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; and 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, LLC,

Relief Defendants.
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O R D E R

Before the Court is Wells Fargo Bank, N.A.'s Motion (I) to Disqualify Receiver, (II) to Disqualify Wiand Guerra King P.L. and (III) to Disallow All Fees Payable to the Receiver and his Counsel (Dkt. 766), the Receiver's Corrected Response in Opposition (Dkt. 818), Wiand Guerra King P.L.'s Response in Opposition (Dkt. 788), and Plaintiff Securities and Exchange Commission's Memorandum Opposing Wells Fargo Bank's Motion (Dkt. 792). After carefully reviewing the motion, the applicable law, and the entire file, the Court concludes that all of the relief sought in the motion should be denied.

PARTIES AND OTHER ENTITIES

In this motion, Wells Fargo Bank, N.A. (Wells Fargo Bank or the Bank) seeks the disqualification of not only the Receiver, but also one of the law firms representing the Receiver, Wiand Guerra King P.L. (WGK). From the date of his appointment on January 21, 2009, the Receiver, Mr. Wiand, was first represented by his former firm, Fowler White Boggs P.A. (Fowler White).[1] He and several attorneys from Fowler White separated from the firm to form WGK, and WGK has represented the Receiver since that date, November 13, 2009.[2] Two other law firms that have represented and continue to represent Mr. Wiand as the Receiver are Johnson, Pope, Bokor, Ruppel & Burns, LLP (Johnson Pope), and James, Hoyer, Newcomer & Smiljanich, P.A. (James Hoyer). These two firms have represented the Receiver in matters where the potential for a conflict of interest has arisen with WGK or where another firm had specific knowledge and expertise.[3] In the matter at hand, James Hoyer represents the Receiver, and WGK has retained its own counsel.

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[1] See docket 8, Order Appointing Receiver, and docket 10, Notice of Appearance dated January 21, 2009.

[2] See docket 229, Notice of Change of Law Firm, and docket 232, Notice of Change of Law Firm.

[3] See docket 174, Receiver's Motion for Leave to Retain Counsel. On August 11, 2009, the Receiver sought to hire Johnson Pope to pursue claims in the receivership against Holland & Knight, LLP, as counsel for the hedge funds during the Nadel Ponzi scheme. Because Johnson Pope was already suing Holland & Knight on behalf of a putative class of investors of the hedge funds, that firm was already familiar with the claims and had provided advice to the Receiver on the validity of the claims. This Court granted the Receiver's motion on August 12, 2009, and Johnson Pope filed suit in Sarasota County, Florida. See docket 175 & docket 787, para. 5.

Initially Mr. Wiand was appointed as the Receiver over Scoop Capital LLC and Scoop Management, Inc., as the Defendants, and 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 as the relief Defendants. Wachovia Bank, N.A., which is now Wells Fargo Bank, was the actual entity that dealt with Mr. Nadel in the activities and transactions that occurred prior to January 2009. Wells Fargo Bank asserts conflicts of interest with respect to two entities other than itself: Wells Fargo Advisors, LLC (WFA), formerly Wachovia Securities, LLC, an affiliate of Wells Fargo Bank;[4] and Wells Fargo Securities International, Ltd. (Wells Fargo Securities International), formerly Wachovia Securities International, Ltd.[5] Wells Fargo Bank is a secured lender with respect to specific properties which are now or have been subject to the receivership, and for which Wells Fargo asserts a conflict of interest exists.

PERTINENT FACTS

The facts surrounding the allegations of conflict of interest on the parts of the Receiver, as well as WGK, unfold as follows. Both Wells Fargo Bank and WFA have been clients of WGK in connection with twenty-eight (28) matters at various times from

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[4] See docket 730.

[5] The Receiver filed a clawback case against Wells Fargo Securities International in 8:10-cv-243-T-17MAP (M.D. Fla.), on January 20, 2010, and subsequently filed a motion to approve a settlement of the action on June 9, 2011, which was granted.. See docket 639, Motion to Approve Settlement, and docket 640, Order Approving Settlement. Johnson Pope represented the Receiver in that case.

mid-November 2009 through February 2012, for which WGK has received a substantial sum of money, predominantly from WFA.[6] Of the twenty-eight matters, twenty-seven concerned WFA, and WFA has not been connected to this receivership proceeding, and is no longer represented by WGK. As to the sole, unrelated matter for which Wells Fargo Bank was a client of WGK, it involved two lawsuits concerning the same parties and issues.[7] WGK withdrew from representation in that matter effective February 22, 2012, and Wells Fargo Bank is no longer represented by WGK.[8]

Wells Fargo Bank takes issue with one other representation: a clawback case filed by the Receiver on January 29, 2010, against Wells Fargo Securities International and another entity to recover monies invested in the hedge funds.[9] According to Wells Fargo Bank, neither the Receiver nor WGK ever represented Wells Fargo Securities

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[6] See docket 766, Exh. A, Affidavit of Kevin Heiser, senior in-house counsel for Wells Fargo Bank at para. 3.

