UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CASE NO. 8:09-cv-87-T-26TBM

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

Defendants,

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

Relief Defendants.
_____/

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S
MEMORANDUM OPPOSING CONTINUANCE OF THE MARCH 2, 2012 HEARING

I. INTRODUCTION

The Commission opposes Wells Fargo's Motion to (I) Disqualify the Receiver, (II) Disqualify Wiand Guerra King P.L. ("WGK"), and (III) Disallow All Fees Payable to the Receiver and His Counsel (the "Motion") (D.E. 766). The Motion makes many broad statements but does not establish even the appearance of a conflict for the Receiver, much less a conflict justifying the heavy-handed and damaging remedy of removing a receiver whose determination

and diligence have brought the Receivership Estate more than $30 million so far.[1] The Motion has four main flaws.

First, the Motion incorrectly treats the Receiver as if he had been acting as a lawyer in a representational capacity. Second it ignores the fact that any conflict involving WGK is now over Third, it incorrectly implies there has been great harm to the Receivership. Finally, given the three aforementioned issues, the Motion seeks dramatically inappropriate relief. As detailed in the contemporaneous filings on this issue by the Receiver and WGK, the facts indicate the Receiver, in his capacity as a fiduciary acting at the Court's behest, has acted appropriately, retaining counsel other than WGK when it was clear that firm would have had to represent him adverse to Wells Fargo.

II. FACTUAL BACKGROUND

We will not burden the Court recounting the myriad filings and long procedural history of this case, of which the Court is well aware. There are key facts the Court should note, however, in assessing the severe relief the Motion seeks, which the Receiver presents in more detail in the 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 (D.E. 787), from which we take the following facts:

Since the Receiver's appointment in this Commission enforcement case in January 2009, he has marshaled more than $30 million for investors through a combination of litigation, expansion of the Receivership Estate (the "Estate"), and the liquidation of real and personal

[1] Since WGK is filing its own response addressing parts II and III of the Motion, the Commission focuses mainly on the request to disqualify the Receiver himself, because of the severe harm this would do to the Estate and the victims depending upon it for some sort of recovery.

property. As a result, the Receiver can now make an initial $18 million distribution to investors. The Receiver continues pursuing various other matters to benefit the Estate, including claw back litigation, suits against a large law firm, and an action against Wells Fargo. Throughout his work, the Receiver used first Fowler White Boggs P.A. and later WGK to represent him in his capacity as Receiver.

WGK no longer represents Wells Fargo or any entity affiliated with the bank, but during the Receiver's service overseeing the Estate, he has used a firm other than WGK in the three instances when the Receiver saw his interests were clearly adverse to those of Wells Fargo or one of its affiliates. The first situation involved the Receiver's suit against an affiliate of the bank, while the two most recent ones involved Wells Fargo itself. The second instance arose in September 2011 when the Receiver, having come to understand Wells Fargo's role related to the Receivership entities and the circumstances of Arthur Nadel's fraud, researched several law firms and decided to retain the James Hoyer firm to sue Wells Fargo based on claims regarding the bank's role in Arthur Nadel's fraud. The Receiver informed the Commission of his plan soon after this, but at the Commission's request held retaining James Hoyer to pursue one more attempt to settle with Wells Fargo. The Receiver negotiated directly with Wells Fargo, letting the bank know WGK would not be involved. Negotiations unfortunately proved fruitless and in December 2011 the Receiver obtained the Court's permission to hire James Hoyer in order to pursue his suit against Wells Fargo. In the third situation, the Receiver expanded James Hoyer's representation of him when Wells Fargo objected to the Receiver's proposed claims determination involving the bank's claims.

These latter two incidents crystallized only after the Receiver was able to spend time investigating Wells Fargo's claims and conduct in relation to the Nadel Ponzi scheme. These also led to the first instances when the Receiver and Wells Fargo were adverse, implicating Florida Bar Rule 4-1.7 for WGK, since the firm was now in the position of representing two clients – the Bank and the Receiver – whose interests were "directly adverse" to each other. *See* Rule 4-1.7(a)(1). Rule 4-1.10, imputing Rule 4-1.7 to all members of a law firm, also was implicated. As the Receiver's declaration explains, he eliminated both conflicts by notifying the Court and retaining separate counsel to represent him in connection with any issues adverse to the interests of the Wells Fargo. This, together with Wells Fargo's removal of its and its affiliates cases from WGK, removed any conflict for WGK and its lawyers under Rules 4-1.7 and 4-1.10.

