

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

Case No. 8:09-cv-87-T-26TBM

ARTHUR NADEL;  
SCOOP CAPITAL, LLC;  
SCOOP MANAGEMENT, INC.

Defendants,

SCOOP REAL ESTATE, L.P.;  
VALHALLA INVESTMENT PARTNERS, L.P.;  
VALHALLA MANAGEMENT, INC.;  
VICTORY IRA FUND, LTD;  
VICTORY FUND, LTD;  
VIKING IRA FUND, LLC;  
VIKING FUND, LLC; AND  
VIKING MANAGEMENT, LLC

Relief Defendants.

\_\_\_\_\_/

**UNOPPOSED RECEIVER'S MOTION FOR ESTABLISHING  
PROCEDURE TO RESOLVE OBJECTION TO CLAIM NUMBER 445**

Burton W. Wiand, as court-appointed Receiver (the "**Receiver**"), moves the Court to adopt the procedures discussed below in this motion (the "**Motion**") to adjudicate an objection to the determination of Claim Number 445 ("**Claim 445**"), which determination was made as part of the claims process established in this case. The objection to the determination of Claim 445 ("**Claim 445**") remains unresolved and it is now ripe for adjudication by the Court. Pursuant to the Order (the "**Order**") Approving the Receiver's

Motion to (1) Approve Determination and Priority of Claims, (2) Pool Receivership Assets and Liabilities, (3) Approve Plan of Distribution, and (4) Establish Objection Procedure (the “**Claims Motion**”) (Dkt. 675), the Receiver proposes the following procedure for resolving this objection.

### **RELEVANT BACKGROUND**

As part of the claims process approved by this Court (Doc. 391), the Receiver received a Proof of Claim Form from representatives of Canrol Finance Ltd. (“**Canrol**”), which claim was ultimately designated as Claim 445 (a copy of this Proof of Claim Form is attached as **Exhibit A**). After correspondence between the Receiver and Canrol, the Receiver received a revised Proof of Claim Form from Canrol (a copy of this revised Proof of Claim Form is attached as **Exhibit B**).

The rights and title to Claim 445 were subsequently transferred to Fulcrum Distressed Opportunities Fund I, LP. (“**Fulcrum Fund**”), and the Receiver’s and Fulcrum Fund’s counsel had a series of communications relating to Claim 445. Ultimately, however, the Receiver’s Claims Motion recommended denial of Claim 445. *See* Claims Mot. at 23 & Ex. G. On March 2, 2012, the Court entered an Order granting the Claims Motion (except with respect to certain matters relating to Wells Fargo Bank which are not relevant here) (Doc. 776) and approving a procedure for objections to claim determinations requiring written objections to be submitted to the Receiver by March 27, 2012.

On March 6, 2012, the Receiver received an objection relating to the determination of Claim 445 from Fulcrum Fund (the “**Objection**”) (a copy of the Objection is attached as **Exhibit C**). On August 15, 2012, the Receiver served on Fulcrum Fund’s counsel a copy of

the Receiver's Response to Objection Relating to Determination of Claim Number 445 (the "Receiver's Response") (a copy of the Receiver's Response is attached as **Exhibit D**). Since that time, counsel for the Receiver and counsel for Fulcrum Fund have had ongoing communications trying to work towards a resolution of the Objection, but the Objection remains outstanding. The Receiver believes (and Fulcrum Fund agrees) that it is now time to submit this dispute to the Court for adjudication under the following procedures.

### **PROPOSED PROCEDURES**

#### **I. THE OBJECTION TO CLAIM 445 SHOULD BE RESOLVED USING SUMMARY PROCEEDINGS**

##### **A. Legal Standard**

District Courts have "broad powers and wide discretion to determine relief in an equity receivership." *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *S.E.C. v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005). Using this wide discretion, the Court has the authority to "classify claims sensibly in receivership proceedings." *S.E.C. v. Enter. Trust. Co.*, 559 F.3d 649, 652 (7th Cir. 2009); *S.E.C. v. Basic Energy & Affiliated Res., Inc.*, 273 F.3d 657, 670 (6th Cir. 2001). Indeed, the primary purpose of an equity receivership is to promote the orderly and efficient administration of the estate for the benefit of creditors. *S.E.C. v. Hardy*, 803 F.3d 1034, 1040 (9th Cir. 1986).

