

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.

**DECLARATION OF BURTON W. WIAND IN SUPPORT OF THE RECEIVER'S AND
WIAND GUERRA KING P.L.'S RESPONSES IN OPPOSITION TO MOTION OF
WELLS FARGO, 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**

Burton W. Wiand declares as follows:

1. I am an attorney with Wiand Guerra King P.L. (“**WGK**”) in Tampa, Florida, and am the court-appointed Receiver in this matter (“**Receiver**”), having been duly appointed by the Court on January 21, 2009, pursuant to the recommendation of the Securities and Exchange Commission (“**SEC**”), and subsequently reappointed on June 3, 2009, January 19, 2010, and

September 23, 2010. (Docs. 8, 140, 316, 493.) I make this declaration in support of the Receiver's and Wiand Guerra King P.L.'s responses in opposition to Motion of Wells Fargo, 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. (Doc. 766.) I make this declaration based on information personally known to me or gathered by others at my request.

2. At all times since my appointment as Receiver in January 2009, I have acted in good faith and in the best interests of the Receivership in marshaling and safeguarding the assets of the Defendants and Relief Defendants for the protection of the innocent and defrauded investors in full cooperation with the SEC and under the supervision of the Court.

3. In my capacity as Receiver, my efforts to date have generally included the successful institution of a large volume of lawsuits and marshaling of Receivership assets in excess of \$30 million. I have seized, marketed and sold real and personal property on behalf of Receivership Entities. I have negotiated settlement agreements with Wells Fargo Securities International, Ltd., Goldman Sachs Execution & Clearing, LP, and hundreds of other entities and individuals, including profiteers. As a direct result of my efforts, a partial distribution of at least \$18 million is ready to be made to defrauded investors with allowed claims, and that distribution has received preliminary approval from the Court. (Doc. 776.) The complete details of my accomplishments as Receiver in this matter through November 30, 2011 are discussed in the ten Interim Reports I have periodically filed with the Court. (Docs. 103, 141, 176, 240, 362, 462, 540, 609, 685.)

4. Wiand Guerra King P.L. ("**WGK**") is the law firm that I have retained to represent me in the vast majority of Receivership matters, and its lawyers have been instrumental to this Receivership's success.

5. I am currently pursuing a number of clawback cases against additional profiteers and others who received Ponzi scheme proceeds, as well as preparing to initiate more of these cases in arbitration pursuant to earlier court orders. Also, I am pursuing a malpractice action against Receivership Entities' former law firm, Holland & Knight, LLP. In addition, I am pursuing a separate action against Wells Fargo Bank, N.A. (the "**Bank**") for its complicity in Nadel's Ponzi scheme, and I am negotiating the settlement of claims against other parties. As is evident from my Interim Reports, there are many other matters that this Receivership is actively pursuing for the benefit of the Receivership estate and, ultimately, defrauded investors with allowed claims.

6. I selected my former law firm, Fowler White Boggs P.A. ("**Fowler White**"), at the outset of this case to represent me in connection with legal work necessary for the successful completion of my tasks as Receiver. (Doc. 8.) On November 9, 2009, WGK opened and I and most of the lawyers, paralegals, and staff who had dedicated significant time to this Receivership moved from Fowler White to WGK. (*See* Doc. 240 at 2 n.2.) At that time, WGK began undertaking the primary representation of me in my capacity as Receiver. Prior to my appointment as Receiver, I disclosed to the Court my intent to retain Fowler White as counsel (Doc. 6), and later also disclosed my intent to replace Fowler White with WGK as previously discussed (Doc. 240 at 2 n.2). The Court has authorized payment of fees and costs to WGK as my counsel. (Docs. 266, 395, 497, 582, 717.)

7. As fully disclosed in my filing with this Court on February 2, 2012 (Doc. 730), I briefly assisted one of my colleagues at Fowler White in connection with a case involving Wachovia Securities, LLC – a predecessor-in-interest to Wells Fargo Advisors, LLC ("**WFA**") – in September, 2009.

8. I am aware of the fact that WGK has in the past represented WFA, a broker/dealer with no connection to this Receivership as a creditor, debtor, or in any other role. I disclosed this fact to the Court in my filing dated February 2, 2012. (Doc. 730.) However, shortly after James, Hoyer, Newcomer & Smiljanich, P.A. (“**James Hoyer**”) initiated the above-described action for damages against the Bank for its role in Nadel’s scheme, WFA terminated its relationships with WGK. During WGK’s representation of WFA, neither the firm nor I received any confidential information pertaining to WFA that was in any way relevant to or otherwise of benefit in the Receivership.

9. I am also aware that WGK previously represented the Bank on one matter unrelated to this Receivership. After I determined that litigation against the Bank for its role in Nadel’s Ponzi scheme was necessary, and that I also needed to address the Bank’s objections to the claims determination motion (“**Claims Motion**”) (Doc. 675), WGK sought to obtain a waiver from the Bank of any perceived conflict. When WGK did not receive a waiver from the Bank, I retained James Hoyer to represent me in my capacity as Receiver on all Receivership matters pertaining to the Bank. During WGK’s representation of the Bank on this single matter, neither the firm nor I received any confidential information pertaining to the Bank that was in any way relevant to or otherwise of benefit in the Receivership.

