

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

vs.

STANLEY J. KOWALEWSKI and
SJK INVESTMENT MANAGEMENT, LLC,

Defendants.

CIVIL ACTION NO.
1:11-cv-0056-TCB

**RECEIVER'S MOTION FOR
APPROVAL OF PRIVATE SALE OF REAL PROPERTY**

S. Gregory Hays, the court-appointed Receiver for SJK Investment Management, LLC (“SJK”), the SJK Special Opportunities Fund, LP (the “Special Opportunities Fund”), and their assets (collectively, the “Receiver Estate”), files this Motion for Approval of Private Sale of Real Property (the “Motion”) and shows the Court as follows:

BACKGROUND

1. Pursuant to the terms of Orders dated February 2, 2011 [ECF No. 37] and March 8, 2011 [ECF No. 59] (the “Receivership Orders”), Mr. Hays was appointed as Receiver for SJK and the Special Opportunities Fund. Among other

things, the Receivership Orders authorize and direct the Receiver to take custody and control of assets of the Receiver Estate, to sell assets of the Receiver Estate, and to marshal and administer assets held by third-parties. Receivership Order §§ IV, VII, IX.

2. In accordance with Receivership Orders, the Receiver has taken custody and control of various assets of the Receiver Estate, including: (1) a parcel of real property and house located at 5802 Henson Farms, Summerfield, North Carolina, 27358 (the “Henson Farms Property”); and (2) a parcel of real property and house located at 5203 Southwind Road, Greensboro, North Carolina 27455 (the “Southwind Property”) (collectively, with the Henson Farms Property, the “Properties”). The Properties were transferred to the Special Opportunities Fund in August 2011 by separate quitclaim deeds executed by Defendant Stanley J. Kowalewski and his wife, Traci Kowalewski.¹ Consequently, both Properties are part of the Receiver Estate and, as described below, may be sold by the Receiver upon the Court’s approval. Copies of the quitclaim deeds are attached hereto as Exhibit A.

¹ The Receiver maintains that the Properties were impressed with a constructive trust for the benefit of the Special Opportunities Fund since the time that they were acquired by the Kowalewskis from the Special Opportunities Fund in 2010 and, therefore, that the Kowalewskis never had a cognizable ownership interest in the Properties after these acquisitions.

3. The Receiver is now prepared to proceed with the sale of the Properties with the goal of realizing the highest reasonable value for the Properties under the circumstances of this receivership.

SALE OF THE PROPERTY

4. Where the administration of a receiver estate requires the sale of real property, 28 U.S.C. § 2001 provides the general procedures that a receiver must follow. Specifically, subsection (b) establishes the following procedures for a private sale of real property:

(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).

5. Therefore, in order to sell the Properties in a private sale, the Receiver must obtain permission from the Court to do so. The sale also must comply with

the other provisions in section 2001(b), which provide, in part, that the Court appoint three disinterested persons to appraise the Properties and that a minimum price of two-thirds of the appraised value be obtained. Section 2001(b) also requires that the terms of the sales shall be published in a newspaper of general circulation as the Court directs for at least ten (10) days before the final confirmation of the sales. Finally, a private sale cannot be confirmed if a bona fide offer is made, which guarantees at least a ten percent (10%) increase over the price offered in the private sale.

6. Notwithstanding the processes outlined in section 2001(b), in overseeing equity receiverships, district courts have wide discretion in overseeing the sale of real and personal property. Accordingly, except in cases of abuse, appellate courts will not disturb the exercise of the district courts' discretion in setting the conditions for judicial sales or the confirmation thereof. *See United States v. Branch Coal*, 390 F.2d 7, 10 (3rd Cir. 1968), *cert. denied*, 391 U.S. 966 (1968).

7. One of the ultimate purposes of the Receiver's appointment in this case is to provide a vehicle through which assets can be gathered, preserved, and, ultimately, liquidated in order to minimize to the extent possible the losses incurred

by investors in the hedge funds that were managed by SJK (the “SJK Funds”).² To that end, the Court has extremely broad powers to supervise the receivership and to determine the appropriate action to be taken in the administration of the receivership. *See SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986); *SEC v. Lincoln Thrift Ass’n*, 577 F.2d 600, 606 (9th Cir. 1978); *see also SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 (5th Cir. 1982) (holding that a court overseeing a receivership is accorded “wide discretionary power” in light of “the concern for orderly administration”). (citations omitted).

8. Each receivership case presents its own distinct circumstances that require the presiding court to employ case-specific procedures. *See SEC v. Hardy*, 803 F.2d at 1038 (recognizing that courts must often craft reasonable administrative procedures to deal with the complex circumstances of each case). Because a court may not have the resources to ascertain which procedures will be most efficient in a given situation, the receiver has a duty to assist the court in understanding the specific issues in the case and developing the appropriate procedures. *See id.* (citing *SEC v. Wencke (Wencke II)*, 783 F.2d 829, 837 n.9 (9th Cir. 1986)) (noting the duty of an equity receiver to aid the court in orderly and

² The SJK Funds are: (1) the SJK Absolute Return Fund, Ltd.; (2) the SJK Absolute Return Fund, LLC; (3) the SJK Long/Short Equity Fund, Ltd.; and (4) the SJK Long/Short Equity Fund, LLC.

efficient administration of the estate); *see also Marsch v. Williams*, 23 Cal. App. 4th 238, 248 (Cal. Ct. App. 1994) (noting that the receiver is “the hand of the court, to aid it in preserving and managing the property involved in the suit for the benefit of those to whom it may ultimately be determined to belong”).

