is.

10 MR. SHAHEEN: Right.

11 THE COURT: I agree with that.

12 What I'm saying, I have not seen a case like this
13 that presents the fact pattern that's presented here. We're
14 assuming Wells Fargo didn't file the claim; and if they
15 didn't, does that automatically wipe out their security
16 interest?

17 MR. SHAHEEN: Well, Your Honor, there is no case
18 that says that, and there are dozens of cases that say that
19 secured interest survives an equity receivership both
20 outside of bankruptcy --

21 THE COURT: Let's assume I reject their position
22 and I say, "All right, Wells Fargo, you have a secured
23 interest. I tell you what: We're going to sell this
24 property, and we're going to take all the money, and we're
25 going to put it into a pot somewhere, and then we'll duke it

1 out later with regard to who gets what when." That's what
2 you want, isn't it?

3 MR. SHAHEEN: Well, Your Honor, we don't have any
4 objection to the sale of a property at a fair price.
5 Your Honor knows there's a whole series of motions on that.

6 THE COURT: You need three appraisers. You select
7 'em. You pay for 'em.

8 MR. SHAHEEN: We propose --

9 THE COURT: Excuse me. You select 'em. You pay
10 for 'em.

11 MR. SHAHEEN: The process, Your Honor, doesn't
12 provide for that. The process provides for a specific
13 procedure, whether it be the Court appoints the receivers --

14 THE COURT: Right. You select 'em subject to my
15 approval.

16 MR. SHAHEEN: Well, we've tried to reach some
17 agreement.

18 THE COURT: I'm just talking hypothetically.
19 Let's assume that's what I rule. You know, there's -- I
20 found a district court case where the receiver had
21 recommended that with regard to secured creditors, you just
22 sell the property and they're limited. The secured creditor
23 is limited to the proceeds of that sale, meaning you can't
24 go into the receivership estate for a deficiency.

25 Where is it? It's *SEC vs. Byers*, B-Y-E-R-S, 637

1 F.Supp.2d 166.

2 Wouldn't that cure all these problems and we would
3 just move on and I can take care of all these investors who
4 have been waiting so patiently to recoup at least some of
5 their money?

6 MR. SHAHEEN: No, it would not, Judge. It
7 wouldn't take care of it for a couple of reasons: Number
8 one, the -- we do have the issue of whether or not we have
9 any additional clients. The claims for a deficiency, for
10 example. The way this receiver has classified those claims,
11 there will be no payment to the bank. That in itself is an
12 issue.

13 There is also the lawsuit. There's a \$168 million
14 lawsuit filed in Sarasota seeking to invalidate these
15 transactions by the bank as fraudulent transfers and
16 asserting a number of other claims. That in and of itself
17 is a problem. I mean, that receiver is effectively suing
18 his own client. That's a problem.

19 I mean, Judge, we don't bring these matters
20 lightly. This is the first motion like this I filed in 35
21 years, and I realize the expense to the Court, but these are
22 serious issues where we have a receiver and his law firm
23 basically taking claim -- making claim against their own
24 bank; and, Your Honor, we've got correspondence that shows
25 that not only were they making these demands against bank

1 officers months ago, they were actually investigating their
2 own client by contacting lower-level employees at the bank
3 to obtain information. It's a serious issue.

4 We bring this before the Court because we think
5 it's a very serious issue that cannot be ignored. And I
6 understand it's a problem. I appreciate that. And I take
7 no joy in having to file this motion; but it's a problem,
8 and we think that under the case that they rely upon, the
9 *CTCF vs. Eustace* case -- in that case the court actually
10 appointed a special master to investigate. It basically
11 stopped the proceedings until that was done.

12 That's the case they rely upon which they say
13 basically supports their position. We submit that's what
14 the Court should do here and move as quickly as possible.
15 We'll move everything we can possibly to get this done in a
16 very quick period of time. We don't have any interest in
17 delaying this process any more than it absolutely has to.

