

**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.

**RECEIVER'S VERIFIED RENEWED MOTION TO APPROVE
THE SALE OF REAL PROPERTY LOCATED IN
GRAHAM, ALAMANCE COUNTY, NORTH CAROLINA**

Pursuant to 28 U.S.C. § 754, 28 U.S.C. § 2001, Rule 66 of the Federal Rules of Civil Procedure, and Rule 3.01 of the Local Rules of the Middle District of Florida, Burton W. Wiand, as Receiver (the "**Receiver**"), respectfully renews his motion for the Court to enter an order in substantially the form attached as **Exhibit 1** approving the sale of Receivership property located in Graham, Alamance County, North Carolina (the

“**Property**”) in accordance with the terms of the Agreement of Sale and Purchase (the “**Agreement**”) between the Receiver and Trinet West, LLC, which is attached as **Exhibit 2**. Although the Property secures a loan made by Wachovia Bank, N.A., n/k/a Wells Fargo Bank, N.A. (“**Wachovia**”), and Wachovia filed a related claim in the claims process (which the Receiver has argued should be denied for several reasons), as discussed below the Court has the power to approve the sale and to order transfer of the Property free and clear of all claims, liens, and encumbrances. Legal, equitable, and factual circumstances establish this is warranted and in the best interest of the Receivership estate in light of the already substantially reduced value of the Property and the prospect of further significant reductions in its value.

Background

On January 21, 2009, the Securities and Exchange Commission (“**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.; 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 (“**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 Entities.**”

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 particular, the Receiver was directed to:

[t]ake immediate possession of all property, assets and estates of every kind of the [Receivership Entities], whatsoever and wheresoever located belonging to or in the possession of the [Receivership Entities], including but not limited to all offices maintained by the [Receivership Entities], rights of action, books, papers, data processing records, evidences of debt, bank accounts, savings accounts, certificates of deposit, stocks, bonds, debentures and other securities, mortgages, furniture, fixtures, office supplies and equipment, and all real property of the [Receivership Entities] wherever situated, and to administer such assets as is required in order to comply with the directions contained in this Order, and to hold all other assets pending further order of this Court

(*Id.* at 2.) The Receiver took possession of the Property pursuant to the Order Appointing Receiver. The Receiver now seeks to convey the Property by Receiver’s Deed, in accordance with the terms of the Agreement.

On January 6, 2012, the Receiver filed a Verified Motion to Approve the Sale of Real Property Located in Graham, Alamance County, North Carolina (the “**Verified Motion**”). (Doc. 706) Wachovia filed an objection to the sale, wherein it claimed to be a secured creditor. (Doc. 718) The Court subsequently denied the Verified Motion without prejudice to it being renewed after strictly complying with the provisions of 28 U.S.C. §2001(b)

regarding “the appointment of three disinterested appraisers and publication of the terms of the sale in a newspaper of general circulation.” (Doc. 726) Wachovia also filed a Motion to Compel the Receiver to Abandon the Property Located at 841 South Main Street, Graham, North Carolina, upon which the Court reserved ruling.¹ (Docs. 719, 776)

On March 2, 2012, this Court granted the Receiver’s Motion to Appoint Appraisers Pursuant to 28 U.S.C. § 2001 to Appraise Receivership Real Property in Graham, North Carolina to the extent that (a) Thomas J. Skeahan of CB Richard Ellis Valuation & Advisory Services (“**Skeahan**”), whose appointment Wachovia agreed to, was appointed as one of the three appraisers to appraise the Property; (b) Wachovia was directed to file the name of the second appraiser to appraise the Property with this Court on or before March 9, 2012; and (c) the Receiver was directed to file the name of the third appraiser to appraise the Property with this Court on or before March 9, 2012. (Doc. 739)