[7] In May 2010, Wachovia Bank (now Wells Fargo Bank) contacted WGK to represent it in the case of NAC Group, Inc. v. Wachovia Bank, N.A., Case No. 10-6459CI8, filed in Pinellas County, Florida, which was removed to the Middle District in Case No. 8:10-cv-1195-T-23TGW. See docket 789, Affidavit of Attorney George L. Guerra at para. 2. The matter was dismissed on September 3, 2010, because the Plaintiff failed to amend the complaint. See dockets 6 & 7 in Case No. 8:10-cv-1195-T-23TGW. On August 17, 2011, the same plaintiff filed another suit in Hillsborough County, Florida, titled NAC Group, Inc. v. Wells Fargo Bank N.A. f/k/a Wachovia Bank, N.A. See docket 789 at para. 7. The case was removed on August 29, 2011, to the Middle District in Case No. 8:11-cv-1967-T-23TGW, and remains pending. See docket 789 at para. 7. The total fees received by WGK for this entire matter was $48,170.02. See docket 789 at para. 11.

[8] See dockets 28 & 29 in Case No. 8:11-cv-1967-T-23TGW.

[9] See Case No. 8:10-cv-243-T-17MAP, and the order approving the settlement in this case at docket 640.

International.[10] As of May 2010, however, WGK represented Wells Fargo, and WGK had been representing WFA since mid-November 2009. The Receiver secured a different law firm, Johnson Pope, to represent himself in the case against Wells Fargo Securities International. The clawback case was dismissed with prejudice on June 28, 2011.[11]

Apart from the unrelated matters concerning WFA and the unrelated case in which WGK represented Wells Fargo Bank, Wells Fargo Bank is a secured creditor with respect to four properties involved in the receivership: (1) the "Rite Aid Property" in Graham, North Carolina;[12] (2) the "Laurel Mountain Property" near Asheville, North Carolina;[13]

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[10] There is some confusion in the record, however, as to exactly what entity the Receiver as attorney temporarily represented in September 2009. The Receiver disclosed that in September 2009, while the receivership was pending and while he was a member of Fowler White, he was asked to assist in the defense of Wachovia Securities, LLC, now WFA, in a matter unrelated to the receivership. See docket 730 & docket 787, para. 7. The Receiver in his response, however, states that "WF Securities is successor-in-interest to Wachovia Securities International, Ltd." See docket 818, at p. 14 n. 11. This Court will rely on the sworn allegations made in the Receiver's declaration. See docket 787.

[11] See docket 39 in Case No. 8:10-cv-243-T-17MAP.

[12] Wells Fargo Bank filed a Motion for Relief from the Injunction of this Court, or to Compel the Receiver to Abandon the Rite Aid Property on January 19, 2012, which is currently pending before this Court. See docket 719. The Rite Aid Property has been subject to the receivership since January 21, 2009, pursuant to the many orders expanding the receivership, as the Rite Aid Property was purchased in May 2005 by Relief Defendant Scoop Real Estate, L.P. See dockets 17, 44, 68, 81, 153, 172 & 454. The Rite Aid Property's encumbrance was mentioned in the receiver's first interim report. See docket 103-2, p. 32. Wells Fargo lent money to Scoop Real Estate, L.P. for the purchase of the Rite Aid Property, and Wells Fargo is claiming to be owed $3,147,427.00 pursuant to a promissory note. See docket 766 and docket 719 at para. 5.

[13] The Laurel Mountain Property became subject to the receivership pursuant to an order of this Court entered February 11, 2009, expanding the receivership to include the Laurel Mountain Property. See docket 44, Order, and docket 37, Affidavit of Wiand as Receiver at paras. 16-24. The encumbrance on the Laurel Mountain Property was mentioned in the receiver's first interim report. See docket 103-2, p. 24. The encumbrance was also noted in a

(3) the "Evergreen Property" in Evergreen, Colorado;[14] and (4) the "Sarasota Property" in Sarasota, Florida.[15] Wells Fargo Bank, however, filed only one proof of claim in the receivership by September 2, 2010, the claim bar date.[16] The proof of claim identified only the Rite Aid Property.[17] While the exact time Wells Fargo Bank became aware of the conflict of which it now complains is disputed, it was clear upon the filing of the claims determination motion on December 8, 2011, that the Receiver was contesting Wells Fargo Bank's position as secured creditor with respect to some of the properties.[18]

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letter from former counsel to Wells Fargo Bank on March 17, 2009. See docket 713-6. Wells Fargo Bank is a first priority secured lender pursuant to a deed of subordination dated May 2, 2008, and is allegedly owed $2,046,256.50. See docket 766. This order does not pass on the issue of whether Wells Fargo Bank properly preserved its status as a secured creditor by filing a proof of claim.

