

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

TRAVIS E. CORRELL, individually and
doing business as Horizon Establishment, et. al.

Defendants,

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Case 4:05-cv-00472-RAS Civil Action No. 4:05-CV-472-RAS Document 73-1 Filed 03/29/2006 Page 1 of 12

**RECEIVER'S MOTION TO SELL REAL PROPERTY FREE AND CLEAR
OF ALL LIENS, CLAIMS AND ENCUMBRANCES
(305 Princess Drive, Sunrise Beach, Texas)**

TO THE HONORABLE RICHARD A. SCHELL, UNITED STATES DISTRICT JUDGE:

COMES NOW S. Gregory Hays, the duly appointed and qualified receiver in this case (the "Receiver"), and files this Motion to Sell Real Property Free and Clear of All Liens, Claims, and Encumbrances and in support of such would show unto the Court as follows:

I.

INTRODUCTION

1.1 On December 7, 2005, upon the application of the Securities and Exchange Commission ("SEC"), this Court entered its Order Appointing Receiver (the "Receiver Order") in the above-styled and numbered action wherein the Court appointed S. Gregory Hays as the receiver (the "Receiver") in these proceedings. Thereafter, the Receiver qualified by filing the bond as required by the Receiver Order, which was accepted and approved by the Court.

1.2 On the same date that the Court appointed the Receiver, it also signed and entered its *Ex Parte* Temporary Restraining Order, Order Freezing Assets, Requiring an Accounting,

Authorizing Expedited Discovery and Granting Other Emergency Relief (the “Asset Freeze”). Thereafter, at the preliminary injunction hearing on December 13, 2005, the Court entered its Agreed Order of Preliminary Injunction and other Equitable Relief as to Defendant Gregory Thompson (“Thompson Preliminary Injunction”).

1.3 Among the duties and obligations of the Receiver established in the TRO Order and Preliminary Injunction Order is the obligation to marshal the assets of the Defendants. One of the assets identified and marshaled by the Receiver was a lake house located in Sunrise Beach, which is on Lake LBJ, in Llano County, Texas (the “Sunrise Beach” property).

1.4 The Sunrise Beach property is commonly known as 305 Princess Lane, and consists of two lots and a .22 Acre fill area, containing a split level house of approximately 2,100 square feet, a boat dock and a fishing pier. It is more particularly described as follows:

Lots 153 and 154 in Sunrise Beach II, Unit A, a subdivision located in Llano County, Texas, according to the map or plat thereof recorded in Volume 94, Page 15, Llano County Deed Records, and a 0.22 Acre Tract of land out of the Middleton M. Hill Survey No. 104, Abstract No. 360, Llano County, Texas.

Said property is hereinafter referred to as the “Property” or the “Sunrise Beach Property”.

1.5 The Sunrise Beach Property is titled in the name of Gregory Thompson and Sandra Thompson. Gregory Thompson is the primary bread winner for his family, however, and it is believed by the Receiver that the funds utilized to acquire the Sunrise Beach Property, and/or the funds used to make the monthly note payments, came in principal part from the illegal Ponzi scheme. While the Receiver has not been appointed over Sandra Thompson’s interest in the Property, the Receiver believes that it is in the best interest of the receivership estate to compel Mrs. Thompson to enter into the transaction, if necessary. Accordingly, as part of this motion, the Receiver requests

that this court set a show cause hearing, simultaneously with the hearing on this sale, and notify Mrs. Thompson to appear and show cause why she should not be ordered to enter into the sale, assuming that the Court approves the sale.

1.6 The Sunrise Beach Property is not owned by Gregory and Sandra Thompson free and clear, but has both a first and second lien deed of trust against it. The liens are both held by Countrywide Home Loans. As of February 15, 2006 the balance on the first lien was \$409,243.85, and the second lien had a balance of \$51,583.93, for a total indebtedness against the property of \$460,827.78. The Receiver made the monthly payments on these notes for January and February. The March payment has not been made.