On March 8, 2012, the Receiver submitted Roscoe W. Shiplett, MAI, of Grubb & Ellis Landauer Valuation Advisory Services, LLC (“**Shiplett**”) as a qualified appraiser to be appointed to provide the required appraisal for the Property, and Wachovia submitted Carol Lomax Fortenberry of Fortenberry Lambert, Inc. (“**Fortenberry**”). (Docs. 781, 783) The Court subsequently entered an order on March 9, 2012 appointing Shiplett and Fortenberry as the additional two appraisers to appraise the Property, thereby completing the appointment of three disinterested appraisers in accordance with 28 U.S.C. § 2001(b). (Doc. 784)

On March 20, 2012, Skeahan, whose appointment Wachovia agreed with, submitted his firm’s appraisal of the Property to the Receiver, which was filed with the Court on April

¹ In an Order dated March 2, 2012, the Court stated that it will consider Wachovia’s claims at a later date after it resolves the motion to disqualify the Receiver and his law firm, as filed by Wachovia. (Doc. 776)

10, 2012 and is attached as **Exhibit 3**. (Doc. 812) As set forth in the appraisal, after conducting a thorough analysis of the Property, it was determined that the Property has a current market value of \$2,400,000.00. On April 4, 2012, Shiplett submitted his firm's appraisal of the Property to the Receiver, which was filed with the Court on April 10, 2012 and is attached as **Exhibit 4**. (Doc. 812) As set forth in the appraisal, after conducting a thorough analysis of the Property, it was determined that the Property has a current market value of \$2,600,000.00. Finally, on April 17, 2012, Fortenberry submitted her firm's appraisal of the Property to Wachovia, which is attached as **Exhibit 5**, wherein she determined that the Property has a current market value of \$3,740,000.00.² These three appraisals are sufficient to satisfy the appraisal requirements of 28 U.S.C. § 2001(b), as each was provided by an appraiser who is independent from the Receiver and has no interest in the proposed sale of the Property.

As discussed in detail below, the Receiver received a private sale offer of \$2,400,000.00 for the Property from Trinet West, LLC or its assigns (the "**Purchaser**") on September 15, 2011. The Receiver has caused a legal notice containing the terms of this private sale offer to be published in The Times-News – a newspaper of daily and general circulation based in the geographic area where the Property is located – from April 26, 2012 to May 5, 2012 in substantially the form attached as **Exhibit 6**. Publication of these terms for this period of ten consecutive days perfects the Receiver's compliance with 28 U.S.C. §

² Only four months ago, Wachovia independently retained Integra Realty Resources ("**Integra**") to appraise the Property. (Doc. 718-1) The appraisal submitted by Integra on December 13, 2011 suggested that the Property had a then-current market value of \$4,140,000.00. The fact that there is a \$400,000 difference between the appraisals Wachovia received from Integra and Fortenberry in the span of 18 weeks confirms, not only the arbitrary nature of the appraisals secured by Wachovia, but also the continued depreciation of the Property's value, which is discussed below.

2001(b). Upon completion of the publication period, the Receiver will disclose any qualifying competing bids (i.e., bids with a purchase price at least 10% higher than the purchase price in the Agreement attached as Exhibit 2) received in response to the published notice. The Receiver will notify the Court promptly if he receives such an offer prior to the Court's order on this matter seeking approval of the sale to Trinet West, LLC.

The Property

The Property is a commercial building located at 841 South Main Street in the City of Graham, Alamance County, North Carolina. The Property consists of approximately 1.18 acres of land and a 13,824 square-foot building. The Property was purchased by Receivership Entity Scoop RE in May 2005 for approximately \$5,310,000.00. The Property has received no significant improvements since being purchased by Scoop RE. The Alamance County Tax Collector appraised the taxable value of the Property as \$2,041,514.00 in 2009, 2010, and 2011. The Property is currently being leased by Rite-Aid Corporation (“**Rite-Aid**”) pursuant to a triple net lease which expires in 2024, and it houses a Rite Aid drugstore. A significant portion of the Property's value is directly attributable to the future income which will be generated by the lengthy Rite-Aid lease. Consequently, absent the income generated by the lease, the value of the Property would decrease substantially.

