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.
_____/

RECEIVER'S MOTION TO OVERRULE
OBJECTION TO DETERMINATION OF CLAIM NUMBER 469

Burton W. Wiand, as court-appointed Receiver[1] (the "**Receiver**"), moves the Court to overrule the objection (the "**Objection**," a copy of which is attached as **Exhibit A**) submitted by MMG Bank & Trust Ltd. ("**Claimant**" or "**MMG**") to the Receiver's determination of

[1] Mr. Wiand was appointed Receiver for a number of entities including Valhalla Investment Partners, L.P.; Viking Fund, LLC; Viking Fund IRA, LLC; Victory Fund, Ltd.; Victory IRA Fund, Ltd.; and Scoop Real Estate, L.P. (collectively, the "**Hedge Funds**," and along with all other entities placed in receivership, the "**Receivership Entities**").

Claim Number 469 (the "**Claim**"). Specifically, the Receiver recommended the Court deny the Claim because MMG failed to identify the underlying claimant – *i.e.*, the real party in interest. *See* Doc. 675. Only after the Court denied the Claim did MMG disclose for the first time in its Objection that the Claim was submitted on behalf of OW Dragoon – a private Panamanian investment fund.

After reviewing the Objection, the Receiver concluded his original determination of the Claim was proper for two independent reasons: (1) MMG failed to comply with claims procedures and deadlines, and the information belatedly supplied in the Objection did not cure the deficiency, and (2) OW Dragoon was a sophisticated institutional investment firm and thus either had inquiry or actual notice of fraud. In addition, MMG failed to respond to the Receiver after he served his Determination of Objection to Claim 469 on MMG in November 2013 and again in January 2014. As such, MMG has not made contact with the Receiver in more than a year and a half. As discussed below, as a matter of law and equity Claim 469 was properly denied, and consequently the Objection should be overruled.

BACKGROUND

I. MMG AND OW DRAGOON WERE SOPHISTICATED FINANCIAL INSTITUTIONS

MMG is a bank organized under the laws of the Bahamas. According to its website, MMG was founded in 1996 as a private offshore bank to serve the banking and fiduciary needs of the Morgan & Morgan Group, a large law firm in Panama, and its international clientele.[2] OW Dragoon was organized under the laws of the Republic of Panama to act as a private investment company. *See* Ex. A. As of March 28, 2012, OW Dragoon was in

[2] *See* https://www.mmgbank.com/about-us/?page_id=48, accessed Sept. 9, 2015.

liquidation. *Id.* It is the Receiver's understanding that OW Dragoon was a fund created and managed by OpenWorld. OpenWorld's website states that "its vast experience in the world's main capital markets allows . . . it to be considered as an investment boutique at an international level." OpenWorld states that it offers a wide range of investment services and products and conducts various types of investigations and market research. Its founders are said to have more than thirty years of experience in European, North American, and Latin American stock markets and possess a "thorough knowledge of the characteristics of each internationally available investment tool." Further, OpenWorld states that it analyzes each company in which its funds invest before investing in a company.[3]

II. CLAIMS PROCESS

On September 2, 2010, the Receiver received a Proof of Claim Form from a representative of MMG, a copy of which is attached as **Exhibit B**. The Proof of Claim Form claimed total losses of $305,000.00 from two investments made in Valhalla Investment Partners, L.P. on or about October 3, 2005, and June 29, 2005. In response to question 17 of the Proof of Claim Form, MMG indicated that "the investment was made by the advised [SIC] from OPENWORLD INVESTMENT, a private advisor. The investment was made based on the advise of the advisor." *See* Ex. B. Although this response ostensibly identified the investment's advisor, MMG did not provide the name of or any details about the beneficial owner of the investment.

[3] This information was obtained from http://www.openworld.ws/en/nuestra_compania.php, but as of at least September 15, 2015, that website was no longer accessible.

After reviewing the Proof of Claim Form, on February 8, 2011, the Receiver sent correspondence to MMG identifying deficiencies in the Proof of Claim Form (the "**Deficiency Letter**," a copy of which is attached as **Exhibit C**). The Deficiency Letter noted that the investment underlying Claim 469 appeared to have been made through a custodial arrangement, and consequently MMG needed to provide information about the beneficial owner or owners of the investment. Specifically, it explained,

> As this appears to be a custodial account, you must identify the beneficial owner(s) of this account and any other parties with an interest in this account and specify the nature of each such person's or entity's interest. If the beneficial owner(s) is an entity, you must provide the information requested in question 3 of the Proof of Claim Form. Further, I require an original signature of an authorized beneficial owner on the submitted Proof of Claim Form certifying under penalty of perjury that the information provided on the Proof of Claim Form is true and correct for the beneficial owner(s) and the [pertinent] ... account.
>
> Alternatively, an officer of the Bank may provide a notarized document attesting to the following: (1) the identities of the beneficial owner(s) of the [pertinent] ... account and any other parties with an interest in the account; (2) the nature of the interest of each person or entity identified in (1); (3) the beneficial owner(s) agrees that the Exhibit A attached to the Proof of Claim Form accurately reflects the amount of the investment and all amounts received from that account and any other funds received from the Receivership Entities; (4) the beneficial owner(s) and/or any other interested parties have not commenced any litigation or other proceedings relating in any way to his/her investment as specified in question 12 of the Proof of Claim Form; and (5) the beneficial owner(s) and/or any other parties with an interest in the [pertinent] ... account did not receive anything of value other than money from any Receivership Entity at any point in time.

