

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**  
COURT  
TEXAS  
MAR 27 2001  
CLERK, U.S. DISTRICT COURT  
By \_\_\_\_\_ Deputy



VS.

## Defendants Solely for Purposes of Equitable

**RECEIVER'S UNOPPOSED MOTION TO SELL REAL PROPERTY AND BRIEF IN SUPPORT**  
N:\TCD\FILES\MJO\FUND911.01\MotionCreekwood.wpd - Page 1

2. Subsequent to his appointment, the Receiver has taken control and possession of certain real property in which Howe Financial Trust has an interest 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 October 30, 1998 between Thomas and Diana Weinkauff ("Weinkauff"), seller, and Ream Family Trust, a part of Howe Financial Trust, buyer. The Purchase Agreement was never recorded in the appropriate real property records. The total purchase price of one-hundred sixteen thousand, nine hundred dollars (\$116,900.00) for the Property was to be paid in installments of eight thousand dollars (\$8,000) per month until paid in full. To date, only \$72,000.00 has been paid toward the purchase of the Property. Accordingly, Weinkauff is still owed \$44,900. In addition, since the purchase price for the Property has not been paid in full, Weinkauff is still the legal owner of the Property and Howe Financial Trust has an unrecorded equitable interest in the Property.

4. The Receiver has reached an agreement with Weinkauff pursuant to which the Receiver will market and sell the Property and the money owed Weinkauff will be paid at closing. In that the money used by Howe Financial Trust to make the payments under the Purchase Agreement is directly traceable to monies received from investors, the Property constitutes a receivership asset within the meaning of the Receivership Order. To the best knowledge of the Receiver, there are no other outstanding liens, claims, or encumbrances with respect to the Property other than possibly property taxes for 1999 and 2000.

5. 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**

6. 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 Financial Trust. 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.

7. 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 one of the persons appointed be the appraiser hired and paid for by the buyer and his lender, Alex Antonnelli. The Receiver would hire two other appraisers, Bill Ezzell and Richard Gaddis, at a cost of \$275.00 per appraisal.

8. 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.

9. 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).

10. 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.

11. 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.

12. 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  
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By:   
Michael J. Quilling, SBN 16432300  
D. Dee Raibourn, III, SBN 24009495

ATTORNEYS FOR RECEIVER

### CERTIFICATE OF CONFERENCE

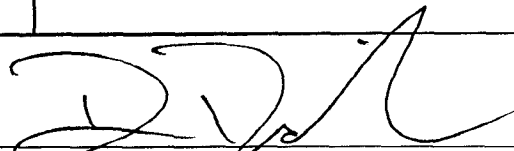
I have conferred with Robert Brunig of the SEC regarding the relief requested in this motion and he does not oppose the relief requested.

  
D. Dee Raibourn, III

### CERTIFICATE OF SERVICE

I certify that on the 28<sup>th</sup> day of March, 2001, a true and correct copy of the foregoing was served via United States mail, first-class, postage pre-paid, on:

Robert B. Brunig Securities & Exchange Commission 801 Cherry Street, 19th Floor Fort Worth, Texas 76102	Deborah Goodall Goodall & Sooter 12830 Hillcrest Rd., Suite 111 Dallas, Texas 75230
Wendell A. Odom, Jr. 440 Louisiana, Suite 800 Houston, Texas 77002	Dan R. Waller Secore & Waller, LLC 13355 Noel Road, Suite 2290 Dallas, Texas 75240
S. Cass Weiland Sheinfeld, Maley & Kay, P.C. 1700 Pacific Avenue, Suite 4400 Dallas, Texas 75201-4618	Thomas Weinkauff 29860 CR 24 Elkhart, IN 46517

  
Michael J. Quilling / D. Dee Raibourn, III

## EXHIBIT "1"

Property situated in Elkhart County, Indiana, Lot Number Eighteen (18) as the said Lot is known and designated on the recorded Plat of CREEKWOOD ESTATES FIRST SECTION, a Subdivision in Baugo Township; said Plat being recorded in Plat Book 9, page 61, in the office of the Recorder of Elkhart County, Indiana. More commonly known as 30910 Creekwood Terrace, Osceola, Elkhart County, Indiana.