

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.

**RECEIVER'S VERIFIED MOTION FOR
APPROVAL OF SALE OF REAL PROPERTY LOCATED
IN FAIRVIEW, BUNCOMBE COUNTY, NORTH CAROLINA**

Pursuant to 28 U.S.C. § 754, 28 U.S.C. § 2001, 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**, (a) authorizing him to sell certain real property free and clear of all claims, liens, and encumbrances, and (b) relieving him from certain provisions of 28 U.S.C. § 2001. There

is some urgency to this motion because the purchaser's loan commitment expires on November 20, 2014.

INTRODUCTION

The Receivership estate holds title to residential real property located at 131 Garren Creek Road, Fairview, Buncombe County, North Carolina (the “**Fairview Property**”) pursuant to an order of this Court dated March 30, 2009 (Doc. 146). The Receiver has listed the Fairview Property for sale through a real estate broker for several years and has finally received a fair offer to purchase the Fairview Property for \$287,500. As explained below, there is a lien on the property, but the offer far exceeds the lien amount, and thus the validity of the lien can be resolved after the Court grants this motion. The offer is also consistent with an appraisal (the “**Appraisal**”) obtained by the purchaser, Sarah Z. Pearsall (the “**Purchaser**”), in connection with her efforts to obtain financing for the purchase, which most recently valued the Fairview Property at \$295,000. The Appraisal is attached as **Exhibit 2**. As mentioned above, the Purchaser's loan commitment expires on November 20, 2014.

In light of the current state of the real estate market in Buncombe County and the fact that there has been minimal interest in the Fairview Property since it was first listed for sale in 2009, the Receiver believes the current offer represents a fair and reasonable price for the Fairview Property and believes it is in the Receivership estate's best interests to proceed with the sale of the Fairview Property without obtaining any additional appraisals or advertising the terms of the sale as contemplated by 28 U.S.C. § 2001(b). Thus, the Receiver requests that the Court waive, or find that the Receiver has substantially complied with, the

procedures in 28 U.S.C. § 2001(b) governing the private sale of real property by a receiver. As explained below, the Receiver also requests the Court grant this motion before resolving the disputed lien on the Fairview Property. The encumbrance will simply transfer to the sale proceeds, which the Receiver will hold in trust pending the Court's determination of the validity of the lien. This procedure will protect the lien holder's potential interest in the Fairview Property while also allowing the sale to close in a timely manner before the Purchaser's loan commitment expires. Importantly, the Court has previously followed this procedure at least once before in this Receivership in connection with another real estate sale. *See* Doc. 842 (granting motion to approve sale and transferring lien to sale proceeds).

BACKGROUND

On January 21, 2009, the Securities and Exchange Commission (the "**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 (Doc. 8) (the "**Order Appointing Receiver**"). 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 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.

The Fairview Property

Shortly after his appointment, the Receiver learned that proceeds of Nadel's fraud had been used to purchase various assets, including the Fairview Property. Arthur and Peg Nadel (collectively, the "Nadels") purchased the Fairview Property for approximately \$335,000 in June 2004. A portion of the purchase price was paid in cash by the Nadels and Scoop Capital at closing, and they obtained a loan (the "Loan") through Branch Banking and Trust Company ("BB&T") for the remaining \$268,000. The Receiver filed a motion for possession of and title to the Fairview Property. Docs. 98, 99. The Court granted the Receiver's motion on March 30, 2009. Doc. 100.

The Fairview Property consists of approximately 3.62 acres. The main house is a 200 year-old farm house with over 2,500 square feet of living space. There is an efficiency-style guest house on the property with approximately 300 square feet of living space. There is also a detached two-car garage with unfinished living or storage space on the second level. The Fairview Property has received no significant improvements since it has been in the Receiver's possession. The Buncombe County Tax Department lists the taxable and real value of the Fairview Property as \$311,500.