Wells Fargo has long been aware of the Receiver's existence, activities, and use of WGK and other firms, but moved to disqualify the Receiver only after he proposed denying the bank's claims and concluded he had to sue it. The Receiver has received no complaints of impropriety or conflict (and the Commission is aware of none), except for those levied by Wells Fargo in the days leading up to the March 2, 2012 hearing before this Court.

III. MEMORANDUM OF LAW

1. Rules 4-1.7 and 4-1.10 Do Not On Their Face Apply To the Receiver

Florida Bar Rule 4-1.7 provides, in relevant part, that a lawyer may not represent a client if "the representation of 1 client will be directly adverse to another client." Rule 4-1.7(a)(1). Rule 4-1.10 imputes Rule 4-1.7 to all members of a firm. The Motion would apply these Rules to the Receiver simply because he is a lawyer WGK. However, this is incorrect.

Rather than acting as a lawyer representing a client, the Receiver is actually the client, and WGK is his lawyer. The fact that the Receiver has appeared, testified, and filed documents in Court or has been involved in negotiations with third parties on numerous issues does not mean he has appeared as a lawyer for the Estate. He has appeared, testified, and conducted business in his role as the appointed agent of the Court. "Although lawyers are often appointed as receivers, they assume a neutral position *and are not serving in their typical role of advocate*. Rather, receivers "are officers of the court . . . [and] are, therefore, representatives of the court and act for the court." 1 Ralph E. Clark, *Treatise on the Law and Practice of Receivers* § 35 (1992) (footnotes omitted) (emphasis added). *See also* 75 C.J.S. Receivers § 139 (2007) (footnotes omitted):

> While for some purposes a receiver is treated as a representative of the person [or entity] whose property he is appointed to administer, . . . strictly speaking he is not . . . the representative or agent of any such person or party . . . . A receiver is, rather, . . . a ministerial officer and representative of the court having charge of the receivership, and accountable to such court, and has been referred to in some cases as an "arm," in other cases as a "hand," of the court, and in still others as a part of its "machinery."

Thus, because the Receiver is not acting as a lawyer representing a client, Rule 4-1.7 does not operate as a bar on his taking positions adverse to Wells Fargo. It only operates to bar WGK from representing him in any matter adverse to the bank. This is analogous to a situation if the Receiver walked into a lobby at a branch of Wells Fargo and slipped and injured himself because of water on the floor. Rule 4-1.7 would not bar him from suing and being adverse to the bank in his individual capacity merely because he is a lawyer at WGK. He could not retain WGK to represent him unless the bank waived the conflict, but he could sue the bank.

Rule 4-1.10 would not operate to disqualify the Receiver under these circumstances for the same reason. Because he would not be acting as a lawyer representing any client, but as an individual plaintiff, that Rule would not disqualify him from suing Wells Fargo just because WGK represented the bank in another matter.

The outcome is no different in this situation. The Receiver may be adverse to the bank even though he is a lawyer at WGK because he is acting in a capacity other than as a lawyer representing a client adverse to Wells Fargo. He is the client, just as he would be in the hypothetical personal injury lawsuit. Accordingly, Rules 4-1.7 and 4-1.10 on their face do not disqualify the Receiver from acting adversely to the bank in connection with his duties before the Court.

2. The Receiver Cured Any Actual Conflict Between WGK and Wells Fargo

As discussed above WGK's conflict under Rule 4-1.7 arose for the first time in late 2011, when the Receiver determined he had to sue Wells Fargo, and bank objected to his claims proposal. The Receiver cured the conflict when he retained other counsel to represent him in matters adverse to the bank, thus leaving WGK free to represent him in the others matter. Although, as the Receiver points out, bankruptcy is not exactly on point, at least one court has held this is an acceptable means of curing any actual conflict in an analogous bankruptcy context. *In the Matter of Rea Holding Corp.*, 2 B.R. 733, 734-35 (Bankr. S.D.N.Y. 1980).

