

70106-1

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NO. 70106-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

Veritas Development, Inc. and Randy Previs,

Appellants,

v.

Turnaround, Inc., as Receiver for Wellington Hills Park, LLC, a
Washington limited liability company, UNION BANK, N.A., successor-
in-interest to the Federal Deposit Insurance Corporation, as the Receiver
of Frontier Bank, et. al.

Respondents.

Jev Recycling, Inc. and Donovan Brothers, Inc., and RFJF, Inc, d/b/a
Cascade Landscape Construction, Union Bank,
John T. Blanchard, H.D. Supply Waterworks, Ltd., Harper Hayes,
Northwest Asphalt, Public Utility District No. 1 of Snohomish County,

Other Parties

OPENING BRIEF OF THE APPELLANTS

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I. INTRODUCTION

Randy Previs and Veritas Development, Inc. (“Veritas”) (collectively, the “Appellants”), request that this Court reverse the Order (I) Approving Sale of Property Free and Clear of Liens and Rights of Redemption; (II) Authorizing and Approving Purchase and Sale Agreement; (III) Authorizing Assumption and Assignment of Real Property Lease; and (IV) Granting Related Relief (the “Sale Order”), CP at 173, as affirmed by Order Denying Motion for Revision of Commissioner’s Sale Order (“Revision Order”). CP at 93. Also, Appellants request that this Court reverse the Sale Order based upon the flawed interlocutory order approving the retroactive amendment to the bid procedures (the “Bid Procedures Amendment Order”). CP at 604. In the Sale Order, the Commissioner approved the general receiver’s proposed sale of commercial property to OIBP Wellington Hills, LLC (“OIBP”), for \$10,850,000 over Veritas’ bid for \$12,000,000. In making this ruling, the Commissioner erroneously ruled that OIBP’s bid was the highest and best that could be obtained and thus acceptance of such offer was in the best interest of the estate and its creditors.

Veritas was OIBP’s competing bidder for the purchase of the Property, and at all times it offered to pay more than OIBP. The Receiver’s refusal to accept Veritas as the “Winning Bidder” was

improper. The Commissioner should have denied the Receiver's motion to approve the Sale Order because Veritas' offer of \$12,000,000 for the Property was the highest and best offer, and in the best interest of the estate and its creditors, including appellant Randy Previs. Because Veritas made the highest and best offer, this Court should reverse on appeal and remand to the trial court for a determination of the true highest and best price. Given the amount at issue, a number of interested parties filed pleadings for the Commissioner's consideration, and a large volume of paper was submitted. Veritas and Randy Previs believe the Commissioner simply did not have the time to fully consider all the evidence and arguments, and that they were denied a sufficient opportunity to be heard, which is required by due process. In this case, based on conflicting declarations, the Commissioner should have held an evidentiary hearing. Finally, the Commissioner improperly permitted the Receiver to retroactively amend the court approved bid procedures to cure OIBP's failure to timely submit a binding purchase and sale agreement and tender its 5% bid deposit. This action denied Veritas, the Backup Bidder at the auction, its right to close its sale at a higher price.

II. ASSIGNMENT OF ERROR

(1) The trial court erred in making the conclusion of law that OIBP's bid was the highest and best price that could be obtained and thus

acceptance of such offer was in the best interest of the estate and its creditors.

(2) The trial court erred in not holding an evidentiary hearing to resolve disputed issues of fact presented in conflicting declarations at the sale hearing.

(3) The trial court erred in retroactively amending the bid procedures to cure OIBP's noncompliance with them and denying Veritas its rights as the Backup Bidder.

III. STATEMENT OF THE CASE

Turnaround, Inc. (the "Receiver"), is the court-appointed general receiver of the assets of defendant Wellington Hills Park, LLC ("Wellington Hills"). On January 31, 2013, Commissioner Brudvik entered the Sale Order, approving the sale of property known as the Wellington Hills Business Campus in Woodinville (the "Property"), pursuant to a proposed Purchase and Sale Agreement ("PSA") between the Receiver and OIBP. Specifically, the Sale Order approves an agreement for OIBP to purchase the Property for \$10,850,000. CP at 173.

