UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

COMMODITY FUTURES TRADINGCOMMISSION,

Plaintiff,

v.

Case No. 8:19-cv-00886-VMC-SPF

OASIS INTERNATIONAL GROUP LIMITED; OASIS MANAGEMENT, LLC;SATELLITE HOLDINGS COMPANY; MICHAEL J. DACORTA; JOSEPH S. ANILE, II; RAYMOND P. MONTIE, III; FRANCISCO "FRANK" L. DURAN; and JOHN J. HAAS,

Defendants,

and

MAINSTREAM FUND SERVICES, INC.;BOWLING GREEN CAPITAL MANAGEMENT LLC; LAGOON INVESTMENTS, INC.; ROAR OF THE LION FITNESS, LLC; 444 GULF OF MEXICO DRIVE, LLC; 4064 FOUNDERSCLUB DRIVE, LLC; 6922 LACANTERA CIRCLE, LLC; 13318 LOST KEY PLACE, LLC; and 4OAKS LLC,

Relief Defendants.

MICHAEL J. DACORTA'S OBJECTION TO RECEIVER BURTON WIAND'S MOTION (DOC. 439)

1. Comes now Michael J. DaCorta, pro se Defendant, and objects to Receiver's Motion (Doc. 439) ("Motion") to (1) approve his determinization of claims; (2) pool all assets and liabilities into a consolidated Receivership Estate, and; (3) approve a plan of distribution; and (4) establish a procedure to litigate or compromise objections.
2. The Motion should be denied for the following reasons:
   a) Based upon the evidence, Burton W. Wiand ("Wiand") was never lawfully appointed Receiver in the instant case. He is now and has been acting without lawful authority; and
   b) Oasis International Group neither accepted nor retained money from any lender until such lender verified that they had read and accepted all the terms, conditions, and disclosures provided them under a Promissory Note & Loan Agreement with Agreement and Risk Disclosures; and
   c) A Stay Order has stopped Defendant from discovering evidence to support Wiand's claims; and
   d) There has been no hearing on the merits of the Amended Complaint and, thus, no grounds upon which properties were seized; and
   e) Because Wiand unlawfully seized Defendant's property without authority, Wiand or his agents cannot lawfully disburse Defendant's property.

SUMMARY OF THE PRINCIPAL ARGUMENTS & LEGAL BASIS IN SUPPORT OF THE OBJECTION

3. At any time during the course of any case one of two conditions is present: the case is either in a state of pre-judgment or post-judgment.
4. Under specific statutory conditions a receiver may be appointed when a case is in either state, but generally a receiver is appointed post judgment.
5. By authority of 7 U.S.C. § 13a-1(a), a Temporary Receiver may be appointed during pre-judgment conditions for a limited time "to administer such restraining order and to perform such other duties as the court may consider appropriate," as was done on 15 April 2019 (Doc. 7) for a term of 14 days, ending 29 April 2019.
6. Authority for a permanent pre-judgment appointment of a receiver is found exclusively under 28 U.S.C. § 3103 "if the requirements of section 3101 are satisfied."
7. There is no evidence showing that the Receiver was appointed pre-judgment, according to the requirements of 28 U.S.C. § 3101.
8. Case law is the only authority for "reappointment" of a receiver in the Federal Circuit Courts.
9. Several Circuit Courts addressed the 10-day limit question required under 28 U.S.C. § 754 and each addressed the question of a receiver's "reappointment". As detailed extensively hereinafter, there is no Circuit Court case law that supports an unconditional "reappointment" of a receiver.

10. There are no Eleventh Circuit cases regarding the unconditional "reappointment" of a receiver.

11. Further, there is no statutory authority or rule authorizing the "reappointment" of a receiver (*See* Exh. A).

12. In *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995) the Seventh Circuit held that a debtor's plea agreement is admissible as hearsay under Federal Rules of Evidence 803(22).

13. No plea agreement was entered upon the instant case.

14. Joseph S. Anile, II entered a plea in ancillary case 8:19-cr-334-T-35CPT on August 12, 2019 (Dkt. 3), 104 days after Wiand's appointment as permanent receiver on April 30, 2019 (Dkt. 44).

15. The "Consolidated Receivership Order (Doc. 177) was filed on July 11, 2019, at least 32 days prior to Mr. Anile's Plea Agreement.

16. Mr. Anile's plea agreement was not entered in the instant case.

17. Mr. Anile's plea agreement did not answer the Counts in the instant case.

18. Wiand's appointment and reappointments were ordered well prior to the filing of Mr. Anile's plea agreement.

ILLEGITIMACY WOVEN INTO THE COURT'S DOCTRINAL FABRIC

19. Query: How did Wiand establish presumptive authority in the Middle District Court of Florida in order to get a series of "reappointments" over the course of his career as receiver in the Middle District, including the one by this Court's "Consolidated Receivership Order"? (Doc. 177).

20. The Receiver's adulterated case law citations misled this Court into accepting and adopting a false understanding of precedent.

21. The Receiver's efforts, which established a false precedent in the Middle District Court of Florida, seemingly began in *SEC v. HKW Trading LLC,* No. 8:05-CV-1076 (M.D. Fla. 2005) (hereinafter "*HKW*"), wherein he was appointed receiver on 9 June 2005 (*HKW* Doc. 10).

