

**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;
and 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.

ORDER

This cause comes before the Court pursuant to an adopted procedure to resolve the objection to Claim Number 445.¹ For this Court's review in resolving the objection, in addition to the record, is the Joint Statement of Undisputed Facts (Dkt. 1038), Fulcrum Distressed Opportunities Fund I, LP's Memorandum of Law in Support of its Objection to the Receiver's Proposed Treatment of Claim Number 445 (Dkt. 1048), and the

¹ See docket 1034, Order dated July 3, 2013, which establishes the procedure to resolve the objection to Claim Number 445.

Receiver's Response (Dkt. 1051). After careful consideration of the objection, the submissions and the entire record, the Court concludes that the final determination with respect to Claim Number 445 is affirmed and the objection is overruled.

BACKGROUND

Claim 445 was timely filed by the claims bar date of September 2, 2010.² Canrol Finance Limited (Canrol) filed its Proof of Claim form, claiming a loss of \$1,195,000.00 as nominee for the account of two investment funds: Genium AI Fund Series 1 Ltd. Standard Portfolio and Genium Trading Company Ltd.³ The Genium entities had invested that amount in Hedge Fund Valhalla Investment Partners, L.P., in July 2008.⁴ The Receiver responded to Canrol's Proof of Claim form by letter in February 2011, stating that the investment appeared to be a custodial arrangement requiring the disclosure of the identity of the beneficial owner.⁵ Canrol submitted a revised Proof of Claim form stating that Canrol was acting as nominee for the Genium entities, but did "not intend to provide/disclose the requested information."⁶

² See docket 391 (Court's Order dated April 21, 2010, setting claims bar date of 120 days from entry of order or 90 days from mailing proof of claim form to claimants, whichever is later). September 2, 2010, is ninety days from June 4, 2010, the date the Receiver mailed the claims package.

³ See docket 1038, paras. 1, 2 & 10, Exh. C.

⁴ See docket 1038, para. 1.

⁵ See docket 1038, para. 11, Exh. D.

⁶ See docket 1038, para. 12, Exh. E.

Until the point in time when Canrol filed the Amended Proof of Claim form, the Receiver had dealt only with Canrol. Thereafter, beginning in May 2011, the Receiver was contacted by Fulcrum Distressed Opportunities Fund I, LP (the Fulcrum Fund), which is the entity that now opposes the determination of Claim 445.⁷ The Fulcrum Fund unsuccessfully requested the Receiver's consent to transfer the rights and title to Claim 445 from the Genium entities to the Fulcrum Fund.⁸ The Receiver noted in his letter of June 10, 2011, that while Canrol identified the Genium entities as the beneficial owners, it did not identify any individuals with a legal interest in the beneficial owners, stating that it did "not intend to provide/divulge the requested information."⁹ The Receiver reiterated that failure to disclose the beneficial owners would result in his denial of Claim 445.¹⁰

Correspondence followed in which the Fulcrum Fund raised the requirement of a confidentiality agreement if disclosure was made.¹¹ Emails between the parties continued.¹² The Receiver concluded on June 28, 2011, that Canrol had not complied with the requirements of the Proofs of Claim and that the time for providing additional

⁷ See docket 1038, para. 13.

⁸ See docket 1038, paras. 13 & 14, Exh. F.

⁹ See docket 1038, para. 14, Exh. F.

¹⁰ See docket 1038, para. 14, Exh. F.

¹¹ See docket 1038, para. 15, Exh. G.

¹² See docket 1038, para. 16, Exhs. H, I & J.

information in the claims process had passed.¹³ Thereafter, on December 7, 2011, the Receiver filed his motion seeking the approval of the determination and priority of claims, the pooling of receivership assets and liabilities, the approval of a plan of distribution, and the establishment of an objection procedure.¹⁴ The motion recommended denial of Claim 445 based on the failure of Canrol to divulge the specific identity of the beneficial owners.¹⁵ In response to the motion, the Fulcrum Fund emailed the Receiver an Evidence of Transfer, which reflected a May 2011 agreement by the

¹³ See docket 1038, para. 17, Exh. M.

¹⁴ See docket 675.

