

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.: 8:09-0087-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 UNOPPOSED MOTION FOR: (I) APPROVAL OF
SETTLEMENT WITH WELLS FARGO, N.A; (II) ENTRY OF AN ORDER
AUTHORIZING DISBURSEMENT OF SALE PROCEEDS TO WELLS
FARGO, N.A.; (III) AND RELIEF FROM INJUNCTION, PERMITTING
WELLS FARGO TO FORECLOSE ON THE LAUREL MOUNTAIN PROPERTY**

Burton W. Wiand, as Receiver (the "Receiver") respectfully requests the Court to enter an order approving a proposed partial settlement with Wells Fargo Bank, N.A. ("Wells Fargo")¹ under which the Receiver would disburse to Wells Fargo: (i) sale proceeds less expenses from the sale of the Rite Aid Property (defined below) in the amount of \$2,224,563.15; (ii) and sale proceeds

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

less expenses from the sale of the La Bellasara Property (defined below) in the amount of \$2,106,140.29. In addition, the parties have agreed that Wells Fargo shall have 90-days from the filing of this Motion to perform its due diligence on the Laurel Mountain Property (defined below) and to either: (i) pay to the Receiver the expenses for maintaining the property, in the amount of \$254,073.76, and foreclose on the Laurel Mountain Property (the Receiver having consented to relief from the injunction on the condition that he receives \$254,073.76 from Wells Fargo); or (ii) waive its security interest in the Laurel Mountain Property in favor of the Receiver. The Receiver has determined that the proposed settlement is in the best interest of the Receivership Estate and the investors for whose benefit the Securities and Exchange Commission initiated the securities fraud action. In support of this Motion, the Receiver states as follows:

BACKGROUND

On January 21, 2009, the Securities and Exchange 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 (the "**Order Appointing Receiver**"). (*See generally* Order Appointing Receiver, Doc. 8). The Court subsequently granted several motions to expand the scope of the Receivership to include other entities owned or controlled by Arthur Nadel. (*See generally* Docs. 17, 44, 68, 81, 153, 172, 454.) All of the entities in receivership are hereinafter collectively referred to as the "**Receivership Estate.**"

Pursuant to the Order Appointing Receiver, the Receiver has the duty and authority to "administer and manage the business affairs, funds, assets, choses in action and any other property of the Defendants and Relief Defendants; marshal and safeguard all of the assets of the Defendants and Relief Defendants; and take whatever actions are necessary for the protection of the investors." (Order Appointing Receiver at 1-2.). In addition, the Receiver is responsible for reviewing and resolving all claims against the Receivership Estate and making recommendations to the Court regarding the plan of distributions of assets to qualifying claimants.

On April 21, 2010, the Court entered an order establishing a claims administration process by which potential claimants could file their claims against the Receivership Estate. The claims bar date for claims against the Receivership Entities was September 2, 2010. The order also barred any claims asserted after that date. (Doc. No. 391). On December 7, 2011, the Receiver filed a proposed plan for claims determination and priority of claims, which the Court granted. (Doc. Nos. 675 and 776). Simply stated, the order established the claim priority as (1) allowed investor claims and tax lien claims would receive the highest priority, (2) allowed non-investor secured claims to be paid from the sale of collateral less certain fees and costs, and (3) allowed non-investor unsecured claims.

As a result of the Order Appointing Receiver, the Receiver took possession of a commercial building located at 841 South Main Street in the City of Graham, Alamance County, North Carolina (the "**Rite Aid Property**"), along with a condominium unit located in Sarasota, Florida at 464 Golden Gate Point, Unit 703 (the "**La Bellasara Property**"), and partially developed land consisting of approximately 420 acres near Asheville, North Carolina in Buncombe and McDowell counties (the "**Laurel Mountain Property**" and together with the Rite Aid Property and the La Bellasara Property, the "**Properties**").

