Securities and Exchange Commission v. Nadel et al Doc. 1402

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants. CASE NO.: 8:09-cv-0087-T-33CPT

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 VERIFIED MOTION TO APPROVE SETTLEMENTS OF CLAIMS AND OBJECTIONS WITH CERTAIN SECURED CREDITORS

Burton W. Wiand, as receiver (the "**Receiver**") for Quest Energy Management Group, Inc. ("**Quest**"), moves the Court for an order, in substantially the form attached as **Exhibit 1**, approving settlements of claims and objections with five Texas-based taxing authorities (*see infra* pp. 4-5) (the "**Taxing Authorities**") and the First National Bank of Albany/Breckenridge (the "**Bank**"). The Receiver believes these settlements are fair and reasonable and will conserve limited resources by avoiding unnecessary litigation.

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BACKGROUND

On January 21, 2009, the Securities and Exchange Commission ("**SEC**") initiated this action to prevent the defendants from further defrauding investors in hedge funds the defendants operated. That same day, the Court entered an order appointing Burton W. Wiand as Receiver for defendants Scoop Capital, LLC, and Scoop Management, Inc., and relief defendants Scoop Real Estate, L.P.; Valhalla Investment Partners, L.P.; Valhalla Management, Inc.; Victory Fund, Ltd.; Victory IRA Fund, Ltd.; Viking IRA Fund, LLC; Viking Fund, LLC; and Viking Management, LLC. *See* Doc. 8. The Court subsequently granted several motions to expand the scope of the Receivership to include other entities owned or controlled by Arthur Nadel ("**Nadel**"). *See generally* Docs. 17, 44, 68, 81, 153, 172, 454, 911, 916, 1024. All of the entities in receivership are collectively referred to as the "**Receivership Entities**." The Court directed the Receiver to, among other things, administer and manage the business affairs, funds, assets, and any other property of the Receivership Entities. *See, e.g.,* Doc. 8.

Quest And Its Assets

Quest is an oil and gas exploration and production company based in Texas. Paul Downey was its Chief Executive Officer, and his son Jeff Downey was its Chief Operating Officer (collectively, the "**Downeys**"). Viking Oil & Gas, LLC ("**Viking Oil**") is a Florida limited liability company formed in January 2006 by Neil and Christopher Moody (the "**Moodys**") to make investments in Quest. The Moodys funded Viking Oil with proceeds from Nadel's scheme, and as a result, the Court expanded the Receivership to include Viking Oil on July 15, 2009. Doc. 153. Between February 2006 and April 2007, through Viking

Oil, the Moodys invested at least $4 million in Quest. As a result, the Receiver filed a motion to expand the Receivership to include Quest (Doc. 993), and the Court granted that motion on May 24, 2013 (Doc. 1024). Although Quest is one of the Receivership Entities, the Receiver has administered Quest independently, as directed by the Hon. Richard A. Lazzara (the "**Quest Receivership**" and the "**Quest Estate**").

Since the inception of the Quest Receivership in May 2013, the Receiver has managed and operated Quest, including its oil and gas leases. The company generates revenue by selling its production, but that revenue has varied sharply with oil and gas prices, and it has not historically exceeded Quest's operating costs by a material margin. As such and as explained in more detail below, the Receiver has long sought to sell Quest to monetize its assets for the Quest Estate and eventual distribution to creditors. The Receiver's efforts, however, have been complicated by the fraudulent manner in which the Downeys operated Quest. *See, e.g., S.E.C. v. P. Downey et al.*, Case No. 1:14-cv-185 (N.D. Tex.).[1]

[1] The SEC asserted claims against the Downeys for their violations of the anti-fraud provisions of the federal securities laws in connection with their activities on behalf of Quest. On July 25, 2016, the court presiding over the enforcement action entered an order granting summary judgment in favor of the SEC on its claims against the Downeys. On September 29, 2016, the court granted the SEC's motion for remedies and entered final judgments as to all defendants. In addition to entering final judgments, the court also made specific findings as to the defendants, including that Jeff and Paul Downey (1) "raised $4.9 million from 17 investors in a fraudulent offering of securities"; (2) "acted with a high level of scienter, knowingly deceiving investors about virtually every aspect of the investment"; (3) concealed the Receiver's appointment from Quest's investors; and (4) exhibited "misconduct [that] was extremely egregious." *S.E.C. v. P. Downey et al.*, Case No. 1:14-cv-185, order granting SEC's motion for summary judgment, Doc. 117 at 2-3 (N.D. Tex. Sept. 29, 1996). The court ordered the Downeys to disgorge $4.9 million plus $1.1 million in interest and to pay a civil penalty of $178,156 each. As far as the Receiver is aware, the Downeys have not paid anything toward the disgorgement or penalty.

