

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.

**LIMITED OBJECTION AND MEMORANDUM OF LAW OF
WELLS FARGO BANK, N.A. IN OPPOSITION TO RECEIVER'S
UNOPPOSED MOTION TO (1) APPROVE SIXTH INTERIM
DISTRIBUTION AND (2) INCREASE CERTAIN RESERVES**

Wells Fargo Bank, N.A. ("Wells Fargo"),¹ a secured creditor and party in interest herein, hereby files this limited objection (the "Objection") and memorandum of law in opposition to Receiver's Unopposed Motion to (1) Approve Sixth Interim Distribution and (2)

¹ Wells Fargo is successor by merger to Wachovia Bank, N.A.

Increase Certain Reserves (the "Motion") (Doc. No. 1253), and in support thereof, states as follows:

MEMORANDUM OF LAW

The Receiver's Motion seeks to make a sixth interim distribution of approximately \$2 million representing an additional 1.52% distribution to investors on account of their allowed claims, for a total distribution of approximately 48.18%. The Motion also seeks to establish increased reserves for certain of Wells Fargo's claims secured by real estate (or the proceeds upon disposition) held in the receivership estate. Wells Fargo initially filed a limited objection to the establishment of reserves with respect to the Rite Aid Property to the extent the Receiver was attempting to limit Wells Fargo's secured claim against its collateral (Doc. No. 825), which consists of the proceeds of disposition of the Rite Aid Property and approximately \$1 million in rental payments collected by the Receiver. The Court overruled Wells Fargo's objection on the basis that the Receiver had sufficient funds in his possession (i.e., over \$5 million) to pay Wells Fargo's secured claim in full in connection with the Rite Aid Property (Doc. No. 838).

As noted in Wells Fargo's prior pleadings with the Court and its proof of claim submitted for the Rite Aid Property, Wells Fargo has valid liens on the Rite Aid Property (and the proceeds upon disposition) and all rent collected by the Receiver in connection with that property. It is unclear from the Motion whether the Receiver will continue to maintain sufficient funds in his accounts to pay Wells Fargo's secured claim in full with respect to the

Rite Aid Property, which claim aggregates approximately \$4,093,039.48² as of December 31, 2016 (the "Rite Aid Claim"). In addition, it is unclear whether sufficient funds will remain in the Receiver's accounts to pay in full \$40,312.94 in post-Receivership costs awarded to Wells Fargo in the related litigation captioned *Wiand v. Wells Fargo Bank, N.A.*, Case 8:12-cv-00557-JDW-EAJ (Doc. No. 340) and approximately \$806,121.22.00 for attorneys' fees and costs incurred by Wells Fargo in enforcing its security interests in this case and on appeal before the Eleventh Circuit in the case captioned *Wells Fargo Bank, N.A. v. Wiand*, Case No. 16-10942 (collectively, the "Fees and Costs Claim").³ To the extent the Receiver continues to maintain sufficient funds in his accounts to pay the Rite Aid Claim and the Fees and Costs Claim in full, and provided all rights are reserved for Wells Fargo, Wells Fargo has no objection the relief requested therein.⁴

However, to the extent sufficient cash will not remain in the Receiver's accounts, the Motion effectively seeks to limit Wells Fargo's secured lien to the proceeds of the sale of the Rite Aid Property and the increased reserved amounts of 48.18%, and will extinguish Wells Fargo's secured lien on approximately \$1 million in rent collected by the Receiver and its

² Debt amount calculated as follows: Principal - \$2,655,000.00; Interest - \$1,046,007.29; Appraisal Fee - \$6,840.00; Legal Fees Trenam - \$20,047.29; Legal Fees KL Gates - \$15,144.90; Legal Fees - Akerman - \$350,000.00 (Approx.).

³ See, e.g., *S.E.C. v. HKW Trading LLC*, 8:05-CV-1076-T-24-TB, 2009 WL 2499146, at *4 (M.D. Fla. Aug. 14, 2009) (finding attorneys' fees incurred while litigating a lien claim against a receiver comprise an administrative claim which is entitled to priority because "the litigation that led to the attorneys' fee award was pursued by the Receiver in an attempt to benefit the estate"); *G.I.C. Government Secur., Inc.*, 121 B.R. 647, 648 (Bankr. M.D. Fla. 1990) (finding costs incurred by defendant who prevailed in suit against a Chapter 7 trustee were properly chargeable against the estate as costs of administration and are entitled to priority because the trustee brought the suit to benefit and preserve property of the estate).

⁴ These supplemental reserves are in addition to all other funds held in reserve/escrow by the Receiver in connection with the Sarasota Property and Laurel Mountain Property.

administrative priority claim to which it may be entitled for Fees and Costs (regardless of the ultimate outcome of any pending motion before this Court or two appeals before the Eleventh Circuit involving Wells Fargo).⁵ In that case, the Receiver's Motion ignores fundamental creditor protections, improperly limits Wells Fargo's recovery as a secured and administrative priority creditor, and should be denied. Alternatively, the Court should require the Receiver to maintain sufficient cash in his accounts to satisfy the Rite Aid Claim and Fees and Costs Claim in full.

CONCLUSION

WHEREFORE, for the foregoing reasons, Wells Fargo respectfully requests that the Court deny the Motion to the extent it seeks to impair Wells Fargo's rights to receive the full recovery on its secured claims to which it is entitled, and to grant such other and further relief as it deems just and proper.

DATED this 21st day of December, 2016 in Tampa, Florida.

Respectfully submitted,

AKERMAN LLP

/s/Steven R. Wirth

L. Joseph Shaheen, Jr.

Florida Bar No.: 212385

Email: joseph.shaheen@akerman.com

Steven R. Wirth

Florida Bar No.: 170380

Email: steven.wirth@akerman.com

Jason L. Margolin

Florida Bar No. 69881

Email: jason.margolin@akerman.com

⁵ See *Wiand v. Wells Fargo Bank, N.A.*, Case No. 15-10968; *Wells Fargo Bank, N.A. v. Wiand*, Case No. 16-10942.

401 East Jackson Street, Suite 1700
Tampa, Florida 33602
Telephone: (813) 223-7333
Facsimile: (813) 223-2837

Counsel for Wells Fargo, N.A.

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/Steven R. Wirth
Attorney