

**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.

**THE RECEIVER'S VERIFIED MOTION TO ENFORCE CONSTRUCTIVE TRUST
THROUGH TURNOVER OF REAL PROPERTY, OR IN THE ALTERNATIVE,
THROUGH FORECLOSURE OF THE RECEIVER'S EQUITABLE LIEN**

Burton W. Wiand, as Receiver (the "**Receiver**") for Valhalla Investment Partners, L.P.; Viking Fund, LLC; Viking IRA Fund, LLC; Victory Fund, Ltd.; Victory IRA Fund, Ltd.; and Scoop Real Estate, LP (collectively the "**Hedge Funds**"), and also for Traders Investment Club ("**Traders**"), moves the Court to enforce his constructive trust and/or equitable lien in the amount of \$336,891.39 through turnover or foreclosure, respectively, against the real property located at 4018 Via Miranda in Sarasota, Florida (the "**Property**").

As explained below, the Receiver obtained the constructive trust and equitable lien through an adversary proceeding he filed against clawback defendant and then bankruptcy debtor Vernon M. Lee, individually and as Trustee of the Vernon M. Lee Trust (“**Lee**”), and his wife, Manon Sommers-Lee (“**Sommers-Lee**” and, collectively, the “**Lees**”) because Lee purchased the Property with proceeds from Arthur Nadel’s Ponzi scheme.

BACKGROUND

On January 24, 2013, the United States District Court for the Middle District of Florida entered a final judgment against Lee for \$935,631.51 (the “**Judgment**”) in *Wiand, as Receiver v. Lee*, Case No. 8:10-cv-210-T-17MAP (M.D. Fla.) (the “**Clawback Case**”). The Judgment represents Lee’s “false profits” – *i.e.*, the amount of money he received from Nadel’s Ponzi scheme in excess of the amount he invested. The Eleventh Circuit affirmed the Judgment, in relevant part, on June 2, 2014. *Wiand v. Lee*, 753 F.3d 1194 (11th Cir. 2014). Lee, who was a close friend of Nadel’s, has not repaid a single dollar of the Judgment and remains unjustly enriched compared to other victims of the scheme – who collectively lost approximately \$168 million – and even compared to other profiteers who returned their false profits either by settling with the Receiver or by satisfying the Receiver’s judgments against them. At present, Lee is one of the largest beneficiaries of Nadel’s Ponzi scheme.

On August 9, 2013, the Receiver commenced proceedings supplementary to collect the Judgment and impleaded Sommers-Lee into the Clawback Action. On February 2, 2015, Lee filed a voluntary petition for bankruptcy under Chapter 7 of Title 11 of the United States Code, along with pertinent schedules. *See In re Vernon M. Lee*, Case No. 8:15-bk-01038-KRM (Bankr. M.D. Fla.) (the “**Bankruptcy Proceeding**”). Lee’s Schedule C claimed that

the Property was an exempt homestead and also owned as tenants by entireties with Lee's non-filing spouse, Sommers-Lee. The Receiver timely filed an objection to Lee's exemptions. *Id.* Doc. 14. Aside from the Property, Lee claimed that he had no other material assets to satisfy the Judgment. Indeed, when the Receiver's counsel questioned Lee about substantial withdrawals from his bank accounts, Lee testified that he gambled away hundreds of thousands of dollars in the months and years leading up to his second bankruptcy.¹ Other than his self-serving testimony, Lee did not provide any evidence supporting his claim that he lost that money gambling.

On May 6, 2015, the Receiver filed his proof of claim in the amount of \$1,391,269.41, which includes both pre-judgment and post-judgment interest on the Judgment. On May 8, 2015, the Receiver filed a five-count adversary complaint against Lee, which included two counts against the Lees in connection with the Property. *See Wiand v. Lee et al.*, Adv. Proc. No. 8:15-ap-00464-KRM (Bankr. M.D. Fla.) (the "**Adversary Proceeding**") Doc 1. Count I of the complaint sought the imposition of an equitable lien against the Property because Lee used tainted funds from Nadel's Ponzi scheme to purchase the Property. Count II of the complaint sought to impose a constructive trust against the Property for the same reason.