22. In *HKW*, Wiand realized that he had failed to timely file his Appointment Order and original Complaint as prescribed by 28 U.S.C. § 754 in a foreign district court through which he wished to claim property.

23. On 16 February 2006, Wiand moved the Court to reopen the case and grant him a "reappointment" for the purpose of extending the 10-day § 754 limit. (*HKW* Doc. 73, p.5, Exh. B).

24. On 22 February 2006, without lawful authority, the Court granted Wiand's Motion. (*HKW* Doc. 73–74).

25. On page 5 of the Motion presented in *HKW* (Doc. 73), Wiand falsely asserted that, "Reappointment of a receiver for the purpose of re-starting the 10-day time limit under § 754 has been expressly approved by the courts".

26. He cited a single higher court ruling in Doc. 73, which stated: "See *Bilzerian*, 378 F.3d at 1105 (citing *SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996)) ("On **remand**, the court may reappoint the receiver and start the ten-day clock ticking once again."). [emphasis added]

27. The precondition of remand from appeal before a reappointment may be considered did not exist in *HKW*, nor in *S.E.C. v. Nadel*, case 8:09-cv-87, where Wiand later employed precisely the same arguments (Compare text of *HKW* Doc.73, p.5, ¶ 1 to *Nadel* Doc.139, p.5, ¶ 3, Exh. C).

28. The necessary precondition (remand back from the higher court) did not exist in the instant case to authorize the Court to give a "Consolidated Receivership Order," (Doc. 177).

29. In other words, the alleged establishment of a "precedent" in *HKW*, purportedly granting authorization for the Receiver's "reappointment" was thereafter parlayed in *S.E.C. v. Nadel*, and reiterated by the Receiver in case after case, until such *ad hoc* receiver "reappointments" fashioned "Law of the Case Doctrine" in the Middle District of Florida Court, all in violation of 28 U.S.C. § 754, Federal and Local Court rules, and higher court case law.

30. Defendant points the Court's attention to the illegitimacy being woven into the fabric of its doctrine and continually re-polluting the lawful integrity of its proceedings, which no judge could discover or unravel.

31. Thus, the contagion of illegal property seizures stemming from the boundless, unwarranted expansion of the Receiver's illegitimate authority spread from case to case unnoticed for the past twelve years.

32. Attorneys in other lower courts have misrepresented and misstated Circuit-Court decisions to avoid Congress's 10-day time limit window (28 U.S.C. § 754) that grants receivers authority to take jurisdiction over property in foreign districts.

33. The Receiver did this through recitations of misstated lower court holding and misrepresentation of Circuit-Court holdings in order to make them appear to authorize receiver reappointments for the sole purpose of establishing a new starting date of the § 754 mandatory 10-day limit for filing his order of appointment and complaint in other districts.

34. The three cases most frequently abused for this purpose are:

1) *S.E.C. v. Am. Capital Invs., Inc.*, 98 F.3d 1133 (9th Cir. 1996), which qualifies reappointment—defining it as a permanent appointment <u>following a temporary one</u>—a circumstance analogous to the instant case; 2) *S.E.C. v. Vision Communications, Inc.*, 74 F.3d 287 (D.C. Cir. 1996), provided for reappointment <u>on remand</u> from a higher court; and 3) *S.E.C. v. Equity Service Corp.*, 632 F.2d 1094

(3d Cir. 1980), which predicated reappointment upon a complexity of extenuating circumstances not present in the instant case.

35. By citing district-court cases that amended, abridged, or otherwise misstated higher court rulings, the Receiver deceived this Court into thwarting Congress' § 754 clear intent to enforce a 10-day time limit for filing copies of the Complaint and Order of Appointment in each foreign district court, wherein Defendants' properties were located.

36. In short, the Receiver's repeated applications of misstated precedents, claiming that any receiver may "easily defeat" the statutory 10-day check by requesting repeated "reappointments," disregards Congress' clearly established mandate to toll a receiver's jurisdictional authority, and disrespects specific qualifications regarding reappointment allowed by higher courts.

37. The Receiver's repeated citations of adulterated case law misled this Court into accepting and adopting a false "Law of the Case Doctrine."

PERTINENT CIRCUIT LAW RESPECTING 28 U.S.C. § 754 AND RECEIVER REAPPOINTMENTS

38. In the Eleventh Circuit there is no case law supporting the reappointment of a Receiver.

39. Several Circuit Courts outside the Eleventh Circuit have addressed the 10-day requirement imposed by Congress. The cases date from *Kilsheimer v. Rose*

Moskowitz (2nd Cir. 1958) to *S.E.C. v. Ross* (9th Cir. 2007). Each case concerns the question of a receiver's "reappointment."

40. In ***Kilsheimer v. Rose Moskowitz***, 257 F.2d 242 (2d Cir. 1958), the 2d Circuit Court explained that due to a prior dismissal there arose the need for the reappointment of the receiver, who accomplished a timely filing. This Court's ruling essentially accords with *S.E.C. v. Vision Communications, Inc.*, 74 F.3d 287 (D.C. Cir. 1996), whereby the court authorized a reappointment following remand.

