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14
15 **UNITED STATES DISTRICT COURT**
16 **DISTRICT OF NEVADA**

17 SECURITIES AND EXCHANGE
18 COMMISSION,

19 Plaintiff,

20 v.

21
22 MATTHEW WADE BEASLEY, et al.,

23 Defendants,
24

Case No. 2:22-cv-00612-CDS-EJY

**INTERESTED PARTY WELLS
FARGO BANK, N.A.'S OBJECTIONS
TO ORDER AUTHORIZING
RECIEVER TO EMPLOY SPECIAL
LITIGATION COUNSEL UNDER FED.
R. CIV. P. 72**

1 Pursuant to Federal Rule of Civil Procedure 72(a), interested party Wells Fargo Bank, N.A.
 2 (“Wells Fargo”) hereby objects to Magistrate Judge Eleyana Youch’s order dated February 21,
 3 2023 (the “Order”) appointing Levine Kellogg Lehman Schneider + Grossman LLP (“Levine
 4 Kellogg”) as special litigation counsel for the Receiver. ECF No. 471. Although Wells Fargo does
 5 not object to special litigation counsel being appointed for the Receiver generally, Wells Fargo
 6 specifically objects to Levine Kellogg’s appointment due to its conflict of interest in representing
 7 the class members in the class action pending in this district *In re J&J Investment Litigation*, Case
 8 No. 2:22-cv-00529-GMN-NJK (the “Class Action”),¹ and the Receiver. The proposed class
 9 members in the Class Action have interests that are distinct from, and in direct conflict with, the
 10 Receiver who stands in the shoes of the alleged fraudulent entities in this action.

11 Additionally, Wells Fargo objects to the Order because any information sharing between
 12 the Receiver and its newly appointed counsel Levine Kellogg will likely violate the protective order
 13 in in the Class Action. Wells Fargo believes that a violation of the protective order is likely, given
 14 the Receiver’s representations that he plans to enter into a common interest and joint prosecution
 15 agreement with counsel in the Class Action. ECF No. 457 at p. 9.

16 Prior to this filing, Wells Fargo attempted to meet and confer with Levine Kellogg and
 17 Levine Kellogg’s only response is that it would abide by the Protective Order. Although Levine
 18 Kellogg has agreed to abide by the Protective Order, Wells Fargo still has concerns about the
 19 Receiver’s stated intentions to enter into a common interest and joint prosecution agreement with
 20 Class Action’s counsel. Therefore, Wells Fargo submits these objections to the Order appointing
 21 Levine Kellogg as Receiver’s counsel.

22 **I. BACKGROUND**

23 On February 3, 2023, the Receiver in this action filed a motion to employ Levine Kellogg
 24 as special litigation counsel. ECF No. 457. On February 21, 2023, this Court granted the Receiver’s
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 27 ¹ On March 3, 2023, Levine Kellogg submitted a motion to permit its withdrawal as interim co-lead
 28 counsel in the Class Action. Class Action, ECF No. 70. However, the motion is still pending, and
 Levine Kellogg is currently counsel of record for the proposed class members.

1 motion to appoint Levine Kellogg as its counsel. ECF No. 471. Within the Receiver’s motion, the
2 Receiver stated that if Levine Kellogg were to be appointed as its counsel, Levine Kellogg would
3 withdraw as counsel for the proposed putative class in the Class Action. *Id.* at p. 11. As of
4 submission of these written objections, Levine Kellogg is still counsel of record of the proposed
5 putative class in the Class Action.²

6 By way of background, the SEC has alleged that the entities the Receivership represents in
7 this action have committed securities fraud. The victims of the alleged fraud are the putative class
8 members in the Class Action. Therefore, if the SEC proves that the defendants in this Action (which
9 includes the receivership entities) did commit securities fraud, some of the putative class members
10 will have claims against the receivership entities, which will likely be resolved through a claims
11 process against the Receiver. *See, e.g., SEC v. Beasley*, No. 222CV00612CDSEJY, 2022 WL
12 17061196, at *11 (D. Nev. Nov. 17, 2022), *aff’d sub nom. SEC v. Matthew Wade Beasley, et al.*,
13 No. 222CV00612CDSEJY, 2023 WL 2308275 (D. Nev. Mar. 1, 2023) (“Ninth Circuit precedent
14 grants to the district court discretion to hold summary proceedings to administer the assets under
15 the administrative control of the Receiver.”) (citing *S.E.C. v. American Capital Investments, Inc.*,
16 98 F.3d 1133, 1146 (9th Cir. 1996) (“For the claims of nonparties to property claimed by receivers,
17 summary proceedings satisfy due process so long as there is adequate notice and opportunity to be
18 heard.”)).

