

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.

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**RECEIVER'S UNOPPOSED MOTION TO APPROVE  
SALE OF THE ASSETS OF RESPIRO, INC.**

Pursuant to 28 U.S.C. §§ 754, 2001, and 2004; Fed. R. Civ. P. 66; and Rule 3.01 of the Local Rules of the Middle District of Florida, Burton W. Wiand, as Receiver (the “Receiver”), respectfully moves the Court for an order, in substantially the form attached as **Exhibit 1**, (i) authorizing him to sell the assets of Receivership Entity Respiro, Inc. (the

“Assets”) pursuant to the Purchase Agreement attached as **Exhibit 2**, and (ii) relieving him from the requirements of 28 U.S.C. §§ 2001 and 2004.

### **BACKGROUND**

On January 21, 2009, the Securities and Exchange Commission (“**Commission**”) initiated this action to prevent the defendants from further defrauding investors of hedge funds operated by them. That same day, the Court entered an order appointing Burton W. Wiand as Receiver for Defendants Scoop Capital, LLC and Scoop Management, Inc. and Relief Defendants Scoop Real Estate, L.P.; Valhalla Investment Partners, L.P.; Valhalla Management, Inc.; Victory Fund, Ltd.; Victory IRA Fund, Ltd.; Viking IRA Fund, LLC; Viking Fund, LLC; and Viking Management, LLC (the “**Order Appointing Receiver**”) (Doc. 8). The Court subsequently granted several motions to expand the scope of the Receivership to include other entities owned or controlled by Arthur Nadel (“**Nadel**”). (*See generally* Docs. 17, 44, 68, 81, 153, 172, 454, 911, 916, 1024.) All of the entities in receivership are hereinafter collectively referred to as the “**Receivership Entities.**” Pursuant to the Order Appointing Receiver, the Receiver was directed to, *inter alia*, administer and manage the business affairs, funds, assets, choses in action, and any other property of the Receivership Entities.

### **VALUE OF THE ASSETS AND THE RECEIVER’S MARKETING EFFORTS**

#### **Respiro, Inc., Background**

Respiro is a Sarasota, Florida, company focused on providing home respiratory services and medical equipment to patients. The company’s core business model involves the purchase of specialized medical equipment directly from the manufacturers, for which it

receives Medicare reimbursement meant to cover both the equipment price and the price of providing services to individual patients using that equipment. The company's success depends on the continuation of this favorable reimbursement agreement with Medicare, as well as cultivating and maintaining relationships with health service professionals who prescribe certain products and services offered by Respiro to their patients.

The Receiver's investigation revealed that Respiro was largely funded with proceeds paid to Christopher Moody ("**C. Moody**") from Arthur Nadel's Ponzi scheme. Specifically, Respiro received more than \$500,000 in transfers from C. Moody and his wife, Tamara Moody ("**T. Moody**"), and T. Moody held 60% of the company's shares. On September 21, 2012, the Court entered an Order granting the Receiver's Motion to Expand the Scope of Receivership to Include Respiro, Inc., and ordered the delivery, assignment, and transfer of all share certificates by all Respiro shareholders to the Receiver (Doc. 916).

After assuming control of Respiro, the Receiver began investigating the value and status of Respiro. The Receiver's investigation revealed significant concerns about the ability of Respiro to continue as a going concern. Specifically, the Receiver learned that, prior to the inclusion of Respiro in the Receivership estate, the company had been denied a bid to continue receiving reimbursement from Medicare for the purchase of various medical equipment. This inability to continue receiving Medicare reimbursement had a significant negative impact on Respiro's business. Additionally, Respiro has since seen an unfavorable shift in industry conditions, including a measurable decline in the number of patient referrals it has received from health service professionals. Finally, the company continues to suffer the loss of key personnel required to conduct day-to-day operations.