As a result of various loan transactions with the Receivership Entities, Wells Fargo claims a security interest in the Properties based upon certain loan documents as discussed below. Wells Fargo timely filed a proof of claim in this case with respect to the Rite Aid Property loan, which claim has been designated No. 502 by the Receiver. However, Wells Fargo failed to file a proof of claim for loans concerning the La Bellasara Property and the Laurel Mountain Property. On or about February 8, 2012, Wells Fargo filed a motion seeking a determination that the filing of a proof of claim was unnecessary to preserve its security interests in the La Bellasara Property and the Laurel Mountain Property. (Doc. No. 740). After an appeal, the Eleventh Circuit Court of Appeal held that Wells Fargo's security interests remained intact as to the La Bellasara Property and the Laurel Mountain Property even though Wells Fargo did not file a proof of claim. *See SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017).

A. THE RITE AID PROPERTY

The Receivership Entity Scoop RE purchased the Rite Aid Property in May 2005 by executing a promissory note with Wells Fargo (formerly Wachovia Bank) in the amount of \$2,655,000 (the "**Rite Aid Note**"). The Rite Aid Note is secured by a Deed of Trust and Security Agreement (the "**Rite Aid Security Agreement**"). Copies of the Rite Aid Note and Rite Aid Security Agreement are attached hereto as Composite Exhibit "A". As of December 31, 2016, the total indebtedness on the Rite Aid Note was not less than \$4,093,039.48.

On January 6, 2012, the Receiver filed a motion to approve the sale of the Rite Aid Property (Doc. Nos. 706 and 823) free and clear of all liens. Although Wells Fargo objected to the sale of the Rite Aid Property based upon the Rite Aid Note and Rite Aid Security Agreement, the Court entered its Order authorizing the sale of the Rite Aid Property over Wells Fargo's objection (Doc. No. 840). On May 8, 2012, the Court entered an order approving the sale of the Rite Aid Property

to Trinet West, LLC free and clear of all claims, liens, and encumbrances (the “**Rite Aid Sale Order**”) (Doc. No. 842). In relevant part, the Rite Aid Sale Order provided—

Any and all existing claims, liens, and encumbrances relating to the property located in Alamance County, North Carolina (the "Property"), including any held by Wells Fargo Bank, N.A. as successor to Wachovia Bank, N.A., arising from a loan provided to Scoop Real Estate, L.P., *shall be transferred to the proceeds of the sale* ordered herein, and the Property shall become free and clear of any and all such existing claims, liens, and encumbrances.

Emphasis added.

After certain closing costs the proceeds from the sale of the Rite Aid Property were approximately \$2,229,463.15 (the “**Rite Aid Sale Proceeds**”). The Receiver incurred expenses in connection with the Rite Aid Property of approximately \$9,200 for an appraisal of the Rite Aid Property and \$300 for certain processing fees. Wells Fargo has agreed to reimburse the Receiver half of the appraisal \$4,600 and \$300 for these processing fees.

Wells Fargo is claiming an interest in the rental income collected by the Receivership Estate, which the Receiver disputes. As such, the Receiver and Wells Fargo have agreed to participate in mediation to resolve this dispute.

Therefore, this Motion seeks authority for the Receiver to disburse to Wells Fargo \$2,224,563.15 (the Rite Aid Sale Proceeds less \$4,600 for the appraisal and \$300 for processing fees) on account of its lien on the Rite Aid Property. The Receiver will disburse the entire amount to Wells Fargo within three days of the Court's Order granting this Motion.

B. LA BELLASARA PROPERTY

Following the entry of the Order Appointing Receiver, Neil V. Moody in his capacity as Trustee of the Neil V. Moody Revocable Trust Agreement dated February 9, 1995, transferred title and possession of the La Bellasara Property to the Receiver. The Receiver actively marketed the

La Bellasara Property for five years resulting in an offer on March 3, 2015. Pursuant to an order from the Court (the “**La Bellasara Sale Order**”)(Doc. No. 1177), the Receiver, with the consent of Wells Fargo, sold La Bellasara Property for \$2,300,000 less closing costs, resulting in net sale proceeds of approximately \$2,147,805.19 (the “**La Bellasara Sale Proceeds**”). Pursuant to the La Bellasara Sale Order any and all existing claims, liens, and encumbrances relating to the La Bellasara Property, including claims held by Wells Fargo, Bank of America, N.A., and La La Bellasara Condominium Association, Inc. were transferred to the La Bellasara Sale Proceeds. During the time that the Receivership Estate was attempting to sell the La Bellasara Property, the Receiver incurred costs for condominium association dues, storage, appraisals, and utilities, totaling approximately \$41,664.90. Wells Fargo has agreed to reimburse the Receiver for these costs. As described below, the Senior Loan/Mortgage and the Junior Mortgage exceed the La Bellasara Sale Proceeds.