On August 31, 2012, the trial court entered a Bid Procedures Order, approving a sealed-bid process and setting deadlines by which the Receiver would solicit bids for the Property, select the "highest and best offer," and seek Court approval of a sale to the "Winning Bidder." CP at

765. The Court overruled Veritas' objection that the sealed bid process was not likely to maximize value for the receivership estate, and that an open auction process was more likely to maximize value. CP at 874.

On October 5, 2012, pursuant to the approved bid procedures, Veritas timely submitted its sealed bid to purchase the Property for \$20,100,000. CP at 294. Veritas enclosed a commitment from its lender to fund the bid amount, and offered to provide the Receiver with any other financial information to evidence its financial ability to close the transaction. CP at 294, 297. Under the approved bid procedures, the Receiver was to select from all initial bidders “not more than the three highest and best First-Round Bids by bidders that the Receiver determines, in its sole discretion, have the financial ability. . . to timely consummate sale of the Property[.]” CP at 774. On October 8, 2012, the Receiver notified Veritas that it had been selected as a Final-Round-Qualified-Bidder. CP at 299. By its own definition, the Receiver had then determined that Veritas had the financial ability to pay \$20.1 million.

Veritas then affirmed its \$20.1 million bid as a Final Bid on the Final-Round Deadline of October 12, 2012. CP at 301. The Receiver had questions about Veritas' funding, and spoke with Veritas' financier on Monday, October 15, 2012. CP at 290. Veritas' financier told the Receiver

he was in the hospital that day, but would send financial documentation as soon as he could. *Id.*

Later that day, without waiting for Veritas' financial documentation, the Receiver informed Veritas it had selected another party as the "Winning Bidder" though neither the bidder's identity nor the amount of its "winning" bid was disclosed. CP at 303. The Receiver then gave the opportunity for Veritas to become the "Backup Bidder," who pursuant to the bid procedures was to step into the shoes of the Winning Bidder if the Winning Bidder failed to timely comply with the bid procedures and close a sale. CP at 303-06. Veritas timely notified the Receiver of its acceptance of the position of "Backup Bidder," assuming that its offered price was the second highest. CP at 306.

Pursuant to the bid procedures, the Winning Bidder was given until November 5, 2012, to complete its due diligence. CP at 774-75. On October 31, 2012, the Receiver filed a motion to extend this deadline to November 8, 2012, the same time its PSA and 5% Bid Deposit was due. CP at 685. In that motion, the Receiver confirmed that if the Winning Bidder failed to provide an executed PSA and a Bid Deposit by November 8th, it would "relinquish its position as the Winning Bidder, allowing the Backup Bidder to step into its shoes[]." CP at 686. On November 6, 2012, the Court granted the extension. CP at 682.

The Winning Bidder failed to comply with the November 8th deadline, but Veritas was not substituted as the Winning Bidder pursuant to its rights under the bidding procedures and previous orders. Instead, on November 13th, the Receiver filed a motion retroactively requesting a second extension of the deadline to December 5th, for the Winning Bidder to wire its Bid Deposit and deliver a signed PSA. CP at 673.

Once again, the Winning Bidder failed, and the Receiver once again sought to deny Veritas its rights. On December 24, 2012, the Receiver filed yet another motion to extend the Winning Bidder's deadline retroactively. CP at 648. Over Veritas' objection, the Court granted the extension, giving the Winning Bidder a deadline of January 22, 2013, to provide the required Bid Deposit and signed PSA. CP at 604.

Finally, on January 23, 2013, the Receiver filed and served its Notice of Winning Bidder and Hearing to Approve. CP at 540. For the first time, the OIBP bid amount became known. The Receiver finally disclosed it had selected OIBP as the Winning Bidder even though its initial bid was only \$15,055,000—over \$5 million less than the Veritas bid the Receiver had rejected. To make matters worse, the Receiver disclosed that in the months of delay and extensions, OIBP had reduced its bid to \$10,850,000. CP at 489-90.