### Value of Respiro's Assets and the Receiver's Marketing Efforts

As detailed in the List of Assets included in the Agreement, Respiro's current assets consist of various medical equipment, several automobiles, patient files, and office equipment. To determine the market price of the automobiles, the Receiver obtained quotes from Edmonds.com and Kelly Blue Book – two internet websites routinely used as a benchmark in the valuation of automobiles. Edmonds.com estimated the total value of the automobiles as between \$19,884 and \$26,727, while Kelly Blue Book valued the automobiles at between \$23,741 and \$30,141. The office equipment is outdated, and likely has little saleable value. Finally, the equipment on hand is primarily refurbished, and the Receiver does not believe that any private sale would result in any meaningful proceeds.

Having obtained no material interest from any prospective purchasers, and in light of the precarious state of Respiro's business operations, the Receiver enlisted the services of a business broker to locate a purchaser for some or all of Respiro's assets. The only offer received did not survive the due diligence process. The Receiver then resurrected earlier discussions with Matrix Medical, LLC ("**Buyer**") to sell the Assets for \$65,000 subject to a possible decrease discussed below (the "**Agreement**"), contingent upon this Court's approval. As previously noted, a true and correct copy of the Agreement is attached hereto as **Exhibit 2**. The Agreement contemplates the purchase of Respiro's assets, patient files, and on-hand equipment, and also provides that the purchase price may be decreased by \$250 for each deficient and/or missing patient file. Buyer has conducted a partial review of Respiro's files and has proposed to deduct (i) \$6,750 based on both missing and deficient files, and (ii) \$12,500 for amounts billed by Buyer since assuming responsibility for

servicing Respiro's customers but which have been paid to Respiro. This would result in a net purchase price of approximately \$45,750. The Receiver believes this proposal is fair, and that approval of the Agreement is in the best interests of the Receivership Estate as it represents the current value of the Assets – especially in light of the Receiver's significant doubts as to Respiro's ability to continue to operate as a going concern. This includes (i) Respiro's continuing obligation to provide services for its customers, and (ii) the threat of the continued loss of essential personnel. The Agreement contains a proposed closing date of October 20, 2013, and the Receiver believes that approval of the Agreement in a timely fashion is warranted. In light of the foregoing, the Receiver respectfully requests that this Court enter an order approving the sale of the Assets, and requests that the Court waive, or find that the Receiver has substantially complied with, the procedures in 28 U.S.C. § 2001(b) applicable to the private sale of property by a receiver.

#### **MEMORANDUM OF LAW**

#### **I. THE COURT HAS BROAD POWERS OVER THIS RECEIVERSHIP'S ADMINISTRATION AND THE SALE OF THE ASSETS IS IN THE RECEIVERSHIP ESTATE'S BEST INTEREST**

The Court's power to supervise an equity receivership and to determine the appropriate actions to be taken in the administration of the receivership is extremely broad. *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). The Court's wide discretion derives from the inherent powers of an equity court to fashion relief. *Elliott*, 953 F.2d at 1566; *S.E.C. v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5th Cir. 1982). The relief sought by the Receiver falls squarely within those powers. The Receiver believes that the proposed sale of the Assets, which will result in the

net recovery of \$45,750.00 (i.e., \$65,000 minus \$6,750 as a result of deficient files and \$12,500 for recent bills paid to Respiro even though services were provided by Buyer) and the satisfaction of any current obligations to patients, is in the best interests of and represents the best possible realistic recovery for the Receivership estate. The relief sought is in furtherance of the duties and authorities bestowed upon the Receiver by the Order Appointing Receiver.

A court imposing a receivership assumes custody and control of all assets and property of the receivership and it has broad equitable authority to issue all orders necessary for the proper administration of the receivership estate. *See S.E.C. v. Credit Bancorp Ltd.*, 290 F.3d 80, 82-83 (2d Cir. 2002); *S.E.C. v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980). The court may enter such orders as may be appropriate and necessary for a receiver to fulfill his duty to preserve and maintain the property and funds within the receivership estate. *See, e.g., Official Comm. Of Unsecured Creditors of Worldcom, Inc. v. S.E.C.*, 467 F.3d 73, 81 (2d Cir. 2006). The goal of a receiver charged with liquidating assets is to obtain the best value available under the circumstances. *Fleet Nat'l Bank v. H & D Entertainment, Inc.*, 926 F. Supp. 226, 239-40 (D. Mass. 1996) (citations omitted). Further, the paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See, e.g., Four B. Corp. v. Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997).