[14] Wells Fargo Bank is a loan servicer for Freddie Mac on a first priority secured loan as to the Evergreen Property. Freddie Mac is currently owed $389,407.16 on the loan. See docket 766. The Receiver contends that "the Evergreen Property was not funded with scheme proceeds and is not owned by a Receivership Entity." See docket 755, p. 1 n. 1. The Receiver therefore claims that because the Evergreen Property was neither owned by Nadel, any other insider, or any receivership entity, nor purchased with the scheme proceeds, the reasons for contesting the Laurel Mountain and Sarasota Properties do not apply. See docket 755, p. 1 n. 1.

[15] Wells Fargo Bank is a loan servicer for Bank of America, N.A. (BOFA) on a first priority secured loan on the Sarasota Property, and BOFA is currently owed $1,183,530.66 on the loan. See docket 766. Wells Fargo Bank is a second priority secured lender with respect to the Sarasota Property and is currently owed $1,060,812.55. See docket 766. This order does not pass on the issue of whether Wells Fargo Bank properly preserved its status as a secured creditor by filing a proof of claim.

[16] See docket 713-10.

[17] See dockets 755, p. 5; 712, p. 9 & 713-11, 713-12.

[18] See docket 675.

The claims determination motion asserted that "shadow" bank accounts at Wachovia Bank, which bank was acquired by Wells Fargo & Company in December 2008, were used by Nadel to perpetrate his fraudulent scheme.[19] The motion alleges that the bank not only should have known of the improprieties associated with the accounts but was also an investor in the Nadel hedge funds.[20] The motion also seeks to disallow Wells Fargo Bank's secured claim with respect to the Rite Aid Property,[21] and seeks to disallow the secured claims related to the Laurel Mountain and Sarasota Properties because no proofs of claim were filed.[22] Wells Fargo Bank filed an objection to the motion on December 21, 2012.[23]

While the Receiver does not pinpoint the exact moment when he realized Wells Fargo Bank participated in the Ponzi scheme, he does refer to the fact that it took him "several months" to explore which law firm would best represent him in a case against the Bank.[24] He made his decision to retain James Hoyer the second full week of September 2011.[25] The Receiver does aver that he became aware in mid-2011 that Wells

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[19] See docket 675, pp. 55-59.

[20] See docket 675, pp. 55-59.

[21] See docket 675, pp. 55-59.

[22] See docket 675, pp. 21-22. See also dockets 712, 714 at p. 2 n. 1, 728 & 755, wherein the Receiver claims that Wells Fargo Bank's claims should be disallowed for failure to file proofs of claim by the bar date.

[23] See docket 690.

[24] See docket 787, para. 16.

[25] See docket 787, para. 16.

Fargo Bank itself, not an affiliate, had become a holder of an interest in one of the hedge funds.[26] The Receiver kept the SEC informed about his findings with respect to Wells Fargo Bank, and at the SEC's request, postponed hiring James Hoyer until one last attempt was made at negotiating a settlement before suit was filed.[27] The Receiver avers that WGK was not involved in the negotiations with Wells Fargo Bank before he retained James Hoyer to proceed against the Bank.[28]

Finally, on December 22, 2011, the Receiver sought to retain James Hoyer to pursue the claims against Wells Fargo Bank, which included the Wachovia shadow accounts and Wachovia's investment in two of Nadel's hedge funds.[29] The motion also noted Wells Fargo Bank's objection to the motion for claims determination. The motion to appoint counsel was granted December 27, 2011.[30]

Another material adverse position was taken by the Receiver on January 6, 2012, with the filing of a motion to approve the sale of the Rite Aid Property for a price that would not cover the secured debt.[31] This Court denied that motion based on the Receiver's failure to comply with 28 U.S.C. § 2001(b).[32] The parties then endeavored to

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[26] See docket 787, para. 24.

[27] See docket 787, para. 17.

[28] See docket 787, para. 17.

[29] See docket 691.

[30] See docket 696.

[31] See docket 706.

[32] See docket 726.

select the requisite number of appraisers.[33] On January 19, 2012, Wells Fargo Bank filed an objection to the sale as well as a motion seeking the right to foreclose on the Rite Aid Property, which remains pending.[34] The Receiver opposed the motion on February 1, 2012.[35] From this point forward, WGK has not represented the Receiver in any matter concerning Wells Fargo Bank.