On November 20, 2015, the Receiver filed a motion for partial summary judgment on Counts I and II of the adversary complaint. After significant briefing and a hearing on the matter, the Bankruptcy Court granted the Receiver's motion on June 23, 2017, determining

¹ Lee previously filed a Chapter 13 bankruptcy, but it was dismissed because he did not meet pertinent requirements. *See In re Lee*, Case No. 8:13-bk-01055-KRM (Bankr. M.D. Fla.), Doc 36.

that Lee, in fact, used money from Nadel's Ponzi scheme to purchase and improve the Property, and as a result, he is not entitled to homestead protection. *See id.* Doc. 29. The Bankruptcy Court awarded the Receiver a constructive trust and equitable lien. A copy of the pertinent order is attached to the Declaration of Burton W. Wiand (the "**Wiand Decl.**") as **Exhibit A.**² The Bankruptcy Court also awarded the Receiver prejudgment interest and entered a final judgment of \$336,891.39 in favor of the Receiver. *See* Wiand Decl. **Ex. B.** On August 8, 2017, the Receiver recorded a copy of the order in the public records for Sarasota County, where the Property is located. He has also recorded a judgment lien certificate with the Florida Secretary of State.

On August 16, 2017, the Bankruptcy Court ruled that the automatic stay does not prevent the Receiver from enforcing his constructive trust and equitable lien against the Property. Adv. Pro. Doc. 39; Wiand Decl. **Exhibit C.** As such, the Receiver brings this motion for turnover or, in the alternative, foreclosure to obtain title to and possession of the Property so that he can liquidate it for the benefit of the Receivership estate. As explained below, this Court has the authority to order Lee to vacate the Property and to transfer title to the Receiver. In relevant part, the relief requested in this motion is no different than the numerous motions the Court has previously granted to expand the Receivership or to otherwise allow the Receiver take possession of assets funded or purchased with scheme proceeds. *See, e.g.,* Docs. 153, 172, 454, 911, 916, 1024.

² Lee is appealing the order. *See Lee et al. v. Wiand*, Case No. 8:17-cv-1782-T-36 (M.D. Fla.) (Honeywell, J.).

ARGUMENT

I. **THE COURT SHOULD ORDER TURNOVER OF THE PROPERTY SO THAT THE RECEIVER CAN ARRANGE A PRIVATE SALE UNDER 28 U.S.C. § 2001(B)**

The procedures set forth in 28 U.S.C. § 2001 govern a receiver's sale of real property.

Subsection (a) concerns public sales – *i.e.*, courthouse auctions. Subsection (b) concerns private sales, and provides as follows:

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)**”). Receivers and the courts supervising them typically utilize orders for turnover of real property and then employ private sales under Section 2001(b) because such procedures both generate greater value for the pertinent receivership estate and conserve judicial and receivership resources as opposed to independent foreclosure proceedings. To effectuate a private sale under Section 2001(b), receivers file and courts typically grant motions for turnover based on equitable liens or constructive trusts. As illustrated by the following three cases, such motions rely on a court's power to employ summary procedures and its broad discretion to fashion appropriate relief in

federal equity receiverships, and they conserve both judicial and receivership resources by avoiding independent foreclosure proceedings, which can be lengthy and costly.³

S.E.C. v. Aquacell Batteries, Inc., et al., Case No. 6:07-cv-00608-ORL-22DAB (M.D. Fla.) provides the best template for the disposition of the Property because it involved similar factual and procedural circumstances. Specifically, it involved a fraudulent scheme that Michael J. Naste (“**Naste**”) operated through Aquacell Batteries, Inc. (“**Aquacell**”) and several related entities. On April 13, 2007, the Court entered a temporary restraining order (AQ Doc.⁴ 10) and appointed a receiver over Aquacell and its related entities (AQ Doc. 11). The receiver conducted an investigation and determined that Naste used tainted money from Aquacell to purchase a property in North Carolina through The Trophy Group, Inc. (“**Trophy Group**”), another company he controlled. *See* AQ Doc. 115 at 2.

Two business days after the Court entered a temporary restraining order against Naste and his entities, he signed a quitclaim deed on behalf of Trophy Group purporting to transfer the North Carolina property to nonparty Michael W. Hennigan (“**Hennigan**”) for no

³ The Court’s power to supervise this equity receivership and determine the appropriate action to be taken in the administration of the receivership is extremely broad. *See S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (authorizing use of summary procedures and noting “[t]he district court has broad powers and wide discretion to determine relief in an equity receivership”); *F.T.C. v. Productive Marketing, Inc.*, 136 F. Supp. 2d 1096, 1104-05 (C.D. Ca. 2001) (“The Supreme Court had repeatedly emphasized the broad equitable powers of the federal courts to shape equitable remedies to the necessities of particular cases, especially where a federal agency seeks enforcement in the public interest.”); *F.T.C. v. Crittenden*, 823 F. Supp. 699, 702 (C.D. Ca. 1993) (“A district court’s power to supervise an equity receivership once the receivership is underway is extremely broad.”); *F.T.C. v. Equinox Int’l Corp.*, 1999 WL 1425373, *2 (D. Nev. 1999) (same). The Court’s wide discretion derives from the “inherent powers of an equity court to fashion relief.” *Elliott*, 953 F.2d at 1566.

