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.
_____/

RENEWED OBJECTION AND MEMORANDUM OF LAW OF WELLS FARGO BANK, N.A. IN OPPOSITION TO RECEIVER'S VERIFIED RENEWED MOTION TO APPROVE SALE OF REAL PROPERTY LOCATED IN GRAHAM, ALAMANCE COUNTY, NORTH CAROLINA

Wells Fargo Bank, N.A. ("Wells Fargo"),[1] a valid secured creditor and party in interest herein, hereby files this renewed objection (the "Objection") and memorandum of law in opposition to *Receiver's Verified Renewed Motion to Approve Sale of Real Property Located in Graham, Alamance County, North Carolina* (the "Motion") (Doc. No. 823), and in support thereof, states as follows:

[1] Wells Fargo is successor by merger to Wachovia Bank, N.A.

SUMMARY OF ARGUMENT

The Receiver seeks approval of a proposed sale of the property, an operating drug store, based upon two of three appraisals provided to the Court at a price of $2,400,000, approximately $903,462[2] less than the current amount of the secured claim of Wells Fargo. Both appraisals on their face acknowledge that they are based upon "extraordinary" and/or "hypothetical" assumptions which have a direct and substantial effect on the valuations. In fact, one of the appraisers specifically notes that "we have assumed the lease will be renegotiated to current market rent for a Rite Aid. If this assumption proves to be false, we reserve the right to amend our market value estimates." (emphasis added).

This property is subject to a lease that currently requires Rite Aid to pay rent of $33,073.08 per month (the "Lease"). This Lease has been in place since January 24, 2004. Rite Aid requested a rent reduction in 2009. **The Receiver rejected the request.** Rite Aid has continued to occupy the property and continued to pay the required rent set forth in the Lease (now for almost 3 years after the request). Despite that, the two appraisals relied upon by the Receiver do not appraise the property based upon the lease rent of $33,073.08 per month ($28.71 per square foot), but instead appraise the property based upon an assumed reduced rent of about $19,584 per month ($17 per square foot).[3] The other appraisal by Fortenberry Lambert, Inc. ("Fortenberry"), based its valuation on the actual lease rent being paid and valued the property at $3,740,000 (the "Fortenberry Appraisal"). While the Receiver attempts to characterize the Fortenberry Appraisal as an outlier, it supplies the only accurate conclusion because it is the only

[2] As of April 25, 2012, the current amount of the secured claim of Wells Fargo was $3,303,461.60, which is exactly $903,461.60 more than the proposed sale price of $2,400,000. Interest has accrued, and continues to accrue, on this valid secured claim at a per diem rate of $397.61.

[3] The Skeahan Appraisal (as defined below) uses $17.00 per square foot, while the Shiplett Appraisal (as defined below) uses $17.50 per square foot. Both are faulty assumptions given the current contract rate of $28.71 per square foot that is actually being paid.

appraisal that is **not** based on **acknowledged** extraordinary or hypothetical assumptions: that the Rite Aid rent must be reduced based on a request made 3 years ago despite the fact that to force a reduction Rite Aid would have to bankrupt its entire organization and despite obvious and public evidence that Rite Aid is far stronger now than it was in 2009. In April 2009, just before Rite Aid requested a rent reduction, which was rejected by the Receiver, Rite Aid had a published total equity market capitalization of $354.4 million; whereas the 2011 equity market capitalization for Rite Aid increased to $1.28 Billion. Its free operating cash flow in 2009 was at negative $534 million; whereas in 2011 it had arisen to a positive $581.8 million.

As this Court has properly recognized in its prior order, pursuant to 28 U.S.C. § 2001(b) the appraised **value** of the real property at issue must be equal to or greater than two-thirds of the proposed sale price. The proposed sales price does not meet that test taking into account the only appraisal which is not based upon hypothetical or extraordinary assumptions but instead is based on the actual facts, the Fortenberry Appraisal. As a result, the Receiver's motion should be denied because the contemplated sale would be drastically **below market value**, to the detriment of a **secured creditor**, and in violation of the mandated procedural safeguards set forth in 28 U.S.C. § 2001(b).