When it became apparent that litigation against Wells Fargo Bank for its role in the Ponzi scheme was necessary and that the bank had objected to the claims determination motion, WGK sought to obtain a waiver of conflict from Wells Fargo Bank.[36] At that time, WGK was also still counsel for WFA on a number of matters, none of which involved the receivership, and was still counsel of record for Wells Fargo Bank in the sole, unrelated case. On January 13, 2012, WGK wrote a letter documenting previous conversations between WGK and Wells Fargo Bank regarding the potential conflicts and requesting that it waive a direct conflict of interest in the sole, unrelated matter involving Wells Fargo Bank and NAC Group, Inc., and waive any conflict with respect to the adverse positions taken regarding the properties.[37] On February 2, 2012, the Receiver filed a letter to the Court explaining the status of the relationship among WGK, Wells

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[33] See dockets 747, 748, 781, 783 & 784, Order Appointing Appraisers.

[34] See dockets 718 & 719.

[35] See docket 728.

[36] See docket 787, para. 9.

[37] See docket 766, Exh. C.

Fargo Bank and WFA.[38] At that time, WGK was still counsel of record for Wells Fargo Bank in the sole, unrelated case brought by NAC Group, Inc.

On February 9, 2012, James Hoyer filed a suit on behalf of the Receiver in Sarasota County circuit court to recover damages against Wells Fargo Bank based on the "shadow" accounts. Finally, on February 29, 2012, Wells Fargo Bank filed this motion to disqualify. WFA never agreed to waive conflict and terminated its relationship with WGK after the Receiver, through James Hoyer, filed suit against Wells Fargo Bank.[39] At present, WGK no longer represents either Wells Fargo Bank or WFA in any capacity.

Wells Fargo Bank asserts that the conflicts of interest with the Receiver and WGK were not fully realized until December 2011.[40] According to attorney Kevin J. Hieser of the bank's legal department, it was at that time that Wells Fargo Bank's in-house counsel became aware of the adverse positions held by the Receiver and WGK with respect to the bank in the claims determination motion and the shadow account claims, in view of WGK's representation of the bank and its affiliate, WFA.[41] The Receiver, on the other hand, avers that Wells Fargo Bank had been aware of the receivership and WGK's representation of him from the very least November 2009 when WGK formed. On November 8, 2010, a senior in-house lawyer for the Bank participated in a hearing

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[38] See docket 730.

[39] See docket 787, para. 8.

[40] See docket 766-1, para. 5.

[41] See docket 766-1, para. 5.

pursuant to Rule 16 of the Federal Rules of Civil Procedure on the clawback case involving Wells Fargo Securities International.[42] Again, on March 25, 2011, two senior in-house attorneys for Wells Fargo entities participated in the mediation of that clawback case.[43] At that mediation at which the Receiver was represented by Johnson Pope, the mediator contacted an attorney with WGK to explain the Receiver's position in all of the numerous clawback cases.[44] The Bank's attorneys were also aware that the Receiver had retained Johnson Pope to avoid WGK from becoming adverse to a Wells Fargo entity.[45] Finally, the Bank's attorneys were aware and involved in the negotiations with the Receiver in mid-2011 through October 2011 concerning the Bank's involvement with the Ponzi scheme, and the Receiver told them that they would be dealing only with the Receiver so as to avoid a conflict with WGK.[46]

ANALYSIS

Wells Fargo Bank contends that the Receiver and WGK should be disqualified for violating ethical rules regulating conflict of interest, specifically Rules 4-1.7, 4-1.9, and 4-1.10 of the Rules Regulating The Florida Bar. Because WGK was representing the Receiver and WGK has also been representing Wells Fargo Bank and WFA on matters

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[42] See docket 22 in Case No. 8:10-cv-243-T-17MAP.

[43] See docket 787, para. 13.

[44] See docket 787, para. 13.

[45] See docket 787, para. 14.

[46] See docket 787, para. 17.

for over three years, Wells Fargo Bank argues that WGK should be disqualified because there was no consent and an irrebutable presumption exists that confidences were shared pursuant to Rules 4-1.9 and 4-1.10. See Health Care & Retirement Corp. of Am., Inc. v. Bradley, 944 So.2d 508, 511 (Fla.Dist.Ct.App. 2006). Wells Fargo Bank urges this Court to treat the Receiver as an attorney for all purposes and thereby conclude that the Receiver has tainted this entire proceeding through conflicts of interest, since January 2009.

The Receiver

In civil cases brought by the Securities and Exchange Commission (the SEC) for injunctive relief, the statutory authority for the court's appointment of a receiver stems from the general bestowal of equity powers on the district courts. See, e.g., SEC v. First Fin. Group of Tex., 645 F.2d 429, 438 (5th Cir. Unit A 1981) (citing Section 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a); and Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa; and cases such as SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1103 (2d Cir. 1972)).[47] The appointment of a receiver by a federal court applying equity, as opposed to statutory law, is governed by Federal Rule of Civil Procedure 66.[48] Because statute governs the appointment and course of receiverships in

[47] The SEC will often ask the court to appoint a receiver in a case involving a massive Ponzi-type scheme, such as in the instant case. See, e.g., SEC v. Elliott, 953 F.2d 1560 (11th Cir. 1992); SEC v. Shiv, 379 F.Supp.2d 609 (S.D.N.Y. 2005).

