

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

CASE NO. 8:09-cv-0087-T-26TBM

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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.

---

**OBJECTION AND OPPOSITION TO RECEIVER'S MOTION TO APPROVE  
DETERMINATION AND PRIORITY OF CLAIMS, (D.E. 675) AND  
SUPPORTING MEMORANDUM OF LAW**

TRSTE, Inc.<sup>1</sup> ("TRSTE"), the Trustee holding legal title to North Carolina real property known as Laurel Mountain Property<sup>2</sup> ("Laurel Mountain"), and Wells Fargo Bank, N.A. ("Wells Fargo"),<sup>3</sup> as beneficiary of a Deed of Trust held by TRSTE, hereby

---

<sup>1</sup> TRSTE, Inc. is a Virginia corporation registered to do business in North Carolina.

<sup>2</sup> The real property at issue here is described by the Receiver as, "approximately 420 acres near Asheville, North Carolina in Buncombe and McDowell counties, intended for development of home-sites. . ." [D.E. 685, p. 16], and more particularly described in the Deed of Trust appended to Exhibit A, Declaration of TRSTE records custodian.

<sup>3</sup> Wells Fargo is the successor by merger to Wachovia Bank, N.A. ("Wachovia").

file this Objection and Opposition to Receiver's Unopposed 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 (DE 675) ("Receiver's Motion"),<sup>4</sup> on the grounds that this Court and the Receiver lack jurisdiction over the Laurel Mountain real property titled to TRSTE because:

- The Receiver failed to follow the jurisdictional requirements of 28 U.S.C. § 754 (Receivers of property in different districts); and
- Laurel Preserve, LLC and the Laurel Mountain property is already under the jurisdiction of the United States District Court for the Southern District of New York, and were forfeited to the United States in a Preliminary and Final Order of Forfeiture signed October 21, 2010.<sup>5</sup>

In addition to the above jurisdictional issues, the Receiver's failure to provide TRSTE, the Trustee holding title, with *any* notice that the property was part of the Receivership, deprived TRSTE and Wells Fargo of an opportunity to file a timely claim and be heard as required under the Fifth Amendment Due Process clause.

In support of this Objection and Opposition, TRSTE and Wells Fargo, as beneficiary of the Deed of Trust, respectfully submit the following memorandum of law.

---

<sup>4</sup> In accordance with this Court's September 24, 2009 Order [D.E.207], which stated it was intended "to prevent any subsequent motions to intervene which would require the SEC, the Receiver, and the Court to expend valuable time and resources," TRSTE and Wells Fargo have refrained from seeking intervention as the vehicle for protecting their interest in the Laurel Mountain real property. However, to the extent the Court now deems a motion to intervene helpful or necessary, TRSTE and Wells Fargo request the opportunity to submit such motion. *See SEC v. Flight Transportation Corp.*, 699 F. 2d 943 (8<sup>th</sup> Cir. 1983).

<sup>5</sup> This Order was entered into the record on December 2, 2010 as [D.E.78], Southern District New York.

## MEMORANDUM OF LAW

The Receiver's Motion [D.E. 675] in effect seeks leave to exercise dominion and control of property over which, by operation of law, he has been divested of jurisdiction and in contravention of the Fifth Amendment Due Process rights of the title holder and beneficial owner. Such action should not be permitted.

### **I. Factual Background**

On January 21, 2009, a sealed criminal complaint was filed in the United States District Court for the Southern District of New York charging Arthur Nadel ("Nadel") with securities and wire fraud. That same day, the Securities and Exchange Commission initiated this case, filing a complaint, seeking a preliminary injunction freezing the assets of Nadel, and requesting the appointment of a Receiver over property identified in the pleadings. In a letter dated February 6, 2009, the Receiver purported to give Wachovia notice that there was receivership property in which it had an interest. See Exhibit B. The letter is directed to "Wachovia Commercial Loan Services" at a post office box address in Atlanta, Georgia. *Neither the letter nor its accompanying documents identify Laurel Preserve, LLC as a receivership entity.*<sup>6</sup> The letter specifically requests, "that you provide us with a description of your relationship and the extent of any outstanding obligations between you and any of the Receivership Entities." It was not until **after** the purported notice letter was sent that the Receiver sought to add Laurel Preserve, LLC as a Receivership Entity [D.E. 36]. Laurel Preserve, LLC became a Receivership Entity on February 11, 2009 [D.E. 44], but the Receiver **never** supplemented his earlier letter to