⁴ “AQ Doc.” refers to the docket in *Aquacell*.

consideration in a sham transaction. *Id.* After learning of the transfer, the Receiver filed a motion for turnover, arguing the property belonged to Aquacell and was subject to a constructive trust. A copy of the receiver's motion is attached to the Wiand Declaration as **Exhibit D**. The receiver also requested permission to market and sell the property, subject to the Court's approval of the resulting sale. Magistrate Judge David A. Baker granted the receiver's motion, ordered Hennigan to vacate the property within 30 days, and directed the receiver to provide a proposed order to effectuate the transfer of title. A copy of the Magistrate Judge's order is attached to the Wiand Declaration as **Exhibit E**. The receiver then filed a proposed order (AQ Doc. 183), which the Magistrate Judge signed (AQ Doc. 184) (the "**Turnover Order**").

The Turnover Order recited the legal description of the North Carolina property and provided that (1) "[t]itle to the Property is conveyed and transferred to Michael L. Gore, as Receiver, 'subject to' all existing liens and mortgages of record"; (2) the "Receiver is granted authority to immediately list, market and sell the Property, with any sale subject to the approval of the Court"; and (3) Hennigan is required to "cooperate with the Receiver by signing any documents that may be required to effectuate [the] Order, which the Receiver or any title company may reasonably require." A copy of the Turnover Order is attached to the Wiand Declaration as **Exhibit F**. Pursuant to the Turnover Order and the requirements of Section § 2001(b), the Aquacell receiver marketed the North Carolina property, found a buyer, entered into a purchase agreement, obtained three appraisals of the property, and published notification of the proposed sale. He then moved the Court to approve the sale (AQ Doc. 258), and on September 9, 2010, the Court entered a Final Judgment Confirming

Receiver's Sale Of Realty (AQ Doc. 263). A copy of the receiver's motion is attached as **Exhibit G** to the Wiand Declaration, and a copy of the Court's Final Judgment is also attached as **Exhibit H**.

S.E.C. v. Kirkland, Case No. 6:06-cv-183-ORL-28KRS (M.D. Fla.), another recent equity receivership in this District, also followed a similar procedure. Specifically, Patrick Kirkland ("**Kirkland**") operated a fraudulent scheme through numerous entities, and he used money from one of those entities to purchase his primary residence (the "**Isleworth Home**"), which Kirkland had listed for sale prior to the institution of the SEC's enforcement action. On March 22, 2006, the receiver in that case filed a motion to expand the receivership to include a number of properties owned by Kirkland, including the Isleworth Home, and for authority to sell the properties. *See* K. Doc.⁵ 42. The court granted the motion to expand, but barred the receiver from evicting anyone from the Isleworth Home absent further order of the court. K. Doc. 78 at 5. The receiver then obtained a buyer, entered into a purchase agreement, and moved the court to appoint appraisers pursuant to Section 2001(b) and to authorize the sale. *See* K. Doc. 279. The court initially denied the receiver's motion, however, because the SEC had not yet proven its underlying case against Kirkland, who also claimed that the property was a protected homestead. *See* K. Doc. 308. The SEC eventually filed a summary judgment motion against Kirkland, which the court granted. K. Doc. 339. The receiver then found a new buyer and filed a second motion to authorize the sale of the home pursuant to Section § 2001(b) (K. Doc. 396), which the court granted on April 11, 2008 (K. Doc. 475; *S.E.C. v. Kirkland*, 2008 WL 1787234 (M.D. Fla. 2008)). The court rejected

⁵ "K. Doc." refers to the docket in *Kirkland*.