The Quest Claims Process

On June 15, 2016, the Receiver filed his Unopposed Motion to (1) Approve Procedure to Administer Claims and Proof of Claim Form, (2) Establish Deadline for Filing Proofs of Claim, and (3) Permit Notice by Mail and Publication. *See* Doc. 1240 (the "**Quest Claims Motion**"). The Court granted the motion on June 17, 2016, thus establishing the "**Quest Claims Process**." Doc. 1241. Investors and other creditors then submitted 93 claims, which the Receiver reviewed and evaluated.

On March 7, 2019, the Receiver filed his 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. *See* Doc. 1383 (the "**Quest Determination Motion**"). In the Quest Determination Motion, the Receiver recommended that claims be allowed in full, allowed in part, or denied.

Class 1 Claims From Taxing Authorities

Five Taxing Authorities[2] submitted claims in the Quest Claims Process:

- The Brown County Appraisal District filed a proof of claim form with the Receiver on behalf of Brown County, Texas for unpaid property taxes from 2012 through 2016 in the amount of $34,602.72 (*see* Claim No. 1);
- The Callahan County Appraisal District filed a proof of claim form with the Receiver on behalf of the County of Callahan, Texas for unpaid property taxes from 2012 through 2016 in the amount of $9,136.84 (*see* Claim No. 2);
- The Guadalupe County Appraisal District filed a proof of claim form with the Receiver on behalf of the County of Guadalupe, Texas for unpaid property taxes from 2012 through 2016 in the amount of $96.54 (*see* Claim No. 3);

[2] The Taxing Authorities are all represented by Tara LeDay of the firm McCreary Veselka Bragg & Allen P.C.

- The Shackleford County Appraisal District filed a proof of claim form with the Receiver on behalf of the County of Shackelford, Texas for unpaid property taxes from 2012 through 2016 in the amount of $284,893.80 (*see* Claim No. 4); and

- The Denton County Appraisal District filed a proof of claim form with the Receiver on behalf of the County of Denton, Texas for unpaid property taxes from 2012 through 2016 in the amount of $12,633.36 (*see* Claim No. 74);

The Receiver denied the claim from Denton County because it appeared to be related to a non-Receivership entity, but he assigned the other claims to Class 1 – *i.e.*, the highest priority. Given the limited assets available to all creditors, the Receiver also recommended the claims be allowed only in part – *i.e.*, without any entitlement to late fees or penalty interest. The Taxing Authorities objected to the Receiver's determination, and the parties began working through the objection procedure set forth in the Quest Determination Motion. Counsel for the Taxing Authorities informed the Receiver that the foregoing claim amounts increased between 2016 and the present to a total of approximately $379,852 due to the accrual of additional taxes, penalties, and interest.

To resolve all of Quest's liabilities to the Taxing Authorities, the Receiver has agreed to allow the claims submitted by the Taxing Authorities as Class 1 claims in the total amount of $300,000. To be clear, the Receiver is not paying the Taxing Authorities that amount at this time. Rather, he is consolidating their claims and adjusting their allowed amount to a total of $300,000. When the Receiver moves the Court to make a distribution to creditors, the Taxing Authorities – as Class 1 claimants – will be entitled to the first $300,000 distributed. The Taxing Authorities will be responsible for allocating any distribution amongst themselves. A Settlement of Claims and Objections memorializing this agreement is attached as **Exhibit 2**.

The Bank's Class 2 Claim

The Bank submitted a claim for $198,250.14 plus unspecified "interest from 9/12/2013" based on two loans it made to Quest and the Downeys. On April 17, 2006, the Bank loaned $76,000 to Quest, "by and through Jeff Downey, Vice-President," for the purchase of certain real property in Shackelford County, Texas, from which the Downeys operated Quest (the "**Property**" and the "**Property Loan**"). *See* Claim No. 5. As set forth in Exhibit C to the Quest Determination Motion, the Receiver concluded that Bank of Albany's claim with respect to the Property Loan should be allowed in the amount of $46,522.00, which is the approximate outstanding principal balance of that loan at the time of the Receiver's appointment. *See* Doc. 1383, Ex. C.

On October 13, 2010, the Bank loaned Quest $700,000 (the "**2010 Loan**"), which was secured by certain oil and gas leases, personal property, and equipment. The Downeys also personally guaranteed the 2010 Loan. On February 26, 2013, the Bank and Quest entered into a "modification, renewal and extension" of the 2010 Loan, pursuant to which the parties acknowledged that the outstanding principal balance of the loan at the time of the modification was $213,057.30. The Court expanded this Receivership to include Quest shortly thereafter – on May 24, 2013, at which time the outstanding principal balance of the 2010 Loan was approximately $151,728. As explained in the Quest Determination Motion, the Receiver concluded that the portion of the Bank's claim related to the 2010 Loan should be denied. *See* Doc. 1383 at 16-18.