The Property was purchased, in part, with an interest-only loan in the amount of \$2,655,000.00 which Scoop RE obtained from Wachovia. This loan represented half of the total purchase price of the Property. The remaining balance and all closing costs were paid by Scoop RE using funds raised from Nadel's Ponzi scheme. In connection with the loan, Nadel signed a Promissory Note in favor of Wachovia. Nadel signed the Promissory Note in

his capacity as Managing Member of Scoop Capital, Scoop RE's general partner. A Deed of Trust and Security Agreement ("**Deed of Trust**") was also recorded with the Promissory Note, and Wachovia was given a security interest in the Property. The Promissory Note was subsequently modified twice by Nadel and Wachovia, with the second modification requiring that all principal and accrued interest be paid in full by May 23, 2009.

The Receiver was appointed in January 2009, including as Receiver for Scoop RE, and took possession of the Property. Although he did not renew the Promissory Note, he continued to make interest payments on the loan until October 27, 2009. No payments on the loan have been made since that time. To date, Wachovia has received a total of \$681,050.22 in payments on the loan, which represents 25.65% of the principal loan amount. All of the money paid to Wachovia was proceeds of Nadel's scheme – in other words, it was money stolen from investors.

The Receiver's Marketing Efforts and Previous Offers on the Property

The Receiver first marketed the Property to potential purchasers through his website, www.nadelreceivership.com, in a specific "Assets for Sale" section. The Receiver's initial marketing efforts revealed that, due to economic conditions and a depressed real estate market, the value of the Property was significantly lower than what Nadel had originally paid. The Receiver advised representatives of Wachovia of his plans to market the Property and sought recommendations and guidance from Wachovia as to the method and procedures for sale of the Property. The Receiver also sought suggestions from Wachovia representatives to improve his proposed marketing plan. After communicating with Wachovia and reviewing proposals from several brokers, the Receiver decided to list the

Property with one of the nation's largest and most successful commercial real estate brokerage firms, Holliday Fenoglio Fowler, LLC ("**HFF**"). The Receiver chose this specific real estate broker based on the recommendation and urging of Wachovia. (See correspondence between Wachovia and Receivership, dated May 15, 2009 and attached as **Exhibit 8**). The Receiver and HFF entered into an Exclusive Listing Agreement for the Property early in this Receivership, and HFF immediately began marketing the Property for sale. HFF's marketing efforts from August 2009 to the present have resulted in approximately fifteen offers to purchase the Property. The highest offer of \$4,177,000.00 was made in August 2010. Since then, offers have steadily decreased, and the lowest offer (of \$1,400,000.00) was made in September 2011. The factors contributing to the Property's decreasing value are explained in detail below.

The Receiver carefully evaluated all offers and attempted to negotiate to final contract those which he determined were acceptable and in the best interest of the Receivership estate. The Receiver vigorously pursued those offers, but none of them resulted in a final transaction: those potential buyers either failed to respond to the Receiver's efforts, retracted their offers, or terminated the contracts for various reasons. The purchasers at these levels were not able to complete a transaction, secure financing and subsequently appeared to not be realistic or qualified purchasers. As such, despite the Receiver's vigorous efforts, he was unable to sell the property under any of the earlier offers.

The Receiver was advised by HFF that it was unrealistic to anticipate qualified buyers who could perform at price levels above \$2.5 million. As identified in the Verified Motion and detailed below, the Receiver currently has a viable offer of \$2,400,000.00, which is

congruous with two of the three appraisals and perfectly aligned with the appraisal submitted by Skeahan – the one appraiser whom the Receiver and Wachovia agreed upon. HFF has advised that this cash offer of \$2,400,000.00 reflects the market price. The Receiver believes that selling the Property under this offer is in the best interests of the Receivership given: current economic and market conditions; the real possibility that Rite-Aid could file for bankruptcy and terminate its lease of the Property³; and the fact that, as discussed within the Receiver’s claims determination motion (the “**Claims Determination Motion**”) (Doc. 675) and the Receiver’s opposition to Wachovia’s motion for determination that filing proof of claims is not necessary (the “**Opposition to Proof of Claims Motion**”) (Doc. 755), Wachovia’s claim arising from its loan on the Property should be denied for several reasons, including that at a minimum, it was on inquiry notice of fraud and it assisted Nadel’s perpetration of the scheme. The Receiver seeks approval to sell the Property in accordance with the Agreement.

