

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,

Relief Defendants.

RECEIVER'S MOTION TO APPROVE SETTLEMENT

Burton W. Wiand, as Receiver (the “**Receiver**”), moves the Court for an order approving settlement of a specific dispute that arose from the Receiver’s collection efforts on a judgment entered in the Receiver’s favor in *Burton W. Wiand, as Receiver v. Donald Rowe, et al.*, Case No.: 8:10-cv-245-T-17MAP (M.D. Fla.) (the “**Rowe Action**”), on the basis of the Settlement Agreement attached as **Exhibit 1** (the “**Settlement Agreement**”). Among other

things, the Settlement Agreement contemplates entry of a limited bar order as described below.

MEMORANDUM IN SUPPORT

The Securities and Exchange Commission (the “**Commission**” or “**SEC**”) instituted this action to “halt [an] ongoing fraud, maintain the status quo, and preserve investor assets” (Dkt. 1, Compl., ¶ 7.) Burton W. Wiand was appointed by this Court as the Receiver for Defendants other than Arthur Nadel and for Relief Defendants. (See Order Reappointing Receiver (Dkt. 140).) Additionally, the Receivership was expanded to include Venice Jet Center, LLC, and Tradewind, LLC (Dkt. 17); 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. (Dkt. 44); The Guy-Nadel Foundation, Inc. (Dkt. 68); Lime Avenue Enterprises, LLC, and A Victorian Garden Florist, LLC (Dkt. 81); Viking Oil & Gas, LLC (Dkt. 153); Home Front Homes, LLC (Dkt. 172); Traders Investment Club (Dkt. 454); Summer Place Development Corp. (Dkt. 911); Respiro, Inc. (Dkt. 916); and Quest Energy Management Group, Inc. (Dkt. 1024). All of the entities in receivership are collectively identified herein as the Receivership Entities.

Pursuant to the Order Reappointing Receiver (Dkt. 493), the Receiver has the duty and authority to:

2. Investigate the manner in which the affairs of the Receivership Entities were conducted and institute such actions and legal proceedings, for the benefit and on behalf of the Receivership Entities and their investors and other creditors as the Receiver deems necessary . . . against any transfers of money or other proceeds directly or indirectly traceable from investors in the Receivership Entities; provided such actions may include, but not be limited to, seeking imposition of constructive trusts, disgorgement or 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.

Further, the Order Reappointing Receiver (at paragraph 6) authorizes the Receiver to “[d]efend, compromise or settle legal actions ... in which the Receivership Entities or the Receiver is a party ... with authorization of this Court”

The Receiver sued Donald Rowe, individually (“**D. Rowe**”) and as Trustee of The Wall Street Digest Defined Benefit Pension Plan (the “**Plan**”); Joyce Rowe (“**J. Rowe**,” and collectively with D. Rowe, the “**Rowes**”); and one of the Rowes’ entities, Carnegie Asset Management, Inc. (“**CAM**”), to recover sums received from the Receivership Entities with a view to marshaling assets for distribution to investors with verifiable claims in an equitable and appropriate manner (the Rowes, the Plan, and CAM are collectively referred to as “**Defendants**” or “**Judgment Debtors**”). The Receiver and the Defendants entered into a settlement agreement, which was approved by the Court on February 5, 2013 (Dkt. 963). As part of that settlement, the Defendants consented to the entry of a joint and several judgment in the Rowe Action in the amount of \$4,028,385.00 (the “**Judgment**”), which was entered by the Court on February 25, 2013. (*See* Rowe Action Dkt. 124.)