18 THE COURT: Why can't I go forward with the other
19 claims?

20 MR. SHAHEEN: Your Honor, there's two problems.
21 One concern that we have is that it's obvious that this law
22 firm may or may not have run a conflicts check at the
23 beginning of this case; but in a case like this, the cases
24 say you've always got to keep running conflicts 'cause
25 things change.

1 It's not clear that that's been done, so we don't
2 know if there are any other issues with anybody else. I
3 don't know the answer to that.

4 Part 2 is the other issues they want to argue
5 related to the plan relate to the priority scheme, relate to
6 the procedures that this Court is going to undertake. The
7 procedure that they're proposing is basically we got 20
8 days --

9 THE COURT: I don't do anything with regard to
10 Wells Fargo. I'm talking about putting you aside. I'm
11 talking about putting you aside because you -- you were
12 basically here on -- with regard to three pieces of property
13 with regard to Wells Fargo; correct?

14 MR. SHAHEEN: Correct.

15 THE COURT: All right, for which you're secured
16 creditors?

17 MR. SHAHEEN: Correct.

18 THE COURT: All right. If I put you aside and
19 move forward with the other -- and enter an order approving
20 the claims process with regard to everyone else, how are you
21 prejudiced?

22 MR. SHAHEEN: We're prejudiced -- if the Court
23 adopts this receiver's priority plan, priority in terms of
24 how to handle claims -- unsecured claims -- it would -- if
25 the Court finds we're secured, that would only affect us on

1 our unsecured deficiency claim, but we would be prejudiced
2 as a result of adopting their priority scheme. If the Court
3 sets in place procedures for the claim, we would be
4 prejudiced by that with respect to the disposition --

5 THE COURT: I'm not doing anything. I'm delaying
6 yours until I resolve the disqualification issue.

7 MR. SHAHEEN: Your Honor, I don't know that --
8 well, the only issue that Wells Fargo would have would be
9 the overall issue of whether or not the Court should allow
10 this receiver to move forward based upon these alleged
11 violations. You're -- the Court determining these other
12 claims is not going to affect Wells Fargo.

13 THE COURT: I know. So, why should I act to the
14 detriment of these investors?

15 MR. SHAHEEN: Your Honor, our position is we think
16 the issues raised in our motion are so severe that justice
17 requires that they be examined before this receiver take any
18 further action. It's as simple as that. I mean, that's our
19 position in substance.

20 THE COURT: What's to be examined?

21 MR. SHAHEEN: The conflicts of interest that we
22 allege resulted in the --

23 THE COURT: Is there any evidence to suggest that
24 as a result of these alleged conflicts it's affected the
25 receiver's ability to fairly and accurately assess these

1 other claims?

2 MR. SHAHEEN: Your Honor --

3 THE COURT: It seems like they've done an
4 excellent job.

5 MR. SHAHEEN: The cases say that the Court needs
6 to be concerned as to whether or not there is any
7 possibility that, looking back, there was a taint on the
8 process. They, as an arm of the court, have the same
9 responsibility that this Court has to avoid any appearance
10 of impropriety.

11 Under the case -- again, this is a case they
12 cited -- the *Eustace* case, they've got to comply with the
13 Rules of Professional Conduct. There are cases in this
14 court that say the receiver has to comply with that, and
15 they have to comply with a higher standard as the receiver.

16 We submit that it's problematic to allow this
17 receiver to continue forward with anything in this case
18 until those issues are resolved, because this issue is
19 tainted.

20 Judge, I can't sit here and tell you today that I
21 can identify a specific issue there. We weren't involved in
22 this case a year and a half ago, but I think that there is
23 an issue raised by these ethical issues, which is a serious
24 issue that needs to be resolved; and our -- our request to
25 the Court is to do what the *Eustace* case they cited to us

1 says, to appoint a special master to investigate this as
2 quickly and reasonably as possible.