The Receiver's Motion should also be denied because it attempts to sell the Rite Aid Property at a price ($2.4 Million) significantly below **market value** and well below the total amount of Wells Fargo's secured claim, which currently aggregates approximately **$3,303,461.60**.[4] Wells Fargo has a security interest in the property, i.e., under North Carolina

[4] Wells Fargo has a valid security interest in and against the real property located at 841 South Main Street, Graham, North Carolina, which houses a Rite Aid Pharmacy (the "Rite Aid Property"). As of April 25, 2012, Wells Fargo's secured claim against the property aggregated approximately $3,303,461.60 (the "Wells Fargo Claim"), calculated as follows: Principal - $2,655,000.00; Contract Interest - $143,243.76; Default Interest - $221,288.25; Appraisal Fee - $6,840.00; Legal Fees Trenam - $20,047.29; Legal Fees KL Gates - $15,144.90; and Legal Fees - Akerman - $241,897.66. The Wells Fargo Claim is also secured by, among other things, the rents generated from the operation

law, Wells Fargo actually holds legal title to the property to secure the repayment of its loan. The Receiver has asserted that this lien should be invalidated based upon alleged misconduct by Wells Fargo. Until those issues are resolved, Wells Fargo retains a valid secured lien on this property. The Receiver contends that Wells Fargo is under secured. As such, the property would typically be abandoned to the secured lender. *See, e.g., SEC v. Madison Real Estate Group,* 647 F. Supp. 2d 1271, 1284-85 (D. Utah 2009) (lifting stay to allow secured creditors to foreclose on various properties because there was no equity in the properties); *In re Feinstein Family P'ship*, 247 B.R. 502, 507-09 (Bankr. M.D. Fla. 2000). In this instance, the Receiver seeks to invalidate the lien based upon these claims of misconduct. Nonetheless, should the Receiver be allowed to proceed with the sale despite serious questions as to the value of the property and the appropriateness of the sale price, then the Court will effectively be pre-determining the amount of the Wells Fargo Claim. Such a determination is not in the interest of justice and should not be allowed in this instance. As a result, Wells Fargo requests as follows:

1. that the Motion be denied;

2. in the event that the Court wishes to proceed further with this Motion that the Court authorize discovery in the form of depositions of all of the appraisers; and

3. that the Court conduct an evidentiary hearing on the issue of value.

MEMORANDUM OF LAW

A. The Receiver Has Not Complied With the Valuation Requirements Mandated By 28 U.S.C. § 2001, Because Two of the Appraisals Rely on Extraordinary and Hypothetical Assumptions to Improperly Reduce the Value of the Real Property.

By using two appraisals based on extraordinary and hypothetical assumptions, the Receiver seeks to improperly lower the average appraised value in an attempt to comply with 28

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of a Rite-Aid Pharmacy on the property. Wells Fargo timely filed a proof of claim in this case with respect to the Rite Aid Property, which claim has been designated No. 502 by the Receiver.

U.S.C. § 2001(b). Such action fails to comply with the appraised value requirements mandated by 28 U.S.C. § 2001(b), and accordingly, the Receiver's Motion should be denied. Section 2001(b) provides:

> (b) 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) (emphasis supplied).

Courts in this and other districts have determined that the power of a district court to authorize the sale of property in an SEC receivership proceeding is limited by the statutorily mandated procedural requirements set forth in 28 U.S.C. § 2001. *See SEC v. Am. Capital Invs., Inc.*, 98 F.3d 1133, 1137 (9th Cir. 1996) (applying § 2001 to the receiver's proposed sale of real estate within receivership estate in SEC enforcement action), *abrogated in part by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 (1998)); *SEC v. T-Bar Resources, LLC*, 2008 WL 4790987, at *2 (N.D. Tex. Oct. 28, 2008) (same); *Kirkland v. Sunset Bay Club, Inc.*, 2006 WL 3627557, at *2 (M.D. Fla. Dec. 11, 2006) (same). Section 2001(b) prevents a court from confirming a sale price below two-thirds of the appraised value; however, where the sale price meets the two-thirds test, the court is not required to confirm the sale. *See* 28 U.S.C. § 2001(b) (stating that the court *may* approve the sale if it is in the best interest of the parties).

1. The Court Cannot Simply Average The Three Appraisals Because Two Of The Appraisals Make A Counter-Factual, Extraordinary And Hypothetical Assumption, Which Results In A Significant Value Disparity.