The Receiver's Sale Approval Motion failed to even mention Veritas' initial bid of over \$20 million. Nor did it disclose that on January 16, 2013, Veritas' counsel and President, along with Randy Previs, its financier, Columbia Pacific, and others, met with the Receiver and its counsel to confirm that Veritas had the financing and willingness to still pay \$12,000,000 for the Property, despite the devaluation that had occurred in the months of delay. CP at 290-91. The Receiver and its counsel had spoken directly with Veritas' lender, and subsequently indicated that they were satisfied with Veritas' financier. *Id.* At the meeting, the Receiver's counsel agreed to confirm in writing that Veritas had demonstrated the financial ability to pay \$12,000,000, though written confirmation was never received. *Id.*

The Receiver's only stated explanation as to why it had rejected Veritas' higher and better offer was a conclusory statement that the Veritas offer was not "real" and that it did not believe Veritas could close the deal. CP at 628-29. No competent evidence was offered in support of this proposition.

Randy Previs and Veritas objected to the Sale Approval Motion, along with eight other creditors and interested parties. CP at 480, 107, 421, 269, 358. In a twenty minute hearing after only reading two of fourteen volumes of materials, the Commissioner, without making any oral

findings, approved the sale for \$10,850,000. CP at 173. If the OIBP sale closes, it may directly injure Randy Previs in the amount of \$1.15 million. Mr. Previs, the Wellington Hills' Managing Member, personally guaranteed the Union Bank ("Bank") loan to Wellington Hills (the "Wellington Hills Loan"). CP at 310. The Bank represents that the loan balance exceeds the amounts offered for the Property. CP at 249-50. As such, Mr. Previs is potentially liable for the deficiency to the Bank after the Property sale proceeds are applied to the loan balance. A sale to Veritas would provide an extra \$1.15 million in sale proceeds to the Bank, and therefore a commensurate reduction of Mr. Previs's personal guaranty exposure.

IV. ARGUMENT

A court, by and through its appointed general receiver, has fiduciary obligations to the receivership estate and all its creditors. *Springer v. Ayer*, 50 Wn. 642, 646, 97 P. 774 (1908). When a receiver exercises its power to sell property for creditors' benefit, it is "the duty of the receiver to obtain the best possible price for the property of the insolvent." *Yakima Fin. Corp. v. Thompson*, 171 Wn. 309, 312-13, 17 P.2d 908 (1933). A sale of property by the Court through a court-appointed receiver should be fair to all interested parties. *Ferree v. Fleetham*, 7 Wn. App. 767, 770, 502 P.2d 490 (1972).

Veritas, at all times, offered financial information to satisfy the Receiver that it could close a sale for the Property at a price far higher than OIBP. However, the Receiver consistently ignored Veritas and favored OIBP and its lower offer.

The process has been unfair to Veritas, and to Randy Previs, who stands to lose \$1.15 million if the sale to OIBP closes. In approving the Sale, the trial court erred in (1) approving a retroactive amendment to the bidding procedures to allow a lower priced offer to survive despite OIBP's repeated failure to prove its own ability to close, (2) concluding that the OIBP offer was the highest and best offer, and (3) failing to at least hold an evidentiary hearing to establish the highest and best offer.

(a) Standard of Review

As there are multiple assignments of error, Appellants will address each one individually. First, for the issue of whether Appellants had standing to challenge the bidding procedures and the order approving the sale, the review on appeal is de novo. *Holiday Resort Community Ass'n v. Echo Lake Associates, LLC*, 134 Wn. App. 210, 218, 135 P.3d 499 (2006). Second, conclusions of law are reviewed de novo, while findings of fact are reviewed for substantial evidence. *In re Marriage of Dodd*, 120 Wn. App. 638, 644, 86 P.3d 801 (2004). This is true even though the order

being appealed is actually the superior court's de novo review affirming and adopting the commissioner's ruling. *Id.* For the next issue, the trial court's refusal to hold an evidentiary hearing, as this decision was discretionary, it is reviewed for an abuse of discretion. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994). Finally, Washington law has not decided the appropriate standard of review for a trial court's retroactive amendment to an order approving bid procedures. Appellants believe that a court's decision to amend bid procedures would most likely be reviewed for an abuse of discretion.