The relief sought by the Receiver falls squarely within those powers. In light of the considerations discussed above, sale of the Assets is in the best interest of the Receivership estate, and would result in the recovery of approximately \$45,750.00. As a result, the

Receiver respectfully requests that the Court grant the relief requested in this motion and enter the proposed order attached as Exhibit 1.

**II. THE COURT HAS THE AUTHORITY TO WAIVE THE REQUIREMENTS OF 28 U.S.C. §§ 2001 AND 2004, AND THE CIRCUMSTANCES HERE WARRANT SUCH WAIVER**

28 U.S.C. §§ 2001 and 2004 govern the “sale” of property. However, these statutory requirements can be and are often waived by courts. 28 U.S.C. § 2004 (“**Section 2004**”) governs the sale of personal property and provides as follows:

Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with Section 2001 of this Title, unless the court orders otherwise.

28 U.S.C. § 2004 (emphasis added). 28 U.S.C. § 2001(b) (“**Section 2001(b)**”) addresses private sales and provides as follows:

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any private sale, the court shall appoint three disinterested persons to appraise such property or different groups of three appraisers each to appraise properties of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

28 U.S.C. § 2001(b)

Thus, “unless the Court orders otherwise” pursuant to Section 2004, Section 2001(b) requires a court to appoint three disinterested persons as appraisers and to direct in which

newspaper a notice of proposed sale be published prior to confirmation of a sale. Here, using the discretion afforded by Section 2004, the Court should “order otherwise” in this instance with regard to (i) the need for three appraisals and (ii) the publication in newspapers of notice of any sale. The Court’s authority to deviate from the requirements of Section 2004 is supported by caselaw and is in the best interests of the Receivership estate.

The Receiver believes he is in position to adequately evaluate the value of the Assets, and that full compliance with Section 2004 and Section 2001(b) would result in the unwarranted expenditure of funds and resources of the Receivership estate. Additionally, due to the precarious nature of Respiro’s current business state, compliance with the statutory requirements could have a further detrimental impact on Respiro’s operations and potentially result in the Buyer walking away from this transaction. Thus, the Receiver requests that the Court authorize deviation from the statutory appraisal and notice requirement associated with the proposed sale of the Assets.

Courts have recognized the discretion afforded to them by Section 2004 in approving a discretionary deviation from the requirements of Section 2001. *See, e.g., Tanzer United States v. Stonehill*, 83 F.3d 1156, 1160 (9th Cir. 1996) (emphasizing statutory language, “unless the court orders otherwise,” and concluding that “it is at the district court’s discretion whether to obtain appraisals [in sales of] personal property”); *see also SEC v. Kirkland*, 2008 WL 4264532, \*2 (M.D. Fla. 2008) (approving sale of personalty without appraisals or publication where costs of compliance would significantly offset the purchase offer); *United States v. Kerner*, 2003 WL 22905202, \*2 (E.D. Mich. 2003) (“Under...28 U.S.C. § 2004, which states that the requirements of section 2001 must be followed ‘unless the court orders



otherwise,' the Court clearly has the discretionary authority to confirm the private sale [made without strict adherence to the requirements in Section 2001].”).