As noted, before confirmation of any private sale, the Court shall appoint three disinterested persons to appraise such property and no private sale shall be confirmed at a price less than two-thirds of the appraised value. This provision is not discretionary, it is mandatory. *See, e.g., United States v. Monsanto*, 491 U.S. 600, 607 (1989) (by using "shall" in civil forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"). By using appraisals that rely on extraordinary and hypothetical assumptions, the Receiver has not complied with the procedural requirements set forth in Section 2001(b). It should also be noted that a previous appraisal obtained by Wells Fargo values the Rite Aid Property at **$4.14 Million**.[5] The more recent appraisals conclude that the value of the real property is **$2.4 million** (the "Skeahan Appraisal"), **$2.6 million** (the "Shiplett Appraisal"), and **$3.74 million** (defined above as the "Fortenberry Appraisal").[6] Clearly, there is a dispute as to the value of the property.

The Receiver attempts to resolve this dispute by simply averaging the three recent appraisals. *See* Motion, p. 12. In support, the Receiver relies on *United States v. Brewer*, 2009 WL 1313211, at *1 (M.D. Fla. May 12, 2009) (applying § 2001 to the receiver's proposed sale of real estate within receivership estate in insurance fraud case); however, in *Brewer* all three appraisals satisfied the two-thirds rule; and moreover, the disparity between the highest and the lowest appraisals was about $5,000. *Id.* at n.5.[7] Unlike *Brewer*, the high and low appraisals (the

[5] A copy of the $4.14 appraisal is attached to the original Objection, Doc. No. 718 as Exhibit A thereto.

[6] Copies of the $2.4 million, $2.6 million, and $3.74 million appraisals are attached to the Receiver's Motion as Exhibits 3, 4, and 5 respectively.

[7] In footnote 5 of *Brewer*, the Court states that 2/3 of the highest appraisal was $150,000 and that 2/3 of the lowest appraisal was $146,667; therefore, the high appraisal was $225,000 and the low must have been $220,000.

Fortenberry Appraisal and the Skeahan Appraisal) in this case show a value disparity in excess of $1.3 Million. Therefore, here, the Court must examine the reason for the disparity before it can accurately determine the value of the real property, and then it can apply the two-thirds test.

In analyzing the three appraisals, it is clear that disparity between the low appraisals and the high appraisal is that the Skeahan Appraisal and the Shiplett Appraisal both rely on the same "extraordinary" and "hypothetical" assumption that the rent from the single tenant will be drastically reduced from its current rate. *See* Skeahan Appraisal, Doc. 823-3, Pages 12-13 of 117; Shiplett Appraisal, Doc. 823-4, Pages 10-11 of 108.

2. The Extraordinary And Hypothetical Assumption Is Clearly False.

The Skeahan Appraisal and the Shiplett Appraisal both incorrectly assume that the Rite Aid lease will be renegotiated downward. *See* Skeahan Appraisal, Doc. 823-3, Pages 12-13 of 117; Shiplett Appraisal, Doc. 823-4, Pages 10-11 of 108; *see also*, Declaration of Carol Lomax Fortenberry, MAI ("Fortenberry Declaration"), ¶ 4, attached as **Exhibit "A"** hereto. The Shiplett Appraisal explicitly states:

> **Extraordinary Assumptions**
>
> This appraisal employs the following extraordinary assumptions:
> *The property is currently under contract to a buyer that plans to renegotiate the contract lease. We have assumed the lease will be renegotiated to current market rent for a Rite Aid. If this assumption proves to be false, we reserve the right to amend our market value estimates.*

See Shiplett Appraisal, Doc. 823-4, Pages 10-11 of 108 (emphasis in original). Shiplett has admitted that this assumption is "**extraordinary**." *Id.* Moreover, Shiplett specifically requests the right to amend the market value estimate if the assumption is false. *Id.* In reality, the assumption is clearly false, and therefore, the Court should not consider the value estimate provided by Shiplett. *See* Fortenberry Declaration, ¶¶ 8-9.