41. In ***S.E.C. v. Equity Service Corp.***, 632 F.2d 1094 (3d Cir. 1980), the Court formed its holding after consideration of the extraordinary complications found in its district court following the death of its first receiver; the consolidation of two cases not originally within the same district jurisdiction; confusion in the records; and the absence of any forewarning provided to the replacement receiver regarding subject property.

    a. In consequence of these circumstances, the lower court had allowed its **second** receiver to "reassume jurisdiction by a later filing" and the 3rd Circuit affirmed. In order to "reassume jurisdiction", it must have been assumed previously by means amenable to the law, as indeed it had been by the first receiver in one of the two districts later joined together under the receiver's authority when separate cases were combined.

    b. Receivers in lower courts have taken one sentence from this ruling out of context, misconstrued its meaning, and used the result to obtain unlimited

extensions of the § 754 10-day filing limit by "reappointment", thus obliterating the limit *ad hoc* and rendering § 754 utterly inconsequential.

c. Referring to the Reviser's Note to § 754, the 3rd Circuit wrote, "Obviously the election of the receiver not to take control of property in one district ought not to preclude his control in those districts in which he did file copies."

42. ***Haile v. Henderson Nat. Bank***, 657 F.2d 816 (6th Cir. 1981) was not cited in the instant case nor in ancillary case 8:20-cv-00862 other than by reference within other citations: the receiver conformed to the §754 10-day limit.

43. ***American Freedom Train Found. v. Spurney***, 747 F.2d 1069 (1st Cir. 1984) was not directly cited in the instant case nor in ancillary case 8:20-cv-00862. The court confirmed that the district courts have subject-matter jurisdiction in ancillary actions, and also affirmed the lower court's finding that it did **not** have jurisdiction because the required filing under § 754 had not been filed in a forum state where property was located.

44. ***United States v. Arizona Fuels Corp.***, 739 F.2d 455 (9th Cir. 2 Aug. 1984) was not directly cited in the instant case nor in ancillary case 8:20-cv-00862. The 9th Circuit here wrote that "[w]hen there is no other basis of jurisdiction, a receiver appointed in one district must file under § 754 to attain jurisdiction over property in other districts. *See also S.E.C. v. Equity Service Co.*"

45. ***S.E.C. v. Vision Communications, Inc.***, 74 F.3d 287 (D.C. Cir. 1996), cited in ancillary case 8:20-cv-00862, states that "to invoke § 1692, a receiver first must

comply with 28 U.S.C. § 754. *See Haile v. Henderson Nat'l Bank,* 657 F.2d 816, 823 (6th Cir. 1981), *cert. denied,* 455 U.S. 949 (1982)." "In light of the following language in § 754, this was fatal: "The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district." 28 U.S.C. § 754." The Appellants in *S.E.C. v. Am. Capital Invs., Inc.* argued that the toll began with the receiver's temporary appointment. The court disagreed, stating, "The entry of his permanent appointment order set a new 10-day period running."

a. In ancillary case 8:20-cv-00862, Wiand misappropriated *S.E.C. v. Vision Communications* in his Response in Opposition to the Defendants' Motions to Dismiss, claiming that "the Consolidated Receivership Order reappointed the Receiver and restarted the clock for purposes of § 754. (*See S.E.C. v. Vision Communs.*, 74 F.3d 287, 291 (D.C. Cir. 1996)).

46. ***S.E.C. v. Am. Capital Invs., Inc.,*** 98 F.3d 1133 (9th Cir. 1996). "[H]olding that the district court's **entry of a permanent appointment Order following a temporary appointment Order** set a new ten-day period running for purposes of section 754."

a. This is precisely relevant to the instant case. The Receiver was temporarily appointed on 15 April 2019 and permanently appointed on 30 April 2019, setting the § 754 10-toll to divest him of authority after 10 May 2019 and beyond.

47. ***S.E.C. v. Bilzerian***, 378 F.3d 1100 (D.C. Cir. 2004). In ancillary case 8:20-cv-0862, Wiand cited this case in Doc. 523 at 15, to support his assertion of personal jurisdiction, but avoided the question as to whether, as in *Bilzerian*, "the receiver had complied with § 754 by filing the appropriate documents . . . ."

    a. The receiver in *Bilzerian* had complied with filing the appropriate documents (according to § 754) within the 10–day window, thereby distinguishing *Bilzerian* from the instant case.