(b) The Trial Court Erred in Making its Conclusions of Law.

The trial court determined that OIBP's offer represented the "highest or best offer among the bids the Receiver received for the Property." CP at 181. As the raw numbers (\$12,000,000 vs. \$10,850,000) clearly demonstrate the superiority of Veritas' offer, this is apparently based upon the flawed assumption that Veritas lacked the financial ability to close. It is important to note that no actual finding of fact was entered by the trial court that Veritas indeed lacked the financial ability to close. This was simply an unsupported argument that the Receiver employed, urging the court to defer to his "experience." CP at 188. However, the Commissioner in the Sale Order actually made a finding of fact that

Veritas did indeed have the financial ability to close, as verified by the Superior Court Judge reviewing the Commissioner's ruling when she ordered that if OIBP failed to close, the Receiver must close with Veritas. CP at 94. Why would the judge impose such a requirement if she believed that Veritas lacked the financial ability to close the transaction?

The Commissioner made a finding that Veritas had the financial ability to close. The Sale Order clearly has a finding that "the Receiver selected the three highest to be 'Final-Round-Qualified Bidders.'" CP at 178-79. By definition from the bidding procedures, to be a "Final-Round-Qualified Bidder," such bidder had to have the financial ability to close. CP at 774 (defining "Final-Round-Qualified Bidder," as having "the financial ability [by reason of cash or equivalents on hand, financing, or any financial guaranty] to timely consummate sale of the Property for all cash at closing . . ."). It has always been agreed by the parties that Veritas was one of those three "Final-Round-Qualified Bidders." Thus, the Sale Order is internally contradictory as it states that Veritas had the financial ability to close, yet it deems the OIBP offer as the highest and best. The Sale Order should be reversed on this basis.

Regardless, even if the Court had made a finding of fact that Veritas lacked the financial ability to close, such a finding would lack substantial evidence. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103,

112, 937 P.2d 154 (1997) (“Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true”). The Receiver unfairly refused to entertain Veritas as the Winning Bidder and based its position on the unsupportable argument that the offer was “unfunded.” CP at 135. Its position is disingenuous, as it has previously acknowledged satisfaction with Veritas' proof of ability to fund its purchase offers. CP at 291. By the very act of approving Veritas as the “Backup Bidder” with its initial bid of \$20,100,000, the Receiver by definition acknowledged Veritas had the “financial ability” to fund its offer. The court-approved bid procedures provided that only those who had demonstrated financial ability could be a Backup Bidder. CP at 39. If the Receiver were really concerned about financial ability, it would not have approved Veritas as the “Backup Bidder.”

The Receiver never indicated it would reject Veritas' bid because of its financial inability to close until it was too late for Veritas to address its alleged concerns. Moreover, the Receiver has never provided any evidence of what proof OIBP produced to establish its purported financial ability. Veritas has submitted commitment letters from lenders ready to fund Veritas' purchase, and the Receiver went through the motions of meeting with Veritas and conferring with its lenders and others, only to

later inform Veritas for unknown and amorphous reasons it had decided Veritas would not be able to finance the deal. The Receiver has never explained what more Veritas could have done.

Veritas has at all times been ready and able to fund its purchase, and would have no reason to continue its legal efforts to purchase the Property if it was not—indeed the mere legal expenses it has incurred in this long fight should serve as evidence of its commitment to buy the Property at a higher price. Veritas submitted proof that the funds to complete its purchase were readily available, and the Receiver has never come forward with any evidence to support its arbitrary and capricious decision that Veritas' offer was not “real.”