The Receiver then conducted discovery in aid of execution and learned, *inter alia*, that the Judgment Debtors transferred some of their assets to third parties, including to J. Rowe’s son, Ty Hardin (“**T. Hardin**”), and Choice Direct Mail, Inc. (“**Choice Direct**”) f/k/a Carnegie Marketing Associates, Inc. (“**CMA**”) (collectively the “**Transferees**”). On May 21, 2013, to recover those fraudulently transferred assets, the Receiver filed a motion to commence proceedings supplementary and to implead third parties into the Rowe Action, including T. Hardin, Choice Direct, CMA, Brittany Hardin, Brooke Hardin, and Mary

Braeger Hardin (the “**Impleader Motion**”). (See Rowe Action Dkt. 156.) The Court granted that motion on August 8, 2013. (*Id.* Dkt. 223.)

As shown by the attached Settlement Agreement, the Receiver and Transferees, subject to the approval of this Court, have agreed to settle for, among other things, transfer to the Receiver of the following payments and assets:

- (1) 100% of the shares of Choice Direct;
- (2) all financial accounts of Choice Direct, the sum total of which shall be not less than \$731,476.49;
- (3) all residual payments owed to CMA and/or Choice Direct, including such payments owed by CMA’s former executive, Janie Thompson;
- (4) customer lists;
- (5) all buy/sell agreements, including all rights thereunder, between D. Rowe and Janie Thompson;
- (6) any and all legal or equitable claims CMA, Choice Direct, and/or Ty Hardin, in his capacity as owner of Choice Direct, may have, including but not limited to any claims against Janie Thompson; and
- (7) a 2010 Infiniti FX35 automobile, VIN No. JN8AS1MU0AM802385 and corresponding title to this vehicle or, alternatively, the sum of \$25,000 in cash.

In reaching this agreement, the Receiver considered the risk and expense of further efforts to recover the assets transferred to Transferees. The Receiver believes that the settlement provides a practical solution which results in the maximum benefit to the Receivership. Further, the settlement reflected by the Settlement Agreement is in the best

interests of the Receivership, the investors in the Receivership Entities, and Transferees because resolution of the claim avoids protracted litigation, conserving Receivership assets and judicial resources, and avoids the cost of litigation to Transferees.

The Bar Order Is Appropriate

In addition to the items listed above, the Settlement Agreement contemplates the entry of a very limited bar order protecting Transferees from certain claims by Judgment Debtors:

After execution of this Settlement Agreement by all parties, the Receiver will promptly move the SEC Receivership Court for approval of this settlement and entry of a bar order as provided in the proposed Order annexed hereto as Exhibit B. The parties understand and acknowledge the purpose of the bar order is solely to bar any claims by Judgment Debtors against Transferees arising from any obligations to Joyce A. Rowe or the Joyce A. Rowe Revocable Trust for payment of consideration related to T. Hardin's purchase of 100% of the stock of CMA, subsequently merged into Choice Direct. The parties understand and acknowledge the realized value the Receiver received as a result of this agreement is the cash on hand (i.e., \$731,476.49) and value of the 2010 Infiniti FX35 (i.e., \$25,000).

See Settlement Agreement at 6. In other words, the bar order the Receiver seeks here would only bar claims by Judgment Debtors against Transferees "arising from any obligations to Joyce A. Rowe or the Joyce A. Rowe Revocable Trust for payment of consideration related to T. Hardin's purchase of 100% of the stock of CMA, subsequently merged into Choice Direct."

Thus, the bar order the Receiver seeks here is much more limited than the three broad bar orders against all investors and potential joint tortfeasors that this Court entered in connection with the Receiver's settlements with Goldman Sachs Execution & Clearing, L.P. (*see* Dkt. 742); Shoreline Trading Group, LLC (*see* Dkt. 835); and Holland & Knight LLP

(see Dkt. 922) (collectively, the “**Previous Bar Orders**”). The bar order the Receiver seeks in this instance against Judgment Debtors is customary and intended to facilitate settlement by allowing Transferees to turn over the assets Judgment Debtors fraudulently transferred to them without imposing on Transferees a continuing obligation to pay Judgment Debtors for those assets. In short, it allows Transferees to turn over those assets to the Receiver and “buy peace.”