48. ***S.E.C. v. Ross***, 504 F.3d 1146, 1147 (9th Cir. 2007) is an important addition to the canon of Circuit holdings consistent with ancillary case 8:20-cv-00862, wherein Defendants argued that the law divested the receiver of authority over their property by failing to meet the § 754 10-day filing deadline. The 9th Circuit clarified, stating that

> §§ 754 and 1692 permit the district court to obtain jurisdiction in a district where receivership property is located **so long as the receiver has properly filed pursuant to § 754**. See, e.g., *S.E.C. v. Bilzerian*, 378 F.3d 1100 (D.C. Cir. 2004); *S.E.C. v. Vision Comm'ns, Inc.*, 74 F.3d 287 (D.C. Cir. 1996); *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981). We agree with the D.C. and Sixth Circuits that § 1692 extends "the territorial jurisdiction of the appointing court . . . to any district of the United States where property believed to be that of the receivership estate is found, **provided that the proper documents have been filed in each such district as required by § 754**." *Bilzerian*, 378 F.3d at 1103–05; accord *Haile*, 657 F.2d at 823. [underline and bold added].[1]

[1] Furthermore, given the failure to comply with § 754, it follows, a fortiori, that Wiand could not have served process pursuant to § 1692. (*See Vision Commc'ns, Inc.*, 74 F.3d at 289, 291 (expressly rejecting the exercise of *in personam* jurisdiction over a party in a

DUE PROCESS AND STATUTORY LAW

49. This Court's exercise of its inherent power cannot conflict with any express limitation on its power as contained in a statute or rule.

> '[E]xcept for the original jurisdiction of the Supreme Court, which flows directly from the Constitution, two prerequisites to jurisdiction must be present: first, the Constitution must have given the courts the capacity to receive it, and, second, an act of Congress must have conferred it. Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812); Kline v. Burke Constr. Co., 260 U.S. 226 (1922). The fact that federal courts are of limited jurisdiction means that litigants in them must affirmatively establish that jurisdiction exists and may not confer nonexistent jurisdiction by consent or conduct."

(Constitution of the United States Annotated-2017.pdf., p. 688.)

50. Title 28 of United States Code provides no statute granting reappointment of an office other than for a judge (and the annual reappointment of a special counsel).

51. No occurrence of the word "reappoint" nor any of its derivatives appear in the Federal Rules of Civil Procedure or the Local Rules for the U.S.D.C for the Middle District of Florida.

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district outside the district of appointment because the receiver had failed to comply with the filing requirements of § 754)).

52. Authorization for a receiver's reappointment, if any, must derive solely from Circuit or Supreme Court rulings.

53. The Circuit Courts clearly define prerequisite qualifications for a "reappointment" of a receiver, disallowing any breech, avoidance, or unconditional circumstance that might otherwise abate or circumvent the statutory 10-day limits on authorities that §§ 754 and 1692 grant.

54. "Procedural due process rules," says the Supreme Court, "are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." (*Carey v. Piphus*, 435 U.S. 247, 259 (1978)). Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests. (*Fuentes v. Shevin*, 407 U.S. 81 (1972)). The core of these requirements is notice and a hearing before an impartial tribunal.

55. An impartial decisionmaker is an essential right in civil proceedings, just as in criminal and quasi-criminal cases. (See *Tumey v. Ohio*, 273 U.S. 510 (1927); *In re Murchison*, 349 U.S. 133 (1955); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)).

56. In the federal courts the mere appearance of bias is bias. Appearance of bias was introduced into the District Court for the Middle District of Florida by its order in *S.E.C. v. HKW Trading* for the "reappointment" of a receiver in violation of 28 U.S.C. § 754.

57. Wiand, in the capacity of receiver for this Court, perpetuated this bias throughout his career.

58. So long as the District Court for the Middle District of Florida continues to endorse *S.E.C. v. HKW Trading*, or any of its progeny, it is incapable of offering an impartial forum to litigants who challenge the illegality of the Receiver's activities with respect to his claims made upon their property in violation of 28 U.S.C. § 754.

59. Defendant in the instant case was thus irreversibly harmed by denial of his due-process rights, which denial produced the unlawful seizure of his property.

THE RECEIVER HAS NO STANDING

60. Whereas in the instant case, Receiver Wiand was appointed and reappointed on a pre-judgment basis without proper authority; and

61. Whereas Wiand failed to timely file the documents 28 U.S.C. § 754 required; and

62. Whereas Wiand was not legally authorized as receiver under 28 U.S.C. §§ 3103, 3101, and 3102; and

63. Whereas Wiand, being unauthorized as receiver in the instant case, through acts with associated attorneys has knowingly conspired to injure, oppress, and intimidate Defendant; and

64. Whereas Wiand, being unauthorized as receiver in the instant case, has knowingly deprived Defendant of his rights under law and statute; and

65. Whereas Wiand, being unauthorized as receiver in the instant case, has knowingly and willfully acted in conspiracy to defraud the United States by obtaining or aiding to obtain the payment of fraudulent claims; and
66. Whereas Wiand, being unauthorized as receiver in the instant case, has knowingly and willfully acted in conspiracy to defraud the United States by repeated misrepresentation of case law; and
67. Whereas Wiand, being unauthorized as receiver in the instant case, has knowingly represented himself falsely to be an officer of the court acting under color of law and has extorted money, papers, and other things; and
68. Whereas Wiand, being unauthorized as receiver in the instant case, through knowing, willful acts has mismanaged Defendant's property; and
69. Whereas Wiand, being unauthorized as receiver in the instant case, through knowing, willful acts has received, possessed, and disposed Defendant's property.
70. Whereas through the intentional, willful, and knowing acts of Receiver Wiand, Defendant was repeatedly denied constitutionally protected due-process rights;
71. THEREFORE, the Receiver has no standing in this Court and his Motion should be denied.

