

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 UNOPPOSED VERIFIED MOTION FOR
APPROVAL OF AGREEMENT REGARDING SALE OF
SECURITIES OF ENDAI MARKETING GROWTH, INC.**

Pursuant to 28 U.S.C. § 754, Fed. R. Civ. P. 66, and Rule 3.01 of the Local Rules of the Middle District of Florida, Burton W. Wiand, as Receiver (the “**Receiver**”), respectfully moves the Court for entry of an order in substantially the form attached as **Exhibit 1** approving the arrangement reflected in the Receiver’s Stock Purchase Agreement (the “**Agreement**”) with Endai Marketing Growth, Inc. (“**Endai**” or the “**company**”) to sell

67,000 shares of Endai common stock (the “**Shares**”) to the company. The Agreement is attached to this motion as **Exhibit 2**. Under the Agreement, the Receivership estate will receive \$15,000 from Endai. The Receiver believes that this Agreement is in the best interests of the Receivership Estate.

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.; 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 and the trust in receivership are hereinafter referred to collectively 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 Receivership’s Interests in Endai

In April 2012, the Receiver’s attorneys and counsel for Endai began discussions which culminated in the Agreement. The 67,000 shares of Endai common stock held by the Receivership represent a very small interest in Endai – .67% of outstanding shares – and they are currently held in the name of Receivership Entity Valhalla Investment Partners, L.P (“**Valhalla**”). According to receivership records, Neil Moody, who was a principal of Valhalla and one of Nadel’s associates, purchased 67,000 shares of AdClip Networks, Inc. (“**AdClip**”) for Valhalla in August 2000 for a total purchase price of \$50,250. AdClip was later acquired by Endai Corporation, which is now known as Endai Marketing Growth Inc. Endai is a small privately-held internet marketing and advertising company.

During discussions with Endai, the Receiver’s attorneys were provided with a third-party appraisal of Endai (the “**Appraisal**”), which is attached as **Exhibit A** to the Agreement. The Appraisal disclosed that Endai had earnings before interest, depreciation, and taxes (“**EBITDA**”) of \$231,832 in 2011, and was on pace to earn EBITDA of \$450,284 in 2012.

Using these and other factors, the Appraisal estimated the total value of Endai as \$979,500 as of December 30, 2011. Based on the total outstanding number of shares of 9,976,300, the Appraisal valued each common share of Endai at approximately \$.098. Thus, the Receiver's current Endai holdings, according to the Appraisal, are worth approximately \$6,578.24. Due to the private nature of Endai's corporate structure, the market for its stock is essentially illiquid, and the shares cannot be readily sold or exchanged for cash.

Subsequent negotiations with Endai resulted in an offer by Endai to acquire all of the Receiver's Shares for \$15,000 (the "**Offer**") as reflected in the Agreement. The Receiver believes that the Offer maximizes the value of the Receivership's interests in Endai under the circumstances, as it exceeds the current estimated market value of the Receiver's Endai shares; the Receiver is not aware of any prospect for significant appreciation of the value of the Shares; and the Receiver effectively has no other option for selling the Shares. As such, the Receiver believes the Offer is fair, reasonable, and in the best interest of the Receivership. Under the Agreement, the Receivership Estate will gain approximately \$15,000 for the benefit of defrauded victims, and the transaction will reduce, if not eliminate, the uncertainty and risk associated with holding the equity position in Endai. The Receiver is not aware of any liens or encumbrances on the Shares, and no claims have been filed in the Receivership claims process with respect to the Shares.

MEMORANDUM OF LAW

I. SALE OF THE SHARES IS IN THE RECEIVERSHIP ESTATE'S BEST INTEREST

The Court's power to supervise an equity receivership and to determine the appropriate actions to be taken in the 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). The Court's wide discretion 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). The Court, by imposing a receivership, assumed custody and control of all assets and property of the Receivership, and it has broad authority to issue all orders necessary for the proper administration of the Receivership estate. See *SEC v. Credit Bancorp Ltd.*, 290 F.3d 80, 82-83 (2d Cir. 2002); *SEC v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980). The Court's wide discretion derives from the inherent powers of an equity court to fashion relief (*Elliott*, 953 F.2d at 1566; *Safety Finance Service, Inc.*, 674 F.2d at 372), and it may enter such orders as may be appropriate and necessary for the Receiver to fulfill the duty to preserve and maintain the property and funds within the Receivership estate (see, e.g., *Official Comm. of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006); *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997)). The goal of the Receiver, having been charged in relevant part with liquidating assets, is to obtain the best value for the estate available under the circumstances. *Fleet Nat'l Bank v. H & D Entertainment, Inc.*, 926 F. Supp. 226, 239-40 (D. Mass. 1996). And the paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. See, e.g., *Four B. Corp. v. Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997).