Further, Courts have specifically exercised their authority to deviate from the requirements of Section 2001 when faced with the proposed sale of personal property by a receiver under Section 2004. *See Wells Fargo Capital Finance, Inc. v. North Pacific Group*, No. CV10-65-KI, Order on Receiver’s Motion for Order Authorizing Sale of Accounts Receivable (D. Ore. Jan. 24, 2012) (excusing receiver from “compliance with 28 U.S.C. § 2004 concerning sales of personal property through federal court proceedings”); *SEC v. Billion Coupons, Inc.*, 2009 WL 2143531, \*4 (D. Hawai’i 2009) (finding good cause to exercise discretion and permit receiver to sell personal and real property in manner other than as provided by federal statute, including 28 U.S.C. §§ 2001, 2004); *Federal Trade Commission v. Jeremy Johnson et. al.*, No. 2:10-cv-02203-RLH-GWF, Order (D. Nev. August 25, 2011) (allowing receiver to liquidate private limited liability membership interest and authorizing deviation from sale and publication procedures of 28 U.S.C. §§ 2001 and 2004); *SEC v. Lydia Capital, LLC, et al.*, No. 1:07-cv-10712-RGS, Order Granting Receiver’s Motion for Authorization to Sell Asset of the Receivership Estate (D. Mass. March 16, 2011) (“Given the Receiver’s efforts in marketing the portfolio of policies, including the Sale Policy, the third-party offers the Receiver obtained from disinterested bidders in the marketplace, and the notices provided to all interested parties, neither an independent appraisal or publication is necessary under 28 U.S.C. §§ 2001 and 2004”) (emphasis added). Copies of these orders are attached hereto as **Exhibit 3**.

### III. THERE EXIST NO KNOWN CLAIMS OR INTERESTS IN THE ASSETS

Deviation from the requirements of Section 2001(b) is not only warranted by the circumstances, but also by the absence of any known outstanding claims, liens, or encumbrances relating to the Assets. While the Receiver is not aware of any claims, liens, or encumbrances relating to the Assets, nevertheless to eliminate any risk whatsoever, the Receiver seeks an Order allowing him to transfer the Assets free and clear of any and all liens, encumbrances, and claims. This Court's broad authority over the Receivership estate includes the equitable power to "sell property free of liens, transferring the liens to the proceeds." *Seaboard Nat'l Bank v. Rogers Milk Products Co.*, 21 F.2d 414, 416 (2d Cir. 1927); *see also Quilling v. Trade Partners, Inc.*, 2007 WL 296211 (W.D. Mich. 2007) (approving receiver's sale of property free and clear of all liens and encumbrances and ordering that any liens or claims associated with the property would attach to the proceeds of the sale).

Finally, because no known claim, lien, or encumbrance affecting the Receivership estate's interests in the Assets will remain outstanding, no hearing on this Motion is necessary. Instead, aside from filing this Motion in the public docket, the Motion and supporting papers will be posted and easily accessible to any interested party on the Receivership's website ([www.nadelreceivership.com](http://www.nadelreceivership.com)) promptly after they are filed. This procedure will provide any interested party with sufficient notice and opportunity to be heard in accordance with Section 2001(b). *See, e.g., North Pacific Group, Inc.*, No. CV10-65-KI (D. Ore. Jan. 24, 2012) ("no other or further notice of the Motion or the entry of this sale order is required"); *Lydia Capital, LLC, et al.*, No. 1:07-cv-10712-RGS (D. Mass. March 16,

2011) (provision of motion and proposed order to parties, investors, and creditors of receivership, along with posting copy on receiver's website, was sufficient and reasonable where time was of the essence); *Albert Fase Kaleta et al.*, No. 4:09-cv-3674 (S.D. Tex. August 10, 2010) (granting emergency motion waiving receiver's compliance with Section 2004, including notice requirements).

### **CONCLUSION**

For these reasons, the Receiver moves the Court for entry of an order in substantially the form of the proposed Order attached as Exhibit 1 (i) approving the sale of the Assets, (ii) waiving appraisal and publication requirements under 28 U.S.C. §§ 2001 and 2004, and (iii) allowing the Receiver to transfer the Assets free and clear of any and all claims, liens, and encumbrances.

### **CERTIFICATE UNDER LOCAL RULE 3.01(g)**

Undersigned counsel has conferred with counsel for the SEC and is authorized to represent to the Court that this motion is unopposed.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 30, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

**s/Gianluca Morello**

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