Federal Rule of Civil Procedure 16 provides the Court authority to use special procedures, including bar orders, to assist parties in reaching a settlement. *See* Fed. R. Civ. P. 16(c)(9). Relying on Rule 16 and the Bankruptcy Code, the Eleventh Circuit has explicitly authorized the use of bar orders in bankruptcy proceedings. *See In re Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996). According to the Eleventh Circuit, “[s]everal justifications for entering bar orders in bankruptcy cases exist” (*id.*):

First, public policy strongly favors pretrial settlement in all types of litigation because such cases, depending on their complexity, can occupy a court’s docket for years on end, depleting the resources of parties and the taxpayers while rendering meaningful relief increasingly elusive. Second, litigation costs are particularly burdensome on a bankrupt estate given the financial instability of the estate. Third, bar orders play an integral role in facilitating settlement. This is because defendants buy little peace through settlement unless they are assured that they will be protected against codefendants’ efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation.

Id. (quotations and citations omitted). All of these factors are as applicable to the circumstances in this equity receivership as they are to bankruptcy proceedings.¹ Entry of a

¹ Although receivership and bankruptcy proceedings have some important distinctions, the similarities of their goals make an analogy here appropriate. *See, e.g., S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 334 (7th Cir. 2010) (goal in securities-fraud receivership and liquidation bankruptcy is identical: the fair distribution of liquidated assets).

bar order here is within the Court's broad power to administer this Receivership. *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) ("The district court has broad powers and wide discretion to determine relief in an equity receivership. . . . This discretion derives from the inherent powers of an equity court to fashion relief"); *S.E.C. v. HKW Trading LLC*, 2009 WL 2499146, *2 (M.D. Fla. 2009); *see also S.E.C. v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986); *S.E.C. v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657, 668 (6th Cir. 2001).

As noted above, this Court has already entered three bar orders, each of which was significantly broader than the bar order the Receiver seeks here. Further, other courts have issued bar orders in connection with settlements proposed by equity receivers. For example, in *Commodity Futures Trading Comm'n v. Equity Fin. Group*, 2007 WL 2139399 (D.N.J. 2007), the court approved a settlement between an equity receiver and a firm retained by receivership entities to perform accounting services, and entered a bar order after finding that "the Receiver established th[e] settlement is in the best interest of the Receivership estate, and that federal law and public policy favor the entry of the bar order to facilitate settlement of th[e] matter." *Id.* at *2. The Court also found that the bar order would not prejudice investors because of the difficulties investors would have to bring claims directly against the settling defendant. *Id.*; *see also S.E.C. v. Capital Consultants, LLC*, 2002 WL 31470399 (D. Or. 2002) (approving settlement and entering bar order); *Gordon v. Dadante*, 336 Fed. Appx. 540 (6th Cir. 2009) (same); *Harmelin v. Man Fin., Inc.*, 2007 WL 4571021 (E.D. Pa. 2007) (same).

As explained above, the Receiver has determined that the settlement reflected by the Settlement Agreement is in the best interests of the Receivership and the investors in the scheme underlying this case. Specifically, the settlement avoids protracted and expensive litigation, thereby avoiding litigation risk and conserving very substantial Receivership resources, as well as judicial resources. In addition, the settlement amount represents an equitable and good-faith resolution because Transferees have agreed to return assets with a realized value of \$756,476.49, which represents almost 79% of the assets Judgment Debtors transferred to Transferees in an attempt to frustrate the Receiver's collection efforts. The Settlement Agreement is also fair to the Judgment Debtors because their debt to the Receiver reflected in the Judgment will be reduced by the settlement amount.

The bar order is also authorized by and appropriate under the All Writs Act. "An important feature of the All-Writs Act is its grant of authority to enjoin and bind non-parties to an action when needed to preserve the court's ability to reach or enforce its decision in a case over which it has proper jurisdiction." *In re Baldwin-United Corp.*, 770 F.2d 328, 338 (2d Cir. 1985) (citing *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977) ("The power conferred by the Act, extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice.")).²

² "The power to bind non-parties distinguishes injunctions issued under the Act from injunctions issued in situations in which the activities of the third parties do not interfere with the very conduct of the proceeding before the court." *Baldwin*, 770 F.2d at 338.