Further, in support of its objection to the Sale Approval Motion, Veritas provided an updated letter of commitment from its lender, dated January 28, 2013, unambiguously stating that because Veritas had demonstrated financial ability, the lender will provide the financing to complete the purchase of the Property for \$12 million. CP at 308. Previous letters of commitment, also before the Commissioner in Ashley Previs's Declaration, show that Veritas is qualified to obtain financing for its \$12 million offer, and even its original offer of over \$20 million. CP at 297. The fact is, the Receiver never gave Veritas the chance to close a financed

transaction. It selected another party as the “Winning Bidder” based on its irrational and incorrect belief that Veritas' offer was not “real.”

Linked to the incorrect conclusion drawn by the trial court that the OIBP offer was the highest and best, it also approved the OIBP sale based on a determination that “The Sale is in the best interest of the estate, its creditors, Wellington Hills, interest holders, and all other parties in interest hearing.” CP at 181. This conclusion of law, while reviewed de novo, would not even meet the substantial evidence test. Indeed, it is undisputed that it is not in the best interest of Randy Previs, as guarantor on the Wellington Hills Loan and a party in interest, for the Receiver to accept an offer for over \$1,000,000 less than Veritas' offer.

In sum, the OIBP sale was approved based upon two flawed and unsupportable conclusions of law: (1) the OIBP offer was the highest or best offer and (2) the sale to OIBP was in the best interest of the estate, its creditors, Wellington Hills, interest holders and all other parties. For the first, the Sale Order includes language that renders it inherently contradictory—it identifies Veritas as a “Final-Round Qualified Bidder,” that indisputably offered over \$1 million more for the Property, yet comes to the conclusion that the OIBP offer is the highest and best. Further compounding this error of law, the Commissioner concluded that going forth with the sale was in the best interest of all stake holders: how can

that be when the two guarantors on the Wellington Hills Loan adamantly objected to the approval of the OIBP offer because of the resulting increase in their exposure on personal guaranties by over \$1 million?

(c) The Trial Court Erred in Not Holding an Evidentiary Hearing.

While Appellants maintain that the trial court erred in making its conclusions of law to support its decision to approve the OIBP offer, they also argue that to the extent the trial court believed that it should approve the OIBP offer as the highest and best due to Veritas' alleged inability to obtain financing, it should have ordered an evidentiary hearing. Under Washington law, when an issue may be decided by motion and there are controverting affidavits asserting facts, a court should hold an evidentiary hearing. *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943); *Little v. Rhay*, 8 Wn. App. 725, 509 P.2d 92 (1973).

Where the motion affects substantial rights and affidavits present an issue of fact whose resolution requires a determination of witness credibility, failure to hold an evidentiary hearing may even be an abuse of discretion. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994); *Rogoski v. Hammond*, 9 Wn. App. 500, 513 P.2d 285 (1973). At issue here the Receiver, based upon his unsupported speculation that Veritas lacks the financial ability to close, proposes to sell the Property to

OIBP for \$10,850,000. If this occurs, Veritas will lose its ability to pay a higher price (over \$1,000,000 more) for the Property. At the same time, the Bank has filed a lawsuit to enforce Mr. Previs's personal guaranty of the existing Wellington Hills Loan; the Bank seeks damages for any amount not recouped from the smaller sales price currently sought by the Receiver and the Bank. Clearly substantial rights (serious enough to raise due process concerns) are at issue here—as Mr. Previs may potentially incur over a \$1,000,000 increase in any damages award on his personal guaranty due to the OIBP sale's approval based upon, at best, conflicting affidavits. *Tellevik v. Real Property Known as 31641 West Rutherford Street*, 120 Wn.2d 68, 82, 838 P.2d 111 (1992) (“the Court has stated that with no extraordinary circumstances, some type of hearing prior to a deprivation is required by due process”). At the very least, therefore, Appellants request a remand by this Court instructing the trial court to hold an evidentiary hearing.

Such a hearing would allow Veritas to cross-examine the Receiver to determine its basis for asserting that Veritas lacked the financial ability to close and for the court to hear first-hand the pure speculative nature of his concern. It was only in the Receiver's declaration, in which he asserted that based on his hearsay recitation of what Veritas' lender told him, that he raised “concerns with whether [Columbia Pacific] would ever fund.”