3 THE COURT: And what's a special master going to
4 do?

5 MR. SHAHEEN: The special master is going to
6 basically do an investigation at the Court's instruction
7 into the conduct of the receiver and his counsel, which I
8 would presume would be to interview them, look at their
9 files, do the same thing to the bank, and make a report to
10 the Court; and then the Court can tell the parties --

11 THE COURT: You know how long that would take?

12 MR. SHAHEEN: Judge, I don't know how long it
13 would take.

14 THE COURT: I know. That's the problem.

15 Mr. Smiljanich.

16 MR. SMILJANICH: Thank you, Your Honor. May it
17 please the Court.

18 Despite attempting to do so, Mr. Shaheen hasn't
19 come up with a single valid reason why this Court should not
20 go forward on a clear roadmap of allowing the distribution
21 of claims that the receiver is seeking at this point to
22 happen.

23 These defrauded and innocent investors have been
24 waiting for a long time. The money is there, and
25 distribution should be made. Nothing that will happen there

1 will prejudice Wells Fargo in any way.

2 We still have these separate issues as to whether
3 or not they have a valid claim or not with regard to these
4 three properties. We still have a separate issue with
5 regard to the sale of the property, whether or not there
6 will be a deficiency. If there's a deficiency, they would
7 become an unsecured creditor.

8 We still have these issues as to whether or not,
9 as a secured creditor, they still have to participate in the
10 claims-determination process. All those issues can move
11 forward and not in any way affect the -- the motion for
12 determination of claims at this time, Judge, preliminary
13 interim determination, which is why we're here on this
14 motion to continue.

15 There's no reason to continue that matter. It
16 should be allowed to proceed. Obviously there are no other
17 people here, investors or otherwise, who are asking that
18 this Court stop the process from moving forward. Everyone
19 wants this to move forward. This only serves the interest
20 of Wells Fargo to stop it at this point.

21 We have these separate issues. We believe --
22 firmly believe that when we're allowed to fully brief this
23 issue, the Court will find that Mr. Wiand has acted
24 appropriately at all times in this matter.

25 He is -- he is acting as a receiver. He's not

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1 representing a client. He's acting as a receiver. He has
2 his law firm representing him in connection with a very --
3 all the various matters of this receivership. However, when
4 the issue came up that he needed to sue Wells Fargo in
5 connection with a clawback issue with regard to false
6 profits, he hired a separate law firm, Johnson, Blakely, to
7 pursue that matter. It was pursued and resolved.

8 When he saw that there was an issue arising with
9 regard to the potential of having the suit against Wells
10 Fargo in connection with their complicity in the -- in the
11 Ponzi scheme in this matter, he came -- he searched for and
12 interviewed various law firms and eventually selected my
13 firm to represent him in connection with any claims against
14 Wells Fargo in that matter.

15 When the claims-determination motion was made and
16 Wells Fargo started -- took the position that (a) it didn't
17 have to file a claim because it was a secured creditor, when
18 it started objecting to the sale of the Rite Aid property,
19 when it argued that this Court had no jurisdiction over the
20 Laurel Preserve and the Golden Gate condo, when that issue
21 came up, Mr. Wiand came to the Court and said that he
22 intended to hire my firm rather than use Wiand, Garrett,
23 King to represent the receivership in connection with the
24 defense of those matters raised by Wells Fargo.

25 So, the receiver has acted appropriately at every

1 step of the way here. So, when we get to the merits of
2 their motion for disqualification, I think -- I think the
3 Court will find that there's nothing to their motion.

4 But we're here right now on the claims
5 determination moving forward so that the receivers can be --
6 the investors can be partially paid, and we're here in
7 connection with if Your Honor wishes to proceed to the
8 issues with regard to Wells Fargo where Your Honor has
9 already determined the jurisdictional issue.

10 When it comes to the issue of filing a late claim
11 or not, we're prepared to argue that on behalf of the
12 receiver. Not Wiand, Garrett, King, but my firm is prepared
13 to argue that matter adverse to the interest of Wells Fargo.

