UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

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

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

Defendants,

SCOOP REAL ESTATE, L.P., et al.

Relief Defendants.
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WIAND GUERRA KING P.L.'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 PAYBALE TO THE RECEIVER AND HIS COUNSEL

Pursuant to Local Rule 3.01(b) of the Middle District of Florida, Wiand Guerra King P.L. ("WGK") files this Response in Opposition to the 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 "Motion to Disqualify") filed by Wells Fargo Bank, N.A. (the "Bank").

I. SUMMARY OF ARGUMENT

WGK lawyers (formerly with Fowler White) have served as counsel for Burton W. Wiand, in his capacity as Court-appointed Receiver (the "Receiver"), since the inception of this Receivership on January 21, 2009, and should not be disqualified from continuing to represent the Receiver in this matter. WGK has not represented Wells Fargo Bank, N.A. (the

"Bank") in this matter or in any substantially related matter.[1] WGK's representation of the Bank was limited to one discrete dispute involving two successive cases brought by the same claims by the same party. WGK has no confidential information relating to its former representation of the Bank that could be at all relevant or useful in its representation of the Receiver. Accordingly, WGK should not be disqualified from continuing to represent the Receiver in this Receivership.

The Bank was aware of WGK lawyers' representation of the Receiver and of the potential that a conflict could arise since the Receivership's inception when it received notice of the receivership action and those lawyers' representation of the Receiver. Further, the Bank filed a claim in the Receivership on or about September 2, 2010 and served that claim on the Receiver care of WGK. The Bank contends on page 6 of its Motion to Disqualify that it did not "fully realize[]" an actual conflict existed until on or about December 2011/January 2012. But this contention ignores the knowledge it had since the inception of the Receivership, that WGK had been representing the Receiver for more than two (2) years and that its lawyers had been representing him since the Receivership's inception, and that the Bank had knowledge of the representation from as early as January 2009.

In any event, shortly after the Bank purportedly "fully realized" that the "conflict" arose, which was right around the time any conflict would have arisen because the Receivership and the Bank became adverse, the Receiver (a) notified the Court of the conflict, (b) WGK was terminated by Advisors and WGK withdrew from representing the Bank in the unrelated matter, and (c) the Receiver hired a different firm, James, Hoyer,

[1] Although Wells Fargo Advisors LLC ("Advisors") is a former client of WGK, Advisors is not and has never been a party in this Receivership or had any other connection to it. In an attempt to mislead the Court, the Bank improperly uses a broad brush to create the illusion of an extensive relationship between WGK and the Bank by including WGK's former representation of Advisors in its arguments. As discussed below, the Bank's tactic is inconsistent with rules governing conflicts.

Newcomer, Smiljanich, P.A. ("James-Hoyer"), to represent the Receiver with regard to all Receivership issues that involve the Bank.

At this point, the Bank (and Advisors) is a former client of WGK and under Rule 4-1.9 of the Rules Regulating the Florida Bar (the "Rules"),[2] and the primary issue when evaluating a conflict involving a former client is whether the matter in which WGK was representing the Bank was the *"same or substantially related"* matter as this Receivership. The one matter in which WGK represented the Bank involved a dispute related to loans on unrelated parcels of commercial property. It is not the same as or substantially related to this Receivership. In fact, the Bank has made no argument that the matters are the same or substantially related. Moreover, no evidence suggests that WGK obtained any confidential information that could be used in the Receivership.

Finally, even though WGK could have continued to represent the Receiver as the matters are not the same or substantially related, the Receiver took the additional cautious step of hiring James-Hoyer to represent the Receiver on all issues involving the Bank. This goes above and beyond what is required by the Rules. Under the facts and circumstances of this case when, (a) WGK lawyers have been representing the Receiver for over three years, (b) limited funds are available for the Receiver to distribute to victims, and (c) there is no

[2] As discussed below, the Bank attempts to argue that its internal "policy" on conflicts of interest is somehow relevant and binding on this Court. However, the Bank's internal policy can not serve as the basis for disqualifying WGK. The Bank has failed to present evidence that WGK was bound by the policy. Additionally, this argument attempts to bootstrap WGK's former representation of Advisors to create the illusion of a more extensive relationship between WGK and the Bank in an effort to bolster its otherwise hollow allegations of a conflict. The Motion to Disqualify refers to some 28 matters, totaling over $1.04 million in attorney fees that have been handled by WGK. (Doc. 266, pg. 2 and 5.) In fact, WGK represented the Bank in only <u>one</u> case (NAC Matter as identified herein). WGK's representation of the other Wells Fargo entity (Advisors), which is not a claimant or party in this Receivership, does not create a conflict of interest in this action.

conflict under Rule 4-1.9, the law and the equities involved warrant that WGK continue its successful representation of the Receiver.