CP at 188. This is in direct opposition to the declaration of Ms. Ashley Previs, Veritas' President, which attaches a funding letter from Columbia Pacific. CP at 308. Also contradicting the Receiver's interpretation of Veritas' financing commitment, Veritas submitted declarations from Gary Hunter, a Certified Commercial Investment Member and Real Estate Broker, and David Ebanol, Veritas' equity partner for its loan with Columbia Pacific and an experienced real estate developer. CP at 285, 352. Both Mr. Hunter and Mr. Ebanol were present at the meeting with the Receiver and Columbia Pacific. CP at 290-91. Also, both Mr. Hunter and Mr. Ebanol stated their interpretation that Veritas had a real funding commitment from Columbia Pacific and could close at the \$12,000,000 price. CP at 286-87, 353. Thus, at the very least, the trial court was confronted with disputed issues of fact regarding whether Veritas could obtain financing to close at the higher price for the Property—which, of course, would reduce Mr. Previs's exposure on his personal guarantee.

Washington courts have held that “the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property.” *Rogoski*, 9 Wn. App. at 505. To do this, it is required that “the hearing must provide a real test” because “due process is afforded only by the kinds of ‘notice’ and ‘hearing’ that are aimed at establishing the validity, or at least the probable validity, of the underlying

claims . . . before he can be deprived of his property . . .” *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011(1970)). The minimum requirements for such a hearing are: (1) timely and adequate notice of hearing on the probable validity of the claim which states the basis for the claim and allows for adequate time to prepare for the hearing on this issue; (2) an independent and impartial decision maker; (3) the right to appear personally at the hearing, with or without retained counsel; (4) the right at the hearing to confront and cross-examine any adverse witness and to present evidence and oral argument in support of his claim or defense; and (5) the right to a decision based on legal rules and evidence adduced at the hearing. *Rogoski*, 9 Wn. App. at 506.

Appellants received almost none of these constitutionally required protections before this property-deprivation hearing occurred. First, the claim made by the Receiver that Veritas lacked a “real” funding commitment from Columbia Pacific surfaced only in the Receiver’s reply brief. CP at 195. This was surprising to Veritas in light of its meeting with Columbia Pacific and the Receiver, at which the Receiver had stated that it was “satisfied” that Columbia Pacific had the ability to fund the transaction. *Id.* Only in the reply brief did the Receiver allege for the first time that while Columbia Pacific might be able to fund, its commitment to fund Veritas was not definite enough. CP at 188-89. Second, to the extent

that the Commissioner simply deferred to the Receiver's determination (which she apparently did), then Veritas lacked an "independent and impartial decision maker." The Receiver was selected and appointed by the Bank, the party that has sued Mr. Previs on his guarantee for the difference in OIBP's price and the outstanding balance of the loan. King County Cause No. 13-2-14999-1 SEA. Further, the Receiver's appointment was challenged by Mr. Previs in his capacity as the managing member of Wellington Hills. Thus the Receiver can hardly be considered impartial. Indeed, a quick look at the pleadings reveals that the Bank and the Receiver have aligned on every issue and, indeed, have filed joint pleadings signed by both their attorneys in conjunction with motions practice before this Court. Third, Appellants were denied the right to cross-examine a witness, or even to confront the evidence against them—much of which was speculation and hearsay, violating multiple evidence rules. *See, e.g.*, CP at 188-90 (Receiver's declaration reciting conversations with Veritas' lender). Further, this "evidence" was submitted in a reply brief served the day before the hearing, giving Veritas virtually no chance to respond to it. CP at 186.

Further, even the non-evidentiary hearing was woefully inadequate. The Commissioner acknowledged her inability to give the

parties a full and fair hearing. Indeed, the Commissioner started out the January 31, 2013, hearing on the Sale order with the following:

I have to tell you, when I get something this big, oh, I just give up and I take it home and I have a cup of tea. And at 8:00 last night, I said, Okay, done. I've read what I can.

I have to close the room at noon, and I've got one more unlawful detainer behind you. So I'm willing to take at least 20 minutes and a skosh for this case. RP3¹ at 6:1-4, 7-9.