Ex. C. The Deficiency Letter provided MMG thirty days to supplement its Proof of Claim Form and explained that "failure to provide the original signature of an authorized beneficial owner or the notarized documentation requested [in the letter] ... may have an impact on your

claim." *Id.* The Receiver never received an amended Proof of Claim Form or other documentation correcting the deficiency.

On December 7, 2011, the Receiver filed his Unopposed 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 (Doc. 675) (the "**Claims Determination Motion**"). In relevant part, that motion recommended denial of Claim 469 because MMG failed to cure the deficiency in the Proof of Claim Form by providing the requested information, which would have revealed the beneficial owners of the investment underlying the claim and any other party with an interest in that investment. *See* Doc. 675 at 23 & Ex. G. As explained in the Claims Determination Motion, the failure to provide the requested information impeded the Receiver from determining whether Claim 469 should be allowed. For example, without the requested information, the Receiver could not determine whether the beneficial owners of the investment (i) held other investment accounts or other interests with any Receivership Entity; (ii) profited from any other such investment or interest in Receivership Entities; (iii) received any money from Receivership Entities through transactions that were not apparent from an investigation of the investment accounts underlying Claim 469 (for example, through "commissions" for referral of investors); or (iv) were "insiders" in the scheme or a Receivership Entity. On March 2, 2012, the Court entered an order granting the Claims Determination Motion as it related to *inter alia* Claim 469. Doc. 776. Further, the Order directed any claimant wishing to object to the determination of a claim to submit a written objection by March 28, 2012. *Id.*

On March 28, 2012, the Receiver received the Objection. MMG claimed it did not "recall" receiving the Deficiency Letter. Ex. A. The Receiver, however, mailed the letter to the address provided by MMG on the Proof of Claim Form as the "one mailing address where you (or the person/entity on whose behalf you are acting) authorize the receipt of all future communications relating to this claim ...." Exs. B, C. The Deficiency Letter was not returned to the Receiver, and there is no evidence suggesting that it was not delivered to the claimant. Indeed, the Objection references a letter sent to MMG at the same address on March 8, 2012. The Objection further stated that it was MMG's understanding that the claim was denied because the Receiver did not receive any response to the letter requesting the identity of the beneficial owner of the account. *Id.* The Objection identified the beneficial owner as OW Dragoon and asked that the claim be allowed. *Id.*

On November 26, 2013, the Receiver served his Response to Objection Relating to Determination of Claim Number 469 on MMG by facsimile and U.S. Mail (the "**Response**"). The Response continued to support the denial of the claim for the same reasons set forth in this motion. There was no further correspondence from MMG. On January 16, 2014, the Receiver sent the Response to MMG a second time by facsimile and U.S. Mail. Again, there was no further correspondence from MMG. Because the Receiver has not heard from MMG since 2012, and also for the reasons discussed below, the Receiver moves the Court to overrule the Objection

ARGUMENT

I. THE SUBMISSION OF A DEFICIENT PROOF OF CLAIM FORM AND FAILURE TO CORRECT THE DEFICIENCY BY THE APPLICABLE DEADLINE WAS REASON ALONE TO DENY CLAIM 469

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 district 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 the creditors. *S.E.C. v. Hardy*, 803 F.3d 1034, 1040 (9th Cir. 1986). Equity requires that similarly situated investors be treated in a similar fashion. *See, e.g., Quilling v. Trade Partners, Inc.*, 2006 WL 3694629, *1 (W.D. Mich. 2006); *SEC v. Homeland Comm. Corp.*, 2010 WL 2035326 at *2 (S.D. Fla. 2010) ("[I]n deciding what claims should be recognized and in what amounts, the fundamental principle which emerges from case law is that any distribution should be done equitably and fairly, with similarly situated investors or customers treated alike....").

MMG's failure to timely and fully rectify the deficiencies identified in its Proof of Claim Form was reason alone to deny Claim 469. The identity of the beneficial owner of the investment underlying Claim 469 was crucial in aiding the Receiver's determination of the claim. Further, this Court has recognized the various scenarios that warrant the necessity of naming the beneficial owner, including whether the beneficial owner held multiple accounts

with Receivership Entities or if the beneficial owner was an "insider" in the scheme or Receivership Entities. *See* Doc. 1061 at 10. This information was withheld from the Receiver despite being identified as necessary in the Deficiency Letter and was only provided to the Receiver after the denial of Claim 469. As such, the Objection is implicitly premised on MMG's belief that Claim 469 should be treated in a preferential manner – one which differs from the manner in which all other similarly situated claims were treated – by allowing it to submit requested information after the deadline that applied to all other claimants. MMG has received the same treatment with respect to its claim as other similarly situated claimants. The preferential treatment sought by MMG is inconsistent with the equitable principles that govern this proceeding.[4] *Cunningham v. Brown*, 265 U.S. 1, 13 (1924) (as among "equally innocent victims, equality is equity."). Accordingly and consistent with the Court's prior decisions in connection with claimants or purported claimants Elendow (Doc. 980), Fulcrum (Doc. 1061), and BB&T (Doc. 1174), MMG's objection should be overruled for this reason alone.