19 There is also a potential conflict between the “winning” investors and the Receiver. The
20 proposed class members in the Class Action encompass, “[a]ll natural and legal persons who
21 invested in a J&J Entity lawsuit settlement contract between January 2017 and March 2022.” Class
22 Action, ECF No. 22 at ¶ 140. The class definition includes all those who invested in a J&J Entity
23 lawsuit settlement, including net winners who invested and received interest payments above and
24 beyond their initial investment. Thus, if fraud is proven, and some investors received an alleged
25 windfall, the Receiver will be obligated to pursue claims against those net winners, who are also

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28 ² *See supra* fn. 1.

1 member of the proposed class (and who will no doubt oppose the return of any alleged windfall
2 funds). Thus, proposed class members in the Class Action therefore have interests that are distinct
3 from, and in conflict with, the Receiver who stands in the shoes of the alleged fraudulent entities
4 in this action. They are either investors who lost money and have a claim against the receivership
5 estate, or they are winning investors against whom the receiver has claims.

6 The other problem posed by Levine Kellogg’s representation of the Receiver is that it allows
7 for the potential violation of the protective order in the Class Action. On September 28, 2022, the
8 court in the Class Action entered the parties’ agreed-upon protective order prohibiting the parties
9 and their counsel from sharing confidential information with others except for a limited number of
10 exceptions (the “Protective Order”).³ Class Action, ECF No. 56. The documents produced by Wells
11 Fargo may only be used for “prosecuting, defending or attempting to settle this Lawsuit, [the Class
12 Action], and related appeals.” Class Action, ECF No. 56 at ¶ 1. The confidential documents Wells
13 Fargo has produced in the Class Action “may be disclosed only to the categories of persons and
14 under the conditions prescribed in the Protective Order—which does not include the Receiver. *Id.*
15 Levine Kellogg are privy to the produced confidential documents. Based on the Receiver’s

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18 ³ The court ordered exceptions to sharing of confidential information are limited to: “(a) the
19 Parties to this Lawsuit and representatives, officers, directors, insurers, and employees, including
20 in-house counsel, of the Parties who have agreed to be bound by and to comply with this Order;
21 (b) attorneys and legal staff of law firms who are counsel of record in this Lawsuit; (c) the Court
22 and its personnel, including any special master appointed by the Court, and members of the jury;
23 (d) court reporters, recorders, and videographers engaged for depositions in this Lawsuit and their
24 employees; (e) any mediator appointed by the Court or jointly selected by the Parties, and their
25 supporting personnel; (f) any expert or consultant retained specifically in connection with this
26 Lawsuit, but only after such persons have completed the certification contained in the
27 “Acknowledgement and Agreement to be Bound” (Exhibit A); (g) independent providers of
28 document reproduction, electronic discovery, or other litigation services retained or employed by
one or more of the Parties specifically in connection with this Lawsuit, and only after such persons
have completed the certification contained in the ‘Acknowledgement and Agreement to be Bound’
(Exhibit A); and (h) any potential, anticipated, or actual third-party fact witness and his or her
counsel, but only after such persons have completed the certification contained in the
‘Acknowledgement and Agreement to be Bound’ (Exhibit A); (i) the author or intended recipient
of the document (not including a person who received the document in the course of the Lawsuit);
(j) other persons only upon consent of the producing party and on such conditions as the Parties
may agree.” Class Action, ECF No. 56 at ¶ 6.2.

1 representations that it will enter into a common interest and joint prosecution agreement with the
2 Class Action’s counsel it seems likely the Protective Order will be violated.

3 In an effort to meet and confer, counsel of record for Wells Fargo in the Class Action
4 exchanged correspondence with Levine Kellogg concerning the concerns Wells Fargo has with the
5 Order and resulting appointment. First, Wells Fargo expressed concerns of the direct conflict of
6 interest as the proposed class members in the Class Action have interests that are distinct from, and
7 in conflict with, the Receiver who stands in the shoes of the alleged fraudulent entities in this action.
8 Second, Wells Fargo raised concerns about Levine Kellogg’s adherence to the Protective Order
9 which prohibits sharing of confidential information with others, given the Receiver’s
10 representations that he would enter into a common interest and joint prosecution agreement with
11 the counsel in the Class Action. ECF No. 457 at p. 9. Levine Kellogg’s only response is that would
12 abide by the Protective Order. Thus, based on the foregoing concerns Wells Fargo submits the
13 below written objections.