The Bank filed a motion with the Court regarding the Receiver's determination (Doc. 1387), which the Receiver construed as an objection. Pursuant to the Court's order on the

motion (Doc. 1397), the Receiver began attempts to resolve the objection through the Quest Claims Process. Based on those negotiations, the Receiver agreed to allow the Bank to foreclose on the Property and to take possession, custody, control, and ownership of the Property in full satisfaction of the Bank's claim. To accomplish this, the Receiver agreed to move the Court (through the instant motion) to (1) approve the Receiver's settlement with the Bank; (2) abandon the Property, thereby removing it from the Quest Estate; and (3) lift the stay and injunction (*see* Doc. 1024 at p. 8 ¶ 2 & Doc. 8 ¶ 15) with respect to the Bank and the Property so that the Bank can commence foreclosure proceedings. The transfer of the Property to the Bank through this process is in full satisfaction of the Bank's claim against the Quest Estate. If the Court grants this motion, the Receiver will have no further interest in or responsibility for the Property, and the Bank will be entitled to all proceeds from the foreclosure. A Settlement of Claim and Objection memorializing this agreement is attached as **Exhibit 3**.

MEMORANDUM OF LAW

I. THE COURT SHOULD APPROVE THE SETTLEMENTS BECAUSE THEY ARE IN THE BEST INTERESTS OF THE QUEST ESTATE

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).

A. The Settlement With The Taxing Authorities Is Fair And Reasonable

The Court should approve the settlement with the Taxing Authorities because it is fair and reasonable and in the best interests of the Quest Estate. First, the settlement will avoid unnecessary litigation by resolving five separate claims and their related objections. Second, the collective nature of the settlement means that the Receiver does not have to spend time and money to resolve factual and legal issues unique to each claimant. Third, the settled claim amount is approximately $80,000 less than the total amount currently due. And fourth, resolution of the claims by the Taxing Authorities will make the sale of Quest or its assets substantially easier and thus conserve Receivership resources.

B. The Settlement With The Bank Is Fair And Reasonable

The Court should also approve the settlement with the Bank because it is fair and reasonable and in the best interests of the Quest Estate. First, the settlement will avoid unnecessary litigation by resolving the Bank's claim and objection. Second, by allowing the Bank to foreclose on the Property, the Receiver will avoid numerous costs, including (1) ongoing maintenance and repairs; (2) commissions and fees charged by real estate agents or auction companies; and (3) the legal fees and costs required to seek the Court's approval of any private sale. Third, the Receiver believes the value of the Property is substantially less than the Bank's $198,250.14 claim amount. And fourth, the settlement also resolves the Bank's claim to unspecified "interest from 9/12/2013" and litigation over the Bank's right to the payment of interest.

To effectuate the settlement, the Receiver moves the Court to authorize the Receiver to abandon the Property, thereby removing it from the Quest Estate. *See*, *e.g.,* Doc. 1267 (authorizing abandonment of storage unit); *S.E.C. v. Ryan,* 2013 WL 12141502 (N.D.N.Y. 2013) (authorizing abandonment of property). Abandonment is appropriate here because the value to the Quest Estate of resolving the Bank's claim is greater (and perhaps substantially so) than the value of the Property itself, especially given all the attendant maintenance, marketing, and legal costs.

The Receiver also moves the Court to lift – with respect to the Bank's foreclosure of the Property only – the stay and injunction that prevents anyone "from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Defendants or Relief

Defendants." Doc. 8 ¶ 15, made applicable to the Quest Estate by Doc. 1024 at p. 8 ¶ 2. This relief is necessary to allow the Bank to commence foreclosure proceedings against the Property. *See* Doc. 1365 (lifting stay to allow secured creditor to foreclose on property).

CONCLUSION

The Receiver moves the Court for entry of an order (in substantially the form of the proposed order attached as **Exhibit 1**) approving the claim and objection settlements attached as Exhibits A and B, authorizing the Receiver to abandon the Property, and lifting the stay and injunction to allow the Bank to foreclose on the Property.

CERTIFICATE UNDER LOCAL RULE 3.01(g)

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. Counsel for the Receiver has not conferred with the other 87 claimants that submitted claims in the Quest Claims Process, but the Receiver has posted this motion and its exhibits on his website: www.nadelreceivership.com.

VERIFICATION OF RECEIVER

I, Burton W. Wiand, Court-Appointed Receiver in the above-styled matter, hereby certify that the information contained in this motion is true and correct to the best of my knowledge and belief.

s/ Burton W. Wiand
Burton W. Wiand, Court-Appointed Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 24, 2019, I filed the foregoing with the Clerk of the Court by using the CM/ECF system. I also served a copy of the foregoing via email and U.S. Mail on the following counsel for Class 1 and Class 2 creditors:

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