

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

SECURITIES AND EXCHANGE  
COMMISSION

Plaintiff,

v.

ORAL ARGUMENT  
REQUESTED

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.

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**MOTION OF WELLS FARGO BANK, N.A. (I) FOR RELIEF FROM  
INJUNCTION OR, IN THE ALTERNATIVE, (II) TO COMPEL THE  
RECEIVER TO ABANDON THE PROPERTY LOCATED AT  
841 SOUTH MAIN STREET, GRAHAM, NORTH CAROLINA**

Wells Fargo Bank, N.A. ("Wells Fargo"),<sup>1</sup> a valid secured creditor and party in interest herein, hereby files this motion (the "Motion") seeking (i) relief from this Court's injunction so that it may foreclose on the property located at 841 South Main Street,

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<sup>1</sup> Wells Fargo is successor by merger to Wachovia Bank, N.A.

Graham, North Carolina (the "Rite Aid Property"), or, in the alternative, (ii) to compel the Receiver to abandon the Rite Aid Property. In support of this Motion, Wells Fargo states as follows:

**A. The Receivership Case**

1. On January 21, 2009, the Securities and Exchange Commission (the "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 ("Scoop Capital") and Scoop Management, Inc. ("Scoop Management") and Relief Defendants Scoop Real Estate, L.P. ("Scoop RE"); Valhalla Investment Partners, L.P.; Valhalla Management, Inc.; Victory Fund, Ltd.; Victory IRA Fund, Ltd.; Victory IRA Fund, LLC; Viking Fund, LLC; and Viking Management, LLC (the "Order Appointing the Receiver"). (*See generally* Order Appointing Receiver (Doc. No. 8)). The Court subsequently granted several motions to expand the scope of the Receivership Entities to include other entities owned or controlled by Arthur Nadel ("Nadel"). (*See generally* Doc. Nos. 17, 44, 68, 81, 153, 172, 454).

2. The Receiver has taken possession of the Rite Aid Property pursuant to the Order Appointing the Receiver.

3. The Order Appointing the Receiver enjoins all parties with notice of the Order "from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the

property of the Defendants or Relief Defendants . . ." Order Appointing the Receiver, ¶15.

**B. The Rite Aid Property**

4. The Rite Aid Property consists of approximately 1.18 acres of land and a 13,824 square foot building. The Rite Aid Property was purchased in May 2005 by Scoop RE in an arms'-length transaction for \$5,310,000. The Rite Aid Property is currently being leased to a Rite-Aid Pharmacy for \$33,073.08 per month pursuant to a triple net lease which expires in 2024 (subject to potential extensions). The total estimated rent collected by the Receiver to date exceeds \$1.19 Million.

**C. The Loan Documents and Continued Breaches Thereof**

5. On May 23, 2005, Wells Fargo and Scoop RE entered into a standard loan transaction (described below) pursuant to which Wells Fargo served as lender in connection with the Scoop RE's purchase of the Rite Aid Property. As of January 10, 2012, Scoop RE was indebted to Wells Fargo in the total approximate amount of \$3,147,427.00, all pursuant to that certain Promissory Note dated as of May 23, 2005 (as amended, restated, supplemented, or otherwise modified from time to time, the "Note"), between Wells Fargo and the Scoop RE.

6. In order to secure the indebtedness under the Note, Scoop RE executed and delivered to Wells Fargo a Deed of Trust and Security Agreement (as amended, restated, supplemented, or otherwise modified from time to time, the "Deed of Trust")<sup>2</sup>

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<sup>2</sup> The legal description of the Property is included in the Deed of Trust, which legal description is incorporated in this Motion by this reference.

and Assignment of Rents and Leases ("Assignment of Rents"), each dated May 24, 2005.<sup>3</sup> Among other things, pursuant to the Loan Documents, Scoop RE granted Wells Fargo security interests in and liens upon the Rite Aid Property, including but not limited to all rents, issues, revenues and profits generated by the operation of the Rite Aid Pharmacy (the "Cash Collateral").

7. Pursuant to the Loan Documents, Wells Fargo is a first priority, senior secured creditor of Scoop RE. Wells Fargo has valid, perfected, and not otherwise avoidable first-priority security interests in the Rite Aid Property and Cash Collateral (collectively, the "Collateral").

8. Notwithstanding the fact that the Receiver has had possession of the Rite Aid Property since January 2009 and has collected rents from Rite Aid in an amount likely in excess of \$1.19 Million (which is Wells Fargo's Cash Collateral), the Receiver has failed to turnover those proceeds to Wells Fargo. While the Receiver did pay interest on this loan through October 2009, he has not made any payment to Wells Fargo since that date. As a result, the receivership estate is in continuing default under the Loan Documents and Wells Fargo's Collateral has been severely impaired as a result.