The Encumbrance On The Property

The Fairview Property is encumbered by an Adjustable Rate Note and Deed of Trust, which was given to BB&T to secure the Loan. As of October 21, 2014, the balance due on the loan was \$101,710.77, including principal and interest. BB&T, however, failed to submit

a timely proof of claim form for the Loan, despite receiving notice of the claims process established in this action and filing a claim related to another encumbered Receivership property. Further, after the Court entered an order on the Receiver's motion for claim determination (Doc. 776), which reflected no filed claim for the Loan, BB&T did not file an objection or otherwise move the Court for relief. Instead, in early 2012, BB&T, through outside counsel, contacted the Receiver's counsel to inquire about the Loan. BB&T's counsel then claimed it had, in fact, prepared and timely submitted a proof of claim for the Loan, but the Receiver has no record of any such submission, and BB&T has not provided any evidence of its delivery of a proof of claim form to the Receiver. Since its communications with the Receiver in early 2012, BB&T has never sought any relief from the Court. With the exception of BB&T, the Receiver is unaware of any other interests in the Fairview Property, and no claim has been submitted relating to that property.

While the Receiver intends to convey title free and clear of all claims, liens, and encumbrances, including BB&T's encumbrance, as discussed below, if the sale underlying this motion is approved, BB&T's interests still will be protected (assuming it attempts prove it submitted a timely proof of claim form) because its encumbrance will shift to the proceeds of the sale, which will be held by the Receiver pending further order of the Court. Because the sale price exceeds BB&T's encumbrance by more than \$185,000, it is not necessary to resolve any potential opposition or purported claim by BB&T before granting the relief requested in this motion. This is important because the Purchaser's loan commitment expires on November 20, 2014, and consequently there is some urgency to this motion.

The Receiver's Marketing Efforts and the Offer to Purchase the Fairview Property

The Receiver began marketing the Fairview Property in 2009, listing the property for sale through his website, www.nadelreceivership, in a specific "Assets for Sale" section. The Receiver also engaged the services of Keller Williams Professionals to market the Fairview Property, which was initially listed for sale for \$425,000. One offer to purchase the property was presented to the Receiver in late 2009, but the buyer was unable to obtain financing, and the offer was withdrawn. After the Receiver did not receive any other offers to purchase the Fairview Property, the list price was reduced to \$399,900 in September 2009. The list price was further reduced numerous times between 2011 and 2012 because of a lack of interest in the property: to \$359,000 in June 2011; \$349,000 in December 2011; and \$343,000 in March 2012. In early 2013, the Receiver engaged Town and Mountain Realty as the new listing broker, and the price was again reduced to \$340,000. In late 2013, the Receiver engaged a different agent at Keller Williams Professionals, and the property was listed for \$320,000.

The Receiver has received an offer from the Purchaser, who has provided proof of funds in the form of a loan commitment letter to purchase the Fairview Property for \$287,500. The Purchaser has indicated she may not proceed with the sale if Court approval is not obtained by November 20, 2014. The Receiver has accepted this offer, subject to the Court's approval. As such, the Receiver entered into a Purchase and Sale Agreement with Purchaser, a copy of which is attached hereto as **Exhibit 3**. The Receiver intends to convey title, free and clear of all claims, liens, and encumbrances, by Receiver's Deed in substantially the form as attached as **Exhibit 4**.

The Receiver believes the proposed offer is reasonable in light of the current market conditions, the appraised value of the property, and the length of time the property has sat on the market. In the five-year period since the Receiver began marketing the Fairview Property, he has received only one viable offer, which ultimately fell through due to the buyer's inability to obtain a loan. Any other offers were for less than the Receiver's estimated fair market value. Thus, the Receiver believes that obtaining any additional appraisals would result in the unwarranted expenditure of funds and resources of the Receivership estate. Pursuant to the Purchase and Sale Agreement, the Receivership estate will net approximately \$268,301.64 from the sale after deducting the commission and normal closing costs (and not taking into account the Loan).