[48] An equity receivership is "increasingly rare." Liberte Capital Group, LLC v. Capwill, 462 F.3d 542, 551 (6th Cir. 2006). "There remains a class of cases, however, in which the federal courts may exercise their equitable powers and institute receiverships over disputed assets in suits otherwise falling within the federal court's jurisdiction, but which fall outside the

bankruptcy court, Rule 66 does not always apply to receivers appointed in bankruptcy. See Fed. R. Civ. P. 66 advisory committee's note. The bankruptcy courts, however, may rely on federal equitable law outside the bankruptcy scheme when those equitable principles are applicable to the general conduct of receivers. See CFTC v. Eustace, 2007 WL 1314663, * 6 (E.D.Pa. 2007) (referring to the relevancy of some bankruptcy cases discussing equitable receivership law in relation to receivers in bankruptcy, independent of bankruptcy doctrine). Conversely, although federal district courts presiding over federal equity receiverships, such as this SEC case, may look for guidance from bankruptcy law,[49] they are not restricted by the dictates of bankruptcy law. See Quilling v. Trade Partners, Inc., 2007 WL 107669, *1 (W.D. Mich. 2007) (citing SEC v. Forex Asset Mgmt. LLC, 242 F.3d 325, 332 (5th Cir. 2001)).[50]

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statutory bankruptcy proceedings or other legislated domain." Id.

[49] See SEC v. Capital Consultants, LLC, 397 F.2d 733, 745 (9th Cir. 2005) (considering equitable mootness doctrine from the bankruptcy context in receivership's interim distributions); SEC v. Basic Energy & Affiliated Res., 273 F.3d 657, 665 (6th Cir. 2001) (considering "person aggrieved" doctrine from bankruptcy context in non-party litigant's standing to appeal receivership).

[50] See also additional cases cited in the Receiver's Response at docket 786 such as SEC v. TLC Inv. & Trade Co., 147 F.Supp.2d 1031, 1039 (C.D. Cal 2001) (denying request to administer equitable receivership estate as trustee would administer bankruptcy estate, thereby refusing to require receiver to follow bankruptcy code); SEC v. Sunwest Mgmt, Inc., 2009 WL 324879, *8 (D. Or. 2009) (holding that "federal equity receivership courts are not required to exercise bankruptcy powers nor to strictly apply bankruptcy law."); CFTC v. Eustace, 2008 WL 471574 (E.D. Pa. 2008) (stating that in a federal equity receivership, "case law concerning equity receiverships is generally more applicable than bankruptcy case law."); SEC v. Heartland Group, Inc., 2003 WL 1089366, *1 n. 1 (N.D. Ill. 2003) (denying request to ignore requirement of formal intervention based on rejection of argument that receivership actions are more akin to bankruptcy court proceedings).

Under general federal receivership law, a receiver is an officer of the court that appointed the receiver. 1 Clark on Receivers, § 34 (3d ed. 1959). "The receiver is a neutral court officer appointed by the court." Sterling v. Stewart, 158 F.3d 1199, 1201 n. 2 (11th Cir. 1998).[51] "The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court." Booth v. Clark, 58 U.S. 322, 331, 17 How. 322, 15 L.Ed. 164 (1854); SEC v. American Principals Holding, Inc. (In re San Vicente Medical Partners Ltd.), 962 F.2d 1402, 1409 (9th Cir. 1992). A receiver does not represent a particular party but rather acts on behalf of the receivership entities to gather and collect assets for the court to distribute to those entitled to the funds, often the injured investors. While a receiver may also be an attorney, the receiver does not act as an attorney in the course of fulfilling the duties of the receiver, and usually hires his or her own attorney, with the court's permission, when legal representation of the receiver is necessary.

The receiver, who does not function as an attorney in the receivership, does not maintain an attorney-client relationship in the receivership other than the position of client. The receiver is the client of the law firm or firms chosen and approved to represent the receiver in the conduct of the receivership. Even though the receiver may not act as a lawyer in the receivership, the Rules Regulating the Florida Bar (the Rules)

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[51] The receiver has also been described as "an indifferent person between the parties, appointed by the court . . . [to] secure[] funds which this court . . . will have the means of distributing among the persons entitled to those funds." Gulf Refining Co. of La. v. Vincent Oil Co., 185 F.87, 89-90 (5th Cir. 1911).

continue to apply to lawyers in their nonrepresentational roles.[52] The Preamble to Chapter 4 of the Rules articulates that rules other than Rule 4-1.7 through 4-1.10 apply to the nonrepresentational, neutral roles undertaken by lawyers. Alternatively, this Court recognizes that there may be situations that may arise in the conduct of the receivership which would cause concern with respect to the confidences he may have received from his or, through imputation, a member of his firm's prior or present representation of another client that may be some how intertwined with the receivership entities or creditors.