#### **D. The Receiver's Motion to Sell the Property**

9. On January 6, 2012, the Receiver filed a *Verified Motion to Approve Sale of Real Property Located in Graham, Alamance County, North Carolina* (the "Sale Motion") (Doc. No. 706). Pursuant to the Sale Motion, the Receiver seeks to sell the Rite Aid Property at a price significantly below market value (\$2.4 Million) and well below

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<sup>3</sup> The Note, Deed of Trust and Assignment of Rents are collectively referred to herein as the "Loan Documents", copies of which are annexed hereto as Composite Exhibit A.

the total amount of Wells Fargo's secured claim, which currently aggregates approximately \$3,147,427.00.

10. Contemporaneously with the filing of this Motion, Wells Fargo has filed a comprehensive objection to the Receiver's Sale Motion (the "Objection"),<sup>4</sup> asserting that motion should be denied for the following reasons: (1) the Receiver's contemplated private sale does not comply with the mandated procedural safeguards set forth in 28 U.S.C. § 2001(b), which require the Court to appoint three disinterested persons to appraise the property prior to any such sale; (2) the Receiver attempts to sell the Rite Aid Property at a price significantly below market value (\$2.4 Million) and well below the total amount of Wells Fargo's secured claim; and (3) the Receiver seeks to effectuate an impermissible taking of Wells Fargo's state law property rights in contravention of the due process clause of the Fifth Amendment.

### **MEMORANDUM OF LAW**

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**A. Wells Fargo Is Entitled to Relief From the Court's Injunction in Order to Foreclose on Its Collateral.**

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11. A court has the power to grant and continue "stays to prevent interference with the receivership estate." *Commodity Futures Trading Com. v. Chilcott Portfolio Mgmt.*, 713 F.2d 1477, 1483 (10th Cir. 1983). To preclude other individuals from proceeding with their case in another forum, however, one must "make a strong showing" that a receivership is "necessary and that the disadvantageous effect on others would be clearly outweighed." *Id.* at 484. Indeed, "[a] receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an

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<sup>4</sup> The Objection is incorporated in its entirety in this Motion by this reference.

end in itself." *Kelleam v. Maryland Cas. Co.*, 312 U.S. 377, 381 (1941) (quoting *Gordon v. Washington*, 295 U.S. 30, 37, 55 (1935)). Consequently, a receivership must be monitored to ensure it is still serving the function for which it was created. *See id.* (citing *Michigan v. Michigan Trust Co.*, 286 U.S. 334, 345 (1932)).

12. In the case of *Securities & Exchange Commission v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984), the court set forth three factors that are relevant here in determining whether the stay should be lifted for the Rite Aid Property. First, the Court should determine whether the stay preserves the status quo or whether the creditor "will suffer substantial injury if not permitted to proceed." Second, the Court should look at the timing of the motion to lift stay to ensure the Receiver has had sufficient time to organize and understand the assets under his control. *Id.* Finally, the Court should determine whether the creditor's claims have merit. *Id.*

(i) ***The Receiver Has Failed to Maintain the Status Quo and Wells Fargo Has Suffered Substantial Injury as a Result.***

13. It indisputable that federal receivers such as Mr. Wiand are required to manage real estate according to the law of the state where the property is located. *See* 28 U.S.C. § 959(b) (noting receiver must manage and operate the property "in the same manner that the owner or possessor thereof would be bound to do" under applicable state law). Against this backdrop, the district court in *SEC v. Madison Real Estate Group*, specifically held that in order for a receiver to retain property in the estate, the receiver must preserve the status quo with the lender -- which includes bringing current the regular, monthly principal and interest payments, as well as property taxes. *See* 647 F. Supp. 2d at 1284-85 (citing *SEC v. Wencke*, 742 F.2d at 1231). Thus, at minimum,

Wells Fargo is entitled to monthly interest payments on the Rite-Aid Property loan during the pendency of this case. Here, the Receiver has been collecting substantial rent from Rite Aid (which is also Wells Fargo's Collateral) over the last three years and has failed to service the loan with Wells Fargo. The monthly rent on the property is \$33,073.08 and the total estimated rent collected by the Receiver exceeds \$1.19 Million. While the Receiver did pay interest on this loan through October 2009, he has not made any payment to Wells Fargo since that date.<sup>5</sup> As a result, Wells Fargo's Collateral has been severely impaired during the pendency of this case. The Receiver now seeks to further abrogate Wells Fargo's state law property rights by selling the Rite Aid Property for significantly less than Wells Fargo's valid secured claim, based upon unsupported allegations devoid of any factual support.