II. FACTUAL BACKGROUND

A. *Early In The Receivership.*

On January 21, 2009, Burt W. Wiand (the "Receiver") was appointed as receiver in this action. (Doc. 8.) At the time of appointment, Mr. Wiand had no current or potential conflict of interest with any creditor or party to the Receivership. (Doc. 6.)[3] Soon after his appointment, the Receiver discovered that Arthur Nadel ("Nadel") had a set of secretive bank accounts at the Bank which he used in connection with his Ponzi scheme (the "scheme"). Wiand Decl. ¶ 23. Although the Receiver learned of these accounts early in the Receivership, it took some time to understand the nature of those accounts and how Nadel used them, and thus it was not apparent until mid-2011 that Receivership Entities could possibly have claims against the Bank in connection with Nadel's use of those accounts. *Id*. ¶¶ 23-25. Indeed, it took time to collect facts relevant to Nadel's accounts at the Bank, including the existence of "dba" accounts, the scope of Nadel's authority to open accounts, public record items relating to Nadel, the Bank's investment interest in two of the Receivership hedge funds underlying Nadel's scheme, the performance and nature of those investments, and exactly how and how extensively those accounts were used. *Id*. As discussed below, it was not until mid-2011 that the Receiver had obtained sufficient

[3] The items filed by the Securities and Exchange Commission (the "SEC") on January 21, 2009, in support of its motion to appoint receiver included documentation from the Receiver explaining that he would retain his law firm at that time, Fowler White Boggs P.A. ("Fowler White"), as counsel and specifically identified some of the lawyers that would represent the Receiver. (Doc. 6.) When the Receiver and some of those lawyers moved from Fowler White to WGK in November 2009, that too was disclosed to the Court in public filings. Declaration of Burton W. Wiand ¶ 6 ("Wiand Decl.") (Doc. 787); (Doc. 240 at 2 n. 2).

information to warrant approaching several outside law firms to begin the process of evaluating possible claims against the Bank.

B. ***WGK Represented The Bank In Only One Dispute.***

In or around May 2010, WGK was approached by the Bank to undertake the Bank's representation in *NAC Group, Inc. v. Wells Fargo Bank, N.A.*, 10-6459CI8 (Pinellas County Circuit Court). Declaration of George L. Guerra ¶ 2 ("Guerra Decl."), being filed along with this response. That case involved a dispute over a commercial real estate loan and had no relationship whatsoever to the Receivership. *Id.* ¶ 3. This initial representation of the bank on this matter was of limited duration, no discovery occurred, and the Plaintiff's complaint was dismissed on or about September 3, 2010. *Id.* ¶¶ 4, 5. However, a similar case was filed on or about August 29, 2011 by the same Plaintiff, and the Bank again asked WGK to represent it in this second action, styled *NAC Group, Inc. v. Wells Fargo Bank, N.A. f/k/a Wachovia Bank, N.A.*, 11-9833, Div. J (Hillsborough County Circuit Court) (these two cases will be referred to collectively herein as the "NAC Matter"). *Id.* ¶¶ 6-7. This second case arose out of the same substantive facts as to the first case. *Id.* ¶ 6. WGK has not represented the Bank in any other matters. In connection with the NAC Matter, WGK received total fees of $48,170.02. Guerra Decl. ¶ 11.

C. ***The Bank Has Known Of WGK Lawyers' Representation of The Receiver Since The Receivership's Inception.***

On multiple separate occasions the Bank became aware of WGK's representation of the Receivership. Representatives of the Bank have had multiple communications with WGK and the Receiver where the Bank should have become aware of WGK's representation

of the Receiver.[4] Also, in one of the Receiver's clawback cases, the Bank became aware of WGK's representation of the Receiver.[5] Nevertheless, no Bank representative has ever raised a purported conflict of interest – whether actual or potential – until the Receiver announced he would proceed with a lawsuit against the Bank. Wiand Decl. ¶ 28. As a result, the Bank was aware that a potential conflict could arise with WGK.[6]