Nor has MMG fully cured the deficiencies identified in the Deficiency Letter. Despite identifying the beneficial owner of the investment underlying Claim 469, MMG has failed to provide any other relevant information. This includes the identification of any

[4] Aside from being inequitable, the relief sought by the Objection is problematic for another reason. The Objection seeks to modify and supplement the information submitted for Claim 469 long after the claims bar date, and sustaining it and allowing the modification and supplementation could undermine the finality and absolute nature of the claims bar date. So, for example, claimants holding allowed in part or denied claims could argue that they too should be allowed to supplement and modify their submissions. Notably, one of the very reasons that uniform deadlines and procedures are established, and claimants are required to comply with them, is to avoid these exact issues.

interest holder in OW Dragoon as specifically referenced in the Deficiency Letter.[5] Simply identifying the beneficial owner without identifying any individuals or entities with an interest in the beneficial owner fails to allow the Receiver to satisfy his duty to analyze Claim 469, and the Objection should be overruled for this reason as well.

II. OW DRAGOON'S STATUS AS A SOPHISTICATED INSTITUTIONAL INVESTOR ALSO WARRANTS DENIAL OF CLAIM 469

Even ignoring MMG's failure to comply with its deadlines and obligations with respect to the submission of Claim 469 and assuming *arguendo* the additional information provided by MMG cured the deficiency, the Objection still should be overruled because the underlying holder of the investment – OW Dragoon – had, at a minimum, inquiry notice of Nadel's fraud, and it would thus be inequitable to allow a claim based on its investment. Specifically, OW Dragoon held itself out as a sophisticated institutional investment entity and should have recognized at least some of the numerous and easily discernible "red flags" surrounding Arthur Nadel, Receivership Entities, and the purported investment underlying its claim. As this Court previously held,

> 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. With respect to Valhalla, a person 26 disclosed in the private placement memorandum was Michael Zucker, the subject of a cease and desist order. Based on the record in these proceedings, there is no doubt that institutional investors

[5] "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." Ex. B, Q. 3; *see* Ex. C.

> like the Genium entities were placed on inquiry notice and cannot show good faith.

Doc. 1061, pp. 12-13. Similarly, OW Dragoon was, at a minimum, on inquiry notice of fraud, and its objection should be overruled. This is the same treatment the Court has applied to a similarly situated claimant. *See* Order Overruling Objection, Doc. 1061 ("Based on the record in these proceedings, there is no doubt that institutional investors like the Genium entities were placed on inquiry notice and cannot show good faith.").[6]

[6] If the Objection is sustained and Claim 469 is allowed in any part, under principles of equitable subordination, it should only be eligible to receive distributions after all allowed amounts of all Class 1 Claims are paid in full. The power afforded to a district court supervising an equity receivership includes the authority to subordinate the claims of certain investors to ensure equal treatment. *S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 333 (7th Cir. 2010). "Equitable subordination does not deal with the existence or non-existence of the debt, but rather involves the question of order of payment." *In re Lockwood*, 14 B.R. 374, 380–81 (Bankr. E.D.N.Y. 1981). "The fundamental aim of equitable subordination is to undo or offset any inequality in the claim position of a creditor that will produce injustice or unfairness to other creditors...." *Id.* (internal quotations omitted). Here, investors holding Class 1 Claims were not sophisticated institutional investment professionals like OW Dragoon and lacked the skill, experience, knowledge, and resources available to OW Dragoon for conducting reasonable due diligence. As explained above, OW Dragoon was, at a minimum, on inquiry notice of fraud, and placing it on par with claimants holding Class 1 Claims would be inequitable. *See 80 Nassau Assocs. v. Crossland Fed. Sav. Bank*, 169 B.R. 832, 837 (Bankr. S.D. N.Y. 1994) (even if inequitable conduct is lawful, it can still give rise to equitable subordination); *U.S. v. Pearlman*, Case No. 6:07-cr-00097-GKS-DAB (M.D. Fla. 2008) Forfeiture Money Judgment ("It is further ordered that all proceeds collected by the United States of America pursuant to this judgment be returned to the defendant's victims, proportionate to each investor's loss, with priority given to compensate individual investors fully prior to compensating institutional investors.").

CONCLUSION

For the foregoing reasons, the Receiver requests that this Court overrule MMG's objection to the Receiver's denial of Claim 469.

LOCAL RULE 3.01(g) DETERMINATION

Undersigned counsel for the Receiver has conferred with counsel for the SEC and is authorized to represent to the Court that the SEC does not oppose the relief requested in this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2015, a true and accurate copy of the foregoing was filed with the Court's CM/ECF system and furnished by first-class mail delivery to the following non-CM/ECF participant(s):

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