The Current Offer and the Value of the Property

After marketing the Property for more than two years, the Receiver received an offer of \$2,400,000.00 for the Property from Trinet West, LLC, or its assigns (the “**Purchaser**”) on September 15, 2011. This offer is consistent with the current value of the Property as determined by the majority of the appointed appraisers (i.e., Skeahan and Shiplett), and selling it to the Purchaser is in the best interest of the Receivership estate. In evaluating this offer, the Receiver considered, among other things, the poor current economic conditions and

³ The Receiver believes that should Rite-Aid seek reorganization under Chapter 11, the lease on the Property will be abandoned. Should that occur, the Receiver believes the value of the Property will be closer to \$1,000,000.00 than it will be the agreed upon sale price.

the depressed real estate market. As indicated in Skeahan's appraisal, there are significant factors with the potential to negatively impact the value of the Property, including the weakened overall economy, this geographic area trails the nation's economic recovery, depressed levels of consumer spending, changes to our healthcare system, the fact that this Rite Aid location is among the bottom 5% of all stores, the contract rent is well above market value, and Rite Aid has proposed a rent reduction due to the store's poor performance. *See* Exhibit 3. These factors, along with those discussed below, necessitate the sale of this Property now, while the opportunity to do so still exists.

Before the three Court-approved appraisers performed their appraisals in compliance with 28 U.S.C. § 2001(b), HFF—the real estate broker that Wachovia referred to the Receiver—conducted its own analysis of the Property's local commercial real estate market and similarly indicated that, overall, commercial rents in the area, and thus the value of commercial properties, have decreased and will continue to do so. Factors which have generally depressed commercial rents in that geographic area include increased unemployment, low population density and traffic, and excess supply. In short, as confirmed by the majority of the appraisals, the received offer of \$2,400,000.00 is an accurate reflection of how much the buying public is willing to pay for the Property.

The Receiver also considered features of the Property itself. HFF indicated that specific aspects of the Property and its current tenant also contributed to its decreased value, and that value will continue to decline in the future. Those aspects include: (1) a lack of local traffic, population density, and other commercial space in the immediate area which could complement the Property and attract additional customers to the current tenant's

drugstore; (2) adjacent commercial spaces which are vacant or renting at lower prices than the Property; (3) the very poor financial condition of Rite-Aid and the real possibility that it may have to file Chapter 11 bankruptcy; (4) the real potential for termination of Rite-Aid's lease on the Property if it files for bankruptcy, especially in light of the poor performance experienced by the Rite-Aid store located in the Property; and (5) the expectation of reduced rents if Rite-Aid terminates its lease and a replacement tenant is found.

Significantly, HFF has reported that potential purchasers of the Property are seeking to recover their equity in the next three-to-five years, given Rite-Aid's current financial predicament and the real possibility of bankruptcy and termination of the lease on the Property. Because of these and other relevant Property and broader market conditions, HFF estimated that potential purchasers value the Property at between \$1.4 million and \$2.4 million. This valuation will decrease at a substantial rate the longer the Property remains unsold because, among other reasons, the opportunity for purchasers to recover their equity will shrink.⁴

Considering all of these factors, the Receiver accepted the offer from the Purchaser and entered into the Agreement with the Purchaser to sell the Property free and clear of all claims, liens, and encumbrances contingent upon this Court's approval. *See* Exhibit 2. The sale of the Property is expected to generate approximately \$2,250,000.00 after payment of commissions and other associated expenses. The sale price of \$2,400,000—which perfectly aligns with the majority of the recent appraisals and the analysis of the real estate broker that

⁴ While HFF was retained by the Receiver due to the urging of Wachovia, after significant experience in working with this company the Receiver believes that HFF and the individuals working on this transaction are extremely skilled and proficient and has come to place reliance on their advice.