Kirkland's homestead argument and imposed an equitable lien on the Isleworth Home of more than \$2 million. The court determined it was "empowered to enter both the equitable lien and to direct the sale of the ... home" because "the instant action is an equitable receivership." 2008 WL 1787234 at *5 (emphasis added). As such, the Court approved the receiver's proposed sale and ordered "Kirkland and anyone else residing in the Isleworth House with him ... to vacate the Isleworth House and remove their furnishings and personal possessions...." *Id.* at *2. The court directed "the U.S. Marshal ... to take any and all necessary action to remove any resident or furnishings and possessions from the house." *Id.*

Finally, *C.F.T.C. v. Hudgins*, Case No. 6:08-cv-00187, 620 F. Supp. 2d 790 (E.D. Tex.), involved a Ponzi scheme operated by George D. Hudgins ("**Hudgins**"), who transferred scheme proceeds to Wendy Silette ("**Silette**"), his girlfriend. *See* 620 F. Supp. 2d at 792. Silette then used the money to retire the mortgage on her Florida condominium. *Id.* The receiver filed a motion for turnover, and applying federal receivership and Florida law, the court rejected Silette's claim of homestead protection and imposed an equitable lien on the condominium in favor of the receiver. *Id.* at 794-95. As in *Kirkland*, the court expressly noted that because it "has authority to impose an equitable lien, it also has authority to direct the sale of the home." *Id.* at 795 (emphasis added). The court signed the receiver's proposed order, a copy of which is attached to the Wiand Declaration as **Exhibit I**. The order provided that "the Receiver holds all right, title, and interest in the Condo, and is entitled to sole possession and control of the Condo." *Id.* at 1. To further ensure marketable title, the court directed Silette to execute a quitclaim deed in favor of the receiver. *Id.* Finally, it directed her to "have fully and completely vacated the Condo" by a time and date certain. *Id.* at 2.

In short, this Motion asks the Court to enforce the Receiver's constructive trust and equitable lien by applying the turnover procedures previously utilized in *Aquacell* to the Property, which procedures are consistent with those used in both *Kirkland* and *Hudgins*, so that the Receiver can arrange a private sale under Section 2001(b). *See also F.T.C. v. Am. Precious Metals, Inc.*, 2017 WL 1323466 (S.D. Fla. Apr. 10, 2017) (noting “[o]nce an equitable lien is imposed, the property can be sold and the proceeds applied in favor of the lien holder” and ordering homeowner to cooperate with receiver to effectuate sale); *F.T.C. v. Para-Link Int'l, Inc.*, 2001 WL 34107045 (M.D. Fla. May 30, 2001) (expanding receivership to include home funded with scheme proceeds and directing receiver to sell property). Specifically, if the Court grants this Motion, thereby transferring title to the Receiver and directing Lee and Sommers-Lee to vacate the Property, the Receiver will immediately list the property for sale. He will ultimately move the Court to approve the sale, as he has done numerous times in the past.⁶ *See, e.g.*, Docs. 1050, 1075, 1110, 1151, 1177, 1230, 1301.

Application of the procedures used in *Aquacell* and the provisions of Section 2001(b) will (1) allow the Receiver to market the Property free of interference from Lee or Sommers-Lee; (2) likely ensure the Property is sold for a higher value than could be obtained at a public foreclosure auction; (3) prevent intentional or negligent damage to the Property that could occur while a foreclosure proceeding is pending; (4) facilitate the quickest resolution

⁶ The Receiver has previously asked the Court to depart from certain components of Section 2001(b) (like to requirement to obtain three appraisals) based on market conditions and asset values, and he might do so again here if conditions warrant after he has had opportunity to inspect and market the Property.

of this Receivership; and (5) conserve judicial and receivership resources by resolving this issue in this action.

II. IN THE ALTERNATIVE, THE COURT CAN FORECLOSE THE EQUITABLE LIEN USING SUMMARY PROCEDURES

If the Court declines to order turnover of the Property so that the Receiver can negotiate a private sale pursuant to Section 2001(b), the Receiver respectfully asks that the Court treat this motion, in the alternative, as a request to foreclose the equitable lien pursuant to Fla. Stats. § 702.10 (“**Section 702.10**”) using summary procedures. As an initial matter, the procedures set forth in Section 702.10 apply “[a]fter a complaint in a foreclosure proceeding has been filed” (*see* Fla. Stats. § 702.10(1)), but because this is a federal equity receivership, the Court is authorized to foreclose the equitable lien using summary procedures.⁷ *See, e.g., S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (authorizing use of summary procedures and noting “[t]he district court has broad powers and wide discretion to determine relief in an equity receivership”); *S.E.C. v. Wencke*, 783 F.2d 829, 835-36 (9th Cir. 1986) (affirming use of summary procedures and rejecting argument Receiver was required to file “a formal complaint” and serve “summons”); *In re San Vicente Medical Partners Ltd.*, 962 F.2d 1402, 1408 (9th Cir. 1992) (“In sum, a district court has the power to include the property of a non-party ... in an SEC receivership order as long as the non-party ... receives actual notice and an opportunity for a hearing.”); *Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1133 (D. Ariz. 2006) (“A receiver in a S.E.C. action may