MEMORANDUM OF LAW

I. THE COURT HAS BROAD POWERS OVER THIS RECEIVERSHIP'S ADMINISTRATION

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). 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 in this motion falls squarely within the Court's powers and is in the best interests of defrauded investors and the Receivership estate. That relief is also consistent with precedent, which establishes that a court of equity – like this one in these proceedings – may authorize the sale of property free and clear of all claims, liens, and encumbrances. *See, e.g., Miners' Bank of Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (3d Cir. 1933); *People's-Pittsburgh Trust Co. v. Hirsch*, 65 F.2d 972, 973 (3d Cir. 1933). In part, a court has this authority because when a court of competent jurisdiction takes possession of property through its officers – like this Court has done with the Fairview Property through the Receiver – it has jurisdiction and authority to determine all questions about title, possession, and control of the property. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 737-38 (1931).

Generally, courts authorize a sale of encumbered property when there is a reasonable prospect that a surplus will be left for distribution among creditors. *See Bogosian v. Foederer Tract Comm., Inc.*, 399 A.2d 408, 414 (Pa. Super. Ct. 1979). Here, the Receiver

believes BB&T has no right to any proceeds from the sale of the Fairview Property because it failed to file a timely proof of claim form¹, but even if BB&T had a claim in the full amount of its encumbrance, the proposed sale price exceeds the value of BB&T's encumbrance by more than \$185,000. Importantly for BB&T, although the Court can order the Fairview Property's sale free and clear of all claims, liens, and encumbrances, those claims, liens, and encumbrances do not evaporate. Rather, upon sale of the Fairview Property, BB&T's encumbrance will transfer to the sale's proceeds. *Bogosian*, 399 A.2d at 414 (citing *Buss Mach. Works v. Watsonstown Door and Sash Co.*, 2 F. Supp. 757 (M.D. Pa. 1933)) ("Under the broad equity powers of the court, it can, under proper circumstances, order a sale of property free and divested of liens by transferring the liens to the fund derived from the sale."); *In re Franklin Brewing Co.*, 249 F. at 335 (noting transfer of liens to proceeds of sale of collateral); *see also Acker*, 66 F.2d at 852; *Novor v. Fourth Street Bargain Store Co.*, 145 A. 119, 120 (Del. Ch. 1929) ("[L]ien claimants ought to be permitted to look to the proceeds as a substitute for the property."). As such, a sale of the Fairview Property free and clear of all claims, liens, and encumbrances will not prejudice BB&T's potential interest (assuming it eventually seek relief from the Court); rather, granting the relief requested herein will simply shift BB&T's encumbrance from the Fairview Property to the sale proceeds, which the Receiver will then hold pending further order from the Court. This will then allow for a full resolution of any argument BB&T might have in pursuit of this interest, while still allowing the sale to close before the Purchaser's loan commitment expires and

¹ This Court has previously refused to recognize late claims. *See* Doc. 1002 (denying motion to modify order disallowing late claim).

without further impairing the Fairview Property's value for the Receivership Estate. Importantly, the Court has previously followed this procedure at least once before in this Receivership in connection with another real estate sale. *See* Doc. 842 (granting motion to approve sale and transferring lien to sale proceeds).

II. THE COURT HAS THE POWER TO DEVIATE FROM THE REQUIREMENTS OF 28 U.S.C. § 2001, AND THAT IS WARRANTED UNDER THE CIRCUMSTANCES HERE

Pursuant to 28 U.S.C. § 2001, property in the possession of a receiver may be sold by private or public sale. 28 U.S.C. § 2001. Specifically, subsection (b) establishes the following procedures for a private sale of real property:

(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) (“**Section 2001(b)**”).