Wachovia referred to the Receiver—is a value which has the potential to decrease at a steep rate. The Receiver believes acceptance of this offer was in the best interest of the Receivership estate, including because it fairly represents the current value of the Property and because the opportunity to secure the same or a higher value at a later date is highly unlikely.

As required by 28 U.S.C. § 2001(b), the offer of \$2,400,000.00 is not less than two-thirds of the appraised value. While case law does not indicate there is one exclusive formula for determining whether a Receiver has satisfied this two-thirds rule, this Court has held that, when faced with three distinct appraisals, the rule is satisfied where the sale price is in excess of two-thirds of the average of the appraised values. *U.S. v. Brewer*, 2009 WL 1313211, at *1, n.5 (M.D. Fla. May 12, 2009). Here, the appraisals were valued at \$2,400,000, \$2,600,000 and \$3,740,000 – the average of which is \$2,900,000. Two-thirds of this average is \$1,900,000. Accordingly, the sale price of \$2,400,000 exceeds two-thirds of the average appraisal value by \$500,000.

Should the Court decide to apply the two-thirds rule to each of the three appraisals, the sale price of \$2,400,000 should still satisfy 28 U.S.C. 2001(b). Beginning with Skeahan’s appraisal value of \$2,400,000, the sale price clearly satisfies the rule, as it is for this exact amount. Regarding Shiplett’s appraisal value of \$2,600,000, the sale price of \$2,400,000 also satisfies the rule, as it exceeds two-thirds of this appraisal value (\$1,730,000). Finally, as discussed above, Fortenberry’s appraisal value of \$3,740,000 should be recognized as the outlier that it is. This figure is a notable aberration in comparison to the other two appraisals and contradicts another appraisal that Wachovia

independently secured from Integra in the amount of \$4,100,000 only four months earlier. (Doc. 718-1) In any event, the sale price of \$2,400,000 is approximately \$93,000 shy of two-thirds of Fortenberry's appraisal (\$2,493,308). Considering the fact that the sale price of \$2,400,000 is consistent with the majority of the appraisals, mirrors the appraisal of Skeahan (the one appraiser whom the Receiver and Wachovia agreed upon), and the appraisal secured by Wachovia is an anomaly, the Court should allow the sale of the Property to proceed without further delay.

The Encumbrance on the Property and the Receiver's Efforts to Resolve It

The only known encumbrance on the Property relates to the loan Nadel obtained in Scoop RE's name from Wachovia to pay one-half of the Property's purchase price. The Property is encumbered by the Promissory Note and Deed of Trust which was given to Wachovia to secure its loan. As of the date of filing this motion, Wachovia has been paid \$681,050.22 in interest or principal payments on that loan, all of which were made with proceeds of Nadel's scheme.

In connection with the claims process in this matter, Wachovia submitted a Proof of Claim Form relating to its loan on the Property seeking \$2,655,000.00 plus accrued but unpaid interest since October 27, 2009, late fees, attorney's fees, and costs. Since early in the Receivership in 2009, the Receiver has attempted to reach a resolution with Wachovia regarding its interest in the Property on a number of occasions, including when the Receiver received what he believed were viable purchase offers, but he has not been successful.

On May 23, 2011, Wachovia's counsel informed the Receiver's counsel that its claim aggregates to at least \$2,930,256.29. Importantly, however, the Receiver's Claims

