

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v.

Case No. 8:20-CV-325-T-35-NHA

BRIAN DAVISON;
BARRY M. RYBICKI;
EQUIALT LLC;
EQUIALT FUND, LLC;
EQUIALT FUND II, LLC;
EQUIALT FUND III, LLC;
EA SIP, LLC;

Defendants, and

128 E. DAVIS BLVD, LLC, et al.,

Relief Defendants.

_____ /

**RECEIVER'S UNOPPOSED MOTION TO SELL
VEHICLE VIA CONSIGNMENT**

Burton W. Wiand, as receiver over the assets of the corporate and relief defendants (the “**Receiver**” and the “**Receivership**” or “**Receivership Estate**”) files this unopposed motion requesting that the Court approve the marketing and sale of a 1981 Land Rover Defender (VIN: SALLDHAD7BA244596) (the “**Defender**”) via consignment (*i.e.*, private sale) through Dimmitt Automotive Group (“**Dimmitt**”). In late 2022, this Court

approved the marketing and sale of three high-end vehicles, including the Defender, through online and live auction (Doc. 729). Since that time, the Receiver has successfully sold the Ferrari and Porsche, but despite several auction attempts, the Defender has not sold.

The Receiver has reviewed various options for trying to sell the Defender at the best price for the Receivership and has determined that selling the vehicle through consignment at Dimmitt is the most expedient, efficient, and economical way to sell the vehicle. As explained below, the Receiver believes the consignment is commercially reasonable and will result in a fair and equitable recovery for the Receivership Estate. Because this method of sale is slightly different from the auction method previously approved by the Court, in an abundance of caution, the Receiver is seeking the Court's approval of the proposed consignment (*i.e.*, private sale).

Proposed Consignment

The Receiver proposes consigning the Defender through Dimmitt in Clearwater, Florida. Dimmitt, a trusted local dealer with a hundred-year history, is a certified Land Rover dealer. Additionally, Dimmitt is a certified dealer of a number of high-end automobile brands including Aston Martin, Bentley, McLaren, Rolls-Royce, and Jaguar. The Receiver believes that Dimmitt's customer base, location, and experience in high-end vehicles will provide the best opportunity for him to sell the Defender. Dimmitt's

Consignment Agreement, a sample copy of which is attached hereto as **Exhibit 1**, allows the Receiver to set the price for the vehicle and provides for a five percent consignment fee to Dimmitt upon the sale of the vehicle. Based upon the Receiver's research, this is a reasonable fee for such consignment services.

ARGUMENT

I. THE COURT HAS BROAD POWER OVER THIS RECEIVERSHIP, AND THE SALE OF DEFENDER 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 of the receivership is extremely broad. *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *S.E.C. 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; *S.E.C. v. Safety Finance Service, Inc.*, 674 F.2d 368, 372 (5th Cir. 1982). A court imposing a receivership assumes custody and control of all assets and property of the receivership, and it has broad equitable authority to issue all orders necessary for the proper administration of the receivership estate. *See S.E.C. v. Credit Bancorp Ltd.*, 290 F.3d 80, 82-83 (2d Cir. 2002); *S.E.C. v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980). The Court may enter such orders as may be appropriate and necessary for a receiver to fulfill his 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. S.E.C.*, 467 F.3d 73, 81 (2d Cir. 2006). Any action taken by a district court in the exercise of its discretion is subject to great deference by appellate courts. *See United States v. Branch Coal*, 390 F. 2d 7, 10 (3d Cir. 1969). Such discretion is especially important considering that one of the ultimate purposes of a receiver's appointment is to provide a method of gathering, preserving, and ultimately liquidating assets to return funds to creditors. *See S.E.C. v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 (5th Cir. 1982) (court overseeing equity receivership enjoys "wide discretionary power" related to its "concern for orderly administration") (citations omitted).

Given these principles, the Court should approve the proposed consignment of the Defender because the plan will provide a targeted clientele for this niche vehicle and garner reasonable value for the Receivership Estate. Further, the sale will avoid the accrual of additional, unnecessary carrying costs like insurance and maintenance. Once the Defender is sold, the Receivership will no longer own any vehicles.

II. THE RECEIVER SEEKS THE COURT'S WAIVER OF THE REQUIREMENTS OF 28 U.S.C. §§ 2001 AND 2004.

Personal property sold by a federal court receiver should generally be done in accordance with 28 U.S.C. § 2004 ("**Section 2004**") and, with respect

to private sales and consignments (as opposed to auctions), 28 U.S.C. § 2001(b)

(“**Section 2001(b)**”). Section 2004 reads, in relevant part, as follows:

Any personalty [like the Defender] 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). Section 2001(b) reads 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 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). Section 2001(b) imposes relatively onerous and costly procedures on the Receiver and the Court – *e.g.*, appointing three independent appraisers, publishing the terms of sale in a newspaper of general circulation, and holding a confirmation hearing. Under Section 2004, however, the Court has the discretion to waive strict compliance with Section 2001(b). Specifically, and as excerpted above, Section 2004 provides that personal property “shall be

sold in accordance with [S]ection 2001 ... **unless the court orders otherwise.**” 28 U.S.C. § 2004 (emphasis added).