Indeed, the Commissioner acknowledged that she only reviewed the final two volumes of the fourteen volumes of pleadings in preparing for the sale hearing and was only give those files 24 hours in advance; RP3 at 6:12, 15-16 (“I’ve done the best I can to review in the limited time that Commissioners have”). Then, in making her decision, the Commissioner acknowledged that “This calendar is not really designed for half-hour arguments or more. And, Counsels, I don’t want to do things that are going to be rather quick or major . . .” RP3 at 24:22-24. Nevertheless, the Commissioner made a major decision—denying the receivership estate and its creditors over \$1,000,000. Of course, this decision, as has been explained herein, was major. While such a brief hearing may be adequate for some routine receivership issues, it certainly does not comply with due

¹ As there are three verbatim reports of proceedings, the numbers indicate which hearing by chronological date (earliest is 1, latest is 3).

process requirements for a property deprivation proceeding such as a sale approval hearing, in which millions of dollars are at stake.

Other jurisdictions have held evidentiary hearings akin to what is requested by Appellants here to decide whether to approve receiver's sales. See *Fleet Nat. Bank v. H & D Entm't, Inc.*, 926 F. Supp. 226, 236-37 (D. Mass. 1996) ("this court held evidentiary hearings with respect to the Receiver's motion to sell"); *Arzuman v. Saud*, 964 So. 2d 809, 811 (Fla. Dist. Ct. App. 2007); *Mandalaywala v. Zaleski*, 124 Ohio App. 3d 321, 706 N.E.2d 344, 353 (1997) (finding that disputes related to a receiver's sale "necessitate an evidentiary hearing by the trial court").

(d) Veritas and Randy Previs Have Standing.

Veritas and Randy Previs (along with all other creditors and parties in interest) have standing to oppose the Sale Order. Though it is not clear whether the alleged lack of standing formed a basis of the Trial Court's ruling, because it is anticipated that Respondents will raise this point, Appellants demonstrate below why this argument is without merit.

At the trial court, the Respondents argued that Appellants lacked standing pursuant to RCW 7.60.260(2)(ii), which provides that the Court shall not approve a sale of receivership property free and clear of liens if the "owner of the property or a creditor with an interest in the property"

files an opposition, and the amount the objecting party would receive from the sale is less than what he would realize without the proposed sale. Mr. Previs satisfies this requirement. Mr. Previs satisfies this requirement. Randy Previs has an interest in the property and will potentially receive \$1.15 million less (by way of a reduction of his personal guaranty exposure) if OIPB's purchase is approved over Veritas' higher offer.

Even assuming that Veritas and Randy Previs cannot block the sale approval under RCW 7.60.260(ii) (which uses language that removes a court's discretion), that does not mean that they lack standing to object. In the absence of an objection by an "owner" or "party with an interest in the property," the statute simply provides that the Court "may" approve a sale. The Court in equity maintains the ultimate oversight and discretion to deny a proposed sale if it is not for the highest and best offer, as well as the overarching obligation to maximize value in the best interest of all creditors. RCW 7.60.055(1).

By statute, "[a]ny person having a claim against or interest in any estate property" has the right to appear and participate in a receivership proceeding, and any "creditor or other party in interest has a right to be heard with respect to all matters affecting the person, whether or not the person is joined as a party to the action." RCW 7.60.190(2). Such persons are entitled to notice of proposed actions by the receiver, including the

proposed sale of property. RCW 7.60.190(6). Veritas (as an approved bidder and creditor), and Randy Previs (as majority owner of the Defendant, a creditor, and—most importantly—personal guarantor of the Wellington Hills Loan) have standing to object to the proposed sale of the Property, because their interests are directly affected.

(e) The Trial Court Erred in Granting a Retroactive Amendment to the Bidding Procedures.

