

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

Case No. 8:09-cv-87-T-26TBM

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

Defendants,

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

Relief Defendants.

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**RECEIVER'S UNOPPOSED MOTION TO (1) APPROVE THIRD
INTERIM DISTRIBUTION, (2) INCREASE CERTAIN
RESERVES, AND (3) RELEASE CERTAIN OTHER RESERVES**

Burton W. Wiand, as Receiver (the "Receiver"), respectfully moves this Court for an Order: (1) approving a third interim distribution of \$5,000,000.00 as set forth in this motion and in **Exhibit A**, representing an additional recovery of 3.81% of the Allowed Amounts¹ of

¹ The phrase "Allowed Amount" is defined in the Receiver's Motion to (1) Approve Determination and Priority of Claims, (2) Pool Receivership Assets and Liabilities, (3) (footnote cont'd)

Class 1 Claims² receiving a distribution at this time;³ (2) increasing reserves by \$246,488.43; and (3) releasing reserves in the amount of \$615,746.25, which will leave in place a total reserve amount of \$2,549,852.75 for claims for which timely objections were received and remain unresolved and for Wells Fargo Bank, N.A.'s and TRSTE, Inc.'s purported interests in Receivership assets and the Receivership estate as set forth in **Exhibit B**. A proposed order is provided as **Exhibit C**.

BACKGROUND

On April 27, 2012, the Receiver filed a Motion to (1) Approve First Interim Distribution, (2) Establish Reserves, and (3) Approve Revisions to Certain Claim Determinations (Doc. 825) ("**First Distribution Motion**"). In that motion, the Receiver sought the approval of (1) a first interim distribution of \$25,994,012.73 on a *pro rata* basis, representing a recovery of 20% of the Allowed Amount of Class 1 claims receiving a distribution at that time; (2) establishment of reserves of \$1,789,268.46 for claims for which timely objections were received and for Wells Fargo's and TRSTE, Inc.'s purported interests in Receivership assets and the Receivership estate; and (3) approval of revisions to certain

Approve Plan of Distribution, and (4) Establish Objection Procedure (the "**Claims Determination Motion**") (Doc. 675 at 8 n.8).

² Class 1 is comprised of (i) claims made by investors which were allowed or allowed in part and (ii) claims asserted by taxing authorities which were allowed. (See Doc. 675 at 34-38.)

³ As discussed in more detail below and in Exhibit A, \$76,156.27 of this \$5,000,000.00 will not be distributed and instead will revert to the Receivership. (See Claim No. 391.)

claim determinations previously submitted by the Receiver and approved by the Court in the Claims Determination Motion.⁴

On May 2, 2012, Wells Fargo filed a limited objection to the First Distribution Motion to which the Receiver replied on May 4, 2012 (Docs. 831, 836). The Court overruled Wells Fargo's objection and granted the Receiver's motion in its entirety on May 7, 2012 (Doc. 839). The Receiver mailed 343 first interim distribution checks totaling \$25,520,133.79 to Claimants holding claims which were determined to be entitled to participate in the first interim distribution, representing a recovery of 20% of the Allowed Amounts of those Class 1 Claims.⁵ All first interim distribution checks have been negotiated.

On November 14, 2012, the Receiver filed a Motion to (1) Approve Second Interim Distribution, (2) Approve Revisions to Certain Claim Determinations, (3) Increase Certain Reserves, and (4) Release Certain Other Reserves (Doc. 945) ("**Second Distribution**

⁴ The Receiver sought revisions for up to fifteen claims as detailed in the First Distribution Motion and Exhibit C thereto. All but one of the revisions were requested to accommodate changes in Claimants' circumstances, such as the death of a claimant or a change in custodian for the account which held the investment underlying this case.

⁵ Four claims did not receive a first interim distribution although a first interim distribution was allocated to them on Exhibit A to the First Interim Distribution Motion. *See* Doc. 825, Ex. A at Claim Nos. 336, 363, 377, and 391. Claim Numbers 363 and 377 were not entitled to receive their allotted distribution amounts pursuant to the terms of a settlement agreement and as set forth in the Claims Determination Motion and approved by the Court (*see* Doc. 675 at 13 n.10). Likewise, as set forth in the Claims Determination Motion and approved by the Court (*see* Doc. 675 at 42), Claim Number 391 is not allowed to participate in any distributions of Receivership assets until and if all Class 1 Claims receive 50% of their Allowed Amounts. Because the first interim distribution provided a 20% recovery to such Class 1 Claims, this claim was not entitled to participate in the first interim distribution. After the filing of the First Distribution Motion, the Receiver discovered that the remaining claim, Claim Number 336, did not experience losses and thus was not entitled to a distribution.