⁷ If the Court declines to either order turnover of the Property or to foreclose the equitable lien through the use of summary procedures in this action, the Receiver will file an ancillary foreclosure action against Lee, but that would significantly hinder the Receiver’s ability to promptly satisfy the equitable lien and wind up this Receivership.

petition the court for an order to show cause against a possessor of money belonging to the receivership who is not a party to the original S.E.C. action. This sort of summary proceeding satisfies the requirements of procedural due process so long as the non-party is provided with adequate notice and opportunity to be heard.” (citation omitted)); *S.E.C. v. Abbondante*, 2012 WL 2339704, *2 (D.N.J. 2012) (“Summary proceedings may be conducted without formal pleadings, on short notice, without summons and complaints, generally on affidavits, and sometimes even ex parte.”).

Section 702.10 provides for expedited foreclosure proceedings through the issuance of an order to show cause based on a verified complaint that “alleges a cause of action to foreclose on real property.” Fla. Stats. 702.10(1). Here, this motion is verified (and it replaces the need for a complaint because the Receiver requests the Court employ summary procedures), and it alleges a cause of action for foreclosure based on the Receiver’s equitable lien against the Property. Thus, the Court may “promptly issue an order directed to [Lee and Sommers-Lee] to show cause why a final judgment of foreclosure should not be entered.” *Id.* Section 702.10(1)(a)(5) expressly authorizes Lee to file any defenses to foreclosure by motion (except any alleged homestead protection, as the Bankruptcy Court has already rejected that defense (*see* Ex. A at 8-9)), and if he does so, “the hearing time [on the order to show cause] may be used to hear [his] motion.” If Lee presents any non-homestead defenses, “the court shall then determine whether there is cause not to enter a final judgment of foreclosure. If the court finds that [Lee] has not shown cause, the court shall promptly enter a judgment of foreclosure.” Fla. Stats. § 702.10(1)(d). As the Bankruptcy Court has already recognized, Lee used money from Nadel’s Ponzi scheme – *i.e.*, money stolen from other

victims and fraudulently transferred to Lee – to purchase and improve the Property. *See Ex. A at 16.* As such, the Lees have no defenses to foreclosure of the Receiver’s equitable lien.

Fla. Stats. § 45.031 provides procedures for use “[i]n any sale of real or personal property under an order of judgment,” but as opposed to Section 2001(b), those procedures delegate numerous tasks to the Clerk of the Court instead of the Receiver, thereby expending judicial resources, and they result in a public auction, which will not likely garner as much value as a private sale. Further, they apply “as an alternative to any other sale procedure if so ordered by the court.” Fla. Stats. § 45.031. As such, the Court can enter a final judgment of foreclosure and order the Property sold at auction, but the Receiver respectfully requests the Court order turnover, as described in Section I, so that he can arrange a more efficient private sale of the Property pursuant to Section 2001(b).

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that this Court enter an order, in substantially the form attached hereto as **Exhibit 1**, granting the Receiver possession of and title to the Property. Exhibit 1 is substantively identical to the Court’s order in *Aquacell* with the addition of two provisions from the order in *Kirkland*. In the alternative, the Receiver requests the Court order Lee and Sommers-Lee to show cause why it should not enter a final judgment of foreclosure on the Receiver’s equitable lien.

LOCAL RULE 3.01(g) CERTIFICATION

Counsel for the Receiver has conferred with counsel for the SEC and is authorized to represent to the Court that the SEC has no objection the relief requested in this motion.

Counsel for the Receiver has conferred with counsel for Lee and Sommers-Lee, and they oppose the relief requested in the motion.

RECEIVER'S VERIFICATION

I declare and affirm under the penalties of perjury that the foregoing facts are true and correct to the best of my knowledge and belief.

s/Burton W. Wiand

Burton W. Wiand, as Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and also served a copy of this motion by email and US Mail on the following:

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