10. At present, WGK does not represent the Bank or WFA in any legal matters, and neither is a current client of the firm.

11. During the pendency of this Receivership, there have been three separate occasions that required my taking positions adverse to the interests of the Bank or one of its affiliates. On each of these occasions, in an abundance of caution, I retained outside counsel to represent me. WGK did not participate in my representation on these three occasions.

12. First, upon discovering that a brokerage account held in a nominal capacity by Wachovia Securities International, Ltd. (“**Wachovia Securities**”) had participated in investments in Scoop Real Estate, LP and Viking Fund, LLC – two of the Hedge Funds at the heart of Nadel’s Ponzi scheme – and had received false profits in connection with those two investments, I determined that I needed to pursue a clawback action against Wells Fargo Securities International, Ltd. (“**Wells Fargo Securities**”), the successor-in-interest to Wachovia Securities. Despite the fact that WGK has never represented Wells Fargo Securities, out of an abundance of caution I retained the law firm of Johnson, Pope, Bokor, Ruppel & Burns, LLP (“**Johnson Pope**”) to represent me in that lawsuit. (Docs. 174, 175.) Johnson Pope represented me in all aspects of that clawback action from the initial filing of the complaint through the Court-approved settlement of the action. (Doc. 640.) WGK did not represent me in that clawback action.

13. During the course of that case, a mediation was held telephonically on March 25, 2011, and two senior in-house lawyers for various Wells Fargo entities, including at least one of whom represents the Bank, participated on behalf of Wells Fargo Securities. At that mediation I was represented by Johnson Pope, but WGK attorney Michael Lamont, who has been one of my attorneys for all other clawback cases that I have filed, was contacted by mediator Peter Grilli and asked to explain a position taken by me which applied across all clawback cases. As a result, Mr. Lamont called into the mediation and spoke with the two Wells Fargo lawyers (at least one of whom also represents the Bank) and Mr. Grilli.

14. I have known the Wells Fargo lawyer who represents the Bank for some time, and he is a longstanding friend of several principals of WGK. Around the time of the mediation, I explained to that lawyer the reason for my retaining Johnson Pope as opposed to having WGK lawyers handle the matter. Specifically, I informed him that even though WGK was representing

me in this Receivership, in light of WGK's relationship with Wells Fargo Advisors, out of an abundance of caution WGK did not want to become adverse to a Wells Fargo entity.

15. The fact that Johnson Pope was retained and utilized due to a potential conflict also was publicly disclosed in multiple fee applications filed with this Court. (*See, e.g.*, Doc. 392 at 17-18 & Ex. 25; Doc. 496 at 16-17 & Ex. 14.)

16. Second, while performing my duties as the Receiver in this matter, I concluded that the Bank played an active and complicit role in Nadel's Ponzi scheme. After attempts to address the damages stemming from the Bank's misconduct proved unproductive, I determined that legal action was necessary. I had exploratory discussions with several law firms and sought proposals from three of them, and that process lasted several months. During the second full week of September 2011, I decided to retain James Hoyer to represent me in an action against the Bank. (Docs. 691, 696.) James Hoyer researched and evaluated the merits of claims against the Bank and relationship manager Timothy Ryan Best ("**Best**"), and drafted and filed the complaint, which was filed in the Twelfth Judicial Circuit of Sarasota County. To date, James Hoyer has represented me in all aspects of this action against the Bank and Best and will continue to do so through its conclusion. Again, WGK did not represent me in connection with this action.

17. In October 2011, shortly after I decided to retain James Hoyer, the SEC was informed about my selection of counsel and my intent to pursue claims against the Bank. Over the ensuing few days, information was exchanged with the SEC relating to these matters, and the SEC informed me that it had no objection to my retaining James Hoyer to proceed against the Bank, but that it wanted me to first make another effort to resolve those claims before retaining James Hoyer. I agreed to do that, and then had several discussions – without WGK's involvement – with the in-house Bank lawyer mentioned above over the next several months

about resolving the claims. During our first communications, I explained to the Bank's lawyer that I would be negotiating directly with the Bank as Receiver and that WGK would not be involved. I also informed him that the Bank needed to execute a tolling agreement. After several months it still had not done so. At that point, I determined that I needed to proceed with litigation against the Bank so that James Hoyer would have sufficient time to investigate relevant matters, formulate legal theories and claims, and prepare a complaint without prejudicing the Receivership estate. I advised the SEC of my decision and received its concurrence. A motion for leave to retain James Hoyer was promptly filed on my behalf on December 22, 2011 (Doc. 691).

18. In the third instance, I filed a motion for approval of my claims determinations (the "**Claims Motion**") (Doc. 675) with the Court, which included my determination that the one claim filed by the Bank as an alleged secured creditor in relation to a single property within the Receivership should be denied due to the Bank's role in Nadel's scheme. The Bank objected to the Claims Motion, thereby confirming that the Claims Motion would be met with adversity from the Bank. (Doc. 690.) I asked James Hoyer to also represent me in all Receivership matters involving the Bank and provided notice to the Court of my decision. (Doc. 730.) Since entering notices of appearance, James Hoyer has represented me in all matters in the Receivership action pertaining to the Bank. WGK is not representing me in the Receivership action with respect to any matters involving the Bank.