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[4] Shortly after the Receivership began, on February 9, 2009, a Bank employee accepted service of a subpoena issued in this case by Fowler White as counsel for the Receiver. That subpoena identified Fowler White as counsel for the Receiver. Further, on March 17, 2009, the Receiver received a letter from Jeffrey Kucera, Esq., of K&L Gates LLP, explaining that he was outside counsel for the Bank with respect to loans on properties in Receivership. (Doc. 713 ¶ 18, Ex. 6.) (Docs. 713 ¶ 16, Ex. 4.) Over time, representatives of the Receiver, first with Fowler White and then with WGK (after WGK opened in November 2009), had various communications with Bank employees and other representatives of the Bank. These communications included Mr. Kucera and other Bank outside counsel and related to Bank loans on Receivership properties. (*See, e.g.*, Doc. 713, Exs. 7, 8.) (*See, e.g.*, Doc. 713, Exs. 7, 8.) On June 4, 2010, a claims packet was also mailed to the Bank which was returned to the Receiver. (*See* Doc. 713, Ex. 10.) The materials in that packet also showed the Receiver was represented by WGK, and the Bank returned a completed Proof of Claim form to the Receiver c/o WGK. (Doc. 713, Ex. 11.) The Receiver and WGK lawyers have also had other dealings with the Bank that should have clearly demonstrated those lawyers represented the Receiver. Wiand Decl. ¶¶ 26, 27.

[5] In a case brought by the Receiver, *Wiand, as Receiver v. Wells Fargo Securities Int'l, Ltd.*, 8:10-cv-00243-EAK-MAP, Middle District of Florida (Tampa) (the "WF Securities Matter"), a clawback case in which the Receiver was represented by Johnson, Pope, Bokor, Ruppel & Burns, LLP ("Johnson, Pope"), senior in-house lawyers with the Wells Fargo Law Department represented the Defendant, Wells Fargo Securities International ("WF Securities"), an affiliate of the Bank. (WF Securities Matter, Docs. 11, 22, 24, 36.) At least one of those lawyers was also in-house counsel for the Bank. Wiand Decl. ¶ 13. Although WGK never represented WF Securities, out of an abundance of caution the Receiver retained a firm other than WGK to represent him in that matter. The Receiver's continued investigation later revealed that the Bank itself had an interest in the investment underlying the WF Securities Matter, but that was not clear at the time that matter was pending. *Id.* ¶ 24. Throughout that representation, those lawyers were well aware of this Receivership, the Receiver's relationship with WGK, WGK's relationship with the Receivership, and the Bank's connection to the Receivership. *See id.* ¶¶ 13-15. Indeed, on November 8, 2010, one of those lawyers participated by telephone in a Federal Rule of Civil Procedure 16 Status Conference held in that and ten other clawback cases by U.S. Magistrate Judge Mark Pizzo. (WF Securities Matter, Doc. 22.) Although the Receiver was represented by Johnson, Pope with respect to that case, WGK lawyers Gianluca Morello and Michael Lamont were also present and addressed all matters relating to the other clawback cases.

Further, on March 25, 2011, the parties in the WF Securities Matter held a telephonic mediation conference in which the Receiver spoke to WF Securities' in-house counsel, which included the Bank lawyer mentioned above. Although the Receiver was represented by Johnson Pope, the mediator contacted WGK counsel Michael Lamont and asked him to provide the explanation of a position the Receiver had also adopted across the rest of his clawback cases, which he did over the telephone to the two in-house lawyers and the mediator. Also as a result of this, the Bank was aware of WGK's representation of the Receiver in this Receivership. Indeed, the Receiver directly told the Bank lawyer that he had retained Johnson Pope in that case because, out of abundance of caution, WGK did not want to become adverse to any Bank affiliate. Wiand Decl. ¶ 14.

[6] The Bank delayed raising the conflict and came to any conflict by twice hiring WGK. The Bank hired WGK for the first time a year and nine months after the receivership began and after it knew WGK represented the Receiver. During this representation, the Bank did not raise any potential conflict. Thereafter, the Bank again

D. ***The Receiver's Efforts To Resolve Matters With the Bank <u>Without</u> WGK's Involvement.***

By the Fall of 2011, the Receiver had selected James-Hoyer to represent him in a lawsuit against the Bank for its role in the scheme, which at its core involved the "shadow accounts" and was based on information the Receiver learned as a result of investigation over the course of several years. Wiand Decl. ¶¶ 16, 23-25. In early October 2011, the SEC was informed about the Receiver's selection of counsel and his intent to pursue claims against the Bank. *Id.* ¶ 17. On October 5, 2011, the SEC informed the Receiver that it had no objection, but it requested that the Receiver make another effort to resolve his claims with the Bank before retaining James-Hoyer. *Id.* The Receiver agreed to do so, and then attempted to resolve the matter over the next few months with the same Bank in-house counsel that represented the bank's affiliate in the WF Securities Matter. *Id.*