---

<sup>6</sup> Laurel Preserve, LLC is a North Carolina entity that was controlled by Arthur Nadel. The 420 acres of real property located in Buncombe and McDowell counties, North Carolina referred to herein as Laurel Mountain was titled to Laurel Preserve, LLC until May 2, 2008 when legal title was conveyed to TRSTE to hold in trust under a Deed of Trust to secure a \$1.9 million loan Wachovia made to Laurel Preserve, LLC.

Wachovia with the new Order identifying Laurel Preserve, LLC. Moreover, although the Motion seeking to add Laurel Preserve, LLC. as a Receivership Entity identifies the Laurel Mountain real property as an asset it does not mention that a search of the public records shows that title to the real property was held by TRSTE, in trust for Wachovia as security for a loan made May 2, 2008. The Receiver never provided TRSTE notice by any means at any time. See Exhibit A, Declaration of TRSTE records custodian.

More importantly, once the Court included the Laurel Mountain property in the receivership, the Receiver **did not** within 10 days, or anytime thereafter, file copies of the order of appointment in the Western District of North Carolina as explicitly required by 28 U.S.C. §754. See Exhibit C, Declaration of Mayda Nahhas.

Nadel was arrested January 27, 2009 on a warrant issued by the Southern District of New York. On April 28, 2009, a Grand Jury sitting in the Southern District of New York returned an Indictment charging Nadel with multiple counts of securities, wire and mail fraud, and sought the forfeiture of, among other things, the Laurel Mountain property. On January 24, 2010, Nadel changed his plea to guilty and on October 21, 2010, he was sentenced in accordance with Fed. R. Crim. P. 32 and 32.2. As part of his sentence<sup>7</sup> the United States District Court for the Southern District of New York forfeited Laurel Preserve, LLC and the Laurel Mountain property to the United States, subject to the provisions of 21 U.S.C. § 853(n), among other pertinent forfeiture provisions. See [D.E. 78, SDNY], Exhibit D, Preliminary Order of Forfeiture / Final Order of Forfeiture as to Defendant's Interest in Specific Property.

---

<sup>7</sup> Forfeiture is part of the sentence. See *Libretti v. United States*, 516 U.S. 29, 49 (1995).

## II. Legal Argument

### A. The Failure to File Copies of the Order Appointing Receiver and Complaint With the District Court in the Western District of North Carolina has Divested the Receiver of Jurisdiction and Control Over the Laurel Mountain Real Property.

The Receiver's reach is constrained by the provisions of 28 U.S.C. § 754 which give a receiver great reach but only on condition that:

Such receiver *shall*, within ten days after the entry of his order of appointment, file copies of the complaint and such order of appointment in the district court for each district in which property is located. The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.

28 U.S.C. § 754 (emphasis added).

The provision is not discretionary, it is mandatory. The Laurel Mountain property, by the Receiver's own description is located in Buncombe and McDowell counties, North Carolina.<sup>8</sup> Searches of the records for the Western District of North Carolina, which encompasses Buncombe and McDowell counties, show no record of any filing by the Receiver. See Exhibit C, Nahhas Declaration. This failure to follow the jurisdictional requirements of the law has removed this property from the receivership and deprived this Court of jurisdiction over it. See *e.g.*, *Securities and Exchange Commission v. Bilzerian*, 378 F.3d 1100, 1103-1104 (D.C. Cir. 2004); *Securities and Exchange Commission v. Kirkland*, No. 6:06-cv-183-Orl-28KRS, 2006 WL 3388463, at \*2 (M.D. Fla. Nov. 21, 2006) (finding that the Court did not have jurisdiction over the nonparty's interest in property located in Georgia, because the receiver failed to file copies of the complaint and order of appointment in the foreign county pursuant to 28 U.S.C. § 754).