Notwithstanding the language of Section 2001, district courts are afforded wide discretion in overseeing the sale of real and personal property in equity receiverships. Any action taken by the district court in the exercise of this discretion is subject to great deference by appellate courts. *See United States v. Branch Coal*, 390 F.2d 7, 10 (3d Cir. 1969). Such

discretion is especially important considering that one of the ultimate purposes of a receiver's appointment is to provide a method of gathering, preserving, and ultimately liquidating assets to return funds to defrauded investors. *See S.E.C. v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 (5th Cir. 1982) (court overseeing equity receivership enjoys "wide discretionary power" related to its "concern for orderly administration") (citations omitted).

A. Waiver Of The Statutory Appraisal Requirements Under Section 2001(b) Is Warranted

Pursuant to Section 2001(b), a court may order the sale of real estate after (i) the completion of three appraisals, of which the proposed sale price may not occur at less than two-thirds of the average appraised value; and (ii) the advertisement of the terms of the proposed sale in such newspaper(s) of general circulation as directed by the court. 28 U.S.C. § 2001(b). Here, the Purchaser has obtained an appraisal of \$295,000. The proposed sale price of \$287,500 is well in excess of two-thirds of the appraised value as required by 28 U.S.C. § 2001(b). The Receiver is unaware of any actual or potential claims to the Fairview Property other than BB&T's interest, nor has he received any indication that any interested party plans to object to the proposed sale.

Courts have utilized their wide discretion to authorize deviations from the requirements of Section 2001(b) to approve sales of real property in equity receiverships. *See S.E.C. v. Global Online Direct, Inc.*, Case No. 1:07-CV-0767-WSD, Order Granting Receiver's Mot. For Order Authorizing the Sale of Certain Property (N.D. Ga. 2009) ("The Court hereby relieves the Receiver from the provisions of 28 U.S.C. §§2001-2002"); *S.E.C. v. Stanley J. Kowalewski et. al.*, Case No. 1:11-cv-0056-TCB, Order Granting Receiver's Motion for Approval of Private Sale of Real Property (N.D. Ga. 2012) (finding compliance

with 28 U.S.C. § 2001(b) despite receiver not obtaining three appraisals for the property). In fact, this Court has previously authorized the Receiver's deviation from the requirements of Section 2001(b) where the Receiver obtained only one appraisal and expressed belief that any additional appraisals would only result in unwarranted expense to the Receivership estate. *See* Doc. 811. These orders are attached hereto as "**Composite Exhibit 5**".

At least one court authorized a receiver's private sale of real property under 28 U.S.C. § 2001 without requiring any appraisals. In *S.E.C. v. Billion Coupons, Inc.*, the receiver proposed that the court deviate from the appraisal requirements of Section 2001(b) and instead authorize the receiver to retain a licensed real estate broker to market and sell the property for the highest and best price obtained. 2009 WL 2143531, *3 (D. Hawaii 2009). Concluding that the proposed plan contained sufficient safeguards for maximizing the sales price, as well as an efficient process to minimize carrying costs and other expenses, the court granted the receiver's request to deviate from Section 2001(b). *Id.* at *4. Similarly, in *S.E.C. v. Patrick Kirkland et al.*, the receiver requested that the court find substantial compliance with the appraisal requirements in Section 2001(b) based on a single appraisal and the uniqueness of the subject property. 2009 WL 1439087 (M.D. Fla. 2009). Citing the receiver's belief that the proposed sale was in the best interest of the receivership estate and that no benefit would be realized in obtaining additional appraisals, the court granted – over the defendant's objection – the waiver of the requirements of Section 2001(b). *Id.* at *3.

Importantly, neither the receiver in *Kirkland* nor in *Billion Coupons* obtained both an appraisal and the services of a realtor in listing the property for sale, as the Receiver has done here, but they still received court approval of their deviation from the Section 2001(b)

requirements. Not only do the Receiver's efforts here exceed those in *Kirkland* and *Billion Coupons*, but full compliance with the statutory procedures enumerated in Section 2001(b) here would result in the unwarranted depletion of funds and resources of the Receivership estate. Given the existence of (1) a ready and willing buyer and (2) an appraisal supporting the proposed sales price, the Receiver requests that the Court authorize deviation from the statutory requirements associated with the proposed sale of the Fairview Property.