Importantly, the Receiver informed the Bank that such discussions were being handled by him in his capacity as Receiver and would not involve WGK in any way. *Id.* Consistent with that, the discussions were <u>always</u> directly between the Receiver and the Bank and never involved WGK. *Id.* The Bank, however, did not execute a tolling agreement in a reasonable amount of time and the Receiver was left with no choice but to proceed with seeking this Court's approval of his retention of James-Hoyer. *Id.*

E. ***Receiver's Recommendation That The Bank's Claim Be Denied.***

On December 7, 2011, the Receiver filed his motion relating to claims determinations (the "Claims Determination Motion"), in which he recommended that the Bank's lone claim submitted in the Receivership be denied. (Doc. 675 at 55-59 & Ex. H.) On December 21,

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hired WGK two years and eight months after the receivership began. Again, the Bank did not raise the conflict issue at that time. This was despite the fact that at least one senior in-house Bank lawyer was aware that WGK represented the Receiver, represented Advisors, and represented the Bank in one matter. *See* n. 5 above.

2011, the Bank filed two objections to that motion (Docs. 689, 690). On December 23, 2011, WGK filed on behalf of the Receiver motions for leave to reply to the Bank's two objections (Docs. 693, 694). On January 6, 2011, WGK also filed on behalf of the Receiver a motion to approve the sale of real property commonly referred to in this Receivership as the "Rite Aid Property." (Doc. 706.) With leave of Court, on January 17, 2011, WGK filed on behalf of the Receiver a response to each of the two objections noted above (Docs. 712, 714). Finally, on January 19, 2011, the Bank essentially moved to take control of the Rite Aid Property (Doc. 719), and on February 1, 2012, WGK filed an opposition to that motion on behalf of the Receiver (Doc. 728). This represented the last filing made by WGK on behalf of the Receiver to address specific matters raise by the Bank in this Receivership.

F. ***The Receiver Retained James-Hoyer To Represent Him In All Matters Involving The Bank.***

After the Receiver was unsuccessful with amicably resolving his claims against the Bank, on December 22, 2011, he moved for leave to retain James-Hoyer to pursue those claims. Wiand Decl. ¶ 17; (Doc. 691.) On December 27, 2011, the Court granted that motion. (Doc. 696.)

Although WGK no longer represented the Receiver on matters related to the Bank, in an abundance of caution, WGK informed the Bank that it would need to waive any conflicts if WGK were to continue the representation. However, the Bank refused its consent.[7] (Doc. 766-3.) On February 2, 2012, the Receiver filed with the Court a letter explaining the relationship between WGK and the Bank and Wells Fargo Advisors, LLC ("Advisors"), a

[7] In his January 13, 2012 letter to the Bank, Mr. Guerra outlined that the only conflict WGK had was with the Bank and not with any of the Bank's affiliated companies. (Doc. 766-3.) Furthermore, Mr. Guerra made clear that should the Bank fail to consent to the conflict he would be forced to withdraw from the NAC Matter, even though the complaint to be filed against the Bank would be filed by another law firm (James-Hoyer) and that this would not be a direct conflict of interest. (Doc. 766-3.)

separate entity owned by the same parent as the Bank. (Doc. 730.) In relevant part, the letter explained that WGK represented the Bank in one pending matter (the NAC Matter) that was unrelated to this Receivership and that it was terminating that representation. (Doc. 730.) It also noted that WGK represented Advisors in matters unrelated to this Receivership, and the Receiver's very limited work on behalf of Advisors in 2009; Advisors has since terminated its relationship with WGK. That letter then explained that after consulting with the SEC, the Receiver retained James-Hoyer to represent him in all matters involving the Bank.

III. ARGUMENT

WGK should not be disqualified in this action because (1) the Rules do not require WGK's disqualification; (2) the Bank's internal conflicts policy is not enforceable in this action; and (3) appointment of counsel other than WGK to handle all cases related to the Bank was the proper remedy. As a result, the Bank's Motion to Disqualify should be denied.