The relief sought by the Receiver falls squarely within those powers. In light of the considerations discussed above, the sale of the Shares is in the best interest of the Receivership estate, and would result in the recovery of \$15,000 for the benefit of defrauded

investors. As a result, the Receiver respectfully requests that the Court grant the relief requested in this motion and enter the proposed order attached as Exhibit 1.

II. THE COURT HAS THE AUTHORITY TO WAIVE THE REQUIREMENTS OF 28 U.S.C. §§ 2001 AND 2004, AND THE CIRCUMSTANCES HERE WARRANT SUCH WAIVER

28 U.S.C. §§ 2001 and 2004 govern the “sale” of property. However, these statutory requirements can be and are often waived by courts. 28 U.S.C. § 2004 (“**Section 2004**”) governs the sale of personal property and provides as follows:

Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with Section 2001 of this Title, unless the court orders otherwise.

28 U.S.C. § 2004 (emphasis added). 28 U.S.C. § 2001(b) (“**Section 2001(b)**”) addresses private sales and provides as follows:

After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interest 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 or 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 ten percentum increase over the price offered in the private sale.

28 U.S.C. § 2001(b). Thus, “unless the Court orders otherwise” pursuant to Section 2004, Section 2001(b) requires a court to appoint three disinterested persons as appraisers and to direct in which newspaper a notice of proposed sale be published prior to confirmation of a

sale. Here, however, using the discretion afforded by Section 2004, the Court should “order otherwise” in this instance with regard to (i) the need for three appraisals and (ii) the publication in newspapers of notice of any sale. The Court’s authority to deviate from the requirements of Section 2004 is supported by caselaw and is in the best interests of the Receivership estate.

The Receiver was provided with an independent appraisal of Endai that he relied upon in concluding that the Shares were appropriately valued.¹ The Receiver was also provided with certain financial data in the Appraisal to appropriately evaluate the value of the Shares. The delay and expense associated with obtaining two other independent appraisals of the Shares is not warranted under these circumstances in light of the Shares’ relatively small value, nor is the cost and delay associated with publishing notice as these requirements would significantly, if not completely, offset the net sale proceeds. Thus, the Receiver respectfully requests that the Court accept the Appraisal *nunc pro tunc* under Section 2001(b) and find the Receiver has substantially complied with the appraisal requirements of that statute.

This is particularly appropriate here because courts have recognized the discretion afforded to them by Section 2004 in approving a discretionary deviation from the requirements of Section 2001(b) for the sale of personal property, which encompasses the sale of corporate stock. *See, e.g., Tanzer United States v. Stonehill*, 83 F.3d 1156, 1160 (9th Cir. 1996) (emphasizing statutory language, “unless the court orders otherwise,” and

¹ The Receiver was also supplied with an affidavit from the company conducting the Appraisal, SPAR-DATA, certifying that the Appraisal represented a fair and accurate opinion of the market value of Endai as of December 31, 2011.

concluding that “it is at the district court’s discretion whether to obtain appraisals [in sales of] personal property”); *see also SEC v. Kirkland*, 2008 WL 4264532, *2 (M.D. Fla. 2008) (approving sale of personalty without appraisals or publication where costs of compliance would significantly offset the purchase offer); *United States v. Kerner*, 2003 WL 22905202, *2 (E.D. Mich. 2003) (“Under...28 U.S.C. § 2004, which states that the requirements of section 2001 must be followed ‘unless the court orders otherwise,’ the Court clearly has the discretionary authority to confirm the private sale [made without strict adherence to the requirements in Section 2001].”).

