

**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.

**RECEIVER'S UNOPPOSED MOTION TO (1) APPROVE SIXTH
INTERIM DISTRIBUTION AND (2) INCREASE CERTAIN RESERVES**

Burton W. Wiand, as Receiver (the “**Receiver**”), respectfully moves this Court for an Order: (1) approving a sixth interim distribution of \$2,000,000.00 as set forth in this motion and in **Exhibit A**, representing an additional recovery of 1.52% 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) Approve Plan of Distribution, and (4) Establish Objection Procedure (the “**Claims Determination Motion**”) (Doc. 675 at 8 n.8).

Class 1 Claims² receiving a distribution at this time³ and (2) increasing reserves by \$111,963.37, which will leave in place a total reserve amount of \$2,769,187.73 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

The Receiver has sought and received the Court's approval of five prior interim distributions. (Motions, Docs. 825, 945, 1085, 1113, 1212; Orders, Docs. 839, 946, 1087, 1114, 1213). Through these distributions the Receiver has distributed a total of approximately \$60 million on a *pro rata* basis to Claimants with Allowed Claims who were entitled to receive distributions at that time, representing a total recovery of approximately 46.65% of the Allowed Amounts for those claims.⁴ In these prior interim distributions, the Receiver also sought the Court's approval of the establishment of reserves for claims for which timely objections were received and for Wells Fargo's and TRSTE, Inc.'s purported

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, \$30,462.51 of this \$2,000,000.00 will not be distributed and instead will revert to the Receivership. (See Claim No. 391.)

⁴ As discussed in detail in each of the motions for interim distribution and on the exhibits attached to each motion, certain claims were not entitled to participate in the distribution and the distribution amounts apportioned to those claims reverted to the Receivership. For example, Claim Number 391 is not entitled to participate in any distributions of Receivership assets until and if all Class 1 Claims receive 50% of their Allowed Amounts. Because the interim distributions have provided a combined recovery of 46.65% to such Class 1 Claims, this claim was not entitled to participate in the interim distributions. Accordingly, the amounts apportioned to Claim Number 391 were not distributed and reverted to the Receivership.

interests in Receivership assets and the Receivership estate. With the Court's approval, the Receiver increased reserves as needed for each interim distribution and released reserves as appropriate when objections were resolved. All interim distribution checks have been mailed to Claimants holding claims which were determined to be entitled to participate in the interim distributions and all checks but two have been negotiated. Two checks from the Fifth Interim Distribution were not negotiated. These distribution checks were sent to the Claimants with Claim Numbers 56 and 352 in the amounts of \$1,565.45 and \$146.34, respectively. As set forth in Exhibit A, the Receiver requests that the Court allow him to rollover these amounts to this interim distribution to allow these Claimants an additional opportunity to recover these funds.

PROPOSED PLAN FOR SIXTH INTERIM DISTRIBUTION

The Receiver now seeks leave to make a sixth interim distribution totaling \$2,000,000.00 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 all of the prior interim distributions. This distribution will result in an additional 1.52% recovery for these Claimants' Allowed Amounts, bringing these Claimants' total recovery to approximately 48.18% of their Allowed Amounts.⁵

⁵ Again, because 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 and the proposed sixth interim distribution will bring the total combined recovery to 48.18% for such Class 1 Claims, this claim is not entitled to participate in the sixth interim distribution.

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 sixth interim distribution is specified in Exhibit A.

As of December 5, 2016, the total funds in all Receivership accounts are approximately \$9,962,964.22, which includes \$2,657,224.36 currently being held in reserves for objections and \$4,377,456.84 being held separately until a claim to these funds is resolved. The Receiver believes that by distributing \$2,000,000.00 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 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 sixth interim distribution in the amounts specified on Exhibit A within 15 business 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 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, petitioned the Court for relief with respect to its claim and to other interests it has asserted in Receivership property.

All objections relating to the 23 claims identified above have been resolved. Five of the 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). Sixteen objections were overruled by the Court (*see* Claim Nos. 403, 404, 405, 406, 407, 408, 445, 462, 463, 464, 465, 466, 467, 469, 477, and 504; Docs. 928, 1061, 1121, 1194, 1198). Thus, no reserves are needed for these claims.

With respect to Wells Fargo’s purported interests in Receivership assets and the Receivership estate, the Receiver seeks leave to increase the pertinent reserves until those

issues are resolved. The Receiver seeks an increase in the specified reserves so that these purported interests do not impede or delay a sixth interim distribution. More specifically, as 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.⁶ (See Docs. 689, 690, 718, 719, 740.) The Receiver seeks leave to increase those reserves by a total of \$111,963.37 as set forth and itemized in Exhibit B. Assuming the Court increases reserves relating to Wells Fargo as requested, total reserves will be \$2,769,187.73. Reserves will be held until the corresponding asserted interest is resolved.

ARGUMENT

As explained above, the Receiver asks the Court to approve the sixth interim distribution as set forth in this motion and in Exhibit A. The Court has previously approved the Receiver's plan of distribution and five interim distributions. (See March 2, 2012 Order, Doc. 776; May 7, 2012 Order, Doc. 839; November 16, 2012 Order, Doc. 946; November 22, 2013 Order, Doc. 1087; April 24, 2014 Order, Doc. 1114; December 15, 2015 Order,

⁶ 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.

Doc. 1213.) The sixth 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 sixth interim distribution in the total amount of \$2,000,000.00 as set forth above and in Exhibit A⁷ and (2) increasing reserves by \$111,963.37. The total reserve amount will then be \$2,769,187.73 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.

⁷ 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. 23, 132, 246, 247, 303, and 304) and also for a claimant whose pension funds were rolled over to an IRA (*see* Claim No. 64). These custodian changes are noted on Exhibit A.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 20, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

s/Gianluca Morello

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