Therefore, this Motion seeks authority for the Receiver to disburse to Wells Fargo \$2,106,140.29 (the La Bellasara Sale Proceeds less \$41,664.90 costs incurred by the Receivership Estate). The Receiver will disburse the entire amount to Wells Fargo within three days of the Court's Order granting this Motion.

(i) THE SENIOR LOAN/MORTGAGE

On May 23, 2006, MSC Mortgage, LLC (“**MSC**”), as lender, and Neil V. Moody as Trustee of the Neil V. Moody Revocable Trust Agreement dated February 9, 1995, as borrower, entered into a loan transaction pursuant to which Wells Fargo served as servicer of the loan made in connection with the Neil Moody Trust's purchase of the La Bellasara Property. The Senior Loan Documents (defined below) were subsequently assigned to Bank of America, N.A. (“**BOFA**”) with Wells Fargo acting as servicer of the La Bellasara Property loan. As of December 30, 2016,

the total indebtedness on the Senior Loan/Mortgage was not less than \$1,537,026.12 pursuant to that certain Note dated as of May 23, 2006 (as amended, restated, supplemented, or otherwise modified from time to time, the “**Senior Note**”), between MSC and the Neil Moody Trust.

In order to secure the indebtedness under the Senior Note, the Neil Moody Trust executed and delivered to MSC a Purchase Money Mortgage (as amended, restated, supplemented, or otherwise modified from time to time, the "**Senior Mortgage**") dated May 23, 2006.² Thereafter, the Senior Loan Documents were assigned to BOFA. Among other things, pursuant to the Senior Loan Documents, BOFA held a security interests in and liens upon the La Bellasara Property. The Senior Note and Senior Mortgage are attached hereto as Composite Exhibit B.

(ii) THE JUNIOR LOAN/MORTGAGE

On May 23, 2006, Wells Fargo, as lender, and Neil V. Moody, individually and as Trustee of the Neil V. Moody Revocable Trust Agreement dated February 9, 1995, and Sharon G. Moody (collectively the “**Home Equity Borrowers**”), entered into a home equity line of credit loan transaction with Wells Fargo. As of December 31, 2016, the total indebtedness on the home equity line of credit loan (*i.e.* the Junior Loan/Mortgage) was not less than \$1,314,955.10 pursuant to that certain SmartFit Home Equity Account Agreement and Disclosure Statement dated as of May 23, 2006 (as amended, restated, supplemented, or otherwise modified from time to time, the “**Junior Note**”), between Wells Fargo and the Home Equity Borrowers.

In order to secure the indebtedness under the Junior Note, the Home Equity Borrowers executed and delivered to Wells Fargo a Mortgage (as amended, restated, supplemented, or otherwise modified from time to time, the "**Junior Mortgage**") dated May 23, 2006. Among other

² The Senior Note and Senior Mortgage are collectively referred to herein as the "Senior Loan Documents", copies of which are annexed hereto as Composite Exhibit B.

things, pursuant to the Junior Loan Documents, the Home Equity Borrowers granted Wells Fargo security interests in and liens upon the La Bellasara Property. The Junior Note and the Junior Mortgage are attached hereto as hereto as Composite Exhibit C.

C. LAUREL MOUNTAIN PROPERTY

On May 2, 2008, Wachovia and Laurel Preserve, LLC entered into a loan transaction to acquire the Laurel Mountain Property in the principal amount of \$1,900,000. As of January 3, 2017, the total indebtedness on the Laurel Mountain Preserve loan is not less than \$2,650,453.38 pursuant to that certain Promissory Note dated as of May 2, 2008 (as amended, restated, supplemented, or otherwise modified from time to time, the "**Laurel Mountain Note**"), between Wachovia and Laurel Preserve.