Indeed, Courts have specifically exercised their authority to deviate from the requirements of Section 2001(b) when faced with the proposed sale of personal property by a receiver under Section 2004. *See Wells Fargo Capital Finance, Inc. v. North Pacific Group*, No. CV10-65-KI, Order on Receiver’s Motion for Order Authorizing Sale of Accounts Receivable (D. Ore. Jan. 24, 2012) (excusing receiver from “compliance with 28 U.S.C. § 2004 concerning sales of personal property through federal court proceedings”); *SEC v. Billion Coupons, Inc.*, 2009 WL 2143531, *4 (D. Hawai’i 2009) (finding good cause to exercise discretion and permit receiver to sell personal and real property in manner other than as provided by federal statute, including 28 U.S.C. §§ 2001, 2004); *Federal Trade Commission v. Jeremy Johnson et. al.*, No. 2:10-cv-02203-RLH-GWF, Order (D. Nev. August 25, 2011) (allowing receiver to liquidate private limited liability membership interest and authorizing deviation from sale and publication procedures of 28 U.S.C. §§ 2001 and 2004); *SEC v. Lydia Capital, LLC, et al.*, No. 1:07-cv-10712-RGS, Order Granting Receiver’s Motion for Authorization to Sell Asset of the Receivership Estate (D. Mass.

March 16, 2011) (“Given the Receiver’s efforts in marketing the portfolio of policies, including the Sale Policy, the third-party offers the Receiver obtained from disinterested bidders in the marketplace, and the notices provided to all interested parties, neither an independent appraisal or publication is necessary under 28 U.S.C. §§ 2001 and 2004”) (emphasis added).

III. THERE EXIST NO OTHER KNOWN CLAIMS OR INTERESTS IN THE SHARES

Deviation from the requirements of Section 2001(b) is not only warranted by the circumstances, but it also would not raise any issues because there are no known outstanding claims, liens, or encumbrances relating to the Shares. Although the Receiver is not aware of any claims, liens, or encumbrances relating to the Shares, to eliminate any risk whatsoever, the Receiver nevertheless seeks an Order making the transfer of the Shares free and clear of any and all liens, encumbrances, and claims. This Court’s broad authority over the Receivership estate includes the equitable power to “sell property free of liens, transferring the liens to the proceeds.” *Seaboard Nat’l Bank v. Rogers Milk Products Co.*, 21 F.2d 414, 416 (2d Cir. 1927); *see also Quilling v. Trade Partners, Inc.*, 2007 WL 296211 (W.D. Mich. 2007) (approving receiver’s sale of property free and clear of all liens and encumbrances and ordering that any liens or claims associated with the property would attach to the proceeds of the sale).

Finally, because no known claim, lien, or encumbrance affecting the Receivership estate’s interests in the Shares exists, no hearing on this Motion is necessary. Instead, aside from filing this motion in the public docket, it will be posted and easily accessible to any interested party on the Receivership’s website (www.nadelreceivership.com) promptly after

it is filed. This procedure will provide any interested party with sufficient notice and opportunity to be heard in accordance with Section 2001(b). *See, e.g., North Pacific Group, Inc.*, No. CV10-65-KI (D. Ore. Jan. 24, 2012) (“no other or further notice of the Motion or the entry of this sale order is required”); *Albert Fase Kaleta et al.*, No. 4:09-cv-3674 (S.D. Tex. August 10, 2010) (granting emergency motion waiving receiver’s compliance with Section 2004, including notice requirements).

CONCLUSION

For these reasons, the Receiver respectfully moves the Court for entry of an Order in substantially the form of the proposed order attached as Exhibit 1 approving the sale of the Shares free and clear of any and all claims, liens, and encumbrances and finding that, under 28 U.S.C. §§ 2001 and 2004, the Receiver has substantially complied with any appraisal requirements and any publication requirements are deemed waived.

VERIFICATION OF RECEIVER

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



Burton W. Wiand, Court-Appointed Receiver

CERTIFICATE UNDER LOCAL RULE 3.01(g)

Undersigned counsel has conferred with counsel for the SEC and is authorized to represent to the Court that this motion is unopposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 31, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

s/Gianluca Morello

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