Motion”). The motion sought the approval of (1) a second interim distribution in the amount of approximately \$22 million on a *pro rata* basis, representing an additional recovery of 16.75% of the Allowed Amount of claims receiving a distribution at that time, bringing the total recovery to 36.75% of the Allowed Amount of these claims; (2) revisions to certain claim determinations previously submitted by the Receiver and approved by the Court;⁶ (3) an increase in reserves of \$1,327,793.22; and (4) the release of reserves in the amount of \$197,951.10, leaving in place a total reserve amount of \$2,919,110.57 for claims for which timely objections were received and remain unresolved and for Wells Fargo Bank, N.A.’s and TRSTE, Inc.’s purported interests in Receivership assets and the Receivership estate as set forth in the motion. The Court granted the Receiver’s motion in its entirety on November 16, 2012 (Doc. 946). The Receiver mailed 346 checks totaling \$21,644,200.35 to Claimants holding claims which were determined to be entitled to participate in the second interim distribution.⁷ No checks from the second distribution remain outstanding.

⁶ The revisions were requested to (1) accommodate changes in Claimants’ circumstances, such as a change in custodian for the account which held the investment underlying this case; (2) correct overstatements of the Allowed Amount for two claims; and (3) reverse the consolidation of two claims due to tax implications.

⁷ Three claims did not receive the second interim distribution amount allocated to them on Exhibit A to the Second Distribution Motion. *See* Doc. 945, Ex. A at Claim Nos. 363, 377, and 391. Claim Numbers 363 and 377 were not entitled to receive a distribution until their allotted combined distribution amount exceeded \$362,366.96. All allotted distributions up to that amount reverted to the Receivership. The first interim distribution allocated to these claims was a combined total of \$342,000, leaving a balance owed to the Receivership of \$20,366.96. The second interim distribution exceeded that amount, but the amount of their distribution was reduced on a *pro rata* basis for the remaining balance owed. *See id.* Claim Number 391 was not entitled to receive any second interim distribution because it was not allowed to receive any distributions of Receivership assets until and if all Class 1 Claims receive 50% of their Allowed Amounts. Because the second interim distribution resulted in a
(footnote cont’d)

PROPOSED PLAN FOR THIRD INTERIM DISTRIBUTION

The Receiver now seeks leave to make a third interim distribution totaling \$5,000,000.00 as specified in **Exhibit A** to holders of Class 1 Claims on a *pro rata* basis subject to applicable exceptions, priorities, and other parameters discussed in the Claims Determination Motion – the same method and parameters used for the first and second interim distributions.⁸ This distribution will result in an additional 3.81% recovery for these Claimants' Allowed Amounts bringing these Claimants' total recovery to 40.56% of their Allowed Amounts.

The distribution plan approved by the Court provides that Class 1 Claimants receive a percentage of their Allowed Amount from the aggregate amount distributed to Claimants in any particular distribution based upon the following formula, which achieves a *pro rata* distribution: each claim's Allowed Amount divided by the total Allowed Amount of all allowed claims multiplied by the aggregate distribution amount. The amount each Class 1 Claim would receive based on this formula as part of a third interim distribution is specified in Exhibit A.

As of November 5, 2013, the total funds in all Receivership accounts are approximately \$14,057,440.27, which includes \$2,919,110.57 currently being held in

combined recovery of 36.75%, this claim was not entitled to any funds from the second interim distribution.

⁸ As discussed in footnote 7, Claim Number 391 is not allowed to participate in any distributions of Receivership assets until and if all Class 1 Claims receive 50% of their Allowed Amounts. Because the proposed third interim distribution will provide a combined recovery of 40.56% to such Class 1 Claims, this claim is not entitled to participate in the third interim distribution.

reserves for objections and \$2,229,463.15 being held in escrow until a claim to these funds is resolved. The Receiver believes that by distributing \$5,000,000.00 he will be able to provide a significant amount of money to Claimants now while still maintaining adequate funds, including to cover the expenses of (1) continuing ongoing litigation and post-judgment collection efforts, (2) administering the Receivership, and (3) paying the Receiver's professionals for services already provided and yet to be provided. Further, as discussed below, the Receiver will be left with sufficient funds and assets to cover claims which are subject to objections in the event the objections are sustained and to cover asserted interests in the Receivership by Wells Fargo. The Receiver believes he has reserved more than is necessary for the payment of these items and intends to distribute the excess in one or more future distributions as appropriate.

