

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
APR 11 2001  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_  
Deputy

Plaintiff,

VS.

Defendants,

and

## Defendants Solely for Purposes of Equitable

CIVIL ACTION NO.  
3:98-CV-2689-M

**RECEIVER'S UNOPPOSED MOTION TO SELL REAL PROPERTY  
(POTTAWATOMIE) AT PRIVATE SALE AND TO APPOINT APPRAISERS AND BRIEF  
IN SUPPORT**

TO THE HONORABLE JEFF KAPLAN, UNITED STATES MAGISTRATE JUDGE:

COMES NOW, Michael J. Quilling (“Receiver”), and files his Unopposed Motion to Sell Real Property (Pottawatomie) at Private Sale and to Appoint Appraisers and in support of such would respectfully show unto the Court as follows:

## FACTUAL BACKGROUND

1. On November 13, 1998, the United States Securities and Exchange Commission (“SEC”) initiated these proceedings and, in connection therewith, sought the appointment of a receiver. On November 13, 1998, the Court issued an Order appointing Michael J. Quilling Receiver as to the Defendants and the Equity Relief Defendants named in the Complaint at that time

("Receivership Order"). One of the entities to which the Receivership Order applies is Howe Financial Trust.

2. Subsequent to his appointment, the Receiver has taken control and possession of certain real property located in Elkhart County, Indiana more particularly described in Exhibit "1" attached hereto (the "Property").

3. Howe Financial Trust obtained an interest in the Property by virtue of a Real Estate Lease Option Purchase Agreement ("Purchase Agreement") dated March 12, 1998 between Jack Warner ("Warner"), seller, and Howe Financial Trust ("Howe"), buyer. The Purchase Agreement was never recorded in the appropriate real property records. The total purchase price of four-hundred fifty thousand dollars (\$450,00.00) for the Property was to be paid in installments of forty thousand dollars (\$40,000.00) per month until paid in full. .

4. One June 1, 1999, the remaining balance, one-hundred thirty thousand dollars (\$130,000.00), plus interest, was paid on the Property by Strong Heart, Inc. ("Strong"). At that time, the Property was conveyed to Strong from Warner.

5. Subsequent to Warner's conveyance to Strong, the Receiver reached an agreement with Rodger Griggs and Strong. The agreement provided, in part, that Strong would turn over the Property to Howe.

6. By virtue of this Court's Order on March 1, 2001, Strong was ordered to transfer ownership of the Property to Howe. On March 16, 2001, a Warranty Deed in favor of Howe was recorded in the Elkhart County Recorder's Office. Howe continues to own the Property to this day.

7. As part of his duties, and pursuant to 28 U.S.C. § 2001(b), the Receiver requests that he be allowed to market and sell the Property<sup>1</sup> **by virtue of a private sale** and that in connection therewith, the Court appoint three disinterested persons<sup>2</sup> to appraise the Property.

### **ARGUMENTS AND AUTHORITIES**

8. The ultimate purpose of a receivership is to provide a vehicle through which assets can be held, liquidated and distributed to the particular beneficiaries of the receivership. In this instance, the beneficiaries are the creditors and investors of Howe. 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.

9. 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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1978). *See SEC v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5<sup>th</sup> 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 (9<sup>th</sup> Cir. 1986).

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<sup>1</sup>Subject to Court approval to be sought by virtue of a separate Motion. A buyer has already been located but the requirements addressed in this Motion must be satisfied before the sale is brought before the Court.

<sup>2</sup>The Receiver proposes that he be authorized to hire Bill Briscoe, Bill Ezzell and Richard Gaddis, at a cost of \$275.00 per appraisal.

10. 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.

11. The district court has wide discretion in judging whether a receiver's 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 (1<sup>st</sup> Cir. 1996), *citing United States v. Peter*, 777 F.2d 1294, 1298 n.6 (7<sup>th</sup> 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 (5<sup>th</sup> 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 foreclosed 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 (9<sup>th</sup> 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 (3<sup>rd</sup> Cir. 1969).

12. 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 (3<sup>rd</sup> Cir. 1969)(federal statute expresses preferential course to be followed in connection with a court authorized sale of *personal property* and district court should not order otherwise except *under extraordinary circumstances*). 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 (5<sup>th</sup> 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 (5<sup>th</sup> 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). To bypass the stringent requirements of 2001(b), the court can order a public sale under 2001(a) and set the terms and conditions as it so desires.

13. In order for the Receiver to sell the 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

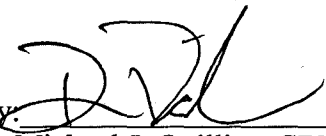
addition, the statute provides that the terms of the sale shall be published in a newspaper of general circulation as the Court directs at least ten (10) days before confirmation of the sale.

14. Accordingly, the Receiver respectfully requests that upon final consideration of this matter that he be permitted to retain the services of three disinterested persons to appraise the Property and that he be authorized to market the Property for private sale. After the appraisals are obtained the Receiver will file a motion to actually sell the Property and to publish the proposed sale in the appropriate media.

WHEREFORE, PREMISES CONSIDERED, the Receiver prays that upon final hearing and consideration of this matter that the Court authorize him to retain the services of three appraisers and to offer the property for private sale, and for such other and further relief, general or special, at law or in equity, to which the Receiver may show himself to be justly entitled.