In **June of 2009**, the current tenant (Rite Aid) did request to renegotiate the contract rent. *See* Skeahan Appraisal, Doc. 823-3, page 15 of 117. The June 2009 request to renegotiate the rent was denied by the Receiver. *Id.* Despite this denial, the tenant has continued to lease the property (and pay the contract, above-market rent) from June 2009 through the present. *Id.* The current rent is $28.71 per square foot ($33,073.08 per month). *See* Fortenberry Appraisal, Doc. 823-5, page 56 of 96. There is no reason to assume that rent will be renegotiated significantly (to $17 per square foot or $19,584 per month) when almost three years have passed since the tenant's request was denied by the Receiver. The extraordinary and hypothetical assumption that the property's income will be reduced by over $13,489 per month drastically affects the estimated value put forth by the Skeahan Appraisal and the Shiplett Appraisal. Again, there is no factual support for this assumption, and in reality, the request for a reduction of rent was denied almost three years ago.

Moreover, the lease is guaranteed by the tenant and the risk of default is already accounted for by the capitalization rate used in the appraisals. *See* Fortenberry Declaration, ¶¶ 6-8. Further, the chances of default by the tenant are minimal because the tenant, the entire Rite Aid corporation, would have to go bankrupt to force a reduction or rejection of this Lease. The Rite Aid corporation cannot simply abandon the property and avoid their contractual liability as Shiplett and Skeahan seem to suggest. In actuality, the financial position of Rite Aid has improved in the past three years. In April 2009, just before Rite Aid requested a rent reduction, which was rejected by the Receiver, Rite Aid had a published total equity market capitalization of $354.4 million; whereas the 2011 equity market capitalization for Rite Aid increased to $1.28 Billion.[8] Similarly, Rite Aid's free operating cash flow went from a **negative $534 million** in

[8] The current market capitalization is available at: http://www.google.com/finance?q=NYSE:RAD#. The historic market capitalization figure is available in Rite Aid's SEC filings, specifically its 10k; *see, e.g.*,

2009, to a **positive $581.8 million** in 2011.[9] The Receiver has not provided any evidentiary basis to challenge the financial stability of Rite Aid nor to suggest that there is a possibility of bankruptcy for the entire organization, which would allow for a rejection of the Lease. Therefore, the "extraordinary assumption" made by Shiplett is clearly false and without a factual basis. Accordingly, this Court should disregard the Shiplett value estimate.

The appraisal by Skeahan makes the same counter-factual, extraordinary assumption; however, Skeahan categorizes it as a "hypothetical" assumption:

> **Extraordinary Assumptions And Hypothetical Conditions**
> **…**
>
> Hypothetical conditions are defined by the Uniform Standards of Professional Appraisal Practice as "… that which is contrary to what exists but is supposed for the purpose of analysis. Hypothetical conditions assume conditions contrary to known facts about physical, legal, or economic characteristics of the subject property; or about conditions external to the property, such as market conditions or trends; or about the integrity of data used in the analysis." The following hypothetical conditions have been incorporated into the analysis:
>
> - For the purpose of analysis, we have assumed a market rent that will replace the above market contract rent in order for Rite Aid to continue operation at this location. The contract rent is something higher, but not sustainable for the store to remain open. The concluded value is the same with either rent but the available data supports the use of the lower market rent for analysis purposes.

Skeahan Appraisal, Doc. 823-3, Pages 12-13 of 117 (emphasis in original). As with the Shiplett Appraisal, the Skeahan Appraisal should be disregarded because it is based on the same counter-factual assumption that the rent will be renegotiated. Again, there is no factual basis for this

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http://www.sec.gov/Archives/edgar/data/84129/000104746909004278/a2192156z10-k.htm, reflecting that as of April 7, 2009, Rite Aid had a market capitalization of $354.4 million.

[9] *See* Standard & Poors, RatingsDirect on the Global Credit Portal for Rite Aid Corp., dated February 14, 2012; a copy of the relevant excerpt is attached as **Exhibit "B"** hereto.

assumption. As explained above, nearly three years have passed since the tenant's request to renegotiate the rent was denied. Since the denial, the tenant has not vacated the property and has not gone out of business. Further there is no evidence to suggest that Rite Aid is not financially secure. There is no factual basis for Skeahan or Shiplett to assume that the rent will be revised downward. Regardless of whether this assumption is characterized as extraordinary or hypothetical, the assumption is clearly false. Thus, the Court should disregard both the Skeahan Appraisal and the Shiplett Appraisal, and instead, rely on the Fortenberry Appraisal that does not make any extraordinary or hypothetical assumptions. In the alternative, the Court should conduct, or at least allow the parties to engage in, discovery into the factual basis, if any, for the extraordinary and hypothetical assumption made by Skeahan and Shiplett.