Wells Fargo Bank argues that despite the receiver's status as a client, Mr. Wiand's title of attorney subjects him to the Rules pertaining to conflict of interest and thereby taints his neutral, disinterested status as a receiver. Wells Fargo Bank relies primarily on two cases: SEC v. Kirkland, 2008 WL 4144424 (M.D. Fla. 2008), and SEC v. Founding Partners Capital Mgmt., (M.D. Fla. 2009).[53] Some courts, and in particular the Kirkland

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[52] "In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 4-1.12 and 4-2.4. In addition, there are rules that apply to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See Rule 4-8.4.

[53] Wells Fargo also relies on two bankruptcy court cases concerning conflicts of interest: In re Southern Diversified Prop., Inc., 110 B.R. 992 (N.D. Ga. 1990); In re Blinder, Robinson & Co., Inc. v. Keller, 131 B.R. 872 (D. Colo. 1991). Southern Diversified is distinguishable, and Blinder lends support to the Receiver in this case securing counsel other than WGK to handle the matters involving Wells Fargo. In Southern Diversified, the bankruptcy court had not approved the trustee's counsel and the trustee was serving a dual role as an attorney and trustee. In Blinder, the bankruptcy court permitted the trustee and his firm to remain given the disruption that would be caused by a substitution and given the fact that a conflict no longer existed— the trustee's firm had withdrawn from representation of the

court, have commented negatively on the SEC's choice of lawyers as receivers based on the increased chance for conflicts of interest to arise in connection with the receiver's law firm of which he or she is a member.[54] Additionally, the ensuing risk of disqualification of the receiver exposes the receivership estate to significant financial loss and harm through the additional time and fees required to bring a successor receiver and law firm up to speed on the case.

The receiver in Kirkland, unlike Mr. Wiand, had practiced law for twelve years and her expertise at the time leaned toward ERISA law. While the receiver in Kirkland had previously served as lead counsel to a receiver, she had never been appointed as the receiver. Mr. Wiand, on the other hand, enjoys a lengthy resume of expertise spanning forty or so years as a lawyer, having served as a receiver in several significant SEC actions and having particular expertise in securities law.[55] His performance in this case indicates he has been diligent and has vigilantly identified and gathered assets of the receivership, amassing $30 million.[56]

The Founding Partners Capital case is also distinguishable from this case. There, the lawyer-receiver's law firm was performing lobbying services for a factoring affiliate

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creditor of the bankruptcy estate.

[54] See Kirkland, 2008 WL 4144424, * 8 n. 7 (stating that the SEC should "seek a business professional experienced in the business of the company to be placed in receivership rather than seeking appointment of an attorney as the receiver.").

[55] See docket 6.

[56] See docket 787, para. 3.

client of one of the relief defendants. The court found that the client was "sufficiently intertwined with the issues" in the receivership to warrant substitution of the receiver. The receiver had been appointed less than one month before the court learned of the necessity to substitute the receiver. There were no issues in the case concerning any harm to the receivership. Conversely, in this case, there has been no showing that WFA was intertwined with the issues in these receivership proceedings.[57] Although Wells Fargo Bank is now embroiled in this case, for almost three years the Receiver's position toward Wells Fargo Bank was not adverse. In this case, the Receiver has been fulfilling his duties for over three years. The potential harm done to the receivership by removing the Receiver and his law firm with respect to the vast majority of claims would cripple the ability of the investors to recoup their losses.

Weighing the benefits of removing a receiver and disqualifying his law firm against continuing the receiver's representation is a necessary step in resolving any ethical dilemma arising in the receivership proceedings. See Eustace, 2007 WL 1314663, * 10; Scholes v. Tomlinson, 1991 WL 152062, * 9 (N.D. Ill. 1991). At the outset, disqualification is disfavored. Eustace, 2007 WL 1314663, * 10. Factors to be considered in resolving any conflict issues and retaining the receiver include the delay in the progress and termination of the receivership case, the additional expense of appointing a new receiver, the strength of the qualifications and experience of the

[57] To the extent Mr. Wiand and his firm in September 2009 represented Wachovia Securities LLC (now WFA) on an unrelated matter, Wells Fargo Bank does not take issue with that isolated incident.

receiver, the diligence of the law firm representing the receiver, the familiarity of the receiver with the details of the underlying government case and the related litigation, the position of the governmental entity, in this case the SEC, with respect to retention of the receiver, whether separation of one of the creditor's matters in the receivership is feasible with the representation of the receiver by another law firm in these matters, and whether any prior representation has tainted the proceedings in any way. Eustace, 2007 WL 1314663, * 10-12; Scholes, 1991 WL 152062, * 9.