A. The Rules do not require WGK's disqualification.

The Rules govern the Motion to Disqualify filed by the Bank with respect to WGK. *Bochese v. Town of Ponce Inlet*, 267 F.Supp.2d 1240, 1242 (M.D. Fla. 2003). It is well established that the party seeking disqualification of an attorney carries a heavy burden and must meet a high standard of proof before an attorney is disqualified. *In re Jet 1 Center, Inc.*, 310 B.R. 649 (M.D. Fla. 2004) (*citing Evans v. Artek Sys. Corp.*, 715 F.2d 788, 794 (2d Cir. 1983)). Courts are loathe to separate a client from his chosen attorney where the alleged misconduct does not prejudice an opposing party or taint the litigation. *C.F.T.C. v. Eustace*, 2007 WL 1314663, *8 (E.D. Pa. 2007). Additionally, the delay and additional expense created by substitution of counsel is a factor to which courts attach significance in considering motions to disqualify. *Id.*

1. Under Rule 4-1.7 there was no conflict of interest until December 2011.

When the Receivership began in January 2009 and Mr. Wiand was appointed Receiver, WGK did not represent the Bank in any case, so WGK's representation of the Receivership was not directly (or indirectly) adverse to the Bank. *See* Rule 4-1.7(a)(1), R. Reg. Fla. Bar. In fact, WGK did not represent the Bank directly in any action until WGK was hired by the Bank in May 2010 and again in August 2011 in the NAC Matter. The first hiring occurred some 15 months into the Receivership, and at that time the Receiver had not taken any position adverse to the Bank so WGK was not directly adverse and, therefore, no conflict existed.[8] The second hiring of WGK by the Bank occurred some two years and eight months into the Receivership. Although right around that time the Receiver began the process of exploring the retention of counsel (other than WGK) to evaluate and, if necessary, bring claims against the Bank, for its part WGK was focusing its representation of the Receiver on the claims process and, more precisely, preparing the voluminous Claims Determination Motion (Doc. 695). WGK's representation of the Bank in the NAC Matter could not materially limit WGK's ability to represent both the Receivership and the Bank in the NAC Matter because, in relevant part, that motion simply related to the legitimacy of claims to assets of the Receivership Estate for distribution to creditors. In any event, once the Receivership's position in the claims process became adverse to the Bank, the Receiver transitioned all Receivership matters involving the Bank to James-Hoyer.

Furthermore, the Bank cannot manufacture a conflict by citing to WGK's representation of one entity affiliated with the Bank, Advisors. Throughout the Bank's Motion to Disqualify, the Bank references WGK's representation of the Bank and "…its

[8] Although at that time the Receiver had sued Bank-affiliate WF Securities, WGK never represented WF Securities and, in any event, the Receiver retained Johnson Pope to handle that case.

affiliate ... [Advisors]." (Doc. 766, p. 2.) The Bank claims that it and its affiliate were represented by WGK in 28 matters and paid WGK approximately $1.04 million in attorney's fees for services rendered. (Doc. 766, pg. 2 and 5.) However, the Bank and its various affiliates are separate corporate entities. The Bank fails to mention that WGK's representation was, in every case but one, of Advisors and not of the Bank. The Rules are clear that a conflict is not created by the concurrent adverse representation of a corporate entity and its affiliate or subsidiary. The commentary to Rule 4-1.13 states:

> [A] lawyer or law firm who represents or has represented a corporation…is not presumed to also represent….an organization (such as a corporate parent or subsidiary) that is affiliated with the client. [An] attorney or law firm is not ethically precluded from **undertaking representations adverse to affiliates** of an **existing** or **former client**.

See Commentary to Rule 4-1.13, the R. Reg. Fla. Bar (Emph. added).

Regardless, to the extent that the Bank claims that there was a "substantial risk" for WGK to have a conflict with the Bank under Rule 4-1.7 the Bank waived the right to disqualify WGK on these grounds. A party may waive its right to object to the opposing party's counsel. *Jet1 Center, Inc.*, 310 B.R. at 654. In determining whether a party waives its right to move to disqualify an opposing party's counsel the court should consider, (1) the length of the delay in bringing the motion to disqualify; (2) when the movant learned of the conflict; (3) whether the movant was represented by counsel during the delay; (4) why the delay occurred; and (5) whether disqualification would result in prejudice to the non-moving party. *Id.* At the time the Bank hired WGK in the NAC Matter, the Bank was well aware that Mr. Wiand was the Receiver and that WGK represented him. In August 2011, the Bank again hired WGK knowing of its representation of the Receiver. After its second hiring of

WGK, the Bank waited six months to assert in Court that WGK should be disqualified based on the purported substantial risk for a conflict.

In its Motion to Disqualify, the Bank provides no explanation for why it delayed seeking to disqualify WGK. As is reflected in Exhibit B to the Bank's Motion to Disqualify, the Bank was represented by numerous attorneys whose job was to determine if actual or potential conflicts existed and to raise those conflicts on the Bank's behalf. (Doc. 766-2.) Given that all parties were aware of the risk, if any, of a potential conflict with the Bank or its affiliates and the Bank did not raise these matters, the Bank has waived its right to disqualify WGK on the grounds that there was a substantial risk of a conflict.