Notice Will Be Provided To Judgment Debtors

“[T]he requirements of the All-Writs Act are satisfied if the parties whose conduct is enjoined have actual notice of the injunction and an opportunity to seek relief from it in the district court.” *Id.* at 340. Similarly, cases located by the Receiver involving equity receivers’ requests for bar orders in connection with settlement of claims have included notice to impacted parties of the request for a bar order. *See, e.g., Harmelin*, 2007 WL 4571021 (notice of bar order provided before court approved settlement); *Gordon*, 336 Fed. Appx at 544 (court entered order providing interested parties with opportunity to “comment” on settlement reached by equity receiver with broker/dealer and request for bar order).

In connection with the Previous Bar Orders, the Receiver filed a motion to approve his proposed notice procedures, which included mailings to investors and creditors as well as publication in certain newspapers. *See, e.g., Doc 681*. Because the bar order the Receiver seeks through this motion only impacts the Judgment Debtors, however, such procedures are unnecessary here. Instead, as indicated in this motion’s Certificate of Service, the Receiver will serve this motion on counsel for Judgment Debtors by email and U.S. mail at the address below:

George J. Dramis, Esquire
Morgan Dramis
2364 Fruitville Road
Sarasota, FL 34237

Under the Local Rules, the Judgment Debtors will have 17 days (14 days plus 3 days for service by mail) to respond, unless the Court issues an order shortening that time. Further, unless the Court directs otherwise, no public hearing will be held concerning this motion.

Judgment Debtors Will Not Be Prejudiced By Entry Of The Bar Order

Entry of the bar order is also appropriate because Judgment Debtors will not be prejudiced by it. The majority of the Receiver's \$4,028,385.00 judgment against the Judgment Debtors is unsatisfied because Judgment Debtors have taken extraordinary steps to attempt to shelter their assets from the Receiver, including engaging in fraudulent transfers. As noted above, this settlement will satisfy a portion of the outstanding judgment by recovering \$756,476.49 of realized value for the Receivership Estate. As such, Judgment Debtors will not be prejudiced by entry of the bar order because their liability to the Receiver will be reduced by performance of the Settlement Agreement.

CONCLUSION

For these reasons, the Receiver respectfully requests that this Court enter an order in the form attached as **Exhibit B** to the Settlement Agreement granting this motion and finding that:

1. The settlement between the Receiver and Transferees presented to the Court in this motion is a fair, equitable, and good faith settlement of claims the Receiver asserted in the Rowe Action as part of post-judgment proceedings³;
2. The settlement reflected in the Settlement Agreement attached as Exhibit A is approved, and the Receiver is authorized to enter into and complete the proposed settlement with Transferees in accordance with the requirements of the Settlement Agreement; and

³ The Settlement Agreement "only relates to claims against the Transferees asserted in the Rowe Action and specifically excludes any claims the Receiver may have against the Transferees for their receipt of any other assets relating to Judgment Debtors or against Judgment Debtors or other third parties who received transfers from the Judgment Debtors, including but not limited to those named or impleaded in the Rowe Action and Band Gates, P.L." See Ex. A at 4.

3. The Judgment Debtors are permanently enjoined and barred from commencing or continuing a claim, action, or proceeding of any kind and in any forum against Transferees that arises from or relates to any obligations to Joyce A. Rowe or the Joyce A. Rowe Revocable Trust for payment of consideration related to T. Hardin's purchase of 100% of the stock of CMA, subsequently merged into Choice Direct.

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.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on January 14, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I **FURTHER CERTIFY** that on January 14, 2014, sent a copy of the foregoing by email and U.S. Mail to the following:

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