Using the discretion afforded by Section 2004, the Court should “order otherwise” by approving the Receiver’s consignment proposal without requiring him to (1) obtain three independent appraisals of the Defender, (2) publish the terms of the sale in a newspaper of general circulation, or (3) schedule a confirmation hearing before the Court to approve the sale. First, three independent appraisals are not needed because of the data the Receiver has obtained through the unsuccessful auction process and Dimmitt’s expertise selling high-end vehicles. For example, the reserve auction price for the defender was \$150,000, but no potential purchaser ever bid above that amount. The Receiver and his professionals have had several conversations with interested buyers, however, which have provided insight into the lower and upper ranges of the vehicle’s potential market value. Because the Defender is highly customized, the Receiver will work with Dimmitt to determine and initial consignment price and to adjust that price as purchasing interest and market conditions dictate. Formal appraisals are expensive and time-consuming. Given the previous auction attempts and the safeguards built into the consignment process, the Receiver requests that the Court waive the appraisal provisions of Section 2001(b). The Court has afforded the Receiver similar relief on prior occasions in this Receivership. *See, e.g.,* Doc. 890.

Second, the Court should not require the Receiver to solicit *bona fide* offers and to publish the terms of the sale in a newspaper of general circulation at least 10 days before the confirmation of the sale because this is also wasteful and unnecessary. The Receiver has been advertising the Defender for sale on the Receivership website and/or the auction website for months, if not years. Most people who buy a car from a dealership like Dimmitt expect to drive it off the lot that same day. Buyers will not be willing to wait almost two weeks for the notice period to expire and for the receiver to file a Notice of Lack of *Bona Fide* Offers with the Court, as he does in connection with certain private sales of real estate that take longer and are much more complicated to close. In the Receiver's extensive experience, no one has ever submitted a *bona fide* offer in response to a published notice.

Third, the Court should not require a hearing to confirm the sale. By granting this motion, the Court should afford the Receiver full authority to close the sale of the Defender pursuant to the Consignment Agreement and any necessary purchase and sale agreement between the buyer and the Receiver. The Receiver has sold several parcels of real property through the private sale process under Section 2001(b) in this Receivership, and the Court has yet to require a hearing. The sale of the Defender does not require a different result.

The waivers requested by the Receiver also routinely occur in other enforcement actions and receiverships, including those in this district. *See F.T.C. et al. v. E.M. Systems & Services, LLC et al.*, Case No. 8:15-cv-1417-T-23EAJ, Order (M.D. Fla. March 4, 2016) (finding good cause to excuse receiver from judicial sale procedures of 28 U.S.C. § 2001); *S.E.C. v. Kirkland*, 2008 WL 4264532, *2 (M.D. Fla. 2008) (approving sale of personal property without appraisals or publication where costs of compliance would significantly offset sale proceeds); *S.E.C. v. Global Online Direct, Inc.*, Case No. 1:07-CV-0767-WSD, Order Granting Receiver’s Mot. For Order Authorizing the Sale of Certain Property (N.D. Ga. 2009) (“The Court hereby relieves the Receiver from the provisions of 28 U.S.C. §§ 2001-2002.”); *S.E.C. v. Billion Coupons, Inc.*, 2009 WL 2143531, *4 (D. Hawaii 2009) (authorizing receiver to deviate from requirements of 28 U.S.C. § 2001 where proposed plan contained sufficient safeguards for maximizing sales price, as well as efficient process to minimize costs and other expenses).

CONCLUSION

Based on the foregoing, the Receiver respectfully moves the Court for entry of an order authorizing the Receiver to sell the Defender through consignment with Dimmitt Automotive Group

LOCAL RULE 3.01(G) CERTIFICATION

Counsel for the Receiver has conferred with counsel for the SEC who does not object to the relief sought.

Respectfully submitted,
/s/ Katherine C. Donlon
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Attorneys for Receiver Burton W. Wiand

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 15, 2024, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system which will send notification of electronic filing to all counsel of record.

/s/ Katherine C. Donlon

EXHIBIT 1

This Agreement is made as of (date) _____ between (dealership name) _____ (hereafter "Dealership") and (name of owner as it appears on title) _____ (hereafter "Owner").

The Parties

Dealership is a motor vehicle dealership engaged in the business of new and used car sales and service. Owner is the owner of a properly registered, titled and insured motor vehicle. (All owners of record must be made a party to this agreement and sign. If an entity, proof of authority.)