19. In an abundance of caution, I have exclusively turned to Johnson Pope and James Hoyer to assist me in connection with the above-described matters to avoid even the appearance of impropriety.

20. I have kept the SEC apprised of each of these actions, and have taken these steps after consulting with the SEC.

21. To date, I have received no communications from any defrauded investors, nor any other creditors or debtors of the Receivership estate, objecting to my actions pertaining to the Bank or alleging any perceived conflict of interest or other related impropriety or appearance of impropriety. The only creditor or debtor raising any complaint regarding my actions against the Bank has been the Bank itself.

22. I intend to vigorously pursue, with advice and counsel from James Hoyer, the Receivership's claims against the Bank, and vigorously defend against any attempts by the Bank to divert to itself any of the assets of the Receivership from payment to defrauded investors and legitimate creditors who filed timely claims, as set forth in my Claims Motion. (Doc. 675)

23. With respect to Arthur Nadel's "shadow accounts" held at the Bank, I learned shortly after I was appointed Receiver that Nadel had secretive bank accounts at the Bank. I, with the assistance of WGK lawyers and paralegals, began investigating Nadel's use of those Bank accounts along with all other accounts that Nadel controlled at various financial institutions beginning early on in the Receivership. As part of that process, we subpoenaed and reviewed documents from a large number of sources, reviewed documents I was able to seize after being appointed Receiver, interviewed Nadel and other "insiders," and obtained other relevant publicly available materials. Among the materials that we obtained and reviewed was information relating to the shadow accounts, including Nadel's authority with respect to those accounts.

24. We also investigated an offshore investment in two of the hedge funds underlying this case held in a custodial capacity by Wells Fargo Securities. This is the same investment that underlies the clawback case against Wells Fargo Securities discussed above. In mid-2011, it became apparent from our investigation that the Bank itself (and not a Bank affiliate) had become a holder of an interest in that investment account as a result of a transaction it entered into with another holder of an interest in that same investment account.

25. All of this investigation, which took place at the same time as a large number of other Receivership matters, took some time, and it was not until mid-2011 that I determined that I had sufficient information of possible claims by Receivership Entities against the Bank to warrant approaching outside law firms to advise me about these matters and represent me in a potential lawsuit against the Bank.

26. Before this matter, I was appointed by this same Court on June 9, 2005, as Receiver in *SEC v. Howard Waxenberg et al.*, Case No. 8:05-cv-1076-T-24TBM. In connection with that receivership, I used Wachovia Bank, N.A., a Bank predecessor, as the primary bank for the Receivership's accounts and other banking activities, which included voluminous distributions of receivership assets to hundreds of claimants through the claims process in that case. As a result of those matters, over the course of a number of years both I and some of the same lawyers and paralegals that have been involved in this Receivership communicated numerous times with Wachovia Bank representatives, who clearly knew Fowler White and some of the same lawyers and paralegals that represent me in this Receivership and who are now at WGK, represented me in that receivership too. During those communications, we discussed the nature of my activities in that case, including that I was pursuing clawback claims and that I was gathering funds for distribution to defrauded investors. I kept the bank advised of the ongoing activities of that receivership and the timing of when distributions of funds would be made.

27. Further, at the inception of this Receivership, I met with representatives of the Bank (and of other banks) about using the Bank as the primary bank for this Receivership as well. For a number of reasons, I chose not to use the Bank as custodian for this Receivership's funds. My decision in that regard had nothing to do with the fact that the Bank had held accounts for Nadel and some Receivership Entities. Indeed, it was not until the latter part of 2011 that I became aware that the same office that had provided private banking services in the

Waxenberg Receivership and with whom I discussed the possibility of holding this Receivership's funds, was the same office that had acted as personal banker for Nadel.

28. As far as I am aware, no representative of the Bank or of any of its affiliates, nor anyone else, ever raised any conflict-of-interest issue relating to this Receivership, the Bank or any affiliate, and WGK until after I announced that I was prepared to proceed with a lawsuit against the Bank.

29. In light of the long history between me as Receiver, my law firms (both Fowler White and WGK), and the Bank as discussed in this declaration and in the responses in opposition to the Bank's motion for disqualification, the Bank's contention that it did not "fully realize[]" the conflict it claims exists until December 2011/January 2012 is not consistent with my personal knowledge.

I declare under the penalty of perjury that the foregoing is true and correct and is executed this 14th day of March, 2012.



Burton W. Wiand, as Receiver
c/o James, Hoyer, Newcomer & Smiljanich, P.A.
One Urban Centre, Suite 550
4830 W. Kennedy Blvd.
Tampa, FL 33609
Telephone: (813) 397-2300
Facsimile: (813) 397-2310

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

/s Jonathan B. Cohen
Jonathan B. Cohen, Esq.