To the best of his knowledge, information, and belief, Defendant has fully complied with the provisions of the Federal Rules of Civil Procedure Rule 11(b).

CERTIFICATE OF SERVICE

I, Michael J. DaCorta, filed the foregoing with the Middle District of Florida through their e-filing system (ECF) which in turn will send a copy to the following persons:

J. Alison Auxter (CFTC)
A. Brian Phillips (for Satellite Holdings Co. and John J. Haas)
Mark L. Horwitz (for Raymond P. Montie, III)
Francisco "Frank" L. Duran
Christopher Walker (for Mainstream Fund Services, Inc.)
Peter John Grili (Mediator)
Eric Ryan Feld (for Burton W. Wiand)
David W. A. Chee (Movant-United States of America)

Dated: November 22, 2021

Respectfully,

Signed: /s/ Michael J. DaCorta, *pro se*
11774 Via Lucerna Circle
Windmere FL 34786
Telephone: (941) 807-9933
Email: mdacorta64@yahoo.com

EXHIBITS

EXHIBIT A

Occurrences of the word "Reappoint" and its derivatives in Title 28 U.S.C.

"**Reappoint**" – no occurrences

"**Reappointing**" (1 occurrence)

1. p. 70, §153: re reappointing incumbent bankruptcy judges

"**Reappointed**" (11 occurrences)

1. p. 83, §158: re reappointed bankruptcy judges
2. p. 90, §178: re reappointed judges in the Court of Federal Claims (2 occurrences)
3. p. 119, §373: re territorial judges not reappointed
4. p. 135, §377: re retirement upon a judge's failure to be reappointed
5. p. 138, §377: re bankruptcy or magistrate judge not reappointed
6. p. 281, §631: re limitations upon reappointment of magistrate judge
7. p. 282, §631: re exception to reappointment of over-age 70 judge
8. p. 284, §631: re substitution of words related to service of judges within a Federal Agency
9. p. 286, §632: re qualification of magistrates to exercise jurisdiction under 28 U.S.C. §636(c)
10. p. 286, §632: re special reappointment of magistrate judge

"**Reappointment**" (18 occurrences)

1. p. 67: re reappointment of judges in Puerto Rico
2. p. 78, § 152: re reappointment of bankruptcy judge after vacancies
3. p. 79, §153: re reappointment to fill vacancies for judge in a court of appeals (2 occurrences of word)
4. p. 90, §178: re reappointment as judge of the Court of Federal Claims
5. p. 120, §373: re judge failure of reappointment (2 occurrences)
6. p. 121, §375: re Puerto Rican judge failure of reappointment
7. p. 130, §376: re territorial judge failure of reappointment
8. p. 135, §377: re failure of judicial reappointment (2 occurrences)
9. p. 136, §377: re willingness of judge to accept reappointment
10. p. 244, §591: re required periodic annual reappointment of special counsel appointed prior to enactment of 28 U.S.C. §596(b)(2)
11. p. 281, §631: re appointment or reappointment of territorial judges by a concurrence of the majority of all judges

12. p. 284, §631: re reappointment of magistrate judge under a Federal agency by the concurrence of a majority of judges
13. p. 286, §632: word occurs in section re reappointment of magistrate judges (2 occurrences)
14. p. 292, §636: re: reappointment of magistrate judge under § 631

NOTICE:
All but one occurrence ("reappointment" number 10) refer exclusively to reappointment of JUDGES. NO allowance is made for the reappointment of any other office.

Occurrences of the word "Reappoint" or its derivatives in the Federal Rules of Civil Procedure

"**Reappoint**" or any derivative thereof – no occurrences

Occurrences of the word "Reappoint" or its derivatives in the Local Rules for the United States District Court for the Middle District of Florida

"**Reappoint**" or any derivative thereof – no occurrences

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No. 8:05-CV-1076-T-24MSS

HKW TRADING, LLC, HOWARD WAXENBERG TRADING, L.L.C., and DOWNING & ASSOCIATES TECHNICAL ANALYSIS, n/k/a THE ESTATE OF HOWARD WAXENBERG,

Defendants,

HKW TRADING FUND I LLC and THE ESTATE OF HOWARD WAXENBERG,

Relief Defendants.
_____/

UNOPPOSED
RECEIVER'S MOTION TO REOPEN CASE AND FOR REAPPOINTMENT

Burton W. Wiand, (the "Receiver"), as Receiver for Howard Waxenberg Trading, L.L.C.; HKW Trading, LLC; HKW Trading Fund I LLC; The Estate of Howard Waxenberg; and Downing & Associates Technical Analysis, by and through his undersigned counsel, moves the Court to reopen this case temporarily and to reappoint the Receiver. The Receiver further requests that the Order Reappointing Receiver, if issued, be in the form of the original Order Appointing Receiver dated June 9, 2005 (Doc. No. 10), with the scope of the Receivership expanded in accordance with the Order entered September 13, 2005 (Doc. No. 44), which enlarged the original Receivership.