The Receiver was not *directly* adverse to the Bank until December 2011 when the Receiver denied the Bank's claim in the Receivership (*see* Doc. 675), decided to proceed with suing the Bank, and hired James-Hoyer to investigate and prepare a complaint against the Bank.[9] As is clearly stated in the commentary to Rule 4-1.7, this conflict is governed by Rule 4-1.9 and ***not*** Rule 4-1.7. The commentary states:

> An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. **Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any clients is determined by rule 4-1.9**.

See Commentary to Rule 4-1.7 "Loyalty to a Client", R. Reg. Fla. Bar (Emph. added).

An extreme prejudice would result to the receivership if WGK (and the Receiver) were disqualified. The Receivership would be required to expend substantial financial resources to replace them in light of the length and scope of this Receivership. Additionally,

[9] At that specific time, the Receiver had no need to hire new counsel to represent him in connection with the denial of the claim the Bank submitted as part of the Receivership claims process because litigation of that matter would begin only after the Court adopted a claims determination objection procedure and the Bank filed an objection in accordance with that procedure.

a large amount of time would be wasted in appointing new counsel (and a new receiver) and having them get up to speed on every facet of this large and complex matter. Given the consideration of *Jet 1 Center, Inc.* factors, it is clear that the Bank waived any right to move to disqualify WGK on the basis of any conflict or potential conflict that arose by WGK's representation of the Bank in the NAC Matter.

The facts show that after the Receivership took an adverse position to the Bank in December 2011, and the Bank refused to consent, the conflict arose and on or about January 16, 2012, WGK withdrew from representing the Bank in the NAC Matter. Further, WGK has also since withdrawn from representing the Receiver in all matters that are adverse to the Bank; in fact, WGK's last filing in connection with any matter involving the Bank was made on February 1, 2012 (*see* Doc. 728). James-Hoyer was retained to pursue claims against the Bank (Doc. 691) and represents the Receiver in connection with all Receivership matters involving the Bank (*see* Doc. 730). Given these facts, the issues before the Court should be analyzed under Rule 4-1.9.

2. Rule 4-1.9 governs the issues in the Bank's Motion to Disqualify.

Under Rule 4-1.9, WGK and Mr. Wiand may continue to represent the receivership because (1) the instant case is not the same case or substantially related to the NAC Matter, (2) there is no evidence showing that WGK or Mr. Wiand used information relating to WGK's representation of the Bank in the NAC Matter in the instant case, and (3) there is no evidence showing that any attorney at WGK revealed information relating to the NAC Matter to anyone.

Rule 4-1.9 provides in relevant part:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;
(b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; and
(c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

See Rule 4-1.9, R. Reg. Fla. Bar. In determining whether two cases are substantially related, a court considers whether they involve the same plaintiffs, defendants, and issues. *Bochese*, 267 F.Supp.2d at 1246. The court must use these factors and determine whether the two matters are akin in a way reasonable persons would understand as important to the issues involved. *McPartland v. ISI Inv. Srvs., Inc.*, 890 F. Supp. 1029, 1031 (M.D. Fla. 1995).

The Bank makes no argument that the NAC Matter and the instant case are substantially related and public filings show that they clearly are not. The complaints filed in the two cases involving the NAC Matter show that the NAC Matter involved different parties, different property, and different issues than those involved in this action. Additionally, WGK has never represented the Bank in any matter that is substantially related to the "shadow accounts," any claim to Receivership property, or anything else connected to the Receivership. The Bank alleges no facts to meet its "heavy burden" to show that any prior representation by WGK is substantially similar to the instant action. *Jet 1 Center, Inc.*, 310 B.R. at 654. Also, there is no allegation in the Bank's Motion to Disqualify that supports a finding that WGK has any information related to WGK's representation of the Bank that could be used in the Receivership. The same holds true of WGK's representation of Advisors. As a result, WGK does not have a conflict of interest pursuant to Rule 4-1.9.

3. Even if WGK had a conflict of interest it was cured by the Receiver's hiring of James-Hoyer to pursue claims against the Bank.

