UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No. 8:09-cv-0087-T-26TBM

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

Defendants,

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

Relief Defendants.
_____/

RECEIVER'S RESPONSE IN OPPOSITION TO LA BELLASARA CONDOMINIUM ASSOCIATION'S MOTION FOR PARTIAL RELIEF FROM STAY TO PERMIT THE FILING OF A LIEN IN THE PUBLIC RECORDS

Burton W. Wiand, as Receiver (the "**Receiver**"), opposes La Bellasara Condominium Association's (the "**Association**") Motion For Partial Relief From Stay To Permit The Filing Of A Lien In The Public Records (Doc. 1076) (the "**Motion**") because the relief requested is unnecessary and granting the Motion will encourage other creditors to attempt to circumvent the Receivership stay. When, as here, a creditor's only potential "injury" would be a delay in enforcing its purported right, lifting the stay is unwarranted. *See F.T.C. v. Med Resorts Int'l*, 199 F.R.D. 601, 607-609 (N.D. Ill. 2001).

BACKGROUND

On January 21, 2009, the Court appointed the Receiver in this action (Doc. 8) and directed him to "marshal and safeguard" the Receivership Entities' assets and to "take whatever actions are necessary for the protection of the investors . . ." (*id*. at 2). Pertinent to the Association's Motion, the Court enjoined "all persons, including creditors, banks, investors, or others, with actual notice of this Order . . . from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Receivership Entities." *Id*. ¶ 15.

One of the assets currently in the Receiver's exclusive possession, custody, and control is Unit 703 at La Bellasara Condominium in Sarasota County ("**Unit 703**"), which Neil Moody formerly owned. *See* Docs. 324, 327; Mot. Ex. 1. The Association claims it holds a lien against Unit 703 due to unpaid assessments, and it seeks leave "to perfect its lien by (1) providing an updated notice of unpaid assessments; and (2) thereafter fil[ing] a Claim of Lien for unpaid assessments in the Official Records of Sarasota County." Mot. ¶ 10. The Association claims these steps are necessary to "give notice to any potential purchaser of the

existence of the unpaid assessments" and "to protect the Association to recoup those unpaid assessments at the time of sale." *Id.* As explained below, however, the Receiver is required to move this Court for approval of any sale of Unit 703, and the Association's concerns can be addressed at that time. Allowing the Association to file a Claim of Lien now – which is the first step toward initiating a foreclosure proceeding – is unnecessary and would encourage other creditors to purse remedies outside of this Receivership.

ARGUMENT

The Court should deny the Motion because it is not needed to protect the Association's interests; it threatens to cause the unnecessary expenditure of Receivership resources; and it will encourage other creditors to seek to circumvent the stay. "When a district court creates a receivership, its focus is to safeguard the [receivership] assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary." *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) (internal quotation omitted); *see S.E.C. v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986) ("[A] primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors."). "[I]n a case involving a Ponzi scheme, the interests of the Receiver are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy." *Vescor Capital*, 599 F.3d at 1197 (quotation omitted). An equity receiver's goal is to provide "'the greatest number of investors with the greatest recovery possible without inequitably rewarding some investors at the expense of others.'"

United States v. Petters, 2011 WL 281031, *8 (D. Minn. 2011) (quoting *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 182 (S.D.N.Y. 2009)).

The imposition of a stay is an important means to achieve a receiver's goal. Courts have denied motions for relief from receivership stays where (1) denial would preserve the *status quo*; (2) the receiver had "dutifully identified, managed, and preserved the assets for the best interests of all (creditors, claimants, and victims alike)"; and (3) the movant would not suffer substantial injury if the stay remained in place. *See Petters*, 2008 WL 5234527 at *4. The Association's Motion fails for each of these reasons. "The burden is on the movant to prove that the balance of the factors weighs in favor of lifting the stay." *Id.* at *3.

I. DENIAL OF THE MOTION WILL PRESERVE THE *STATUS QUO* AND WILL CONSERVE RESOURCES BY DISCOURAGING OTHER CREDITORS FROM ATTEMPTING TO CIRCUMVENT THE STAY

The Association seeks to file a Claim of Lien against Unit 703 even though it concedes the Receiver "has been offering Unit 703 for sale through a realtor" and is not "seeking to lease Unit 703 or otherwise taking steps to operate Unit 703 for compensation" – the latter being actions to which the Association objects. Mot. ¶ 12. The Court should preserve this undisputed *status quo* by allowing the Receiver to continue to market Unit 703 and addressing the Association's claimed interest in the Unit once the Receiver obtains a buyer.[1] Granting the Motion will only encourage other creditors to seek similar relief, thereby forcing the Receiver to expend Receivership resources. *See United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3d Cir. 2005) ("A receiver must be given a chance to