MEMORANDUM IN SUPPORT

This action was commenced by the Securities and Exchange Commission ("SEC"). On emergency motion of SEC, Burton W. Wiand was duly appointed the Receiver over all of the assets held in the name of Defendants Howard Waxenberg Trading, L.L.C. and HKW Trading, LLC and Relief Defendant HKW Trading Fund I LLC (collectively "Corporate Defendants") by Order Appointing Receiver dated June 9, 2005 ("Receivership Order") (Doc. No. 10). On motion of the Receiver, the Receivership was expanded by Order entered September 13, 2005 (Doc. No. 44) to include The Estate of Howard Waxenberg; and Downing & Associates Technical Analysis.

Under the terms of the Order Appointing Receiver, the Receiver is authorized, among other things, to institute actions and legal proceedings including, but not limited to, seeking imposition of constructive trusts, disgorgement of profits, recovery and/or avoidance of fraudulent transfers under Florida Statute § 726.101, et. seq. or otherwise, rescission and restitution, and the collection of debts. (Receivership Order, ¶2)

The Receiver commenced actions against Debbie Sue Goellnitz and Zelda J. Waxenberg, pending in the Middle District of Florida as cases numbered 8:05-cv-01618-JDW-MSS and 8:05-cv-01856-JDW-MSS, respectively. Further, the Receiver intends to commence other actions, including but not limited to actions against investors in the alleged Ponzi scheme in order to marshal and equitably distribute assets among the investors.

Jurisdiction and Venue

While these actions are and will be based on state law, this Court has subject matter jurisdiction over these actions based on the ancillary or supplemental jurisdiction as set forth in 28 U.S.C. § 1367. *See Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (receiver's state law

fraudulent conveyance action against Ponzi scheme investors for recovery of profits is ancillary to federal court SEC enforcement action which appointed receiver, and subject matter jurisdiction is provided by 28 U.S.C. § 1367). When, as here, a receiver's action is brought to accomplish the objectives of the receivership order, it is ancillary to the court's exclusive jurisdiction over the receivership estate. *See Securities and Exchange Commission v. Bilzerian*, 378 F.3d 1100, 1107 (D.C. Cir. 2004).

Venue for all of these actions is also appropriate in this district under 28 U.S.C. § 754, which states:

> A receiver appointed in any civil action or proceeding involving property, real, personal, or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.
>
> He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.
>
> Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

See Scholes, 56 F.3d at 753 (section 754 provides venue in receivership district). This section "allows a receiver to sue in the district in which he was appointed to enforce claims anywhere in the country." *Id.* Section 754 extends "the territorial jurisdiction of the appointing court . . . to any district of the United States where property believed to be that of the receivership estate is found, provided that the proper documents have been filed in each such district as required by § 754." *Bilzerian*, 378 F.3d at 1104 (citing *Haile v. Henderson Nat'l Bank,* 657 F.2d 816, 826 (6th Cir. 1981)).

In addition, the Court will have personal jurisdiction over the defendants under the nationwide service of process statute for receiverships, 28 U.S.C. § 1692, which states:

> In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

See Bilzerian, 378 F.3d at 1104 (personal jurisdiction is established by the nationwide service of process authorized in receivership proceedings by 28 U.S.C. § 1692, under which "[t]he appointment court's process extends to any judicial district where receivership property is found." (*quoting Haile*, 657 F.2d at 826)).

Need for Reappointment

As shown above, in order to invoke personal jurisdiction over defendants residing outside of this district, the Receiver must file a copy of the complaint and the order appointing the Receiver in the districts in which the receivership property is located within 10 days from the date of the order appointing a receiver. *Bilzerian*, 378 F.3d at 1103.

In the instant case, the Receiver, upon appointment, did not know (could not know) the districts of domicile and identity of parties against whom actions could be brought, a thorough investigation being necessary to assure that actions would be brought in good faith under the Receivership Order. Through investigation, the Receiver has learned the identity of parties against whom actions may be brought and their districts of domicile. Thus, the Receiver requests an order re-appointing him as Receiver so that he may timely file the requisite papers in the appropriate jurisdictions as required by § 754 to obtain jurisdiction over assets and defendants against who actions have been and will be commenced.

Reappointment of a receiver for the purpose of re-starting the section 754 10-day time limit has been expressly approved by the courts. *See SEC v. Bilzerian*, 378 F.3d 1100, 1105, citing *SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996) ("On remand, the court may reappoint the receiver and start the ten-day clock ticking once again."); *Terry v. June*, No. Civ. A. 3:03 CV-00047, 2003 WL 21738299 at *3 (W.D.Va. July 21, 2003) ("Courts having addressed this issue unanimously suggest that an order of reappointment will renew the ten-day filing deadline mandated by section 754."); *SEC v. Heartland Group, Inc.*, No. 01-C-1984, 2003 WL 21000363 (N.D. Ill. 2003) ("[T]he court can easily correct [the Receiver's] failure to file such a claim by merely reappointing the Receiver and thereby starting the 10-day time period under § 754 ticking once more."). "Permitting a receiver to reassume jurisdiction in this manner is consistent with the role and purpose of a federal receivership. Were this not the rule, a receiver would be forced to file the required documentation in all ninety-four federal districts to protect jurisdiction over any potential, but presently unknown, receivership assets—a result that would produce a needless waste of time and lead to dissipation of assets otherwise returnable to defrauded investors." *Terry v. June*, at *3 (citing *Heartland Group*, 2003 WL 21000363, at *5; *SEC v. Infinity Group Corp*., 27 F. Supp. 2d 559, 563 (E.D.Pa. 1998)).