3. The Court Cannot Approve The Sale In Light of The True Value Of The Property.

As noted, before confirmation of any private sale, the Court shall appoint three disinterested persons to appraise such property and no private sale shall be confirmed at a price less than two-thirds of the appraised value. As explained above, the Skeahan Appraisal and the Shiplett Appraisal should each be disregarded because they are based on extraordinary and hypothetical assumptions that are false. Only the Fortenberry Appraisal, which does not make any such counter-factual assumptions, provides an accurate estimation of value. According to the Fortenberry Appraisal, the value of the property at issue is $3.74 million. *See* Motion, Exhibit 5 thereto. Two-thirds of that appraised value equals $2,493,308, more than $93,000 over the proposed sale price of $2.4 Million. Therefore, the sale price is insufficient under the two-thirds rule and this Court should deny the Motion.

4. The Sale Is Not In The Best Interests Of The Estate.

As explained above, 28 U.S.C. § 2001(b) provides that the Court cannot approve a sale

where the sale price is less than two-thirds of the appraised value. Even if the sale price meets this test, as the Receiver claims, the Court is not automatically required to approve the sale; but rather, the Court must consider whether the sale is in the best interests of the estate. *Id.* In this case, the Court should still refuse to approve the sale.

The Receiver contends the property is worth less than the secured debt to Wells Fargo. If so, there is no equity in the property and it should be abandoned to the secured creditor. 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* 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. Thus, by the Receiver's own admission, there will be no funds for distribution to investors at the current sale price. It is precisely for situations such as these that the legislature enacted the procedural safeguards in 28 U.S.C. § 2001(b), in connection with the private sales of real estate before United States courts. For the foregoing reasons, the Receiver's Motion to sell the Rite Aid Property should be denied.

B. The Receiver, and Implicitly this Court, Cannot Abrogate Wells Fargo's State Law Property Rights Through the Receiver's Sale Motion or Otherwise.

The Receiver's Motion – seeking to abrogate Wells Fargo's valid secured creditor property rights – should be denied. Wells Fargo has a security interest in the Property – under North Carolina law, Wells Fargo actually holds legal title to the Property to secure the repayment of its loan. The Receiver has asserted that this lien should be invalidated based upon alleged misconduct by Wells Fargo; however, until those issues are resolved, Wells Fargo retains a valid secured lien on this property. The Receiver also contends that Wells Fargo is under secured; in which case, the Property would normally be abandoned to the secured lender. Nevertheless, the

Receiver ignores well-established law that preserves all liens and priorities under state law when a receiver takes property; that encourages a receiver to abandon "no-equity" property to a secured creditor; and that protects the impairment of collateral and of a secured creditor's rights under state law. Instead, the Receiver implicitly seeks a pre-determination of Wells Fargo's rights as a valid, secured creditor, by moving for the sale of the Property below market value and below the amount of Wells Fargo's secured claim. Accordingly, this Court should deny the Receiver's Motion to sell the Rite Aid Property.

1. The Receiver Took the Property at Issue Subject to Wells Fargo's Valid Lien, and the Receiver Should be Compelled to Abandon the Property.

"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.'" *SEC v. Madison Real Estate Group*, 647 F. Supp. 2d at 1277; *SEC v. Homeland Comm. Corp.*, 2010 WL 2035326, at *7-8 (S.D. Fla. 2010) (determining that secured creditors' claims must be paid out of foreclosure proceeds of collateral and prior to claims of defrauded investors). In addition, a district court's equitable authority in a receivership proceeding does not extend to abrogating fundamental property rights created by state law and protected by due process. *See SEC v. Haligiannis*, 608 F. Supp. 2d 444, 449 (S.D.N.Y. 2009) (citing *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893)).[10] Consequently, Wells Fargo's security interests remain intact despite the receivership. *See id.* at *12.