Applying these factors to this Receiver, the Court finds that removing the Receiver at this stage would "wreak havoc" and militate against the best interests of the investors and creditors. The Receiver as well as his law firm have diligently marshaled the assets which now total $30 million. The cost of appointing a new receiver with a new law firm would be prohibitive by dissipating the assets already gathered. The SEC continues to believe that the Receiver in place is the most qualified and best individual, touting years of significant experience. It would be feasible to separate the matters involving the Bank because the Receiver has acted prudently each time he perceived a potentially adverse situation and has secured a law firm other than WGK. In the clawback case against Wells Fargo Securities International, he retained Johnson Pope, the same firm who was already familiar with the Nadel Ponzi scheme. The Receiver retained James Hoyer to file the shadow accounts claims against Wells Fargo Bank. The Receiver, acting as a client, was trying to prevent adverse positions between WGK and Wells Fargo Bank.

The Receiver in this case has not hidden his plan of action with respect to Wells Fargo Bank. Far from showing favoritism toward the Bank as a creditor of the receivership, the Receiver has fulfilled his responsibilities to the receivership in unraveling the elaborate scheme devised by Nadel. As the facts unfolded, he discovered Wells Fargo Bank's role in the Ponzi scheme and Wells Fargo Bank's adverse position with respect to their secured interests in certain properties as set forth in the claims determination motion. As encouraged by the SEC, the Receiver attempted to negotiate the litigation matter with Wells Fargo Bank apart from any other attorneys in his firm. When it became apparent to the Receiver in late December 2011 that filing the lawsuit was necessary, the James Hoyer firm was prepared to move forward quickly with the lawsuit in Sarasota County, Florida, in early February 2012. Earlier in December 2011, the Receiver had filed the claims determination motion, and Wells Fargo Bank filed an objection in late December 2011. The Receiver then made the decision to retain James Hoyer for the purpose of representing him in all the matters of the receivership pertaining to Wells Fargo Bank. Since that time, James Hoyer has represented the Receiver on this disqualification motion and matters pertaining to the appraisers for the Rite Aid Property, one of Wells Fargo Bank's secured claims. By the time of the hearing on the motion in early March 2012, WGK no longer represented Wells Fargo Bank or WFA on any matters. At the hearing, Wells Fargo Bank's counsel could not identify any damage that had been done to the receivership by virtue of the Receiver's handling of the case.

Perhaps the most telling evidence supporting the Receiver's remaining in place with the James Hoyer firm handling the Wells Fargo matters, is revealed by the shear time table leading up to the hearing in early March. The hearing was not initially set for a motion for disqualification, but was set for February 2, 2012, to hear argument on this Court's jurisdiction in view of the forfeiture orders entered in the criminal case of Arthur Nadel in the Southern District of New York.[58] Just two days before the scheduled March hearing, Wells Fargo Bank finally filed its motion for disqualification, along with a motion to continue the hearing. The Bank clearly had knowledge of its status as a creditor as early as September 2010 when it filed its proof of claim and delivered it to WGK as counsel for the Receiver. The senior in-house counsel were aware of the Receiver's decision to bring a clawback case against the bank's affiliate in January 2010, if not in November 2010 and March 2011 at the respective status and mediation hearings. At least six months before the motion for disqualification was filed, Wells Fargo Bank hired WGK to represent it in an unrelated matter, a continuation of a previously-filed case. Wells Fargo Bank knew that the Receiver was contemplating bringing an action against the bank for its complicity in the scheme at some point in the fall of 2011. The Bank, however, was apparently not contemplating the disqualification of the Receiver and WGK until the conflict became adverse upon the filing of the claim determination motion in early December 2011. Nevertheless, the motion was timed to derail, or perhaps retaliate against, as the Receiver and WGK suggest, the receivership proceedings.

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[58] See dockets 733 & 734.

Unfortunately for the receivership, the gravamen of the contentions made warranted a thorough examination of the history of this case, which is not an easy task.

Having balanced the equities in this case, the Court finds in its broad discretion that the magnitude of the perceived conflict, when considered within the context of the progress and success of this particular receivership and the particular lack of swiftness with which the Bank acted, does not justify disqualification of the Receiver as to any entity. The monetary cost to the injured investors by the depletion of the receivership funds collected to date would effectively cancel a large portion of the work done thus far. The Receiver is directed to continue to secure counsel other than WGK for any matters involving Wells Fargo Bank or its affiliates.