Any alleged conflict or even any appearance of impropriety was cured by WGK's withdrawal from representing the Bank in the NAC Matter and through the Receiver's appointment of an independent law firm to handle all matters involving the Bank. Interestingly, this very remedy was employed in *In re Blinder, Robinson, & Co.*, 131 B.R. 872 (D. Col. 1991), a case described by the Bank in its Motion to Disqualify as being "instructive in the instant case." (Doc. 766, pg. 21.) In *Blinder*, the Securities Investor Protection Act Trustee failed to disclose that his firm had previously represented a potential creditor, Diamond Vision, Inc., against the debtor Blinder, Robinson. *Blinder*, 131 B.R. at 874. The *Blinder* Court applied the same test that the Bank asks this Court to apply in the instant case, stating that "even the appearance of impropriety may merit disqualification." *Id.* at 878. The lower court held that "the Trustee's assurances that independent counsel would evaluate any claim Diamond Vision might file, 'coupled with the firm's complete release from further representation of Diamond, eliminates any material adverse interest, if indeed, it was present in the first place.'" *Id.* at 880. In reviewing this decision, the District Court affirmed and stated:

> Notwithstanding these problems, the liquidation proceedings have progressed to the point that appointing a new Trustee and counsel would be a major disruption….Since the firm now has fully withdrawn from the Diamond Vision litigation, and the Trustee has pledged that an independent third party will review any claims for which there is a conflict, I think more rather than less damage would be done by reversing the bankruptcy court.

Id. at 881. Ultimately, the court determined that the Trustee had mitigated any appearance of impropriety through the hiring of a disinterested third party. *Id.* at 883.

Additionally, in *Matter of REA Holding Corp.*, 2 B.R. 733 (S.D.N.Y.1980), the court held that "the appointment of special counsel to handle the Major Litigants eliminates any question of divided loyalty." *Id.* at 735. The *REA* case involved a Bankruptcy trustee that had previously been heavily involved with the railroad and airline industries. *Id.* One of the creditors to the estate sought to disqualify the trustee on the basis of these connections. *Id.* The District Court in reviewing the Bankruptcy court's ruling noted that "a trustee should be removed if the administration of the estate in bankruptcy would suffer more from the discord created by the present trustee than would be suffered by the change of administration." *Id.* at 735. The District Court affirmed the finding that the trustee should not be removed because of conflicts of interest. *Id.*

As in *REA* and *Blinder*, the Receiver in this action has appointed other counsel, James-Hoyer, to handle the claims that involve the Bank. This appointment essentially cures any purported conflict or appearance of impropriety that may have resulted from WGK's prior representation of the Bank. As the *Blinder* court noted, on balance the appointment of an independent third party causes the estate less disruption and damage than removing Mr. Wiand would. But even if *REA* and *Blinder* were not consistent with the facts here, they still would not govern because this is a federal equity receivership and <u>not</u> a bankruptcy proceeding.[10] *Eustace* is clear about this point. 2008 WL 471574, *6 (E.D. Pa. 2008) ("When an equity receivership is involved, case law concerning equity receiverships is generally more applicable than bankruptcy case law.").

[10] *See 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."); *S.E.C. 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 and nor to strictly apply bankruptcy law.").

Significantly, the fact that the Receivership is attempting to collect from and to prevent recovery by a former client of WGK is the exact opposite of the appearance of impropriety. The Receiver is not showing any favoritism to the Bank (WGK's former client), and instead has appointed an independent firm to represent him in his efforts relating to the Bank. The practical, actual effect of the Receiver's conduct in this case, is the appearance of propriety and not impropriety. The Receiver is continuing to fulfill his fiduciary obligations to the estate and it is disingenuous and hollow for the Bank to claim otherwise. *See Scholes v. Tomlinson*, 1991 WL 152062, *8 (N.D. Ill. 1991).

B. The Bank's "conflict policy" is not enforceable in this action

The Bank cannot manufacture a conflict for the Receiver or WGK by reference to the Bank's internal "conflicts policy." That policy contains requirements that are inconsistent with the Rules and are therefore not relevant to the matters before this Court. The Bank's policy is not binding on this Court. Among other things, the conflicts policy, attached as Exhibit B to the Bank's Motion to Disqualify, sets out the Bank's policy regarding conflicts, unilaterally waives certain anticipated conflicts, and puts in a standard procedure for outside counsel to use in getting the Bank and its affiliates to waive any conflicts of interest that may arise in the representation of the Wells Fargo family of companies. The policy unilaterally purports to require that "[a]ll outside firms and lawyers who represent Wells Fargo must adhere to these policies." The Bank cannot use its internal policy, which differs substantially from the Rules, to force this Court to disqualify WGK (or the Receiver).