Notwithstanding, 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 Claim. At the Receiver's proposed sale price, he concedes that there is no equity in the

[10] Importantly, Wells Fargo's objection (Doc. No. 689) to the Receiver's claims determination motion, sets forth the significant obstacles to the Receiver's pursuit of any "shadow account" or equitable subordination claims against Wells Fargo.

property for the distribution to investors. Accordingly, the injunction should be lifted and the Rite Aid Property be 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); *In re Feinstein Family P'ship,* 247 B.R. at 507-09.

2. If Not Compelled to Abandon the Property, the Receiver Should be Required to Maintain the Status Quo in Accordance with State Law.

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 1230, 1231 (9th Cir. 1984)). 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 turnover those proceeds to Wells Fargo. The monthly rent on the property is $33,073.08 and the total estimated rent collected by the Receiver exceeds $1.28 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. 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.

3. The Receiver's Actions Have Impaired, and the Motion Seeks to Further Impair, Wells Fargo's Fundamental, Constitutionally Protected Property Rights.

When various encroachments such as these have collectively impaired a creditor's security, and have become unduly burdensome on the creditor, or have impinged upon due process as a result of arbitrary and unreasonable procedures, the Supreme Court has found an unconstitutional taking of property rights. *See, e.g., Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 560 (1936) (invalidating bankruptcy legislation because it effected a taking of a secured creditor's property rights contrary to the Fifth Amendment's prohibition against taking property without compensation); *SEC v. Haligiannis*, 608 F. Supp. 2d at 449 (determining court's equitable authority in a receivership proceeding does not extend to abrogating property rights created by state law and protected by due process). Indeed, security interests have long been recognized as property rights protected by the Constitution's prohibition against takings without just compensation. *See* U.S. Const. amend. V; *United States v. Security Indus. Bank*, 459 U.S. 70, 75, (1982); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. at 589 ("[T]he position of a secured creditor, who has rights in the specific property, differs fundamentally from that of an unsecured creditor, who has none."); *In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11th Cir. 1984). Here, it is clear that the numerous encroachments on Wells Fargo's collateral outlined above are burdensome, oppressive, and constitute an impermissible taking of Wells Fargo's property rights. A sale of the property at less than the total amount of Wells Fargo's claim further impairs the Bank's fundamental property rights. Accordingly, this Court should deny the Motion, lift the injunction,

and order the Receiver to immediately abandon the Rite Aid Property and turnover all of Wells Fargo's rent collateral to the Bank.

4. The Receiver's Arguments Cannot Justify the Proposed Pre-Determination that Will Eviscerate Wells Fargo's Valid Secured Creditor Property Rights.

Should the Receiver be allowed to proceed with the sale despite serious questions as to the value of the property and the appropriateness of the sale price, then the Court will effectively be pre-determining the amount of the Wells Fargo Claim. Such a pre-determination is not in the interest of justice and should not be allowed in this instance. *See, e.g., SLW Capital LLC v. Mansaray-Ruffin* (*In re Mansaray-Ruffin*), 530 F.3d 230, 232 (3d Cir. 2008) (determining lawsuit required to invalidate lien; lien remains intact despite creditor's failure to file claim or object to confirmation of plan which provided claim was unsecured); *see also, Sender v. The Bronze Group, Ltd. (In re Hedged 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).

Moreover, at a minimum, Wells Fargo is entitled to credit bid its entire secured claim in connection with any sale of the Rite Aid Property. *See, e.g., River Road Partners, LLC v. Amalgamated Bank (In re River Road Partners, LLC)*, 651 F.3d 642, 652-53 (7th Cir. 2011) (noting secured creditor has absolute right to credit bid its claim in connection with sale of its collateral; finding it dubious that a plan based on a "free and clear" asset sale that did not provide

lenders the right to credit bid could ever be considered by any court "fair and equitable."); *In re SunCruz Casinos, LLC*, 298 B.R. 833, 839 (Bankr. S.D. Fla. 2003) (same); *In re Midway Investments, Ltd.*, 187 B.R. 382, 390-91 (Bankr. S.D. Fla. 1995) (same).