1.7 Attached hereto as **Exhibit A** is a true and correct copy of "One to Four Family Residential Contract" (the "Contract") entered into between the Receiver (through counsel) and Mark and Terri Szeneri ("Buyers"). As is set forth in the Contract, the proposed purchase price is \$500,000.00. Additionally, Buyers are paying almost all traditional closing costs, including some usually paid by the Seller. Finally, Buyers have purchased the two Sea Doo personal water craft for \$8,500.00, which it is agreed is to be allocated to the purchase price of the house as well. Since the Buyers were located by the Receiver, without the utilization of a realtor, there is no real estate commission due at closing, a savings to the receivership estate of approximately \$30,000.00. The Buyer's desire to acquire the furnishings and personal property in the Sunrise Beach Property, along with the real estate and improvements.

1.8 As the court is aware, 28 U.S.C. § 2001(b) requires three appraisals of real property in order to proceed to a private sale. During the week of December 7, 2005, the Receiver's counsel

visited the Sunrise Beach Property to secure and inspect the premises. At that time, the Receiver's counsel visited ReMax Lake LBJ, located in Sunrise Beach, and requested that the real estate broker render a broker's opinion of market value ("BOMV") of the Sunrise Beach Property. On December 29, 2005, the Receiver's counsel received a BOMV of the Sunrise Beach Property, reflecting the broker's opinion that the Sunrise Beach Property, furnished, had a market value of \$595,000.00. A true and correct copy of this BOMV is attached hereto as Exhibit "B" and is incorporated by reference herein for all purposes. Thereafter, the Receiver commissioned an appraisal of the Sunrise Beach Property, through Stouffer and Associates, certified appraisers from San Antonio, Texas. The appraisal reflects the market value of the Sunrise Beach Property as being \$560,000.00, presumably unfurnished. A true and correct copy of said appraisal is attached hereto as Exhibit "C" and is incorporated by reference herein for all purposes. Finally, at the request of the Receiver's counsel, the buyer obtained an additional BOMV, from a broker at the Horseshoe Bay Corp., who is very active in marketing and selling lake property at Lake LBJ. A true and correct copy of this BOMV is attached hereto as Exhibit "D" and incorporated by reference herein for all purposes. This BOMV sets the market value of the Sunrise Beach Property as \$496,524.00.

1.9 Based upon the average of the three appraisals already obtained, the market value of the Sunrise Beach Property is \$550,508.00. 28 U.S.C. § 2001(b) requires that any private sale be for no less than two thirds of the appraised value of the property. Two thirds of this value would be \$368,840.36. Such would not, however, clear the indebtedness against the property. As the Court can see, there is very little equity in the Sunrise Beach Property. Indeed, assuming no additional interest charged, tax proration or broker's commission, but simply subtracting the amount due on the debt as of February 15, 2006 from the average of the various appraisals results in only \$89,680.00

in equity. In 2005, the *ad valorem* taxes for the Sunrise Beach Property totaled \$12,930.14. Assuming a contract for the appraised value, with a traditional real estate commission of 6% (\$33,030.48), and pro-rated taxes through the first four months of 2006 (assuming 2005 level, would be \$4,396.25), such a contract would yield \$52,253.27.

1.10 After taking possession of the Sunrise Beach Property, the Receiver had several inquiries from potential purchasers. The first offer was for \$380,000.00. Upon finding out the amount of debt against the property, this potential buyer declined to increase his offer. Over the next several weeks other interested parties offered \$420,000.00, \$465,000.00, and \$485,000.00. This led the Receiver to conclude that it was not cost effective to list the property, as such would only increase the amount of the purchase price that the Receiver would have to obtain in order to clear commissions and costs from a potential sale, and the market did not seem to support the increased price.