14 But, first and foremost, there is utterly no
15 reason propounded by Wells Fargo that should stop this
16 process from moving forward after all this time has gone by
17 and we're finally in a position to provide some partial
18 relief to these investors.

19 THE COURT: Why can't I just bifurcate? Why can't
20 I just say, "All right, Wells Fargo, we'll put you aside for
21 the moment, along with your motion to disqualify, and make
22 no determination with regard to any of those issues at this
23 juncture. Enter" -- you know, "I've looked at the -- the
24 submission -- the order submitted. I find nothing wrong
25 with it. I enter that order with regard to everyone else

1 except Wells Fargo" and then let -- and come back another
2 day and argue Wells Fargo -- and then have a full hearing on
3 Wells Fargo's motion to disqualify?

4 MR. SHAHEEN: We have no problem with that,
5 Your Honor.

6 THE COURT: Do you have any problem with that,
7 Mr. Shaheen? It's not prejudicing you, because -- as I
8 understand, the only thing I can see here is there's been no
9 allegation that Mr. Wiand or any member of his firm has used
10 privileged information that they may have acquired in
11 connection with the representation of Wells Fargo Bank to
12 the detriment of Wells Fargo in this case.

13 As I understand it, it all boils down to -- what
14 is it? -- 4.107 of the Code of Professional Conduct of
15 Florida, which deals with being adverse to a client, meaning
16 representing the client over here but the next day I'm suing
17 the client over there. That's what your motion's all about,
18 is it not?

19 MR. SHAHEEN: It is, Your Honor. That rule
20 presumes confidential information was provided; but,
21 Your Honor, I want to be clear on this: We don't know at
22 this point in time whether privileged information was used.
23 We don't know. I can't say one way or the other.

24 THE COURT: But there's been no suggestion that
25 with regard to that whole issue it spilled over, if you

1 will, and tainted anything that the receiver or its law firm
2 has done with regard to these other claims. There's been no
3 suggestion.

4 MR. SHAHEEN: We have not alleged that, Judge.

5 THE COURT: Fine. So, why can't I just do what I
6 suggested in the interest of equity, fairness, for the
7 defrauded investors and set you aside and go ahead and
8 approve the claims process with regard to everyone else,
9 direct a briefing with regard to the motion to disqualify,
10 and we'll go from there? What's wrong with that?

11 MR. SHAHEEN: Your Honor, I have no other reasons
12 other than the issues that I raised before. Those are the
13 issues that we've raised. We can't agree to that, but I say
14 to the Court --

15 THE COURT: How are you prejudiced?

16 MR. SHAHEEN: Judge, we would be prejudiced if the
17 Court does approve a priority, you know, in terms of how
18 they propose the claims to be resolved. That would
19 prejudice us. If the Court excludes that, that takes that
20 issue out of the equation.

21 THE COURT: How are you prejudiced by the
22 priority?

23 MR. SHAHEEN: Because, Your Honor, it sets forth
24 the priority that basically says you pay only investors and
25 don't pay creditors such as Wells Fargo. That's the

1 proposed scheme.

2 THE COURT: Well, no, I didn't mean it like that.
3 Am I wrong?

4 MR. SHAHEEN: Unsecured creditors. It doesn't say
5 Wells Fargo, Your Honor. It says that you pay essentially
6 the investor claims because there's not going to be any
7 money for the non-investor unsecured claims.

8 THE COURT: But you have secured claims, don't
9 you?

10 MR. SHAHEEN: We have secured claims, but we may
11 well have deficiency claims.

12 THE COURT: Under that opinion I just cited you,
13 you know, you look to the sale and the sale alone with
14 regard -- you -- it's not fair for you to dip into these
15 other monies of the receivership estate to satisfy your
16 deficiency.

17 Let's face it, if you went into a mortgage
18 foreclosure proceeding, you're limited to that land; right?
19 There's no other pot to satisfy a deficiency, is there?