¹⁵ See docket 675 at p. 23 & Exh. G. The motion provides in pertinent part as follows: [Canrol responded to the deficiency letter and] provided some information but wrote on the Proof of Claim Form that the beneficial owners, which appear to be investment funds, “do not intend to provide/divulge the requested information.” (See Claim No. 445.) This answer was given in response to Question 3 on the Proof of Claim Form (see Exhibit A) which states: “If this form is being completed on behalf of an entity, please provide the full name of the entity and all of its trustees, officers, directors, managing agents, shareholders, partners, beneficiaries, and any other party with an interest in the entity.”

Exhibit G attached to the motion provided further as follows:

The director of an investment fund returned an Amended Proof of Claim Form identifying two investment funds as entities with an interest in this account, but stated that he would not provide the names of the trustees, officers, directors, managing agents, shareholders, partners, beneficiaries, or any other party with an interest in the entities. The Claimant’s failure and refusal to provide the requested information has impeded the Receiver from assessing whether the Claimant has submitted an allowable claim. Because the Receiver cannot be sure that the beneficial owners of this account did not hold other Investor Accounts, receive False Profits in connection with such other accounts, otherwise receive additional money from Receivership Entities, or were not “insiders,” this claim should be denied.

Genium entities to transfer all rights to and title in Claim 445 to the Fulcrum Fund.¹⁶ The Fulcrum Fund also provided a list of shareholders for five Genium funds, although the list does not indicate the beneficial ownership in 2008.¹⁷ The list does not include, however, the interest holders of Genium Trading Company, Ltd. That same day counsel for the Receiver responded by email as follows:

[T]he Receiver finalized his claim review and determinations, submitted those determinations to the Court, and proposed a procedure for the submission of claimants' objections. The Receiver's claim determinations, including with respect to the claims underlying your email, were complete as of prior to the filing of that motion.

Once the Court issues an order on that motion and institutes an objection procedure, your client will have the opportunity to submit its objection in accordance with the terms of the objection procedure ultimately established by the Court. At this time, however, no objection procedure is in place and the Receiver is not engaging in any discussions relating to objections. Again, the Receiver's claim determinations are complete, and at the appropriate time objections may be submitted in accordance with the procedure ultimately adopted by the Court. As such, please note that your email and its attachments will not be considered by the Receiver. Of course, you remain free to resubmit any information provided in your email in accordance with the objection procedure ultimately established by the Court.¹⁸

¹⁶ See docket 1038, para. 20, Exhs. N & O.

¹⁷ See docket 1038, para. 21, Exh. P.

¹⁸ See docket 1038, para. 22, Exh. Q.

This Court approved the denial of Claim 445 on March 2, 2012.¹⁹ Four days later, the Receiver received an objection to the claim determination from the Fulcrum Fund.²⁰ The Receiver responded in writing to the objection, explaining his reasons in detail for the recommendation of denial of the claim, which included the Genium entities' status as one of professional institutional investors.²¹ After many months, the resolution of the objection without the Court's intervention proved unsuccessful. The Court will now decide the merits of the objection to the denial of Claim 445.

STANDARD FOR OBJECTION PROCEDURE

The standard by which this Court will decide the merits of the parties' dispute and resolve the objection to Claim Number 445 is the summary judgment standard provided for in Rule 56 of the Federal Rules of Civil Procedure.²² Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as matter of law." Fed.R.Civ.P. 56(a). The Court must draw all inferences from the underlying facts in the light most favorable to the non-moving party, which in this case is the Receiver. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 548 (1986)

¹⁹ See docket 776.

²⁰ See docket 1038, para. 24, Exh. R..

²¹ See docket 1038, para. 25, Exh. S.

²² See docket 1034, Order dated July 3, 2013, establishing the procedure to resolve the Objection to Claim 445.

(quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)); Welch v. Celotex, 951 F.2d 1235, 1237 (11th Cir. 1992).