Owner's Street Address: _____

Owner's City, State, Zip: _____

Owner's home telephone number: _____ Owner's business telephone number: _____

The Vehicle

This agreement is for the consignment of the following motor vehicle (hereafter "Consigned Vehicle"):

Year: _____ Make: _____ Model: _____

Vehicle Identification Number: _____ Lien Amount, if any: _____

Pursuant to the terms of this agreement, Dealership and Owner agree as follows:

1. Dealership agrees to offer for sale on consignment the Consigned Vehicle for a period of 60 days from the date of this agreement.
2. Owner agrees to leave the Consigned Vehicle at Dealership, during said 60-day period.
3. Owner will receive the sum of \$ _____ within ____ days if, during the foregoing 60-day period, a purchaser is found for the Consigned Vehicle, clear title is produced for the vehicle and the vehicle is delivered to the purchaser.
4. Owner authorizes Dealership to clean and advertise the Consigned Vehicle and to drive and demonstrate the Consigned Vehicle on public roads.
5. Upon execution of this agreement, Owner agrees to provide Dealership the Consigned Vehicle's original title and written proof of valid, Florida state required insurance. The original title will be held in escrow. To protect Owner's proprietary interest in the vehicle, title need not be signed by the owner. Owner will disclose any and all liens on said vehicle and will hold the dealership harmless from any claims arising out of any liens or claims.

Insurance

6. During the term of this agreement, Owner agrees to keep and maintain and deliver proof of sufficient insurance, including but not limited to fire and theft, bodily injury liability and physical damage insurance to cover (i) the full value of the Consigned Vehicle in the event there is a loss and (ii) any claims for personal injury or property damage that may arise as a result of the operation of the Consigned Vehicle. Owner further agrees that during the term of this agreement, Owner's insurance is primary.

Release of Liability

7. Owner is aware that there are risks involved in leaving the Consigned Vehicle at Dealership, including but not limited to fire, theft and vandalism, and that there are risks of personal injury and property damage arising out of, connected with, or arising from demonstrating the Consigned Vehicle. Owner is further aware that Dealership is not insured to cover any loss of any kind of the Consigned Vehicle or any loss of any kind arising out of or connected with the operation of the Consigned Vehicle under any circumstance. Owner accepts full responsibility for any loss or damage that may occur to the Consigned Vehicle or as a result of its operation while the Consigned Vehicle is in the possession of Dealership. Owner further agrees to assume and hereby assumes any and all risks associated with leaving the Consigned Vehicle with Dealership, including but not limited to any damage or injury that may result from any cause or for any reason whatsoever.
8. Owner hereby releases Dealership, its agents, employees and officers from any and all claims, actions, suits, procedures, costs, expenses, damages and liability arising out of, connected with, or resulting from this consignment.

Termination

- 9. The term of this agreement is 60 days and may be terminated sooner by Dealership, in its sole discretion.
- 10. This agreement will automatically renew for a second 60-day period unless terminated by Dealership or Owner giving seven (7) days written notice. Any term longer than this 60-day renewal period will be at the Dealer’s discretion and will be rewritten on a separate contract.
- 11. Upon termination of this agreement, Owner must pick up the Consigned Vehicle within two days at which time the Consigned Vehicle’s title will be returned to Owner. If the Consigned Vehicle is not picked up within two days, Dealership will charge, and Owner agrees to pay, a storage fee of \$65.00 per day, for every day thereafter the Consigned Vehicle remains on Dealership’s premises.
- 12. Upon termination of this agreement, the Owner will be provided a list of Protected Buyers. This list will contain all potential buyers that visited the Dealership in regard to the above-mentioned Consigned Vehicle. Owner agrees that no sale transaction will transpire between the Owner and any of the listed Potential Buyers for a period of no less than _____ days after the termination of this agreement.
- 13. It is agreed by Owner and Dealership, that this contract is covered by and executed through Florida law. Any and all litigation shall take place in Pinellas County, Florida.
- 14. Attorney Fees. In any litigation, arbitration, or other proceeding by which one party either seeks to enforce its rights under this Agreement (whether in contract, tort, or both) or seeks a declaration of any rights or obligations under this Agreement, the prevailing party shall be awarded its reasonable attorney fees, and costs and expenses incurred.
- 15. This agreement is the entire agreement between Owner and Dealership regarding the consignment of the Consigned Vehicle. This agreement may not be modified, except by a written notice signed by both parties.

Date: _____ Owner’s Signature: _____

Date: _____ Dealership Signature: _____
NAME TITLE

This Agreement is made as of (date) _____ between (dealership name) _____ (hereafter "Dealership") and (name of owner as it appears on title) _____ (hereafter "Owner").