Although there is not a detailed recitation of the facts giving rise to the opinion in *Rea,* it is clear the bankruptcy trustee and his co-counsel had a conflict with some creditors in some portion of work for the bankruptcy estate by virtue of the trustee's prior affiliation with a brokerage firm and the railroad and airline industries. *Id.* at 734. To resolve the conflict, the

trustee retained counsel to pursue certain claims, just as the Receiver has done here. *Id.* Some creditors moved the bankruptcy court in *Rea* to remove the trustee as a result of the conflict, but both the bankruptcy court and the district court on appeal denied the motion. Both courts agreed the trustee's retention of special counsel resolved "any possible conflicts." *Id. See also in re Blinder Robinson & Co., Inc.*, 131 B.R. 872, 880 (Bankr. D. Colo. 1991) (noting courts have permitted trustees to cure conflicts involving their law firms by retaining special counsel to represent them in specific matters).

The *Rea* opinion found the trustee did not have any conflict once he retained special counsel. When identical situations have arisen in receiverships in the Southern District of Florida in recent years, receivers have similarly cured conflicts involving their law firms by doing just what the Receiver did here – retaining special counsel. For example, in *SEC v. Michael Lauer, et al.,* Case No. 03-80612-CIV-MARRA, the Receiver, Marty Steinberg, was a lawyer at the firm of Hunton & Williams who had retained his firm to represent him. *Notice of Intention to Retain Roberto Martinez and Colson Hicks Eidson as Special Counsel,* attached as Exhibit 1. When Hunton & Williams developed a conflict because the Receiver needed to pursue litigation against other firm clients, the Receiver retained special counsel to represent him. *Id.* Notably, the district court in *Lauer* did not object to Steinberg continuing in his role as Receiver adverse to Hunton & Williams' clients, in effect recognizing the point we made above, that the Receiver was not acting as a lawyer for his firm representing clients.

Likewise, in *SEC v. Latin American Services Co.*, Case No. 99-2360-CIV, the Receiver was a lawyer at the firm of Akerman Senterfitt & Eidson who had hired his firm to represent him. *Receiver's Motion to Define and Expand Scope of Special Counsel's Duties*, attached as

Exhibit 2. Upon discovering he had a potential claim against another firm client, the Receiver retained special counsel to represent him to resolve any conflict issues under Rule 4-1.7. *Id.* The district court in that case approved the Receiver's motion to retain special counsel and never raised any objection to the Receiver continuing to be adverse to the client.[2]

While none of the aforementioned authorities and pleadings are binding on the Court, they certainly demonstrate that other courts agree with the position we set forth in Section 1 above that the Receiver is not acting as a lawyer representing clients, at least for purposes of Rules 4-1.7 and 4-1.10. They also show other situations in which receivers and a bankruptcy trustee were allowed to proceed with claims adverse to a client of the law firm for which they worked, and that the receivers and bankruptcy trustee cured any potential conflicts by retaining special counsel, just as the Receiver has done here.

3. The Receiver's Actions Have Not Created The Appearance of Any Conflict or Harmed the Estate

As the cases the Show Cause Order cites make clear, Rule 4-1.7 and "disinterested person" statutory definitions are aimed not just at actual conflicts, but at avoiding the appearance of any conflict as well. Even though we disagree the Receiver had any conflict here, the Commission is sensitive to these concerns, since it is vitally important any Receiver we recommend and the District Court appoints be *perceived* as a neutral agent of the Court, and not favoring any party, creditor or group of creditors.