14 **II. LEGAL STANDARD**

15 Wells Fargo respectfully asks the district court to set aside the magistrate judge’s order here.
16 Federal Rule of Civil Procedure Rule 72(a) provides that “a district judge in the case must consider
17 timely objections (to a non-dispositive order) and modify or set aside any part of the order that is
18 clearly erroneous or contrary law.” Fed. R. Civ. P. 72(a). Similarly, the Federal Magistrates Act,
19 28 U.S.C. § 636(b)(1)(A), provides that a district court shall reverse a magistrate judge’s ruling
20 regarding a non-dispositive matter where the order is “clearly erroneous or contrary to law.” *See*
21 *also* LR IB 3-1(a) (“A district judge may reconsider any pretrial matter referred to a magistrate
22 judge in a civil or criminal case under LR IB 1-3, when it has been shown the magistrate judge’s
23 order is clearly erroneous or contrary to law.”).

24 “A magistrate judge’s finding is ‘clearly erroneous’ if the district judge has a ‘definite and
25 firm conviction that a mistake has been committed.’” *United States v. Randall*, No.
26 218CR303JCMEJY, 2020 WL 2308082, at *1 (D. Nev. May 8, 2020) (quoting *United States v.*
27 *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). “An order is contrary to law when it fails to apply
28 or misapplies relevant statutes, case law, or rules of procedure.” *Id.* (quoting *United States v.*

1 *Desage*, 229 F. Supp. 3d 1209, 1213 (D. Nev. 2017)).

2 **III. LEGAL ARGUMENT**

3 **A. The Receiver and Proposed Class Members in the Class Action Have a Conflict**
4 **of Interest**

5 The Order appointing Levine Kellogg as special litigation counsel for the Receiver is
6 clearly erroneous because the appointment of counsel for the proposed class members, who have a
7 direct conflict of interest with the Receiver, is not supported in the law. *United States ex rel. Luke*
8 *v. Healthsouth Corp.*, No. 213CV01319APGVCF, 2017 WL 5346385, at *2 (D. Nev. Nov. 10,
9 2017) (affirming the magistrate judge’s order disqualifying counsel due to their concurrent conflict
10 as two attorneys from the firm represented Healthsound and were associated in the same firm with
11 the attorneys representing the plaintiff in this lawsuit against Healthsound). Here, the proposed
12 class members include net winners—those who profited from the fraud by receiving their initial
13 investment and additional monies from the fraudulent entities in which the Receiver now stands in
14 the shoes of in this action. Therefore, the Receiver has claims against the proposed class members
15 who are net winners to recover assets for the receivership. Additionally, if the SEC proves fraud (a
16 fact that Plaintiffs’ counsel must also prove in the Class Action), the proposed class members who
17 suffered losses will have claims against the receivership estate. Case law is clear in situations like
18 this where there was a scheme to defraud investors, there exists an inherent conflict of interest as
19 members of a class “would certainly have claims against [the fraudulent entities] which would be
20 potentially inconsistent with [Receiver]’s duty as Receiver to manage and preserve the assets of the
21 company.” *Fleming v. Bank of Bos. Corp.*, 127 F.R.D. 30 (D. Mass. 1989), *aff’d sub nom. Fleming*
22 *v. Lind-Waldock & Co.*, 922 F.2d 20 (1st Cir. 1990).

23 **B. Receiver’s Representations that it Will Enter into a Common Interest and Joint**
24 **Prosecution Agreement with Class Action’s Counsel Raises Concerns**

25 Given the Receiver’s representations that he will enter into a common interest and joint
26 prosecution agreement with the Class Action’s counsel raises concerns regarding class counsel’s
27 adherence to the Protective Order in the Class Action. The Protective Order in the Class Action—
28 which was negotiated and agree to by the parties—does not permit Plaintiffs’ counsel in the Class

1 Action to share with the Receiver or his counsel information and documents that Wells Fargo has
2 designated as confidential. Class Action, ECF No. 56 at ¶ 6.2. This prohibition follows those
3 counsel from Levine Kellogg who have elected to work for the Receiver. Wells Fargo attempted to
4 meet and confer with Levine Kellogg on this issue and Levine Kellogg's only response is that it
5 would abide by the Protective Order. Although Levine Kellogg has agreed to abide by the
6 Protective Order, Wells Fargo still has concerns about the Receiver's stated intentions to enter into
7 a common interest and joint prosecution agreement with Class Action's counsel.

8 **IV. CONCLUSION**

9 For the foregoing reasons, Wells Fargo respectfully submits these written objections to the
10 court's order appointing Levine Kellogg as special litigation counsel for the Receiver.

11 Dated: March 7, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document, **INTERESTED PARTY WELLS FARGO BANK, N.A.’S WRITTEN OBJECTIONS TO ODER AUTHORIZING RECIEVER TO EMPLOY SPECIAL LITIGATION COUNSEL UNDER FED. R. CIV. P. 72**, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on March 7, 2023.

/s/ Joseph G. Went, Esq.