* * * *

The undersigned counsel for the Receiver is authorized to represent to the Court that Plaintiff SEC has no objection to the Court's granting this motion and reappointing the Receiver.

* * * *

WHEREFORE, the Receiver requests the Court to reopen this case temporarily and reappoint him as Receiver under the same terms and conditions as the original Order Appointing

Receiver (Doc. No. 10), as expanded by the Order entered September 13, 2005 (Doc. No. 44), and provide such other and further relief as may be just and proper.

/s/ Carl R. Nelson
Carl R. Nelson, Fla. Bar No. 0280186
Maya M. Lockwood, Fla. Bar No. 0175481
Nicole D. LeBeau, Fla. Bar No. 0832391
FOWLER WHITE BOGGS BANKER P.A.
P.O. Box 1438
Tampa, FL 33601
813-228-7411
Fax No: 813-229-8313
Attorneys for the Receiver Burton W. Wiand

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 16, 2006, 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:

Cecilia M. Danger, Esq.
Christopher E. Martin, Esq.
Securities and Exchange Commission
801 Brickell Avenue, 1800
Miami, FL 33131
Phone: 305-982-6386
Fax: 305-536-4154

Deborah Bari Jofre, Esq.
Kluger Peretz Kaplan & Berlin, P.L.
201 South Biscayne Boulevard, 17th Floor
Miami, FL 33131

/s/ Carl R. Nelson
Attorney

#2406995v1 (105-2127)

EXHIBIT C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants, **CASE NO.: 8:09-cv-0087-T-26TBM**

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.
_____/

RECEIVER'S MOTION FOR REAPPOINTMENT

Burton W. Wiand, as Receiver (the "Receiver"), by and through his undersigned counsel moves the Court for an Order Reappointing Receiver in the form attached as Exhibit "A" and would show as follows:

1. The Securities and Exchange Commission (the "Commission") instituted this action to "halt [an] ongoing fraud, maintain the status quo, and preserve investor assets. . . ." (Compl., ¶ 7 (Dkt. 1,)). To further these goals, the Receiver, on motion of the Commission, was appointed Receiver over Defendants Scoop Capital, LLC and Scoop Management, Inc.

and over all Relief Defendants by Order Appointing Receiver entered January 21, 2009 (the "Appointment Order") (Dkt. 8). The Receivership was expanded to include Venice Jet Center, LLC; Tradewind, LLC; Laurel Mountain Preserve, LLC; Laurel Preserve, LLC; the Marguerite J. Nadel Revocable Trust UAD 8/2/07 and the Laurel Mountain Preserve Homeowners Association, Inc.; The Guy-Nadel Foundation; Lime Avenue Enterprises, LLC; and A Victorian Garden Florist, LLC by orders entered January 27, 2009 (Dkt. 17), February 11, 2009 (Dkt. 44), March 9, 2009 (Dkt. 68), and March 17, 2009 (Dkt. 79), respectively (the entities in receivership are collectively referred to as the "Receivership Entities").

2. Under the Appointment Order, the Receiver was authorized, empowered, and directed to, among other things:

> [i]nvestigate the manner in which the affairs of the Defendants and Relief Defendants were conducted and institute such actions and legal proceedings, for the benefit and on behalf of the Defendants and Relief Defendants and their investors and other creditors as the Receiver deems necessary . . . ; provided such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement of profits, recovery and/or avoidance of fraudulent transfers under Florida Statute § 726.101, et. seq. or otherwise, rescission and restitution, the collection of debts, and such orders from this Court as may be necessary to enforce this Order . . . .

(Appointment Order, ¶ 2 (Dkt. 8)).

The Receiver's investigation has revealed it is appropriate to, and the Receiver intends to institute actions, including but not limited to actions against investors in the Receivership Entities who profited at the expense of other investors, against persons and entities that received funds from the Receivership Entities that were not related to the recipient's investments (for example, person and entities that received purported commissions), and against persons and entities to whom and to which assets other than funds

were transferred, such as property interests. The purpose of the actions will be to "marshal and safeguard all of the assets of the Defendants and Relief Defendants" in order to distribute those assets equitably among investors and other creditors who suffered losses as a result of the investment scheme orchestrated through Receivership Entities.

3. The Receiver makes this motion so that he may satisfy the 10-day requirement of 28 U.S.C. § 754 to invoke the jurisdiction of the United States District Court for the Middle of Florida over the actions he intends to commence as will be explained more fully below.

MEMORANDUM IN SUPPORT

Jurisdiction and Venue

While the actions the Receiver intends to commence will be based on state law, this Court has subject matter jurisdiction over the actions based on ancillary or supplemental jurisdiction as set forth in 28 U.S.C. § 1367. *See Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (receiver's state law fraudulent conveyance action against Ponzi scheme investors for recovery of profits is ancillary to federal court SEC enforcement action which appointed receiver, and subject matter jurisdiction is provided by 28 U.S.C. § 1367). When, as here, a receiver's action is brought to accomplish the objectives of the receivership order, it is ancillary to the court's exclusive jurisdiction over the receivership estate. *See SEC v. Bilzerian*, 378 F.3d 1100, 1107 (D.C. Cir. 2004).