20 MR. SHAHEEN: Well, if there were other assets of
21 the debtor, that would be, Your Honor, on a deficiency
22 claim, which is really what we're talking about here. And
23 there are cases, Your Honor, that go the other way, and we'd
24 like the opportunity to argue that at the appropriate time.
25 But that's our concern. That particular issue creates an

1 issue, and then the procedures that would be set in place,
2 because the Court has already indicated that you wouldn't
3 establish those procedures.

4 THE COURT: I wouldn't establish those procedures.

5 MR. SHAHEEN: Judge, I mean, the priority issue is
6 the issue that effects Wells Fargo. Other than that, it's
7 the issues I raised before about the alleged ethical
8 misconduct and the effect of taint on the proceeding.

9 THE COURT: Mr. Smiljanich, what do you say to my
10 suggestion?

11 MR. SMILJANICH: Your Honor, I think it comports
12 with the way other courts have handled this matter when it's
13 been raised, including situations where Mr. Shaheen's law
14 firm found itself in a situation where its partner was
15 acting as a receiver and came up with the situation where he
16 might have to sue a client of the law firm and asked --
17 asked for and received permission to have a separate master
18 handle that separate issue.

19 I think the way Your Honor wishes to proceed here
20 is fair and equitable to all the parties. It won't
21 prejudice Wells Fargo in any way and would allow us all to
22 brief the issues and come back before Your Honor at the
23 appropriate time and show that Wells Fargo indeed has no
24 valid claims, and we can proceed on at that point. But at
25 this point today, Friday, March 2nd, we see no reason why

1 you should not proceed as Your Honor suggests.

2 THE COURT: Of course, I can always provide in
3 that order that it does not apply to Wells Fargo; that those
4 issues will resolve at a later date. And I may change the
5 order of priority with regard to Wells Fargo. I don't know.

6 How long is it going to take you to respond to the
7 motion to disqualify, Mr. Smiljanich?

8 MR. SMILJANICH: Your Honor, we could respond by
9 this coming Friday, I believe, a week from today.

10 THE COURT: Mr. Morello's --

11 MR. MORELLO: The only reason I'm standing up,
12 Your Honor, is we have -- the firm of Wiand, Garrett, King
13 would like to file its own response so that there's a
14 response from the receiver and one from the law firm since
15 the law firm is also accused of all sorts of misconduct that
16 didn't exist.

17 I'm not saying we necessarily also need 25
18 pages -- or 20 pages, but I just want to raise that issue,
19 and I'm happy to do our filing by a week from today as well.
20 We'd be filing on behalf of the receiver.

21 THE COURT: All right.

22 Well, I'm going to go ahead -- I'm going to deny
23 the motion to continue. Subject to my comments, I'll
24 proceed on -- oh, what's the SEC's position? Sorry. Didn't
25 mean to leave you out.

1 MR. MASEL: The Commission has no problem with the
2 Court's plan of action. We can respond by next Friday. We
3 saw no basis to continue this hearing. We saw nothing in
4 the motion to disqualify that warranted that. We oppose the
5 motion, and we'll be filing our opposition whenever the
6 Court requests.

7 THE COURT: All right. Of course, this still
8 remains -- I guess I'll have to continue to carry with the
9 case Wells Fargo's motion for determination of the filing of
10 proofs of claim is not necessary, et cetera -- that's at
11 740 -- as well as its motion for relief from the injunction
12 or, in the alternative, to compel the receiver to abandon
13 the property. I guess that's the Rite Aid Pharmacy
14 property. That's 719.

15 Then there's this motion here to appoint an
16 appraiser to appraise the receivership.

17 Mr. Wiand, what -- just have a seat.

18 Is there still a prospective buyer for this
19 property?

20 MR. WIAND: I'm got him hanging on, Judge, but
21 he's hanging on by a thread. He has indicated that he's --
22 you know, we've had a contract for some period of time now,
23 and he's had his money up; and he has indicated that if
24 something doesn't happen promptly, he's going to look at
25 other things; and that's primarily being conveyed to me by

1 the brokers.