14. This lack of adequate protection represents sufficient cause to lift the injunction to allow Wells Fargo to exercise its state law rights and remedies. *See SEC v. Madison Real Estate Group*, 647 F. Supp. 2d at 1284-85; *Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources, Inc.)*, 54 F.3d 722, 729 (11th Cir. 1995) (" . . a creditor may obtain relief from the stay (1) for cause, including the lack of adequate protection of the creditor's interest in the collateral.") (citation omitted); *Old West Annuity & Life Ins. Co. v. Apollo Group*, 2006 U.S. Dist. LEXIS 68644, at \*16 (M.D. Fla. 2006) (noting that the stay can be terminated, annulled or modified because of a lack of

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<sup>5</sup> In accordance with this Court's September 24, 2009 Order (Doc. No. 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," Wells Fargo has refrained from seeking intervention as the vehicle for protecting its interests in the Rite Aid Property. To the extent the Court now deems a motion to intervene helpful or necessary, Wells Fargo requests the opportunity to submit such motion. *See SEC v. Flight Transportation Corp.*, 699 F.2d 943 (8th Cir. 1983).

adequate protection); *In re Murray Industries, Inc.*, 121 B.R. 635, 637 (Bankr. M.D. Fla. 1990) (lifting the stay for a secured creditor to initiate a state law action against a debtor where the creditor's interest was not adequately protected). Based on the foregoing, Wells Fargo satisfies the first *Wenke* factor for lifting the injunction herein.

**(ii) *The Receiver Has Had Sufficient Time to Understand the Assets Under His Control.***

15. The Receiver was appointed in January 2009, including as Receiver for Scoop RE, and he immediately took possession of the Rite Aid Property. The Receiver cannot credibly assert that he has not had sufficient time to understand the assets under his control. In fact, the Receiver concedes he has marketed the Rite Aid Property for sale since August 2009 and that he has had several offers on the property, with the highest offer of \$4,177,000 being received in August 2010 (*See Sale Motion* at p. 5). Incredibly, the Receiver now seeks to sell the Rite Aid Property at a price significantly below market value (\$2.4 Million) and well below the total amount of the Wells Fargo's secured claim. At the Receiver's proposed sale price, he concedes that there is no equity in the property. Accordingly, the injunction should be lifted and the property abandoned to Wells Fargo. *See, e.g., SEC v. Madison Real Estate Group*, 647 F. Supp. 2d at 1284-85 (lifting stay to allow secured creditors to foreclose on various properties because there was no equity in the properties). Accordingly, this *Wenke* factor also favors lifting the injunction against the Rite Aid Property.

**(iii) *Wells Fargo's Secured Claim Has Merit.***

16. Finally, the third factor supports Wells Fargo's position. Under the third prong of the *Wencke* test, the party requesting a lift of stay is not required to show that it

is likely to prevail on the merits. Rather, the inquiry is whether “the [moving] party has colorable claims to assert which justify lifting the receivership stay.” *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3d Cir. 2005) (emphasis in original) (citing *Wencke*, 742 F.2d at 1232). Pursuant to the Loan Documents, Wells Fargo is a first priority, senior secured creditor of Scoop RE. Wells Fargo has valid, perfected, and not otherwise avoidable first-priority security interests in the Rite Aid Property and Cash Collateral. Significantly, the Receiver does not allege – because he cannot – that Wells Fargo's security interests in the Rite Aid Property and Cash Collateral are not valid under North Carolina law. “It is well-established that a ‘receiver appointed by a federal court takes property subject to all liens priorities or privileges existing or accruing under the laws of the State.’” *In re Real Property Located at Jupiter Drive, Salt Lake City, Utah*, 2007 U.S. Dist. LEXIS 65276, at \*10 (D. Utah June 7, 2007) (quoting *Marshall v. New York*, 254 U.S. 380, 385 (1920)). Consequently, Wells Fargo's priority interest remains intact despite the receivership. *See id.* at \*12; *see generally* Objection. Because “one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors.” *Id.* at \*10–11 (quoting *Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 412 (1938)). Thus, while this Court may have broad powers to carry out the purpose of the receivership, it should not put the interests of the investors and the receivership over the interests of secured creditors. *See SEC v. Madison Real Estate Group*, 647 F. Supp. 2d at 1278-84.

17. On December 7, 2011, the Receiver filed a claims determination (Doc. No. 675), seeking to disallow Wells Fargo's security interests in the Rite Aid Property,