Determination Motion (Doc. 675) and Opposition to Proof of Claims Motion (Doc. 755) explain why that claim should be denied. As explained in detail in both filings, Wachovia's claim should be denied for several reasons, including that Wachovia had knowledge of Nadel's misconduct in connection with his use of the Hedge Funds underlying this case, and that by enabling, facilitating and executing numerous transactions for Nadel, Wachovia was not only aware of unlawful activities but it was actually assisting Nadel's perpetration of the scheme.⁵ Wachovia's liability arose from numerous events, including Nadel's opening and use of secret "shadow" bank accounts at Wachovia to perpetrate his scheme, including two that Nadel opened without authority in a "doing business as" capacity to mimic the names of three of the Hedge Funds underlying the scheme; his repetitive periodic transfers of money between the shadow accounts; his numerous wires of money from trading accounts at Goldman Sachs into the shadow accounts, which Wachovia accepted even though the destination shadow accounts bore names that were different from those on the wires; Wachovia's knowledge of Nadel and the receivership Hedge Funds from its longstanding relationship with Nadel and its investment in two of the Hedge Funds; Wachovia's knowledge of the unrealistic positive performance of the hedge funds while (and before and after) Wachovia was invested in them; and incorrect account opening information submitted by Nadel that even rudimentary due diligence would have revealed.

In light of the high probability that the Property will continue to decrease in value the longer it remains unsold, the proposed sale of the Property is in the best interest of the

⁵ On February 9, 2012, the Receiver filed a complaint against Wachovia in Sarasota County for its role in Nadel's Ponzi scheme, alleging claims for aiding and abetting common law fraud, breach of fiduciary duty, and conversion, as well as common law negligence, fraudulent transfer, and unjust enrichment. The case remains pending.

Receivership estate. Further, although the Property would be transferred to the Purchaser free and clear of all claims, liens, and encumbrances, including Wachovia's encumbrance, as discussed at the March 2, 2012 hearing before this Court (Doc.774) and reiterated below, Wachovia's interests would be protected because its encumbrance would shift to the proceeds of the sale, which would be held by the Receiver pending further order from the Court. As discussed below, that Wachovia's claim amount exceeds the amount of the proceeds from the Property's proposed sale does not change the fact that the sale sought in this motion is authorized by applicable legal and equitable principles and is in the Receivership estate's best interest.

ARGUMENT

The Court's power to supervise an equity receivership and to determine the appropriate actions in its administration is extremely broad. *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). This broad discretion and power derives from the inherent powers of an equity court to fashion relief. *Elliott*, 953 F.2d at 1566; *SEC v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5th Cir. 1982). This is important here because in matters involving administration of this equity Receivership, such as those underlying this motion and, more broadly, the claims process, the Court is equipped with broad equitable powers and authority, and the goal is to protect the best interests of defrauded investors. *See SEC v. Mutual Benefits Corp.*, Case No. 0:04-cv-60573, Order Granting Receiver's Motion For Final Determination Of Allowed Claims at 3 (S.D. Fla. Oct. 23, 2008) (“(1) this is an SEC enforcement action designed to protect the

investors, not the creditors, (2) [the receivership entity's] fraudulent conduct was directed toward its investors, not its creditors (which were paid substantial amounts already), [and] (3) the investors as a whole are less able to bear the financial costs of [the receivership entity's] conduct than are the creditors. . . .”), a copy of which is attached as **Exhibit 7**. This is a critical distinction between equity receiverships like this one and bankruptcy proceedings, which involve significantly less judicial flexibility because of the comprehensive statutory scheme which governs them.⁶ *See Marion v. TDI, Inc.*, 2006 WL 3742747, *2 (E.D. Pa. 2006) (“[A] bankruptcy proceeding differs significantly from an equity receivership imposed at the request of a government agency such as the SEC. The whole purpose of the SEC proceeding is to remedy violations of the securities laws for the benefit of investors.”); *see also Off'l Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1150-57 (11th Cir. 2006) (distinguishing between bankruptcy and receivership law, and noting that bankruptcy trustee's appeal was “governed by the Bankruptcy Code, not the law of receiverships”). The relief sought in this motion falls squarely within the Court's powers and is in the best interests of defrauded investors and the Receivership estate.