1.11 The Contract price is \$500,000.00, furnished, and including the personal water craft, which have already been delivered. Less the water craft, at closing the Receivership Estate should realize approximately \$20,000.00. The Contract price of \$500,000.00 is well in excess of the statutory requirement of two thirds for completing a private sale. Additionally, the improvements on the Property are over 20 years old, and the Property still has the original septic system, which is old and will soon need to be replaced. Since the Receiver's knowledge of the improvements on the Sunrise Beach Property are extremely limited, the Buyers are buying the Property "asis, where is, and with all faults", effectively relieving the receivership estate of any potential liability for any latent defects in the Property that might exist. Further, the Buyers are incurring the costs of the title

policy, survey and other prorations that would customarily be paid by the seller in a sale such as this, resulting in additional savings to the receivership estate.

1.12 As part of his duties, and pursuant to 28 U.S.C. § 2001(b), the Receiver requests that the court approve the Contract and authorize the Receiver to proceed to sell the Property¹, free and clear of all liens, claims and encumbrances, by virtue of a private sale. Pursuant to the requirements of 28 U.S.C. § 2001, the Court must authorize the Agent to hire appraisers. In the interest of saving time, this has already been done. Accordingly, the Receiver requests that the Court appoint the three appraisers who have already rendered opinions of value on the Property, as the disinterested parties, pursuant to 28 U.S.C. § 2001. Pursuant to 28 U.S.C. § 2001(b), the time, date and location of the hearing, must be advertised in the Llano county area at least ten days prior to the hearing and closing of the sale. The Earnest Money Contract seeks to close on March 31, 2006, but the buyer is willing to extend the contract, since it is subject to this Court's approval. Additionally, the Receiver's counsel is already scheduled to be before this honorable Court on April 18, 2006 with regard to another sale. Accordingly, the Receiver requests that the Court further order the Receiver to advertise the terms of this sale consistent with the foregoing and requests the court to set a hearing for the approval and closing of the Contract, preferably on April 18, 2006, if the Court's schedule permits. Finally, the Receiver requests that a summons be issued for the hearing, giving notice to Sandra Thompson to appear at that time and show cause, if any there be, why the sale should not go forward with, or without, her consent.

¹Subject to Court approval which will be sought at an evidentiary hearing, to be set by the court, pursuant to this motion.

II.

ARGUMENTS AND AUTHORITIES

2.1 The ultimate purpose of the Receiver's appointment is to provide a vehicle through which assets can be held, and preserved to make a potential fund for the payment of the defrauded investors who are the victims of the Ponzi scheme described in the Complaint. Allowing the Property to be sold by virtue of a private sale will both further and expedite the process. It will also allow the Receivership Estate to avoid ongoing liabilities for taxes, insurance, and maintenance.

2.2 A district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad. *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). It is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership. *SEC v. Lincoln Thrift Association*, 577 F.2d 600, 606 (9th Cir. 1978). See *SEC v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5th Cir. 1982)(court overseeing a receivership is accorded "wide discretionary power" in light of "the concern for orderly administration"). A primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors. See *SEC v. Wencke (Wencke II)*, 783 F.2d 829, 837 n.9 (9th Cir. 1986).

2.3 To guide courts in this purpose, 28 USA § 2001 governs the sale of real property by order of court by both public and private sale. Subsection (a) sets out the terms of a public sale and Subsection (b) sets out the procedure for a private sale. Subsection (b) provides as follows:

After a hearing, of which notice to all 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....No private sale shall be confirmed at a price less than two-thirds of the appraisal 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 (emphasis added).

Taken in its entirety, Section 2001 provides safeguards to prevent the sale of realty through the use of unfair price or value procedures.