The Receiver requests leave to make the third interim distribution in the amounts specified on Exhibit A within 10 days of the date of the order authorizing the distribution. The Receiver will mail checks by U.S. Mail. The Receiver requests that the Claimants be allowed 120 days to negotiate the distribution checks. If a check is not negotiated by a Claimant within 120 days, the money will revert to the Receivership and likely will be distributed on a *pro rata* basis in a future distribution. A deadline for negotiating distribution checks is necessary for the orderly administration of the Receivership and to avoid future expenses for tracing unnegotiated checks and having the bank place "stop payments" on any such checks.

OBJECTIONS AND RESERVES

The Receiver has received objections relating to 23 claims (*see* Claim Nos. 157, 403, 404, 405, 406, 407, 408, 444, 445, 449, 450, 462, 463, 464, 465, 466, 467, 469, 471, 476, 477, 483, and 504). These objections were raised by twelve Claimants, four of whom have multiple claims. Further, Wells Fargo, which filed Claim Number 502, has petitioned the Court for relief with respect to its claim and to other interests it has asserted in Receivership property.

The Receiver has been working on the resolution of these objections. As of the filing of this motion, objections relating to nine claims have been resolved. (*See* Claim Nos. 157, 444, 445, 449, 450, 471, 476, 483, and 504). Five of these objections were withdrawn after communications with the Receiver's counsel (*see* Claim Nos. 157, 449, 450, 476, and 483), one was resolved in connection with the settlement of ancillary litigation (*see* Claim No. 444), and one was resolved in connection with the First Distribution Motion (*see* Claim No. 471). Two objections were overruled by the Court (*see* Claim Nos. 445 and 504).

In a November 16, 2012, Order the Court approved reserves for Claims 445 and 476 in the amounts of \$439,162.50 and \$176,583.75, respectively. As specified in Exhibit B, the Receiver requests the Court release these reserves to him now that the determination of these claims are no longer in dispute. The Court released any necessary reserves for the other claims to which objections were received but have since been resolved in its November 16, 2012 Order (Doc. 946).

Because the Receiver has not yet resolved the remaining 14 objections which were raised by four Claimants, he seeks leave to increase the reserves for seven of these claims as

specified on Exhibit B until the objections are resolved and also for Wells Fargo's purported interests in Receivership assets and the Receivership estate until those issues also are resolved (*see* Claim Nos. 404, 405, 407, 408, 467, 469, and 477).⁹ The Receiver seeks an increase in the specified reserves so that these objections do not impede or delay a third interim distribution. Similarly, as also set forth in Exhibit B, the Receiver seeks leave to increase reserve funds in connection with Claim Number 502, which was submitted by Wells Fargo, and other purported interests it has asserted in Receivership assets.¹⁰ (*See* Docs. 689, 690, 718, 719, 740.) The Receiver seeks leave to increase reserves by a total of \$246,488.43 as set forth and itemized in Exhibit B. Assuming the Court releases the reserves discussed above and increases reserves as requested, total reserves will be \$2,549,852.75. Reserves will be held until the corresponding claim objection or asserted interest is resolved and a distribution amount is fixed.

⁹ The other seven claims do not require reserves for the reasons identified in Exhibit B. (*See* Claim Nos. 403, 406, 462, 463, 464, 465, and 466.)

¹⁰ With respect to Wells Fargo's claim and asserted interests, the Receiver has previously asserted that, assuming *arguendo* Wells Fargo is entitled to any recovery, (1) such recovery could only come from proceeds of the sale of collateral; (2) Wells Fargo would not be able to recover any deficiency from the Receivership estate; and (3) even assuming *arguendo* Wells Fargo could recover a deficiency from the Receivership estate, any such deficiency claim would be a Non-Investor Unsecured Claim and thus would receive lower priority than Class 1 claims (Class 1 claims are the ones which will receive this proposed interim distribution). As such, any deficiency claim would not be paid until all Investor Claims' Allowed Amounts have been fully satisfied. Nevertheless, and out of an abundance of caution, the Receiver proposes maintaining and increasing certain reserves for Wells Fargo's claim and asserted interests as detailed in Exhibit B.