That relief is also consistent with precedent, which establishes that a court of equity – like this one in these proceedings – may authorize the sale of property free and clear of all claims, liens, and encumbrances. *See, e.g., Miners' Bank of Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (3d Cir. 1933); *People's-Pittsburgh Trust Co. v. Hirsch*, 65 F.2d 972, 973 (3d Cir. 1933). In part, a court has this authority because when a court of competent jurisdiction

⁶ In its Order denying Wells Fargo's Motion to Disqualify Receiver, the Court emphasized the difference between federal equity receiverships—such as this one—and bankruptcy courts, noting that the former “are not restricted by the dictates of bankruptcy law.” (Doc. 822, p.13).

takes possession of property through its officers – such as this Court has done with the Property through the Receiver – it has jurisdiction and authority to determine all questions about title, possession, and control of the property. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 737-38 (1931).

Generally, courts authorize sales of encumbered property when there is a reasonable prospect that a surplus will be left for distribution among creditors. *See Bogosian v. Foederer Tract Comm., Inc.*, 399 A.2d 408, 414 (Pa. Super. Ct. 1979). Here, the Receiver has sought approval of his denial of Wachovia’s claim, and the pertinent legal, equitable, and factual circumstances show there is a “reasonable prospect” that determination will stand and consequently the sale will result in a surplus. Alternatively, that claim could be resolved in several other ways which would still stop short of recognizing the full claim amount and consequently also result in a claim amount that is less than the amount of the proceeds of the Property’s proposed sale. But even if Wachovia’s claim is ultimately recognized for the full amount, the Court has the power to approve the Property’s sale despite that the claim amount will exceed the sale price. *See In re Hout*, 9 F. Supp. 419, 419 (W.D. Pa. 1934) (citing *Isaacs*, 282 U.S. at 738) (“[T]his court [has] exclusive jurisdiction to sell the property of the bankrupt, in spite of the claim that there was no equity in the property for the bankrupt estate . . .” (emphasis added)); *In re Sloterbeek Chevrolet Co.*, 8 F. Supp. 1023, 1023 (W.D. Pa. 1934). Resolution of this motion turns on the equities and facts of the circumstances (*see Spreckels v. Spreckels Sugar Corp.*, 79 F.2d 332, 334-35 (2d Cir. 1935)), and here the equities and facts strongly favor sale of the Property.

The Court’s power to order the Property’s sale, and the important role of applicable equities is evident in legal precedent. *Spreckels* noted that “although there is perhaps no rigid rule about it . . . ordinarily a court will not sell property free of liens unless it can see that there is a substantial equity to be preserved.” *Id.* at 334. The court explained that courts of equity were allowed to “abate the severity of a ruthless exercise of lienor’s powers,” and that exercise of the court’s power was appropriate “so long as the substance of the [lienor’s] rights was preserved.” *Id.* at 335. *Spreckels* focused on the lienor’s right to assert a claim rather than any right to a specific amount. Similarly, *People’s-Pittsburgh Trust Co. v. Hirsch* found that a sale of property free and clear of encumbrances for an amount less than the indebtedness secured by the property was appropriate because the sale by the receiver had notable advantages over a foreclosure sale. *People’s-Pittsburgh Trust Co.*, 65 F.2d at 974-75. *People’s-Pittsburgh Trust* ultimately determined the sale was in the best interests of the receivership but still protected the mortgagee’s interests. *In re Franklin Brewing Co.* also acknowledged a court’s power to sell property free and clear of liens. 249 F. 333, 335 (2d Cir. 1918). Although it noted that it is “good practice” not to order such a sale unless there is “a fair prospect that the proceeds will at least discharge the lien,” this is not a rule of law and “where (for instance) the very existence of any lien is in litigation, and property is wasting while waiting decision, it must be a matter of discretion whether or not to sell promptly” *Id.* *In re Franklin* concluded there was nothing improper about such a sale and that it was not an abuse of discretion. *Id.* Other courts also have long recognized the inherent authority of equity courts to sell property in their custody free and clear of liens. See *Matter of Valley Road Sewerage Co.*, 685 A.2d 11, 18 (N.J. Super. Ct. App. Div. 1996); see also *Passaic*

Plumbing Supply Co. v. Eastside Holding Corp., 105 N.J. Eq. 485, 486, 490 (N.J. Ch. 1930) (concluding that it would “be in the best interest of all creditors if the property be sold free of all liens . . . [with] the liens of such to attach to the proceeds of sale” after finding legality of the liens was in question and property would deteriorate in value).