2.4 The district court has wide discretion in judging whether a sale is fair in terms and result and serves the best interests of the estate. *Fleet National Bank v. H&D Entertainment, Inc.*, 96 F.3d 532 (1st Cir. 1996), *citing United States v. Peter*, 777 F.2d 1294, 1298 n.6 (7th Cir. 1985) and *United States v. Branch Coal*, 390 F.2d 7, 10 (3rd Cir.), *cert. Denied*, 391 U.S. 966, 88 S.Ct. 2034 (1968). The court has broad discretion in setting the terms of conditions of a sale under 28 USC §2001. *United States v. Hundwardsen*, 39 F.Supp.2d 1157 (N.D. Iowa 1999), *citing United States v. Branch Coal Corp.*, 390 F.2d 7, 10 (3rd Cir.), *cert. Denied*, 391 U.S. 966, 88 S.Ct. 2034 (1968); *see United States v. Garcia*, 474 F.2d 1202, 1206 (5th Cir. 1973). The court must decide whether, based on the record made by the parties, the best interest of the estate will be served by a public or a private sale. *Id.* However, section 2001(b) limits the Receiver's ability to sell property at a private sale for an unfair price by setting in place appraisal procedures and acceptable price limits. *United States v. Stonehill*, 83 F.3d 1156 (9th Cir. 1996). Section 2001 "contemplates compliance with

certain procedures designed to protect the best interest of the estate” *Tanzier v. Huffines*, 412 F.2d 221 (3rd Cir. 1969).

2.5 In general, the court has broad discretion to set the terms of a public sale; whereas it must generally follow the procedures in place for a private sale. *See Tanzier v. Huffines*, 412 F.2d 221 (3rd Cir. 1969). In cases involving the private sale of realty, the courts have consistently adhered to the procedures outlined in section 2001(b). *See United States v. Garcia*, 474 f.2d 1202 (5th Cir. 1973)(court scrupulously adhered to statutory requirements of section 2001 for judicial sale of realty); *U.S. v. “A” Manufacturing Company*, 541 F.2d 504 (5th Cir. 1976)(affirming court confirmation of realty sale for greater price than highest appraisal value). Consequently, broad discretion of the court does not include bypassing the specific procedures set out in section 2001(b).

2.6 In order for a receiver to sell property in a private sale he must first obtain permission from the Court to do so and then he must comply with 28 U.S.C. §2001, which provides in part, that the Court appoint three disinterested persons to appraise the property and that confirmation of sale of the property be at a price no less than two-thirds of the appraised value. In addition, the statute provides that the terms of the sale shall be published in a newspaper of general circulation as the Court directs at least ten (10) days before confirmation of the sale. The Receiver intends to publish the terms of the sale in the official publication for legal notices in the Llano county area.

2.7 Accordingly, the Receiver respectfully requests that he be authorized to market the Property for private sale. As noted above, three appraisals have already been obtained, and the Receiver requests that the Court ratify these appraisers as being acceptable to the Court. Additionally, the Receiver prays that a hearing, near the closing date, be set. The Contract is

presently set for closing on March 31, 2006, however there is not time to close on that date and still satisfy the statutory requirement of ten days notice of the hearing. Accordingly, the Receiver requests the Court grant this motion without hearing, and that the Court set a hearing to confirm the sale of the Property on April 18, 2006, if the Court's schedule permits, and that at said hearing, the Court authorize the Receiver to proceed to close the Contract.

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WHEREFORE, PREMISES CONSIDERED, the Receiver prays that the court ratify the Receiver's action in entering into the Contract at Exhibit "A", set a hearing for a confirmation of the sale during the week of April 17, 2006, pursuant to 28 U.S.C. §§2001 and 2002, and for such other and further relief as the Court may deem appropriate under all fo the circumstances.

CERTIFICATE OF CONFERENCE

I certify that on March 27, 2006, I transmitted an electronic copy of this motion to Scott Baker, counsel for TNT Office Supply and Greg Thompson, and requested that he inform me if he was opposed to the motion, concurred with the relief sought, represented Mrs. Thompson, or if he had any comment. On March 28, 2006 I received a cryptic response from Mr. Baker that did not definitively tell me whether he was opposed to the relief sought or whether or not he would be filing a response. Accordingly, it is presumed that it is opposed.

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/s/ Clark B. Will

Clark B. Will

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2006, true and correct copy of the foregoing document was served on the following parties:

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