The Receiver primarily relies on several cases from the 1930s to support his argument that he should be permitted to sell the Rite Aid Property over the objections of a valid, secured creditor. These cases are all clearly distinguishable from this case. For instance, in *Spreckles v. Spreckles Sugar Company*, 79 F.2d 322 (2d Cir. 1935), the City of Yonkers appealed a court of equity's decree directing that a large sugar refinery be sold free and clear of the city's lien for unpaid taxes. The Court of Appeals was clearly troubled by the lower court's decision, acknowledging that "the position of the City was prejudiced" by the sale of the property, and recognizing that "ordinarily a Court will not sell a property free and clear of a lien unless it can see that there is substantial equity to be preserved." *Id*. at 334. Nevertheless, the Court conceded that the receiver really had no choice as the property had "been already three years in attempted liquidation, slowly wasting away." *Id.* In the instant case, the Rite Aid Property is not "slowly wasting away;" rather, the property is occupied by a significant income paying tenant, on valuable land. Unlike in *Spreckles*, there is no immediate or urgent need for the Receiver to sell the Rite Aid Property – and it is especially inappropriate given that the Receiver proposes to do so without the required statutory procedural safeguards. The Receiver's proposed action does not "preserve" a substantial equity, but rather harms it by selling the property (without the appraisals to justify the sale price as required by statute) for substantially less than the property is worth.

The Receiver relies on *People's-Pittsburgh Trust Co. v. Hirsch*, 65 F.2d 972 (3d Cir. 1933), which is also distinguishable from the instant case. The Court in *People's Pittsburgh*

Trust Co. noted that "in the ordinary case this state of facts would preclude the sale free of liens." 65 F.2d at 974. In *People's Pittsburgh Trust Co.* the Court permitted the sale by a receiver of a hotel on a resort on Conneaut Lake in rural Pennsylvania. Significantly, in *People's Pittsburgh Trust Co.* the creditor who held the lien on the hotel did not appear to object to the sale. The court noted that the "Receiver asserts that the receivership received the assent of the mortgagee and that he was in close touch with the latter during the entire period of his operations and did nothing of any importance without the knowledge and approval of its officers." *Id.* The court also recognized that the hotel "contains a large amount of furniture, furnishings, etc. of very considerable value, which are admittedly not covered by any mortgage and which must be sold by the Receiver" and that "it would seem in the interests of the receivership that the hotel furnishings should be put up at the same sale as the hotel property." *Id.* Because of this special circumstance and consideration, the receiver's sale was allowed to go forward – even though the court acknowledged that such a result is certainly not the norm. The *People's Pittsburgh Trust Co*. case is distinguishable from the instant case as Wells Fargo has strenuously objected to the Receiver's proposed sale at a value far less than the amount of its secured claim, and there is no special circumstance with regard to the Rite Aid Property – such as the furniture of considerable value not covered by the mortgage – which should permit the Court to approve the Receiver's ill-conceived and inappropriate proposal to sell the property pursuant to the Receiver's Motion.

Finally, the Receiver relies on several bankruptcy cases to support his proposal for the sale of the Rite Aid Property.[11] *See* Motion at p. 17, citing *In re Hout*, 9 F. Supp. 419 (W.D. Pa. 1934) and *In Re Sloterbeck Chevrolet Co.*, 8 F. Supp. 1023 (W.D. Pa. 1934)). But these cases are also distinguishable. *See In re Sloterbeck Chevrolet Co.*, 8 F. Supp at 1023 (noting "there

[11] Notably, the Receiver cites to bankruptcy cases throughout many of his pleadings with this Court when it is convenient for him, yet asserts that "bankruptcy principles do not apply" in response to many of Wells Fargo's assertions. This fast and loose approach to these proceedings should not be tolerated.

was no petition to this court by the mortgagees for leave to proceed upon the mortgages"); *see also*, *In re Hout*, 9 F. Supp. at 419 (noting the issue was whether or not there is equity in the property for *unsecured* creditors). In short, this precedent does not support the Receiver's Motion to sell the property over the objections of a valid, secured creditor -- particularly when his proposed sale would ignore the procedural safeguards of 28 U.S.C. § 2001(b), and abrogate Wells Fargo's state law property rights. *See SEC v. Madison Real Estate Group*, 647 F. Supp. 2d at 1277 (noting 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.").