2 And so, you should -- you should understand that's
3 where it's coming from. My conversations with him was that
4 he was going to hang with us until we see how it comes out,
5 but I do have a buyer at the moment.

6 THE COURT: How much is he willing to pay?

7 MR. WIAND: I think the number is two million
8 three, if I -- I may not be exact about it.

9 THE COURT: That doesn't satisfy their security
10 interest, does it? What's your --

11 MR. SHAHEEN: Your Honor, it's over \$3 million.

12 THE COURT: So, what do you want me to do with it?
13 How long is it going to take this appraisal that's --

14 MR. SHAHEEN: Your Honor, we would like the
15 property abandoned to Wells Fargo. We don't think that's a
16 fair price. We're confident of that. We'd rather the sale
17 not go forward. We would prefer the property be abandoned
18 to us since it has no equity.

19 Alternatively we'd rather it stay in the
20 receivership to be sold for that kind of price. And if
21 we're determined to be the security creditor, we're the ones
22 that really take the risk. We're prepared to take that
23 risk. We don't think that's a fair price.

24 MR. SMILJANICH: Your Honor, if I may --

25 THE COURT: Yes.

1 MR. SMILJANICH: -- let's not lose sight of the
2 fact that regardless of the determination as to whether or
3 not they file a late claim with regard to Rite Aid, what
4 their claim is, the receiver still objects to their -- the
5 payment of their claim based upon their complicity in the
6 underlying actions here. So, that's not -- turning it over
7 to them is not an option we would consider.

8 We -- you know, we've -- we suggested three
9 appraisers. They objected. And if I may, Your Honor, they
10 only objected to two of our appraisers, and then they gave
11 us the names of five appraisers. We've looked into it, and
12 I would -- I would think we could work out a compromise with
13 them on naming these three appraisers. We agreed on one.
14 We can perhaps pick one of ours, and they can pick one of
15 theirs, and we've got three appraisers and we can move
16 forwards.

17 MR. SHAHEEN: Your Honor had directed us to
18 confer. We conferred. We asked them to consider our
19 appraisers, and the answer we got was a simple no. I mean,
20 we're happy to talk about it, Judge. We tried to, but
21 somebody has got to talk back to us.

22 THE COURT: All right. I understand. So, you've
23 already agreed on one. Why can't you pick one more? You
24 pick one of yours, you pick one of yours, and we go from
25 there?

1 MR. SHAHEEN: We could do that, Judge, as long as
2 they're agreeable. The Court can sort of take care of that,
3 I suspect.

4 MR. SMILJANICH: That's agreeable with us.

5 THE COURT: I've read their resumes. I'm not an
6 appraiser. They all seem very impressive. I don't know
7 anything about appraising property. That's the problem.

8 MR. SMILJANICH: We would agree to that right now,
9 Your Honor.

10 MR. SHAHEEN: Your Honor, we'll agree to that,
11 obviously subject to our objections to the sale, which we
12 can address later; but as to that issue, we'd certainly
13 agree to that.

14 THE COURT: Who's going to pay these appraisers
15 now? What's it going to cost? Six, seven, eight thousand
16 dollars an appraisal? Do they want their money up front?

17 MR. SMILJANICH: (Nods head.)

18 MR. WIAND: The ones that we've talked to, before
19 they begin their work, they want a commitment that they will
20 be paid; and so --

21 THE COURT: How about your person?

22 MR. SHAHEEN: I'm sure they will do the same
23 thing, Judge.

24 THE COURT: All right. By Friday, Mr. Shaheen,
25 let me know who you want. Just file a notice, "We select so

1 and so."