In order to secure the indebtedness under the Laurel Mountain Note, Laurel Preserve, LLC executed and delivered to Wachovia a Deed of Trust and Assignment of Rents (as amended, restated, supplemented, or otherwise modified from time to time, the "**Laurel Mountain Deed of Trust**"), to the Laurel Mountain Property dated May 2, 2008. The Laurel Mountain Note and Laurel Mountain Deed of Trust are attached hereto as Composite Exhibit D. While the Receiver has actively marketed the Laurel Mountain Property, as of the date of this Motion the Receiver has been unable to sell the Laurel Mountain Property. The Receivership Estate has incurred approximately \$254,073.76 to maintain the Laurel Mountain Property.

The parties have agreed that Wells Fargo shall have 90-days from the filing of this Motion to perform its due diligence on the Laurel Mountain Property (*e.g.*, new appraisal and environmental survey, which have already been ordered). After the expiration of that deadline (or sooner if the due diligence is completed sooner), Wells Fargo shall either (i) pay to the Receiver the expenses for maintaining the property, in the amount of \$254,073.76, in exchange for the

Court's lifting of the injunction and authorizing Wells Fargo to foreclose on the property; or (ii) waive its security interest in the Laurel Mountain Property in favor of the Receiver.

LEGAL STANDARD

It is generally recognized that the law favors compromise of disputes over litigation. *In re Bicoastal Corp.*, 164 B.R. 1009, 1016 (Bankr. M.D. Fla. 1993) (Paskay, C.J.). Some courts have held that a proposed settlement should be approved unless it yields less than the lowest amount that the litigation could reasonably produce. *In re Holywell Corp.*, 93 B.R. 291, 294 (Bankr. S.D. Fla. 1988) (Weaver, J.). In *In re Justice Oaks II, Ltd*, 898 F.2d 1544 (11th Cir. 1990), *cert. denied* 498 U.S. 959, (1990), the Eleventh Circuit Court of Appeals enunciated certain factors which must be considered in determining whether to approve a compromise. These factors include the following:

- a. The probability of success in the litigation;
- b. The difficulties, if any, to be encountered in the matter of collection;
- c. The complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and
- d. The paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Id.

In summary, the Receiver recommends approval of this settlement because of Wells Fargo's security interests in the Properties, the absence of equity in the Properties, the continuing costs of maintaining the Laurel Mountain Property, and further continued litigation with Wells Fargo.

WHEREFORE, the Receiver respectfully requests that the Court enter an order in the form attached as **Exhibit "E"** (i) granting this Motion; (ii) authorizing the Receiver to disburse \$2,224,563.15 to Wells Fargo on account of the Rite Aid Property, within three days of the Court's Order; (iii) authorizing the Receiver to disburse \$2,106,140.29 to Wells Fargo on account of the La Bellasara Property, within three days of the Court's Order; (iv) lifting the injunction to (a) allow Wells Fargo to foreclose on the Laurel Mountain Property after payment of \$254,073.76 to the Receiver, or (b) waive its security interest in the Laurel Mountain Property in favor of the Receiver; and (v) granting such other and further relief as this Court deems just and proper.

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 along with Wells Fargo, N.A. have no objection to the relief sought herein.

/s/ Susan Heath Sharp
Susan Heath Sharp (FBN 716421)
Stichter Riedel Blain & Postler, P.A.
110 E. Madison St., Ste. 200
Tampa, FL 33602
Telephone: 813-229-0144
Facsimile: 813-229-1811
Email: ssharp@srbp.com

And

/s/Sean P. Keefe
Sean P. Keefe (FBN 413828)
James Hoyer, P.A.
4830 West Kennedy Boulevard, Suite 550
Tampa, Florida 33609
Phone: 813-397-2300
Fax: 813-397-2310
Email: skeefe@jameshoyer.com
Attorneys for the Receiver

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/Susan Heath Sharp
Attorney