B. Waiver Of The Statutory Notice Provisions Under Section 2001(b) Is Warranted

Section 2001(b) also contemplates that the terms of a proposed sale will be advertised in such newspaper(s) of general circulation as directed by the Court. 28 U.S.C. § 2001(b). Here, because the Purchaser's loan commitment expires on November 20, 2014, the Receiver believes that full compliance with the statutory notice procedure set forth in Section 2001(b) could derail the sale of the Fairview Property and result in the unwarranted expenditure of funds and resources of the Receivership estate. Given the existence of a ready and willing buyer, as well as the lack of any actual or potential claims to the Fairview Property other than BB&T's, which will transfer to the sale proceeds, or knowledge that any interested party plans to object to the proposed sale, the Receiver requests that the Court authorize deviation from the statutory notice requirement associated with the proposed sale of the Fairview Property. *See Billion Coupons, Inc.*, 2009 WL 2143531 at *3 (relieving receiver of compliance with statutory provisions of 28 U.S.C. § 2001 where sufficient safeguards existed and proposed procedure would maximize net sales proceeds).

Further, the Receiver believes that full compliance with the statutory notice requirement of Section 2001(b) is unnecessary in light of the substantial marketing and

advertising efforts undertaken by the Receiver and his listing agents for approximately five years, which have resulted in minimal interest in the Fairview Property. The Receiver will be posting a copy of this motion on his website, www.nadelreceivership.com, immediately after filing, which will be publicly available. Thus, the Receiver requests that the Court either waive Section 2001(b)'s notice provision, or in the alternative find that the Receiver's efforts in marketing and listing the Fairview Property are in compliance with Section 2001(b). Again, such deviation is necessary in part because compliance would cause the Purchaser's loan commitment at earlier low interest rates to expire which, in turn, could cause her to walk away from this transaction.

CONCLUSION

The Receiver moves the Court for entry of an order in substantially the form of the proposed Order attached as Exhibit 1 to (1) sell the real property located in Fairview, Buncombe County, North Carolina by private sale in accordance with the terms and conditions set forth in the Purchase and Sale Agreement attached hereto as Exhibit 3 and free and clear of all claims, liens, and encumbrances; (2) approve the appointment *nunc pro tunc* of appraiser Devin Chapman as an appraiser under 28 U.S.C. § 2001(b); and (3) waive the statutory notice and appraisal requirements of 28 U.S.C. § 2001(b). The Receiver will hold the proceeds of the sale in trust until BB&T has an opportunity to address (should it choose to do so) its failure to file a proof of claim for the Loan.

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 the SEC does not oppose the relief requested in this motion. Counsel for the Receiver has also conferred with the attorney who represented BB&T in early 2012 in connection with the claims process, and that attorney has contacted BB&T, but BB&T's position on the relief requested in this motion is presently unknown. The Receiver is filing the motion now because of the Purchaser's impending deadline and because the Court can resolve the motion in any event by transferring BB&T's lien to the sale proceeds, but the Receiver's counsel will immediately update this certification once counsel ascertains BB&T's position.

VERIFICATION OF RECEIVER

I, Burton W. Wiand, Court-Appointed Receiver in the above-styled matter, hereby certify that the information contained in this Motion is true and correct to the best of my knowledge and belief.

s/ Burton W. Wiand
Burton W. Wiand, Court-Appointed Receiver

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on November 17, 2014, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I **FURTHER CERTIFY** that on November 17, 2014, a true and correct copy of the foregoing has been sent via facsimile: (336) 291-4439 and certified mail return receipt delivery to:

Branch Banking and Trust Company
P.O. Box 2027
Greenville, SC 29602-2027

s/Gianluca Morello

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