ANALYSIS

The Fulcrum Fund relies on bankruptcy law to place the burden of proof of showing the claim should remain denied, or if allowed then subordinated, on the Receiver. It claims that it timely cured the deficiency in Canrol's Amended Proof of Claim by offering to identify the beneficial owners pursuant to a confidentiality agreement, which the Receiver refused. The Fulcrum Fund further asserts that it provided sufficient information regarding the beneficial owners after the motion to determine claims was filed. With respect to the Receiver's determination that the Genium entities constituted sophisticated investors that should have known of the fraudulent scheme, the Fulcrum Fund argues that they are no different than any other investors and therefore presumably acted in good faith and their claim should not be subordinated. For the following reasons, the Court finds the Fulcrum Fund's assertions without merit and the Receiver's position well-taken.

Burden of Proof

Earlier in the course of this receivership, this Court compared a receivership arising from an appointment by a federal court sitting in equity with a receivership in bankruptcy court:

The appointment of a receiver by a federal court applying equity, as opposed to statutory law, is governed by Federal

Rule of Civil Procedure 66. [footnote omitted]. Because statute governs the appointment and course of receiverships in bankruptcy court, Rule 66 does not always apply to receivers in bankruptcy. See Fed. R. Civ. P. 66 advisory committee's note. The bankruptcy courts, however, may rely on federal equitable law outside the bankruptcy scheme when those equitable principles are applicable to the general conduct of receivers. [citation omitted]. Conversely, although federal district courts presiding over federal equity receiverships, such as this SEC case, may look for guidance from bankruptcy law, they are not restricted by the dictates of bankruptcy law. See Quilling v. Trade Partners, Inc., 2007 WL 107669, * 1 (W.D. Mich. 2007) (citing SEC v. Forex Asset Mgmt. LLC, 242 F.3d 325, 332 (5th Cir. 2001)). [footnotes omitted].²³

Any attempted analogy between the significance of a proof of claim under bankruptcy law with respect to any presumption of its validity and one submitted in the course of this equity receivership is unavailing. This Court's order approving the claims determination established the objection procedure and specifically found the procedure to be "logical, fair, and reasonable."²⁴ It further provided that "any and all objections to claim determinations, claim priorities, or the plan of distribution shall be presented to the Receiver in accordance with the Proposed Objection Procedure as set forth in Section V of the motion." Section V A. (h) of the motion states that "[t]he Claimant shall have the burden of proof."²⁵ Absent any binding authority to the contrary, the burden of proof in

²³ See docket 822, pp. 12-13.

²⁴ See docket 776, p. 3.

²⁵ See docket 675, p. 82.

this proceeding lies on the claimant who filed the proof of claim pursuant to the objection procedure approved by this Court.

Timeliness and Sufficiency of Cure

The Fulcrum Fund argues that not only was Canrol's Proof of Claim timely filed by the claims bar date of September 2, 2010, but it was thereafter timely amended, relying on In re International Horizons, Inc., 751 F.2d 1213, 1216 (11th Cir. 1985). The International Horizons case is an appeal from a judgment of a district court affirming the decision of a bankruptcy court. The Eleventh Circuit affirmed the lower courts' finding that a proof of claim with respect to corporate income taxes was never filed by the IRS before the claims bar date in bankruptcy and, furthermore, that an informal proof of claim was never made. The bankruptcy and district courts were found to have properly exercised discretion in forbidding an amendment to a proof of claim that would have essentially added a new claim altogether for corporate income taxes, as opposed to other taxes. The instant case does not involve this issue. In this case, the Proof of Claim filed by Canrol, as well as the Amended Proof of Claim, did not properly identify the claimants by failing to identify the beneficial owners of the Genium entities.

The Proof of Claim Form in this receivership requires that an entity submitting the form must list all of its trustees, officers, directors, managing agents, shareholders, partners, beneficiaries, and any other party holding an interest in the entity. Without knowing the identities of the beneficial owners of the claim, the Receiver was unable to

perform his court-ordered task of determining whether Claim 445 was valid. At least three scenarios warrant the necessity of naming the beneficial owners: (1) one beneficial owner may have held several accounts with Receivership Entities, which would require the accounts to be combined so that any profits in one account would offset losses in another; (2) a beneficial owner could have received money from Receivership Entities through transfers not specifically tied to the performance of the investment, for example, commissions for referring other investors; and (3) a beneficial owner could have been an “insider” in the scheme or in the Receivership Entity or in another position, which would have affected the beneficial owner’s right to receive distributions at all.