[1] Because the Motion is premature, this response does not address the Association's arguments under Florida condominium law and 28 U.S.C. § 959(b). Even assuming *arguendo* the Association's ultimate legal arguments are meritorious, the Motion should still be denied. *See Petters*, 2008 WL 5234527 at *4.

do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant.") (citing *S.E.C. v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985)); *see also 3R Bancorp*, 2005 WL 497784 at *2 ("[R]elief from a receivership stay should only be granted if the moving party's interests outweigh the interests of the receiver."); *Univ. Fin.*, 760 F.2d at 1038 (refusing to lift receivership stay when it would disturb the *status quo* and when lifting the stay "would result in a multiplicity of actions in different forums, and would increase litigation costs for all parties while diminishing the size of the receivership estate"); *S.E.C. v. Byers*, 592 F. Supp. 2d 532, 537 (S.D. N.Y. 2008) (denying motion to lift stay: "The Receiver is charged with protecting the investors as a whole, and thus the best way to maintain the status quo is to permit him to carry on with his investigation."); *Med Resorts*, 199 F.R.D. at 607 ("The stay maintains the status quo. It has done precisely that for the last seven months. Rather than decrease the value of [the third parties'] interests, the stay ensures that the value of those interests will be maintained.").

II. AS THE COURT HAS PREVIOUSLY RECOGNIZED, THE RECEIVER HAS DUTIFULLY MANGAGED RECEIVERSHIP ASSETS

As the Association concedes, the Receiver is attempting to sell Unit 703 (Mot. ¶ 12), and he is seeking the highest price obtainable for the benefit of the Receivership estate and all of its creditors. The relief requested in the Motion will not facilitate that end and may hinder it, as explained above. Notably, the Court has previously denied a creditor's motion to intervene on substantively similar grounds:

> The Court concludes again that allowing intervention by [a third-party secured creditor] in these proceedings would result in the delay of the adjudication of the merits of this case with

> respect to the Plaintiff and Defendants and would ***encourage other non-party creditors and investors to seek intervention*** with the attendant consequences of this Court and the parties having to engage in unnecessary and premature collateral litigation.

Doc. 169 (emphasis added). The Court also "expresse[d] its utmost confidence in the skills and ability of the Receiver to protect the financial interests of [the third-party creditor] with regard to the assets at issue." *Id*. at 2-3. There is no reason to reach a different conclusion here.

III. THE ASSOCIATION HAS NOT DEMONSTRATED A SUBSTANTIAL INJURY SUFFICIENT TO WARRANT RELIEF FROM THE STAY

The Association also has not demonstrated that it would suffer any substantial, cognizable injury if the stay continues. It argues filing a Claim if Lien is necessary to "give notice to any potential purchaser of the existence of the unpaid assessments" (Mot. ¶ 10) but then concedes "the Receiver is advising prospective purchasers of the unpaid assessments" (*id.* ¶ 12). It argues the Claim of Lien is "designed to protect the Association to recoup those unpaid assessments at the time of sale" but concedes it "has no intent at present to seek permission from this Court" to foreclose on Unit 703. *Id.* ¶ 10. Put simply, the continuation of the *status quo* will not injure the Association because (i) the Receiver is well aware of the Association's claimed interest in Unit 703; (ii) the Receiver will negotiate with the Association once he has a buyer with an accepted offer; and (iii) to the extent the Receiver and the Association cannot resolve their issue at that time, then as the Association concedes, this Court can adjudicate matters pertaining to the unpaid assessments at the time the Receiver seeks approval from the Court to sell Unit 703. In short, no Claim of Lien is needed to protect the Association's interest, and when a creditor's only potential "injury" is a

delay in enforcing its claimed right, lifting a receivership stay is unwarranted. *See Med Resorts Int'l*, 199 F.R.D. at 609.

CONCLUSION

The relief requested in the Motion is unnecessary and may require the Receiver and his professionals to spend even more time and effort defending litigation, which would further disrupt the Receiver's on-going investigation and marshaling of assets. It would also set a dangerous precedent that could spur other creditors to follow. The Receiver, who is "charged with protecting" the hundreds of investors who Nadel defrauded and other creditors, should be permitted to continue his investigation and marshaling of assets and to maintain the *status quo* for all creditors. The Association will have an opportunity to address its interests when the Receiver finds a buyer for Unit 703 and, if still unresolved, when he moves the Court to approve the sale of Unit 703.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 1, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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