primarily based on purported "shadow accounts" Arthur Nadel allegedly maintained at Wells Fargo. Importantly, Wells Fargo's objection to the Receiver's claims determination motion (Doc. No. 689) and objection to the Sale Motion (filed contemporaneously herewith) set forth the many reasons why the Receiver's claims have no merit and why Wells Fargo's secured claim is valid under North Carolina state law. Those reasons include, but are not limited to: (1) the Receiver lacks standing to pursue the "shadow account" claims; (2) the Receiver's "shadow account" claims are barred by the *in pari delicto* doctrine; (3) the Receiver cannot subordinate a creditor's valid secured claim based merely on the presence of red flags or the indicia of fraud, particularly in connection with wholly unrelated transactions; (4) the Receiver's contemplated private sale of the Rite Aid Property does not comply with the mandated procedural safeguards set forth in 28 U.S.C. § 2001(b), which require the Court to appoint three disinterested persons to appraise the property prior to any such sale; (5) the Receiver cannot sell the Rite Aid Property at a price significantly below market value (\$2.4 Million) and well below the total amount of Wells Fargo's secured claim; and (6) the Receiver's Sale Motion seeks to effectuate an impermissible taking of Wells Fargo's state law property rights in contravention of the due process clause of the Fifth Amendment.

18. Apart from these reasons, all the Receiver has done is threaten to assert a separate cause of action in another proceeding. That claim has nothing to do with Wells Fargo's security interest, established in 2005, under North Carolina law. The Receiver can litigate the threatened claim if he wishes but that should not affect Wells Fargo's ability to enforce its state law property rights. *See Sender v. The Bronze Group, Ltd. (In*

*re Heded Investments Assocs., Inc.*), 380 F.3d 1292, 1298-1303 (10th Cir. 2004) (refusing to abrogate lender's secured claims despite (i) making loan a thinly capitalized corporate debtor that was being operated as a Ponzi scheme, (ii) lender's lack of due diligence in making loan, and (iii) similarities existing between lender's return on the loan and returns promised to investors in Ponzi scheme); *see also Henry v. Lehman Commercial Paper, Inc. (In re First Alliance Mortg. Co.)*, 471 F.3d 977, 1007 (9th Cir. 2006) (refusing to subordinate secured lender's claim, thus allowing Lehman's \$77 Million secured claim despite Lehman's alleged involvement in aiding and abetting the debtor's fraudulent lending practices). Based on the foregoing, Wells Fargo's secured claim is colorable, and thus this *Wenke* factor also favors lifting the injunction against the Rite Aid Property.

**B. The Trustee Should Abandon the Rite Aid Property.**

19. On request of a party in interest, the Court may order the Receiver to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. *See SEC v. Madison Real Estate Group*, 647 F. Supp. 2d at 1278-84 ("If the value of the property is less than the loan amount . . . the disadvantages of keeping the property in the Receivership outweigh the advantages."); *see also* 11 U.S.C. § 554(b) (directing abandonment in bankruptcy cases when property is burdensome to the estate or is of inconsequential value and benefit to the estate). Wells Fargo seeks to compel the Receiver to abandon the receivership estate's interest in the Rite Aid Property. Where the estate has no equity in an asset, so that investors or unsecured creditors are unlikely to benefit from a sale of the property, it

is generally recognized that abandonment is the appropriate method of dealing with the asset, not liquidation. *See SEC v. Madison Real Estate Group*, 647 F. Supp. 2d at 1278-84; *In re: Feinstein Family P'ship*, 247 B.R. 502, 507-09 (Bankr. M.D. Fla. 2000). By the Receiver's own admission in his Sale Motion, the Rite Aid Property, which he seeks to sell for \$2.4 Million, has no value to the estate because Wells Fargo's secured claim currently exceeds \$3.1 Million. Thus, any potential value that the estate may gain from the sale of the Rite Aid Property is negated by Wells Fargo's valid secured claim and state law property interests.

20. If the sale of an asset will not generate funds for investors or unsecured creditors, abandonment is the proper course. *See In re Kent*, 411 B.R. 743, 751 (Bankr. M.D. Fla. 2009) (quoting *In re Rambo*, 297 B.R. 418, 433 (Bankr. E.D. Pa. 2003)). Accordingly, Wells Fargo requests this Court order abandonment of the receivership estate's interest in the Rite Aid Property.

### **CONCLUSION**

WHEREFORE, Wells Fargo respectfully requests that this Court enter an order (i) lifting the Court's injunction as it relates to the Rite Aid Property; (ii) directing the Receiver to commence payment of the receivership estate's obligations under the Loan Documents, plus attorney's fees and costs and to continue payment on a monthly basis until the Rite Aid Property is abandoned by the Receiver; (iii) compel the Receiver to abandon any interest in the Rite Aid Property; and (iv) for such other and further relief as the Court deems just and proper.

**LOCAL RULE 3.01(g) CERTIFICATION**

Counsel for Well Fargo has conferred with counsel for the Receiver and counsel for the Securities and Exchange Commission, and each indicated that they objected to and would oppose the relief requested in this Motion.

Dated this 19<sup>th</sup> day of January, 2012 in Tampa, Florida.

Respectfully submitted,

**AKERMAN SENTERFITT**

/s/L. Joseph Shaheen

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*Counsel for Wells Fargo, N.A.*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following:

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