Venue for all of these actions is also appropriate in this district under 28 U.S.C. § 754, which states:

> A receiver appointed in any civil action or proceeding involving property, real, personal, or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof.

> He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title.
>
> Such receiver shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

See Scholes, 56 F.3d at 753 (Section 754 provides venue in receivership district). This section "allows a receiver to sue in the district in which he was appointed to enforce claims anywhere in the country." *Id.* Section 754 extends "the territorial jurisdiction of the appointing court . . . to any district of the United States where property believed to be that of the receivership estate is found, provided that the proper documents have been filed in each such district as required by § 754." *Bilzerian*, 378 F.3d at 1104 (citing *Haile v. Henderson Nat'l Bank,* 657 F.2d 816, 823 (6th Cir. 1981)).

In addition, the Court will have personal jurisdiction over the defendants under the nationwide service of process statute for receiverships, 28 U.S.C. § 1692, which states:

> In proceedings in a district court where a receiver is appointed for property, real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but orders affecting the property shall be entered of record in each of such districts.

See Bilzerian, 378 F.3d at 1104 (personal jurisdiction is established by the nationwide service of process authorized in receivership proceedings by 28 U.S.C. § 1692, under which "[t]he appointment court's process extends to any judicial district where receivership property is found." (*quoting Haile*, 657 F.2d at 826)).

Need for Reappointment

As shown above, in order to invoke personal jurisdiction over defendants residing outside of this district, the Receiver must file a copy of the complaint and the order appointing the Receiver in the districts in which the receivership property is located within 10 days from the date of the order appointing a receiver. *SEC v. Bilzerian*, 378 F.3d 1100, 1103 (D.C. Cir. 2004).

In the instant case, the Receiver, upon appointment, did not know (could not know) the districts of domicile and identity of parties against whom actions could be brought, a thorough investigation being necessary to assure that actions would be brought in good faith under the Receivership Order. Through investigation, the Receiver has learned the identity of parties against whom actions may be brought and their districts of domicile. Thus, the Receiver requests an order reappointing him as Receiver so that he may timely file the requisite papers in the appropriate jurisdictions as required by Section 754 to obtain jurisdiction over assets and defendants against whom actions will be commenced.

Reappointment of a receiver for the purpose of re-starting the 10-day time limit under § 754 has been expressly approved by the courts. *See Bilzerian*, 378 F.3d at 1105 (citing *SEC v. Vision Communications, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996)) ("On remand, the court may reappoint the receiver and start the ten-day clock ticking once again."); *SEC v. Aquacell Batteries, Inc.*, 2008 WL 2915064, at *3 (M.D. Fla. July 24, 2008) (citing *Warfield v. Arpe*, 2007 WL 549467, at *12 (N.D. Tex. Feb. 22, 2007)) ("A district court may reappoint a federal equity receiver in a securities fraud case in order to 'reset' the 10-day clock under § 754"); *Terry v. June*, 2003 WL 21738299, at *3 (W.D. Va. July 21, 2003) ("Courts having

addressed this issue unanimously suggest that an order of reappointment will renew the ten-day filing deadline mandated by section 754."); *SEC v. Heartland Group, Inc.*, 2003 WL 21000363, at *5 (N.D. Ill. May 2, 2003) ("[T]he court can easily correct [the Receiver's] failure to file such a claim by merely reappointing the Receiver and thereby starting the 10-day time period under § 754 ticking once more."). "Permitting a receiver to reassume jurisdiction in this manner is consistent with the role and purpose of a federal receivership. Were this not the rule, a receiver would be forced to file the required documentation in all ninety-four federal districts to protect jurisdiction over any potential, but presently unknown, receivership assets—a result that would produce a needless waste of time and lead to dissipation of assets otherwise returnable to defrauded investors." *Terry v. June*, 2003 WL 21738299, at *3 (citing *Heartland Group*, 2003 WL 21000363, at *5; *SEC v. Infinity Group Corp.*, 27 F. Supp. 2d 559, 563 (E.D. Pa. 1998)). This procedure has been utilized in this District. *See, e.g., SEC v. HKW Trading, LLC, et al.,* Case No. 8:05-cv-1076-T-24TBM (M.D. Fla. Feb. 22, 2006) (Order Reappointing Receiver (Dkt. 75)) (order reappointing Burton W. Wiand as Receiver).

WHEREFORE, the Receiver moves the Court to reappoint him as Receiver over all of the Receivership Entities by Order in the form attached as Exhibit "A" and for such other relief as the Court deems appropriate.

LOCAL RULE 3.01(g) CERTIFICATE OF COUNSEL

The undersigned counsel for the Receiver is authorized to represent to the Court that the SEC has no objection to the Court's granting this motion. The undersigned counsel is

unable to contact Arthur Nadel, who is incarcerated in New York and is not represented by counsel in this action.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

Arthur G. Nadel
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