ARGUMENT

As explained above, the Receiver asks the Court to approve the third interim distribution as set forth in this motion and in Exhibit A. The Court has previously approved the Receiver's plan of distribution and a first and second interim distribution. (See March 2, 2012 Order, Doc. 776; May 7, 2012 Order, Doc. 839; November 16, 2012 Order, Doc. 946.) The third interim distribution sought herein is consistent with the plan of distribution approved by the Court and the prior interim distributions. Further, the relief requested in this motion is in the best interest of the Receivership and the Claimants as a whole; is fair, reasonable, and equitable; and satisfies due process.

The Court's power over an equity receivership and to determine appropriate procedures for administering a receivership is "extremely broad." *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986); see *SEC v. Basic Energy*, 273 F.3d 657, 668 (6th Cir. 2001); *SEC v. Elliot*, 953 F.2d 1560, 1566 (11th Cir. 1992). The primary purpose of an equity receivership is to promote the orderly and efficient administration of the estate for the benefit of the creditors. *Hardy*, 803 F.2d at 1038. The relief requested by the Receiver best serves this purpose.

The Court has wide latitude when it exercises its inherent equitable power in approving a plan of distribution of receivership funds. *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001) (affirming District Court's approval of plan of distribution because court used its discretion in "a logical way to divide the money"); *Quilling v. Trade Partners, Inc.*, 2007 WL 107669, *1 (W.D. Mich. 2007) ("In ruling on a plan of distribution, the standard is simply that the district court must use its discretion in a logical way to divide

the money” (internal quotations omitted)). In approving a plan of distribution in a receivership, “the district court, acting as a court of equity, is afforded the discretion to determine the most equitable remedy.” *Forex*, 242 F.3d at 332. The Court may adopt any plan of distribution that is fair and reasonable. *SEC v. Wang*, 944 F.2d 80, 83-84 (2d Cir. 1991); *Basic Energy*, 273 F.3d at 671.

Consistent with the features of Nadel’s Ponzi scheme, “Courts have favored pro rata distribution of assets where, as here, the funds of defrauded victims were commingled and where victims were similarly situated with respect to their relationship to the defrauders.” *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 88 (2d Cir. 2002); *see Quilling*, 2007 WL 107669 at *2 (“The use of a *pro rata* distribution plan is especially appropriate for fraud victims of a Ponzi scheme, in which earlier investors’ returns are generated by the influx of fresh capital from unwitting newcomers rather than through legitimate investment activity.”). A fair and reasonable distribution plan may provide for reimbursement to certain claimants, while excluding others. *See Wang*, 944 F.2d at 84 (citations omitted); *Basic Energy*, 273 F.3d at 660-61. The Receiver believes that the interim distribution set forth above is fair and reasonable and is consistent with the distribution plan approved by the Court.

WHEREFORE, Burton W. Wiand, as Receiver, respectfully requests the Court enter an order: (1) authorizing a third interim distribution in the total amount of \$5,000,000.00 as

set forth above and in Exhibit A;¹¹ (2) increasing reserves by \$246,488.43; and (3) releasing reserves in the amount of \$615,746.25. The total reserve amount will then be \$2,549,852.75 for claims for which timely objections were received and remain unresolved and for Wells Fargo Bank, N.A.'s and TRSTE, Inc.'s purported interests in Receivership assets and the Receivership estate as set forth in Exhibit B.

LOCAL RULE 3.01(g) CERTIFICATION

The undersigned counsel for the Receiver has conferred with counsel for the Securities and Exchange Commission and is authorized to represent to the Court that the Commission has no objection to the relief sought herein.

¹¹ As specified in Exhibit A, the Receiver has honored technical requests related to the distribution of funds. For instance, as authorized by the Court, the Receiver has honored requests for the reissuance of distribution checks made payable to custodians which were no longer being used by the Claimant (*see* Claim Nos. 18, 181, 329, 339, 372, 374). These custodian changes are noted on Exhibit A. The Receiver also recognized an assignment of a claim from a family limited partnership which was dissolved to the living trust of the sole shareholder and president of the general partner (*see* Claim No. 207). Further, the Receiver honored a written request by husband and wife Claimants to divide a jointly-held claim (*see* Claim Nos. 216-A and 216-B). The Receiver, after receipt of sufficient proof, also honored requests to change the designated recipient of future distribution payments due to the death of a Claimant (*see* Claim Nos. 85, 162, 325).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 6, 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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