Respectfully submitted,

QUILLING, SELANDER, CUMMISKEY  
& LOWNDS, P.C.  
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(214) 871-2100 (Telephone)  
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By:   
Michael J. Quilling, SBN 16432300  
D. Dee Raibourn, III, SBN 24009495

ATTORNEYS FOR RECEIVER

**CERTIFICATE OF CONFERENCE**

I have conferred with Robert Brunig of the SEC regarding the relief requested in this motion and he does not oppose the relief requested.



D. Dee Raibourn, III

**CERTIFICATE OF SERVICE**

I certify that on the 11<sup>th</sup> day of April, 2001, a true and correct copy of the foregoing was served via United States mail, first-class, postage pre-paid, on:

|                                                                                                                  |                                                                                              |
|------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------|
| Robert B. Brunig<br>Securities & Exchange Commission<br>801 Cherry Street, 19th Floor<br>Fort Worth, Texas 76102 | Deborah Goodall<br>Goodall & Sooter<br>12830 Hillcrest Rd., Suite 111<br>Dallas, Texas 75230 |
| Wendell A. Odom, Jr.<br>440 Louisiana, Suite 800<br>Houston, Texas 77002                                         | Dan R. Waller<br>Secore & Waller, LLC<br>13355 Noel Road, Suite 2290<br>Dallas, Texas 75240  |
| S. Cass Weiland<br>Sheinfeld, Maley & Kay, P.C.<br>1700 Pacific Avenue, Suite 4400<br>Dallas, Texas 75201-4618   |                                                                                              |



Michael J. Quilling / D. Dee Raibourn, III

## EXHIBIT "1"

A part of the Northwest Quarter of Section 22, Township 37 North, Range 4 East, Baugo Township, Elkhart County, Indiana described as follows:

Commencing at a monument at the Southwest corner of the Northwest Quarter of said Section 22; thence North 00 degrees 25 minutes 37 seconds East along the West line of the Northwest Quarter of said Section 22 (being also the center line of Ash Road) 1,320.89 feet to a spike set on this survey at the intersection of the West line of the Northwest Quarter of said Section 22 with the South line of the Northwest Quarter of the Northwest Quarter of said Section 22, said intersection being midway between the monuments at the Southwest and Northwest corners of the Northwest Quarter of said Section 22; thence South 89 degrees 06 minutes 00 seconds East along the South line of the Northwest Quarter of the Northwest Quarter of said Section 22, 630.00 feet to an iron pin set on this survey said iron pin being at the Point of Beginning of this description; thence North 00 degrees 25 minutes 37 seconds East, 420.00 feet to an iron pin set on this survey; thence North 89 degrees 59 minutes 56 seconds West 400.00 feet to an iron pin set on this survey; thence East along the East line of Creekwood Estates Third Section as recorded August 7, 1978 and Plat Book 14, Page 1 in the office of the Recorder of Elkhart County, Indiana the following two courses; North 00 degrees 25 minutes 37 seconds East 145.32 feet; North 01 degrees 14 minutes 25 seconds East, 100.02 feet; thence along the Southerly line of Creekwood Estates First Section as recorded March 4, 1966 in Plat Book 9, Page 61 in the office of the Recorder of Elkhart County, Indiana the five courses; North 26 degrees 15 minutes 04 seconds East, 153.38 feet; South 89 degrees 14 minutes 56 seconds East, 140.59 feet; South 66 degrees 18 minutes 22 seconds East, 204.56 feet; North 02 degrees 52 minutes 30 seconds West, 84.00 feet; North 79 degrees 45 minutes 04 seconds East, 193.00 feet; thence south 10 degrees 14 minutes 56 seconds East, 148.37 feet to an iron pin found on this survey; thence North 55 degrees 24 minutes 58 seconds East, 160.64 feet to an iron pin found on this survey, said pin being at the Southwest corner of Lot 14 of Creekwood Estates First Section as recorded; thence South 18 degrees 46 minutes 57 seconds East, 23.91 feet; thence Southerly and Easterly along the boundary of a survey done on June 3, 1975 by Homer w. Fisher as Job Number 54-1975 the following eight courses; South 14 degrees 48 minutes 08 seconds East, 68.87 feet; South 00 degrees 01 minutes 26 seconds East, 84.18 feet; South 09 degrees 42 minutes 20 seconds East, 56.77 feet; North 79 degrees 56 minutes 43 seconds East, 98.23 feet; North 51 degrees 38 minutes 55 seconds East, 94.11 feet; North 36 degrees 57 minutes 28 seconds East, 55.19 feet; North 78 degrees 16 minutes 43 seconds East, 121.12 feet to a point on the East line of the Northwest Quarter of the Northwest Quarter of said Section 22; thence South 72 degrees 28 minutes 28 seconds East, 174.20 feet; thence South 00 degrees 07 minutes 19 seconds East, 658.35 feet to a point on the South line of the Northeast Quarter of the Northwest Quarter of said Section 22; thence North 89 degrees 06 minutes 02 seconds West along said South line, 166.03 feet to an iron pin set on this survey at the Southwest corner of the Northeast Quarter of the Northwest Quarter of said Section 22, said Southwest corner being midway between the stone at the Northeast corner of of the Northwest Quarter of the Northwest Quarter of said Section 22, and the Southeast corner of the Southwest Quarter of the Northwest Quarter of said Section 22 as depicted on a survey by Frank



**Exhibit "1" - Continued**

B. Rupe, Jr. dated September 13, 1952; thence continuing North 89 degrees 06 minutes 02 seconds West, along the South line of the Northwest Quarter of the Northwest Quarter of said Section 22, 705.26 feet to the Point of Beginning.

Subject to public highways.

Commonly known as 58100 Pottawatomie, Osceola, IN 46561.