---

<sup>8</sup> See Exhibit A, Declaration of TRSTE custodian of records.

Even if the Court were to now re-appoint the Receiver so he could comply with the law, it would be futile because, as described below, another United States District Court has assumed jurisdiction over the property. Accordingly, the Receiver, and implicitly this Court, are divested of jurisdiction and control of Laurel Preserve, LLC and Laurel Mountain.

**B. The Receivership Entity Laurel Preserve, LLC and Laurel Mountain Property are Already Under the Jurisdiction of the United States District Court for the Southern District of New York, and Forfeited to the United States in an Order of Forfeiture Signed October 21, 2010.**

At the time of his arrest on December 27, 2009, Nadel came under the jurisdiction of the United States District Court for the Southern District of New York. On April 28, 2009, a Grand Jury sitting in the Southern District of New York returned an Indictment charging Nadel with multiple counts of fraud and seeking the forfeiture of specifically identified property that included, “[a]ll right, title, and interest in the entities known and described as Laurel Mountain Preserve, LLC, Laurel Preserve, LLC, . . . including but not limited to 420 acres in Buncombe County and McDowell County, North Carolina,” put the Securities and Exchange Commission and Receiver on notice that it was the intent of the United States in the Southern District of New York to seek the forfeiture of the Receivership Entity Laurel Preserve, LLC and the Laurel Mountain property pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461. See [D.E. 18, SDNY], Exhibit E, Indictment. Nonetheless, the Receiver did not take any action to ensure he in fact obtained and maintained jurisdiction. See *supra*. In the meantime, on February 24, 2010, Nadel entered a guilty plea and agreed to forfeit to the United States a sum of money and property including:

(g) All right, title, and interest in the entities known and described as Laurel Mountain Preserve, LLC, Laurel Preserve, LLC, and Laurel Mountain Preserve Homeowners Association, Inc., including, but not limited to, 420 acres in Buncombe County and McDowell County, North Carolina;

See [D.E. 78, SDNY], Exhibit D, Preliminary Order of Forfeiture/Final Order of Forfeiture as to Defendant's Interest in Specific Property.

On October 21, 2010, the District Court in New York entered the Order forfeiting "All of the defendant's right, title and interest in the Specific Properties"<sup>9</sup> . . ." and authorized the United States Marshals Service to "seize the Specific Properties and hold the Specific Properties in its secure, custody and control." Without a doubt, both the Receivership Entity Laurel Preserve, LLC and Laurel Mountain, are now in the custody and control of the United States Marshals Service and cannot therefore be a part of the receivership.

**C. The Failure to Give Notice and an Opportunity to be Heard Before Appropriating Real Property is a Violation of Fifth Amendment Due Process.**

Assuming this Court had jurisdiction over Laurel Mountain, which as explained above, it does not, the Receiver's failure to afford TRSTE or Wells Fargo notice of his intention to appropriate Laurel Mountain before he exercised dominion over the property, constitutes a taking in violation of the Fifth Amendment Due Process Clause. While district courts have broad powers and wide discretion to determine relief in an equity receivership such as this one, it is not unfettered. Indeed, a district court's use of summary proceedings must still, of course, comply with due process. *See Securities and Exchange Commission v. Pension Fund of America L.C.*, No. 09-10241, 2010 WL

---

<sup>9</sup> "Specific Properties" is defined in the October 21, 2010 Order as including Laurel Preserve, LLC and the Laurel Mountain real property.

1794388, at \*4 (11<sup>th</sup> Cir. May 6, 2010); *Securities and Exchange Commission v. Elliott*, 953 F.2d 1560, 1566 (11<sup>th</sup> Cir. 1992), *rev'd in part on other grounds*, 998 F.2d 922 (11<sup>th</sup> Cir. 1993).