As a final ground for their appeal, Veritas and Mr. Previs believe the trial court erred in retroactively amending the previously approved bid procedures to allow OIBP to cure its failure to timely make its cash deposit and deliver a signed purchase and sale agreement. In analogous sale contexts, Washington courts have been reluctant to allow a party to amend a court order approving a process. For example, in *Rice v. Ahlman*, 70 Wn. 12, 126 P. 66 (1912), the court found a successful bidder liable for its failure to deliver the purchase price to a receiver pursuant to a court order requiring payment within 30 days. In another case, *Bird v. Cox*, 105 Wn. 51, 177 P. 675 (1919), the Washington Supreme Court held that it would “be inequitable to allow an amendment of the sheriff’s return of sale which would cause a loss to innocent parties . . .” *Id.* at 53. Based on this, the *Bird* court refused to allow a retroactive amendment of the court order

confirming the sheriff's return after its sale based upon a mistake in the sale instructions as copied by the sheriff's deputy. *Id.*

While neither of these Washington cases goes to great length to explain the reasoning behind their decisions, a likely impetus was the maintaining the integrity of a court approved sale process. In the analogous context of a bankruptcy court sale, federal courts have refused to allow the re-opening of bidding after a court-sanctioned auction—even to gain a higher price. *In re Gil-Bern Indus., Inc.*, 526 F.2d 627 (1st Cir. 1975). The First Circuit Court of Appeals, in denying the retroactive amendment to bid procedures to reopen bidding, noted the importance of a party's "ability to rely on court approved bidding procedures" and "that the bidder receive what he had reason to expect, and that nothing impair public confidence in the regularity of judicial sales." *Id.* at 628; *see also*, *In re Food Barn Stores, Inc.*, 107 F.3d 558, 565 (8th Cir. 1997) (discussing "the important notions of finality and regularity in judicial auctions").

Here, not only did the trial court retroactively amend the bidding procedures to give OIBP a second and third bite at the apple over Veritas' rights as the Backup Bidder, but it did so to net *less* to the receivership estate. What is more, the trial court did so while allowing the Receiver to deny the court any information about the bid amounts over Veritas'

objection. At each instance in which the Receiver sought to amend the bid procedures, it had not yet disclosed OIBP's purchase price in a deliberate attempt to cover up the fact that it was seeking to sell the Property at a price lower than Veritas' offer. It was partially on that basis that Veritas objected to these retroactive amendments, imploring the trial court to at least insist on a full disclosure of information before it granted these amendments. CP at 641-42. Nevertheless, without even so much as asking a single substantive question, and without articulating its reasoning, the court granted each extension. RP2 at 14:2-10. Because of this, it is unclear whether, if the trial court had been armed with this critical information about the proposed purchase price, it would have still granted these retroactive amendments to the bid procedures. In retroactively amending these court approved bid procedures, especially with incomplete information, the Commissioner abused her discretion. As a result, the trial court denied Veritas, the Backup Bidder, the opportunity to close its sale at a *higher* price.

V. CONCLUSION

Veritas and Mr. Previs have been subject to a flawed sales process that resulted in a loss to both. In overseeing this process, the trial court committed legal error on multiple occasions. At the outset, the Commissioner erred in granting a retroactive amendment to the bidding

procedures allowing OIBP's lesser offer to survive and denying Veritas its previously approved rights as the Backup Bidder. Following this, at the Sale hearing, the Commissioner formed incorrect conclusions of law—namely that the OIBP offer was the highest and best and thus in the best interests of all parties. The Commissioner made no findings to support these conclusions, and indeed, included a finding that directly contradicted this conclusion—that as a “Final-Round Qualified Bidder” Veritas did have the financial ability to consummate its higher offer. Finally, at the very least, the Commissioner should have held an evidentiary hearing to resolve the conflicting declarations submitted by the parties in support of their sale hearing briefs. Such a hearing would be required under Washington law and both the Washington and US Constitutions. In light of this, Veritas and Mr. Previs request that this Court reverse the trial court and remand this matter for a fair determination of whether Veritas can conclude its sale at the higher price it offered.

DATED this 8th day of August, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Pat Shillington, certify under penalty of perjury that, on August 8, 2013, I caused the foregoing Opening Brief of Appellants to be served on the persons identified below via hand delivery to:

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