To that end, we do not believe anything the Receiver has done has created the appearance of any conflict or impropriety. The real concern anyone might raise with the Receiver's current

[2] As Exhibit 2 indicates, the Receiver ultimately concluded that although he was justified in continuing to pursue claims against the firm client, to avoid the appearance of impropriety he should increase the role of special counsel. As discussed in the conclusion to this response, that is a remedy the Court could use in this case, rather than to remove the Receiver entirely.

role – that as a result of his affiliation with WGK and that firm's representation of Wells Fargo he might take actions favorable to the bank at the expense of investors or creditors – is belied by the record in the case. Along those lines, the Estate has suffered no harm, and has if anything benefitted from the Receiver's aggressive pursuit of assets that should go to the benefit of investors. The Receiver has taken actions adverse to the bank and in the best interest of the Estate and investors, as the bank's own filings show. There is nothing in the record to suggest that will change.

4. The Court Should Not Replace The Receiver

For all of the reasons we have set forth in this response, the Receiver does not have a conflict of interest under Rules 4-1.7 and 4-1.10. But even if the Court were to conclude otherwise, the remedy for the situation is not to remove the Receiver from the entire case. Legally, the case law does not support such a result, and practically, it would work an extreme hardship on the very people the District Court appointed the Receiver to protect – the defrauded investors of Arthur Nadel – by increasing expenses to the receivership estate and delaying distribution of any funds to investors.

Numerous opinions, starting with the *Blinder Robinson* case the bank cites, recognize removal of a receiver or trustee is a drastic remedy that has the potential to cause great damage to an estate. In *Blinder Robinson*, a lawyer was appointed trustee of the Blinder Robinson bankruptcy estate, and his law firm was appointed as estate counsel. 131 B.R. at 873-74. A creditor of the estate challenged the appointment on the grounds that the firm represented a potential creditor in litigation against Blinder Robinson. *Id.* at 874.

The district court found the law firm had a conflict by virtue of its simultaneous representation of the creditor and the estate, and also found the trustee and his firm did not voluntarily disclose the conflict and "were not forthright" with the court. *Id.* at 879-81. Despite these serious allegations, the district court still held it was inappropriate to remove the trustee and his counsel and appoint new ones: "the liquidation proceedings have progressed to the point that appointing a new Trustee and his counsel would be a major disruption." *Id.* at 881, *citing In re Lee Way Holding Co.*, 102 B.R. 616, 625 (Bankr. S.D. Ohio 1988) (declining to disqualify counsel to trustee who failed to properly and timely disclose a conflict of interest because of the major disruption it would cause to bankruptcy estate and because there was no "deceptive behavior in the case at bar, no egregious conduct that shocks the conscience"); *In re Concept Packaging Co.*, 7 B.R. 607, 609 (Bankr. S.D.N.Y. 1980) (finding no conflict of interest and holding removal of trustee would cause serious "discord and disruption" to the estate); *Rea Holding*, 2 B.R. at 735 ("removal [of a trustee] should only be exercised if it is shown that the administration of the bankrupt estate will suffer more from the discord created by retaining the present trustee than would be suffered from a change in administration"). *See also in re Microdisk, Inc.*, 33 B.R. 817, 819 (Bankr. D. Nev. 1983) (same).

One district court reached an identical conclusion in a Commission receivership. *Scholes v. Tomlinson*, Case No. 90 C 1350, 1991 WL 152062 (N.D. Ill. July 29, 1991). In that case, Scholes served as a Court-appointed receiver in a Commission enforcement action just like this one, and retained his firm to represent him as receiver. *Id.* at *1. Scholes then filed three class-action lawsuits on behalf of a certain group of investors whom the defendants in the Commission

case had defrauded. Scholes became the putative class representative and hired his firm to represent the class. *Id.* at *2.

The defendants in the class-action cases moved to disqualify Scholes from serving as class representative and his firm as class counsel, and also moved to disqualify Scholes and his counsel from the receivership. *Id.* The court granted the motion to disqualify Scholes from serving as class representative and to disqualify the firm from representing the class because Scholes did not have standing to represent the class and because their duties to the estate and the class conflicted. *Id.* at *4-7.