While a district court has the power to include the property of a nonparty in an SEC receivership order, it can only do so if the nonparty receives actual notice and an opportunity to be heard. *Securities and Exchange Commission v. Whitworth Energy Resources Ltd.*, 2000 WL 1770652, at \*4 (9<sup>th</sup> Cir. Dec. 1, 2000) (finding that investors' due process rights weighed heavily in favor of affording them a right to be heard prior to the sale of their property). Here, neither TRSTE nor Wells Fargo received notice of the Receiver's intention to include Laurel Mountain in the receivership. While arguably a "notice" letter was sent to Wachovia Commercial Loan Services on February 6, 2009, this letter did not, and could not, put TRSTE or Wells Fargo (then operating as Wachovia) on notice of the Receiver's intentions with respect to Laurel Mountain.

In determining if summary proceedings comply with due process, the Court "must look at the actual substance, not the name or form, of the procedure to see if the claimants' interests were adequately safeguarded." *Elliott*, 953 F. 2d. at 1567. The February 6, 2009 letter included receivership documents that identified various properties included in the receivership, *but not* Laurel Preserve, LLC, nor Laurel Mountain. See Exhibit B. Neither were mentioned because as of February 6, 2009, neither Laurel Preserve, LLC nor Laurel Mountain were within the scope of the receivership order. In fact, it was not until February 11, 2009, five days *after* the February 6<sup>th</sup> letter was sent to Wachovia Commercial Loan Services, that this Court expanded the receivership to include, among other things, Laurel Preserve, LLC and Laurel Mountain. See D.E. 44.



At no time after February 11, 2009 did TRSTE receive any Order, Claim Notice, judicial pleading, or correspondence of any kind regarding Laurel Preserve, LLC or Laurel Mountain from the Receiver identifying a claim against Laurel Preserve, LLC, or Laurel Mountain. See Exhibit A, Declaration of TRSTE custodian of records; see also Exhibit F, Declaration of W. Samuel Woodard. Generally, a district court's use of summary proceedings complies with due process if the parties are permitted to "present evidence when the facts are in dispute and to make arguments regarding those facts." *Elliott*, 953 F. 2d at 1567. By not providing notice that the Laurel Mountain real property was added to the receivership, TRSTE and Wells Fargo were deprived of the opportunity to present a claim and submit evidence of the facts or to make arguments before the Court, and accordingly were deprived of Due Process.

### **III. Conclusion**

For the foregoing reasons, this Court should deny Receiver's Motion with respect to Receivership Entity Laurel Preserve, LLC and its assets, including Laurel Mountain.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER  
ALHADEFF & SITTERSON, P.A.

By: /s/ Ana T. Barnett

Ana T. Barnett

[abarnett@swmwas.com](mailto:abarnett@swmwas.com)

Alice R. Huneycutt

Florida Bar No.: 0293105

[ahuneycutt@stearnsweaver.com](mailto:ahuneycutt@stearnsweaver.com)

Julie Fishman Berkowitz

Florida Bar No.: 17293

[jberkowitz@stearnsweaver.com](mailto:jberkowitz@stearnsweaver.com)

150 West Flagler Street – Suite 2200

Miami, FL 33130

Telephone No.: (305) 789-3200

Facsimile No.: (305) 789-3395

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21<sup>st</sup> day of December, 2011, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

/s/ Ana T. Barnett

**SERVICE LIST**

**Securities and Exchange Commission v. Arthur Nadel, et al.**  
**CASE NO. 8:09-cv-0087-T-26TBM**

Gianluca Morello, Esq.  
Wiand Guerra King, P.L.  
3000 Bayport Drive  
Suite 600  
Tampa, FL 33607

*Counsel for Receiver, Burton W. Wiand*

Arthur G. Nadel  
Register No. 50690-018  
FCI Butner Low  
Federal Correctional Institution  
P. O. Box 999  
Butner, NC 27509

*Via U.S. Mail*