In both the Proof of Claim submitted in September 2010 and the Amended Proof of Claim submitted in March 2011, Canrol refused to identify the beneficial owners. It was not until the Receiver informed the Fulcrum Fund in June 2011 that Claim 445 would be denied unless the beneficial owners were disclosed, that even a hint of disclosure might be forthcoming. The Fulcrum Fund responded that disclosure would be made only on the condition that the Receiver enter into a confidentiality agreement, an agreement the Receiver could not honor in the conduct of his duties to all investors. Faced with the claimant’s unwillingness to unconditionally reveal the names and the potential transfer of the claim, the Receiver informed the Fulcrum Fund that he would make his determination regarding Claim 445 on the materials already made available to him.

The identities of the beneficial owners were never disclosed before December 7, 2011, when the Receiver filed his motion for determination of claims in which he recommended denial based on the absence of such crucial and fundamental information. It was not until the Receiver filed the motion for claim determination that the Fulcrum Fund attempted to disclose the identity of the beneficial owners, and even then, the disclosure did not reveal the interest holder in Genium Trading Company, Ltd., and did not reveal whether the purported owners were also owners at the time when the Genium entities invested from 2008 through early 2009. Almost one year passed from the Receiver's request for the identities in early February 2011 to the time any names were actually revealed in late December 2011, which was after the Receiver had recommended to the Court that Claim 445 be denied. No exceptional circumstances have been presented to this Court warranting such late consideration of still deficient information in the Proof of Claim.

Sophisticated Status and Subordination

Even assuming the late-submitted information provided by the Fulcrum Fund actually cured the deficiencies in the Proof of Claim, the Court finds, nevertheless, that the objection must be overruled on the basis of the Genium entities' status as sophisticated institutional investors. In the conduct of the claims process, similarly-situated claimants must be treated equally. See SEC v. Homeland Commc'ns Corp., 2010 WL 2035326, at *2 (S.D. Fla. 2010). Whether the claimant acted in good faith is a

consideration in the claims process. See SEC v. Megafund Corp., 2007 WL 1099640, at *2 (N.D. Tex. 2007). Good faith is an objective standard, measured by whether the claimants were on actual or inquiry notice of the fraud. See Terry v. June, 432 F.Supp.2d 635, 641 (W.D. Va. 2006) (interpreting Florida law, citing United States v. Romano, 757 F.Supp. 1331, 1338 (M.D. Fla. 1989)). The investor bears the burden of showing that “red flags” were not ignored when they invested their money in what is later realized as a Ponzi scheme. See SEC v. Forte, 2010 WL 939042, at *6 (E.D. Pa. 2010); SEC v. Megafund Corp., 2007 WL 1099640, at *2 (N.D. Tex. 2007) (disallowing claim because claimants did not show they acted in good faith).

Many red flags were waving in 2008. As set forth in detail in the Receiver’s response, there were many indicia that would lead a sophisticated institutional investor to question the prudence of investing in Valhalla. Not only had Nadel been disbarred from the practice of law in New York for dishonesty and fraud, but many judgments were outstanding against him in Sarasota County, Florida, along with divorce proceedings that alleged his defrauding of numerous individuals.²⁶ With respect to Valhalla, a person disclosed in the private placement memorandum was Michael Zucker, the subject of a cease and desist order.²⁷ Based on the record in these proceedings, there is no doubt that

²⁶ See docket 1038, paras. 27-30, Exhs. T & U.

²⁷ See docket 1038, para. 31, Exh. V.

institutional investors like the Genium entities were placed on inquiry notice and cannot show good faith.²⁸

Based on the applicable law and the facts, the objection to the denial of Claim 445 is overruled. It is therefore **ORDERED AND ADJUDGED** that the denial of Claim 445 is hereby affirmed.

DONE AND ORDERED at Tampa, Florida, on August 29, 2013.

s/Richard A. Lazzara

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record

²⁸ The Court need not reach the issue of subordination in detail. The Court finds it sufficient to simply note that the Genium entities' status as institutional investors differentiates them from Class 1 investors for purposes of claim determination.