The Receiver also alleges – again with no evidentiary support whatsoever – that half of the funds used to purchase the Rite Aid Property, as well as all of the mortgage payments, were derived from Arthur Nadel's Ponzi scheme (Motion at p. 4). Even if this were true (which Wells Fargo disputes), those factors have no bearing on Wells Fargo's valid security interests in the Rite Aid Property, which were obtained in an arms'-length transaction with Scoop Real Estate, L.P. As Judge Marra recently determined in *SEC v. Homeland Comm. Corp.*, 2010 WL 2035326, at *7-8, the use of proceeds of a fraud to make hundreds of thousands of dollars of lease payments, and for maintenance, improvements and operating expenses of a restaurant, is insufficient to discharge or subordinate the legal contracts and lien rights of the secured party. Significantly, Scoop Real Estate, L.P. enjoyed the benefits of the Rite Aid Property by collecting rent in amounts well in excess of the interest payments due Wells Fargo. Finally, in *SEC v. Madison Real Estate Group*, 647 F. Supp. 2d at 1282, the court determined that it was inappropriate to disallow a secured creditor's claim, despite the fact that commingled Ponzi scheme funds were used to purchase the property. As such, the Receiver's allegations in this regard are red herrings and should be disregarded. In any event, Wells Fargo does not believe

these accusations to be accurate. As the Receiver concedes, the Rite Aid Property has been producing income at a rate of $33,073.08 per month. Accordingly, at a minimum, the interest payments made to Wells Fargo, which averaged approximately $13,500 per month, clearly came from the rents collected from Rite Aid, not investor money. The Receiver's contention to the contrary is disingenuous at best.

CONCLUSION

Based on the foregoing, the Motion should be denied because 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. As explained above, the Skeahan Appraisal and the Shiplett Appraisal rely on an admittedly extraordinary and hypothetical assumption, which assumption is false. As a result, the Skeahan Appraisal and the Shiplett Appraisal both provide an inaccurate estimate of value that should be disregarded. Thus, when the Court applies the two-thirds rule to the value estimate provided by the Fortenberry Appraisal – the only appraisal that did not make a counter-factual assumption – it is clear that the sale cannot be confirmed. Further, even if the two-thirds rule was met, the sale is not in the best interest of the estate and will cause significant harm to the rights of a valid secured creditor.

In addition, Wells Fargo's first priority secured claim remains intact despite the Receivership Proceeding, and Wells Fargo is entitled to be paid in full on its claim in accordance with the loan documents, including principal, interest, default interest, late fees, attorneys' fees and costs. Because the Receiver's Motion seeks to sell the Rite Aid Property for significantly less than Wells Fargo's secured claim, there is no equity for the benefit of the receivership, and the Court should lift the injunction, order the Receiver to immediately abandon the property to

Wells Fargo, and turnover all other collateral of the Bank. As noted to the Receiver before his filing of this Motion, Wells Fargo remains willing to accept abandonment of the Rite Aid Property and to reserve its rights with respect to its rent collateral until after the Bank's disposition of the collateral, and agree to litigate the Receiver's "shadow account" claims separately.

RESERVATION OF RIGHTS

Nothing set forth herein is intended, nor shall be deemed, to modify, limit, release, reduce, or waive any of the Wells Fargo's rights, claims, remedies, causes of action, or privileges at law or in equity, all of which are specifically preserved. More specifically, but not limiting the foregoing, Wells Fargo reserves its right to object in greater detail to the Motion after discovery has concluded, whether by written or oral objection, or in connection with any subsequent motion to which the Receiver seeks to sell the Rite Aid Property, on any basis allowable under applicable law. The filing of this Objection is also not intended, nor shall be deemed, to modify, limit, release, reduce, or waive any of the Wells Fargo's rights, claims, remedies, causes of action, or privileges at law or in equity, with respect to the Rite Aid Property, the Mount Laurel Property, the Evergreen Property or the Sarasota Property, or any additional claims of Wells Fargo against the Receivership Entities, all of which are specifically preserved.

DEMAND FOR RELIEF

WHEREFORE, Wells Fargo respectfully requests the Court (i) sustain the renewed Objection, (ii) deny the Receiver's Motion, (iii) lift the injunction as it relates to the Rite Aid Property, (iv) order the Receiver to immediately abandon the Rite Aid Property and return all other collateral to Wells Fargo, and (v) grant such other and further relief as it deems just and proper.

Dated this 2nd day of May, 2012 in Tampa, Florida.

Respectfully submitted,

AKERMAN SENTERFITT

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/L. Joseph Shaheen, Jr.
Attorney