9. In light of the purposes and principles underlying the administration of this receivership, and in an effort to minimize additional costs incurred by the Receiver Estate in disposing the Properties, the Receiver proposes the sale of the Properties pursuant to the terms set forth below.³

Henson Farms Property

10. The Henson Farms Property has been the subject of several motions, notices, and orders in this receivership. [See ECF Nos. 115, 116, 117, 118, 119, 120, 125, 126, 127, 128, 129, 132, 133, 134, 135, 136, 138, & 139.] The Receiver assumes that all interested parties and the Court are familiar with the details of the events described in these pleadings and will not repeat them here. In short, Defendant Kowalewski, without the permission of the Receiver, removed or permitted to be removed from the Henson Farms Property almost all fixtures, furniture, and other items, leaving the Property in a state of complete disrepair and reducing the value of the Property by hundreds of thousands of dollars.

³ The Receiver intends to employ a similar process to sell the two other real properties that are part of the Receiver Estate.

11. Based on the Receiver's analysis of the expense to the Receiver Estate that would be required to bring the Henson Farms Property back to its prior condition – i.e., the replacement of fixtures and other repair work – the Receiver has determined that it is in the best interest of the Receiver Estate to sell the Henson Farms Property in “as is” condition.

12. On January 19, 2012, the Receiver entered into contract with Clinton R. Babcock and Jolinda J. Babcock (the “Babcocks”) to sell the Henson Farms Property for \$700,000. After the payment of approximately \$16,000 in outstanding property taxes, the Receiver expects the sale to net approximately \$684,000 to the Receiver Estate. A copy of the Purchase and Sale Agreement (the “Henson Farms Agreement”) is attached hereto as Exhibit B.

13. The Receiver is not in any way affiliated with the Babcocks.

14. Prior to entering into the Henson Farms Agreement with the Babcocks, the Receiver received one (1) written offer on the Henson Farms Property for \$675,000 (which was later increased to \$680,000 by an oral offer.

15. The Babcocks' inspection period has expired, and the Receiver is prepared to sell the Henson Farms Property to the Babcocks pursuant to the terms of the Henson Farms Agreement.

16. As required by 28 U.S.C. § 2001, in order to allow for competing bids, the Receiver has published notice of the terms of the Henson Farms Agreement in the Greensboro News & Record, which is a newspaper of general circulation in the geographic area where the Henson Farms Property is located. The Receiver first published the notice on January 25, 2012 and it will run consecutively through February 3, 2012. Upon completion of the notice period, the Receiver will file a Publisher's Affidavit confirming the dates of publication and will disclose any qualifying competing bids – *i.e.*, bids with a purchase price at least 10% higher than the purchase price in the Henson Farms Agreement – in response to the published notice. The Receiver will notify the Court promptly if he receives such an offer prior to the Court's approval of the sale to the Babcocks.

17. Upon the filing of this motion, the Receiver will publish a copy of the motion and all exhibits to his website, www.haysconsulting.net, and will send the motion by email to the investors in the SJK Funds.

18. As required by 28 U.S.C. § 2001, the Receiver has considered the following three “appraisals” to arrive at the sales price:

(a) The November 3, 2011, residential appraisal performed by South Atlantic Appraisal Group, LLC for Timothy P. Mann, placing a fair market value of \$625,000 on the Property, a true and correct copy of which is attached hereto as Exhibit C(1).

(b) The November 1, 2011, residential appraisal report performed by Taylor & Associates Appraisers, Inc. for SJK Special Opportunities Fund LP placing a fair market value of \$1,220,000 assuming repair costs of approximately \$500,000 were completed, which if not completed the property would command a fair market value of \$720,000, a true and correct copy of which is attached hereto as Exhibit C(2).

(c) The December 20, 2011 offer of \$675,000 by Timothy Mann and Sandy Mann, a true and correct copy of which is attached hereto as Exhibit C(3).

19. These documents are sufficient to satisfy section 2001(b)'s appraisal requirements because each was provided by a party who is independent from the Receiver and has no interest in the proposed sale of the Henson Farms Property to the Babcocks.

20. As required by 28 U.S.C. § 2001, the \$700,000 sales price exceeds two-thirds of the appraised value. In addition, given the soft real estate market and the current condition of the Henson Farms Property, the purchase price is reasonable. Moreover, selling the Property now, as is, will allow the Receiver Estate to avoid additional expenses associated with maintaining the Property in the future.