However, despite the presence of that conflict, the court denied the motion to remove Scholes as receiver and his firm as the receiver's counsel (and also refused to order them to forfeit any fees). The Court found the benefits of retaining Scholes as receiver clearly outweighed the disruption it would cause by removing him:

> Finally and most importantly, the benefits of allowing Scholes to continue to act as Receiver and MWE to remain as counsel for Scholes appreciably outweigh any benefits to be obtained from removing Scholes as Receiver and disqualifying MWE from continuing to represent him. At this juncture, both Scholes and MWE are intimately familiar with the details of the underlying SEC action and all of the related litigation, have invested a substantial amount of time and effort in marshalling the assets of the receivership entities, and have done so very capably. We do not believe that their brief involvement in this litigation has in any way tainted or otherwise adversely affected their ability to continue to act in their respective capacities. On the other hand, to entirely remove Scholes and MWE from this litigation at this stage of the proceedings would wreak havoc. To appoint a new receiver and new counsel in the underlying SEC action and all related litigation would effectively grind all proceedings to a halt and further delay collection and distribution of the assets recovered. The professional fees and costs already incurred will reduce the assets available for distribution to the account holders and other creditors by a sizeable sum. Appointing a new receiver and new counsel who undoubtedly would have to familiarize themselves with all of this litigation would only cause professional costs to escalate and further dissipate the assets available for distribution. This, in turn, would impose tremendous financial and emotional hardship upon the account holders, many of

> whom have been financially ruined by Douglas' scam and, at this point, do not enjoy the luxury of time. The account holders have suffered enough and the Court declines to pour salt into their already festering wounds. For these reasons, the Court declines to remove Scholes as Receiver or to disqualify MWE from continuing to represent Scholes.

Id. at *9. The court could easily have written those words about this case. The case and the receivership are now three years old. The Receiver and WGK have worked diligently to marshal and dispose of assets around the country in often difficult circumstances, gather other assets, investigate related entities, trace the use of investor funds, and retrieve funds and assets from third parties. There are many complicated and novel legal issues involved in the case with which the Receiver (and WGK) are now intimately familiar.

Furthermore, as in *Scholes*, the Receiver and his firm have performed extremely well, and unlike trustees in the cases we cite above, have been honest, forthright, and forthcoming with the Court. In addition, the conflict was not due to any nefarious or improper action of the Receiver or his firm; in contrast he has acted in good faith for the benefit of investors and the Estate at all times. The conflict arose because of a significant dispute between the bank and the Receiver, occurred two-and-a-half years after the Receiver and WGK began their work, and involved only fraction of the Receiver's overall efforts.

As in *Scholes* and the bankruptcy cases, removing the Receiver and WGK now would be disastrous for the Estate and investors. The fees and costs the Receiver ultimately receives, whatever that amount be, will reduce the size of investors' recovery.[3] But those fees will only increase if the District Court were to replace the Receiver and WGK, because any new receiver

[3] The Commission notes the fees and costs the Receiver and his counsel have sought are far less than the value of the assets they have brought into the Estate. Without their efforts, the available distribution pot would be significantly less.

and counsel will require significant time and effort to acquaint themselves with all the issues. That will only further reduce the amount of money available to distribute to defrauded investors and delay the time it takes to make a distribution.

IV. CONCLUSION

For all of the reasons we have set forth in this response, the Commission does not believe the Receiver had a conflict with Wells Fargo under Rules 4-1.7 and 4-1.10. To the extent the Court concludes there is a conflict or an appearance of one, the Commission adamantly believes it would be a grave error to remove the Receiver or WGK, from this case, especially since the Receiver has already taken WGK out of any adverse positions with Wells Fargo.

Although we do not believe any substitution for the Receiver is necessary, a response that is much more appropriate than Wells Fargo's, especially in relation to the lack of any wrongdoing by the Receiver or WGK and the work they have performed to date, would be for the Court to appoint a special receiver to address issues with Wells Fargo, and allow the Receiver and WGK to continue their work on the rest of the receivership. This seems an unnecessary expense that would be another example of Wells Fargo seeking form over substance. If that is the conclusion the Court reaches, however, (and we are not suggesting it should), the Commission requests the opportunity at that time to recommend three candidates.

WHEREFORE, the Commission opposes Wells Fargo's Motion and asks the Court to deny it.

March 15, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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I further certify that on the same date I mailed the foregoing document and the notice of electronic filing by U.S. Mail or as indicated below to the following non-CM/ECF participant:

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s/ Scott A. Masel
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