Importantly for Wachovia, although the Court can order the Property’s sale free and clear of all claims, liens, and encumbrances, those claims, liens, and encumbrances do not evaporate. Rather, upon sale of the Property, they would transfer to the sale’s proceeds. *Bogosian*, 399 A.2d at 414 (citing *Buss Mach. Works v. Watsontown Door and Sash Co.*, 2 F. Supp. 757 (M.D. Pa. 1933)) (“Under the broad equity powers of the court, it can, under proper circumstances, order a sale of property free and divested of liens by transferring the liens to the fund derived from the sale.”); *In re Franklin Brewing Co.*, 249 F. at 335 (noting transfer of liens to proceeds of sale of collateral); *see also Acker*, 66 F.2d at 852; *Novor v. Fourth Street Bargain Store Co.*, 145 A. 119, 120 (Del. Ch. 1929) (“[L]ien claimants ought to be permitted to look to the proceeds as a substitute for the property.”). As such, a sale of the Property free and clear of all claims, liens, and encumbrances will not destroy Wachovia’s interests, but it will simply shift them from the Property to the sale proceeds, which the Receiver will then hold pending further order from the Court. This will then allow for a full resolution of Wachovia’s claim without further impairing the Property’s value for the Receivership estate.

CONCLUSION

In light of the Receiver’s compliance with 28 U.S.C. § 2001(b); present economic conditions; the real prospect that the value of the Property will continue to decrease for some

time, including a strong possibility for a drastic decrease resulting from Rite-Aid's poor financial condition; and the time that will be needed to resolve Wachovia's claim relating to the Property, the sale of the Property free and clear of all claims, liens, and encumbrances as sought in this renewed motion is in the best interests of the Receivership estate. Further, Wachovia's interests will be adequately protected as its encumbrance on the Property will shift to the proceeds of the sale, which will be held by the Receiver pending further order from the Court. Accordingly, the Receiver respectfully requests the Court enter an order in substantially the form attached as Exhibit 1 approving the sale of the Property to Trinet West, LLC, or assigns in accordance with the terms of the Agreement attached as Exhibit 2; eliminating any and all claims, liens, and encumbrances from the Property; and directing the Receiver to transfer title to the Property to Trinet West, LLC, or assigns, via Receiver's Deed free and clear of all claims, liens, and encumbrances.

Dated: April 26, 2012

Respectfully submitted,

JAMES, HOYER, NEWCOMER &
SMILJANICH, P.A.

/s/ Jonathan B. Cohen

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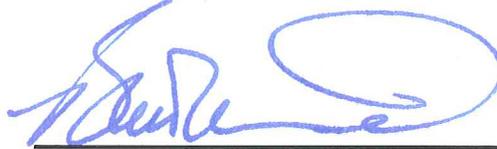
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Attorneys for the Receiver, Burton W. Wiand

VERIFICATION OF RECEIVER

I, Burton W. Wiand, Court-Appointed Receiver in the above-styled matter hereby certify that the information contained in this Renewed Motion is true and correct to the best of my knowledge and belief.



Burton W. Wiand, Court-Appointed Receiver

LOCAL RULE 3.01(g) CERTIFICATION

Counsel for the Receiver has conferred with counsel for the Securities and Exchange Commission and is authorized to represent to the Court that this Renewed Motion is unopposed. Wachovia's counsel has indicated it objects to the sale of the Property.

/s/ Jonathan B. Cohen

Attorney for the Receiver, Burton W. Wiand

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send an electronic copy of this Renewed Motion to Joseph Shaheen, Esquire and Steven R. Wirth, Esquire of Akerman Senterfitt, counsel for Wells Fargo Bank, N.A., successor-in-interest to Wachovia Bank, N.A.

/s/ Jonathan B. Cohen

Attorney for the Receiver, Burton W. Wiand