21. The Receiver believes that if the Court does not approve the sale of the Henson Farms Property under the Henson Farms Agreement, the Receiver may not be able to sell the Property at the same or a materially higher price. Even if he ultimately were able to obtain a higher price, it may take a long time to find a

buyer willing to purchase the Henson Farms House in its current condition, and the Receiver Estate may incur substantial ongoing maintenance expenses in the meantime.

The Southwind Property

22. The Southwind Property is the former residence of Defendant Kowalewski's parents.

23. On December 29, 2011, the Receiver entered into contract with Cameron A. Cooke ("Cooke") to sell the Southwind Property for \$165,000. The Receiver expects the sale to net approximately \$161,250 to the Receiver Estate. A copy of the Purchase and Sale Agreement (the "Southwind Agreement") is attached hereto as Exhibit D.

24. The Receiver is not in any way affiliated with Cooke.

25. Prior to entering into the Southwind Agreement, the Southwind Property was listed for sale for three (3) months, with an asking price of \$184,900. Other than the offer made by Cooke, no other offers were made on the Southwind Property.

26. The inspection period has expired, and the Receiver is prepared to sell the Southwind Property to Cooke pursuant to the terms of the Southwind Agreement.

27. As required by 28 U.S.C. § 2001, in order to allow for competing bids, the Receiver has published notice of the terms of the Southwind Agreement in the Greensboro News & Record, which is a newspaper of general circulation in the geographic area where the Southwind Property is located. The Receiver first published the notice on January 25, 2012, and it will run consecutively through February 3, 2012. Upon completion of the notice period, the Receiver will file a Publisher's Affidavit confirming the dates of publication and will disclose all qualifying competing bids – *i.e.*, bids with a purchase price at least 10% higher than the purchase price in the Southwind Agreement – in response to the published notice. The Receiver will notify the Court promptly if he receives such an offer prior to the Court's approval of the sale to Cooke.

28. Upon the filing of this motion, the Receiver will publish a copy of the motion and all exhibits to his website, www.haysconsulting.net, and will send the motion by email to the investors in the SJK Funds.

29. As required by 28 U.S.C. § 2001, the Receiver has considered the following three “appraisals” to arrive at the sales price:

(a) The purchase price of \$183,000 which was paid by Stanley and Traci Kowalewski when they purchased the property on August 18, 2004. A true and correct copy of the printout from the Guilford County Tax Assessor's office reflecting the purchase price is attached hereto as Exhibit E(1).

(b) The January 10, 2012 residential appraisal report of Taylor & Associates Appraisers, Inc. placing a fair market value of \$172,000 on the Property, a true and correct copy of which is attached hereto as Exhibit E(2).

(c) The Guilford County Tax Assessor's independent assessment of \$176,400 as reflected on the 2011 property tax notice, a true and correct copy of which is attached hereto as Exhibit E(3).

30. These documents are sufficient to satisfy section 2001(b)'s appraisal requirements because each was provided by a party who is independent from the Receiver and has no interest in the proposed sale of the Southwind Property to Cooke.

31. As required by 28 U.S.C. § 2001, the \$165,000 sales price exceeds two-thirds of the appraised value. In addition, given the soft real estate market and the lack of interest in the Southwind Property, the purchase price is reasonable. Moreover, selling the Property now, as is, will allow the Receiver Estate to avoid additional expenses associated with maintaining the Property in the future.

32. The Receiver believes that if the Court does not approve the sale of the Southwind Property under the Southwind Agreement, it may take a long time to sell the Property for an amount equal to \$165,000.

WHEREFORE, the Receiver respectfully requests that this Court enter an order approving the sale of the Henson Farms Property pursuant to the terms of the Henson Farms Agreement, and the Southwind Property pursuant to the terms of the

Southwind Agreement. Specifically, if no objections are filed to this motion and if the Receiver does not receive any qualifying competing bids for the Henson Farms Property and/or the Southwind Property, the Receiver requests that the Court grant this motion without hearing. If objections are filed or competing bids received, the Receiver requests that the Court schedule a hearing to resolve any outstanding issues.

This 27th day of January, 2012.

/s/ J. David Dantzler, Jr.

J. David Dantzler, Jr.

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CERTIFICATE OF COMPLIANCE OF LOCAL RULE 7.1D

I hereby certify that the foregoing has been prepared in a Times New Roman 14 point font, one of the font and point selections approved by the Court in Local Rule 5.1B.

/s/ J. David Dantzler, Jr.

J. David Dantzler, Jr.

Georgia Bar No. 205125

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MOTOIN FOR APPROVAL OF PRIVATE SALE OF REAL PROPERTY** was electronically filed with the Clerk of Court using the CM/ECF system, which automatically serves notification of such filing to all counsel of record.

A copy of this filing also has been provided by electronic mail to all investors in the SJK Funds and the Special Opportunities Fund.

This 27th day of January, 2012.

/s/ J. David Dantzler, Jr.

J. David Dantzler, Jr.

Georgia Bar No. 205125