The Parties

Dealership is a motor vehicle dealership engaged in the business of new and used car sales and service. Owner is the owner of a properly registered, titled and insured motor vehicle. (All owners of record must be made a party to this agreement and sign. If an entity, proof of authority.)

Owner's Street Address: _____

Owner's City, State, Zip: _____

Owner's home telephone number: _____ Owner's business telephone number: _____

The Vehicle

This agreement is for the consignment of the following motor vehicle (hereafter "Consigned Vehicle"):

Year: _____ Make: _____ Model: _____

Vehicle Identification Number: _____ Lien Amount, if any: _____

Pursuant to the terms of this agreement, Dealership and Owner agree as follows:

1. Dealership agrees to offer for sale on consignment the Consigned Vehicle for a period of 60 days from the date of this agreement.
2. Owner agrees to leave the Consigned Vehicle at Dealership, during said 60-day period.
3. Owner will receive the sum of \$ _____ within ____ days if, during the foregoing 60-day period, a purchaser is found for the Consigned Vehicle, clear title is produced for the vehicle and the vehicle is delivered to the purchaser.
4. Owner authorizes Dealership to clean and advertise the Consigned Vehicle and to drive and demonstrate the Consigned Vehicle on public roads.
5. Upon execution of this agreement, Owner agrees to provide Dealership the Consigned Vehicle's original title and written proof of valid, Florida state required insurance. The original title will be held in escrow. To protect Owner's proprietary interest in the vehicle, title need not be signed by the owner. Owner will disclose any and all liens on said vehicle and will hold the dealership harmless from any claims arising out of any liens or claims.

Insurance

6. During the term of this agreement, Owner agrees to keep and maintain and deliver proof of sufficient insurance, including but not limited to fire and theft, bodily injury liability and physical damage insurance to cover (i) the full value of the Consigned Vehicle in the event there is a loss and (ii) any claims for personal injury or property damage that may arise as a result of the operation of the Consigned Vehicle. Owner further agrees that during the term of this agreement, Owner's insurance is primary.

Release of Liability

7. Owner is aware that there are risks involved in leaving the Consigned Vehicle at Dealership, including but not limited to fire, theft and vandalism, and that there are risks of personal injury and property damage arising out of, connected with, or arising from demonstrating the Consigned Vehicle. Owner is further aware that Dealership is not insured to cover any loss of any kind of the Consigned Vehicle or any loss of any kind arising out of or connected with the operation of the Consigned Vehicle under any circumstance. Owner accepts full responsibility for any loss or damage that may occur to the Consigned Vehicle or as a result of its operation while the Consigned Vehicle is in the possession of Dealership. Owner further agrees to assume and hereby assumes any and all risks associated with leaving the Consigned Vehicle with Dealership, including but not limited to any damage or injury that may result from any cause or for any reason whatsoever.
8. Owner hereby releases Dealership, its agents, employees and officers from any and all claims, actions, suits, procedures, costs, expenses, damages and liability arising out of, connected with, or resulting from this consignment.

Termination

- 9. The term of this agreement is 60 days and may be terminated sooner by Dealership, in its sole discretion.
- 10. This agreement will automatically renew for a second 60-day period unless terminated by Dealership or Owner giving seven (7) days written notice. Any term longer than this 60-day renewal period will be at the Dealer’s discretion and will be rewritten on a separate contract.
- 11. Upon termination of this agreement, Owner must pick up the Consigned Vehicle within two days at which time the Consigned Vehicle’s title will be returned to Owner. If the Consigned Vehicle is not picked up within two days, Dealership will charge, and Owner agrees to pay, a storage fee of \$65.00 per day, for every day thereafter the Consigned Vehicle remains on Dealership’s premises.
- 12. Upon termination of this agreement, the Owner will be provided a list of Protected Buyers. This list will contain all potential buyers that visited the Dealership in regard to the above-mentioned Consigned Vehicle. Owner agrees that no sale transaction will transpire between the Owner and any of the listed Potential Buyers for a period of no less than _____ days after the termination of this agreement.
- 13. It is agreed by Owner and Dealership, that this contract is covered by and executed through Florida law. Any and all litigation shall take place in Pinellas County, Florida.
- 14. Attorney Fees. In any litigation, arbitration, or other proceeding by which one party either seeks to enforce its rights under this Agreement (whether in contract, tort, or both) or seeks a declaration of any rights or obligations under this Agreement, the prevailing party shall be awarded its reasonable attorney fees, and costs and expenses incurred.
- 15. This agreement is the entire agreement between Owner and Dealership regarding the consignment of the Consigned Vehicle. This agreement may not be modified, except by a written notice signed by both parties.

Date: _____ Owner’s Signature: _____

Date: _____ Dealership Signature: _____
NAME TITLE