District Courts have authority to use summary proceedings to adjudicate claims in a receivership case provided that due process is afforded to the parties involved. *See S.E.C. v. Byers*, 637 F. Supp. 2d 166, 184 (S.D.N.Y. 2009) ("[S]ummary proceeding is the preferred course of action in a federal receivership because it reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets.");

*Hardy*, 803 F.3d at 1040 (“[R]eivership courts have the general power to use summary procedure in allowing, disallowing, and subordinating claims of creditors.”); *F.D.I.C. v. Bernstein*, 786 F. Supp. 170, 178 (E.D.N.Y. 1992) (court authorized to “determine in a summary proceeding the rights and obligations of the parties to the contract, particularly when the issues presented involve a simply matter of contract interpretation”). A “district court’s use of summary proceedings complies with due process if the parties are permitted to present evidence when the facts are in dispute and to make arguments regarding those facts.” *S.E.C. v. Pension Fund of Am. L.C.*, 377 Fed. Appx. 957, 961-62 (11th Cir. 2010); see *F.T.C. v. Crittenden*, 823 F. Supp. 699, 702 (C.D. Cal. 1993) (“use of summary proceedings in equity receiverships is appropriate so long as creditors and potential creditors receive adequate notice and a reasonable opportunity to respond.”). The applicable standard in conducting summary proceedings is the summary judgment standard set forth in Rule 56 of the Federal Rules of Civil Procedure. See *Elliott*, 953 F.2d at 1566; *S.E.C. v. Sharp Capital, Inc.*, 315 F.3d 541, 546 (5th Cir. 2003)

Here, the use of summary proceedings to resolve Claim 445 as proposed below is in the Receivership’s best interests and satisfies due process as both the Receiver and Fulcrum Fund will have an opportunity to argue the merits of their position and present evidence in support of their arguments. Notably, Fulcrum Fund has agreed to the proposed procedures.

#### **B. Proposed Procedure**

In the Order, in relevant part, the Court approved the Proposed Objection Procedure set forth in Section V of the Claims Motion. Section “g” of the Proposed Objection Procedure explained that the Receiver would file with the Court any unresolved objections,

as well as any further determination made by the Receiver with respect to that claim, with supporting statements and documentation. Claims Mot. at 82. The Court would then make a final determination either based on the submissions or after a hearing. *Id.*

During discussions between counsel for the Receiver and counsel for Fulcrum Fund, Fulcrum Fund expressed a desire to have an opportunity to argue its Objection to the Court in a memorandum of law. The Receiver has agreed to this procedure so long as he has the opportunity to file a responsive memorandum of law. Consistent with this, the Receiver and Fulcrum Fund have agreed to the following procedure for resolving the Objection:

Fulcrum Fund will have 20 days following the entry of the order approving this Motion to serve and file a memorandum of law that is no more than 20 pages in length. The Receiver will then have 20 days after Fulcrum Fund's filing to serve and file a responsive memorandum of law that is no more than 20 pages in length. As part of this briefing procedure, the Receiver and Fulcrum Fund have prepared a joint statement of undisputed facts (with exhibits) which will form the factual basis upon which the memoranda of law will be based and upon which the Receiver and Fulcrum Fund have agreed the Court should rely to adjudicate the merits of the Objection under a Rule 56 summary judgment. In other words, the Receiver and Fulcrum Fund are asking the Court to decide the merits of the Objection based on the facts set forth in the joint statement of undisputed facts (if ultimately the Court concludes that it is not able to resolve the Objection based on the joint statement of undisputed facts, then an additional process would have to be implemented to allow the Receiver and Fulcrum Fund to introduce additional evidence).

This proposed procedure is consistent with summary proceedings employed by other courts in resolving claims objections in receivership proceedings. Further, the Receiver believes this proposed procedure is consistent with the Proposed Objection Procedure; promotes judicial efficiency; is logical, fair, and reasonable; and meets due process requirements. For these reasons, the Receiver submits that the above procedure is in the Receivership's best interest, and respectfully requests that the Court enter an Order approving this Motion.

### **CONCLUSION**

For the foregoing reasons, the Receiver respectfully requests the entry of an Order approving the procedures proposed in this Motion for the Court's adjudication of the Objection to Claim 445.

### **LOCAL RULE 3.01(g) CERTIFICATION**

The Receiver has conferred with counsel for non-party Fulcrum Fund and is authorized to represent that Fulcrum Fund agrees with the relief requested in this motion. Further, the Receiver has conferred with counsel for the S.E.C. and is authorized to represent that the S.E.C. does not object to the requested relief.

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that on July 2, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I **FURTHER CERTIFY** that on July 2, 2013, I furnished a true and correct copy of the foregoing by first-class mail delivery to the following non-CM/ECF participant:

Kevin M. Eckhardt, Esq.  
Matthew Mannering, Esq.  
Hunton & Williams LLP  
101 South Tryon Street  
Charlotte, NC 28280

**s/Gianluca Morello**

Gianluca Morello, FBN 034997  
gmorello@wiandlaw.com  
Michael S. Lamont, FBN 0527122  
mlamont@wiandlaw.com  
WIAND GUERRA KING P.L.  
5505 West Gray Street  
Tampa, FL 33609  
Tel.: (813) 347-5100  
Fax: (813) 347-5198

*Attorneys for the Receiver, Burton W. Wiand*