2 Mr. Smiljanich, you do the same, and we'll get the
3 ball rolling.

4 How long will it take to appraise this property?

5 MR. WIAND: I frankly don't think it's very
6 complicated, Judge, so I think it can be done fairly
7 quickly.

8 THE COURT: All right. What I'm concerned about
9 in the procedure that's been suggested to me is it's only 20
10 days. Isn't that a short period of time?

11 Mr. Morello.

12 MR. MORELLO: Your Honor, the procedures were set
13 up for the -- any objector to come to us with an objection
14 within 20 days and submit documentation. It doesn't end
15 there. There's then a period of time that will allow the
16 receiver and the objecting claimant to negotiate, and
17 obviously there can be an additional exchange of
18 information.

19 The important thing is to get that process moving
20 quickly so that the objections are brought to the receiver's
21 attention within a short period of time rather than waiting
22 90 days. But then there's no set time for the receiver and
23 the objector to be able to negotiate and see if they can
24 compromise the situation; and if, you know, additional
25 documentation is necessary, it can certainly be provided.

1 And that's the whole purpose, is to get that
2 initial step taken care of quicker -- you know, sooner
3 rather than later. But that certainly doesn't stop anyone
4 from providing additional information.

5 And then obviously the subsequent step would be
6 coming to the Court if the objection is not resolved, and
7 there's nothing barring any claimant from submitting
8 additional evidence during the time that the dispute might
9 be before the Court.

10 THE COURT: All right. Now, I want to be clear on
11 this: This order that I will enter applies to everyone
12 except -- well, it's not just Wells Fargo. Who are the
13 other entities involved?

14 MR. SHAHEEN: The only other party that objected,
15 Your Honor, was LandMark Bank.

16 THE COURT: No, I'm not concerned about their
17 objection, but --

18 MR. SHAHEEN: The only claimant, Your Honor, on
19 our side of the table is Wells Fargo Bank.

20 THE COURT: All right. But there was another --

21 MR. SHAHEEN: There are other Wells Fargo entities
22 that are tied into the disqualification motion, but they're
23 not claimants in this case.

24 THE COURT: But there was another one, TSTE, Inc.

25 MR. SHAHEEN: That's right, Your Honor. That's

1 the trustee that has legal title to the properties in
2 North Carolina.

3 THE COURT: But if I was to put just Wells Fargo,
4 all these other entities that are connected to it --

5 MR. SHAHEEN: Yes, Your Honor, but I would -- Your
6 Honor is correct. I would include the TSTE, too, as well,
7 just to be clear, because it's a separate entity.

8 THE COURT: All right. This does not apply to
9 their claims. All right? And I'll deal with those issues
10 de novo, if you will, after I resolve the disqualification
11 motion.

12 Is there anything else that I need to address?

13 MR. SHAHEEN: No, Your Honor.

14 THE COURT: Okay.

15 MR. WIAND: Your Honor, as I mentioned before, may
16 I have permission to file a separate response?

17 THE COURT: Of course. I would assume you want to
18 defend yourself.

19 All right. Thank you, and goodbye.

20 (Adjourned at 9:37 a.m.)

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1 CERTIFICATE OF REPORTER
2
3

4 I, SHERRILL L. JACKSON, Federal Official Court
5 Reporter for the United States District Court, Middle
6 District of Florida, Tampa Division,

7 DO HEREBY CERTIFY, that I was authorized to and
8 did, through use of Computer-Aided Transcription, report in
9 shorthand the proceedings and evidence in the above-styled
10 cause, as stated in the caption hereto, and that the
11 foregoing pages numbered 1 to 37, inclusive,
12 constitute a true and correct transcription of my
13 shorthand report of said proceedings and evidence.

14 IN WITNESS WHEREOF I have hereunto set my hand
15 this 13th day of March, 2012.

16 *s/Sherrill L. Jackson*

17 _____
18 SHERRILL L. JACKSON, RPR, FPR
19 Federal Official Court Reporter
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SHERRILL L. JACKSON, RPR, FPR
Federal Official Court Reporter, U.S. District Court
Middle District of Florida, Tampa Division