The Receiver's Attorney, WGK

WGK represented Wells Fargo Bank in the unrelated NAC matter beginning May 2010 through September 2010, and again beginning August 2011. At the time of the first hiring, the Receiver had not taken any position adverse to the Bank over the first fifteen months of the receivership. When WGK was again retained two years and eight months into the receivership, the Receiver was apparently exploring options of hiring another firm to represent the receivership in possibly bringing claims against the Bank related to the shadow accounts. WGK was preparing the claims determination motion which related to the legitimacy of claims made and the distribution of assets to creditors. The Bank's position became adverse when the Bank objected, and the Receiver thereafter retained James Hoyer to handle all matters with Wells Fargo Bank.

WGK also represented WFA, an affiliate of Wells Fargo Bank, from mid-November 2009 to February 2012 on matters unrelated to the receivership. Because no presumption arises that a firm who represents or has represented a corporation also represents its affiliate, the firm is not "ethically precluded from undertaking representations adverse to affiliates of an existing or former client." Commentary to Rule 4-1.13, R. Regulating Fla. Bar. Thus, concurrent adverse representation of a corporation and its affiliate does not create a conflict.[59]

Any direct adverse position did not exist between the Receiver and the Bank until the Receiver denied the Bank's claim as evidenced by the filing of the claims determination motion and decided to retain James Hoyer for the filing of a suit against the Bank, all occurring in December 2011. The Bank refused to consent, and WGK withdrew from the NAC case in mid-February 2012. WGK no longer represents the receivership in matters against the Bank. James Hoyer now represents the Receiver in all matters involving Wells Fargo Bank. Under Rule 4-1.7 pertaining to conflicts of current clients, a conflict arising after the representation has been undertaken which requires an attorney to withdraw is governed by Rule 4-1.9.[60]

Rule 4-1.9 provides that a lawyer who has formerly represented a client may not represent another person in a substantially related matter unless the former client

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[59] Wells Fargo Securities International, as Wells Fargo Bank admits, was not a client of WGK when the Receiver filed the clawback case in January 2010.

[60] See Commentary to Rule 4-1.7 "Loyalty to Client" (stating that "[w]here more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 4-1.9.").

consents, may not use information relating to the representation to the disadvantage of the former client, and may not reveal information relating to the representation. This rule permits WGK to continue to represent the Receiver because the receivership proceeding is not related to the NAC matter in any way, there is no evidence that WGK or the Receiver have used information gained from the NAC matter in the receivership, and there is no evidence that any attorney at WGK revealed information relating to the NAC matter to anyone.

To the extent any conflicts existed, however, the Receiver always hired another firm to pursue claims against the Bank, and in the case of the clawback action, an affiliate of the Bank. Courts in the bankruptcy setting have held that the retention of separate counsel to handle a particular class of creditors "eliminates any question of divided loyalty." Matter of REA Holding Corp., 2 B.R. 733, 735 (S.D. N.Y. 1980); see also Blinder, 131 B.R. at 883. Although the law governing bankruptcy proceedings is not binding on a federal equity receivership,[61] as the case at bar, this Court may take note of the fact that curing conflict by the hiring of alternative counsel has been recognized as acceptable.

Assuming there was a conflict that was not waived by the Bank,[62] the Bank delayed in seeking disqualification. Delay is but one factor to be considered. See In re

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[61] See discussion in text at footnote 48 and cases cited therein.

[62] Nothing in the record indicates that WGK agreed to the particular conflict policy promulgated by Wells Fargo Bank, and no authority requires that the policy be considered binding on this Court.

Jet 1 Center, Inc., 310 B.R. 649, 654 (Bankr. M.D. Fla. 2004). Other factors that may be considered include when the movant learned of the conflict, whether the movant was represented by counsel during the delay, why the delay occurred, whether disqualification would result in prejudice to the non-moving party, and whether disqualification was delayed for tactical reasons. Id. Although Wells Fargo Bank claims it did not realize the conflict until some time in December 2011 after WGK filed the claims determination motion, there is no question that at the time the Bank hired WGK, it knew that WGK also represented the Receiver. No other reason has been given for the delay in seeking disqualification. Accordingly, the Court finds that WGK may continue to represent the Receiver in this case with the exception of matters specifically involving Wells Fargo Bank or its affiliates.

It is therefore **ORDERED AND ADJUDGED** that Wells Fargo Bank, N.A.'s Motion (I) to Disqualify Receiver, (II) to Disqualify Wiand Guerra King P.L. and (III) to Disallow All Fees Payable to the Receiver and his Counsel (Dkt. 766) is **DENIED.**

DONE AND ORDERED at Tampa, Florida, on April 25, 2012.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record