Even if the Court considers the Bank's internal policy, the Bank has presented no evidence of when, if ever, the Policy was ever received or agreed to by WGK. And notably, there is no specified remedy for a violation of the policy. Thus, the Bank's only possible

remedy for a violation of this policy, that is not also a violation of the Rules, would be to bring an action for damages (assuming, of course, it has suffered any damages). As a result, this Wells Fargo-created "policy" is not a basis to find that a conflict of interest existed for WGK in this case under ethics rules imposed by the Florida Bar.

C. The proper remedy for any purported conflict was the appointment of outside counsel. Disqualification and barring fees is too drastic of a remedy and unwarranted, especially since WGK no longer represents the Bank or Advisors.

In situations very similar to the instant matter, courts have refused to take the drastic measure of disqualifying a Receiver and his attorney. *See Scholes*, 1991 WL 152062 at *9-10. In coming to a decision as to the remedy, the Court should "balance the lack of disclosure [(assuming there even was one here)] … and consider how serious it is in the context of the actual events that have unfolded, and whether any party will be prejudiced or whether the integrity of the proceedings themselves will be subject to question after the case is completed." *Eustace*, 2007 WL 1314663 at *10. The Court should start "with the well known proposition that disqualification is disfavored, a change in the Receiver and/or his counsel would require delay in the progress and ultimate termination of the case and additional expense incurred by appointment of a new Receiver." *Id.*

Similar to the instant case, *Eustace* involved a receivership that arose out of a fraudulent scheme. *Id.* at *1. The receiver C. Clark Hodgson, Jr. and his firm Stradley, Ronon, Stevens, and Young, LLP had previously represented various UBS entities and failed to disclose this fact even though the firm knew that another UBS entity, UBS Fund Services (Cayman) Limited (UBS Cayman), participated in various fraudulent transactions. *Id.* at *2. The receiver believed that UBS Cayman and another UBS entity would not be a party to the litigation and so did not disclose this to the court. *Id.* The receiver sought to bring causes of

action against Man Financial, Inc. ("Man") seeking to hold it responsible to the receivership. *Id.* at *3. In the complaint against Man there were numerous references to UBS Cayman. *Id.* at *2. Shortly after the filing of the Man complaint and at a hearing, Man informed the court that it intended to bring UBS Cayman into the case as a third party defendant. *Id.* at *3.

The court held that there was no conflict for the Receiver under Rule 1.7 of the Pennsylvania Rules of Professional Conduct.[11] *Id.* at *6. Despite this, the court stated that "Rule 1.7 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.* As a result, the court went through a fact laden analysis and held that the proper remedy was to disqualify the receiver only as to the Man litigation. *Id.* at *11. However, the court allowed the Stradley firm to continue to represent the receiver in the Man litigation, stating that:

> Once Mr. Hodgson is no longer the "client" of the Stradley firm, it is not in a conflict situation…the Stradley firm… may continue to represent an independent Receiver ad litem under the specific facts of this case.

Id. at *12. The court found that this resolution was the best overall solution given the facts of the case and the competing interests. *Id.* at *13.

In the instant case, WGK, in an abundance of caution, has separated itself from any potential conflict by withdrawing from <u>all</u> disputes between the Receivership and the Bank. Further, neither the Bank nor Advisors is a client of WGK anymore so there is no possibility of any conflict under Rule 4-1.7, and, as explained above, there is no conflict under Rule 4-1.9. Significantly, there has been no harm whatsoever to the Receivership. In fact, unlike in *Eustace*, the Receiver here sought to recover from and prevent recovery by the third party

[11] These rules are similar to the Florida Rules Regulating the Florida Bar. In fact the commentary to rule 1.7 of the Pennsylvania Rules mirrors rule 4-1.13 of the Florida Rules. It states, "[a] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization such as a parent or subsidiary." *See Eustace*, 2007 WL 1314663 at FN 6.

that now seeks to disqualify him and his law firm. No favoritism for a former client exists or can be shown. Last, if the court were to grant the relief requested by the Bank and disqualify WGK, the receivership would be unnecessarily harmed in a significant way. *See Scholes*, 1991 WL 152062 at *9-10.

IV. Conclusion

WGK should not be disqualified because (1) the Rules Regulating the Florida bar do not require WGK to be disqualified; (2) the Bank's internal conflict policy is not enforceable in this action; and (3) the remedy, if any, for any purported conflict of interest is for WGK to withdraw from its representation of the Receiver only as it relates to the Bank, something that has already occurred. As a result, the Bank's Motion to Disqualify should be denied.

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

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