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 MOTION TO OVERRULE
OBJECTION TO CLAIM 17

Burton W. Wiand (the "**Receiver**"), as Receiver for Quest Energy Management Group, Inc. ("**Quest**") moves the Court to overrule the objection submitted by investor Ruth Artisuk ("**Artisuk**" or "**Claimant**") to the Receiver's determination of Claim 17.

I. BACKGROUND

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 Determinations and Priority of Claims, (2) Pool Receivership Assets and Liabilities, (3) Approve Plan of Distribution, and (4) Establish Objection Procedure (the "**Claims Determination Motion**") (Doc. 1383). The exhibits to the Claims Determination Motion contained the Receiver's determinations on all 93 claims. The Receiver carefully reviewed all submitted claims and determined that each claim fell within one of five categories:

> 1) Property tax lien claims, which should be allowed in part and receive the highest priority among claims ("**Class 1**");
>
> 2) Secured claims, which should be allowed in part and receive the second highest priority but which also should be paid only from the proceeds of the sale of the collateral securing the claims, less fees and costs for maintaining and selling the assets ("**Class 2**");
>
> 3) Investor Claims, which should be allowed (in whole or in part) and should receive the highest priority among unsecured claims ("**Class 3**");
>
> 4) Unsecured Non-Investor Claims, which should be allowed but should be paid only after tax lien claims, secured claims, and Investor Claims have been paid in full ("**Class 4**"); and
>
> 5) Claims that should be denied ("**Class 5**").

Doc 1383 at 10, 34-35. The Receiver considered each submitted claim to determine its claim category, with the goal that distribution of the Receivership's assets be equitable and fair among all claimants. To ensure fair and equitable treatment, the Receiver established the categories of claimants through the review of (1) information each claimant provided, (2) Quest's books and records, and (3) information obtained from non-parties. *See id.*

The Claims Determination Motion also contained a detailed objection procedure for any claimants who disagreed with the Receiver's claim determinations. *See* Doc. 1383 at 41-45. That procedure required objecting claimants to serve their objections on the Receiver by April 19, 2019. *Id.* The Court granted the Claims Determination Motion on March 15, 2019. Doc. 1384. Claimants served objections in connection with 11 of the 93 claims. All objections have either been resolved or waived except for the one at issue.[1] As discussed in more detail below, Artisuk contends that her claim should be classified as a Class 2 secured claim rather than a Class 3 claim. A copy of Artisuk's proof of claim form and objection are attached as **Exhibit 1** and **Exhibit 2**, respectively. Pursuant to the procedure approved by the Court, the Receiver was required to evaluate all objections and notify the objecting claimants of his evaluation in writing (the "**Notification**"). The Receiver mailed the Notification regarding the objection to Claim 17 to Artisuk on June 14, 2019. A copy of the Notification is attached as **Exhibit 3**.

[1] The Receiver reached agreements to resolve objections for five claims submitted by Texas taxing authorities and one claim submitted by the First National Bank of Albany ("**Bank of Albany**"). *See* Doc. 1402. The Court approved these agreements on August 9, 2019. *See* Doc. 1406. Claimants with unsecured claims submitted five objections to the Receiver's determination of their claims. *See* Doc. 1395. The Receiver resolved one of those objections (Claim No. 72). Claimants abandoned three other objections after receiving the Receiver's written notifications detailing the evaluation of their objections. (Claim Nos. 73, 75, and 79).

After receipt of the Notification, Artisuk had 30 days to serve the Receiver with a written response clearly stating whether she maintains the objection or accepts the Receiver's further determination of the claim as set forth in the Notification. Doc. 1383 at 43. Artisuk's written response maintaining her objection was received on July 2, 2019, and is attached as **Exhibit 4**. Because the Receiver and Artisuk are unable to reach an accord on this objection, the Receiver is required to file this motion with the Court and provide the Court with the documents served on him by the Claimant. *Id.*

I. ARGUMENT

A. Claimant Bears the Burden of Proof

Section IV of the Claims Determination Motion detailed the proposed objection procedure through which the Court would review and resolve any outstanding objections. Subsection (j) states that "[t]he Claimant shall have the burden of proof." Doc. 1383 at 44. This subsection also states that the Court may make a final determination based on the submissions (which are this motion and the attached exhibits) or may set the matter for hearing. *Id.* On March 15, 2019, the Court granted the Claims Determination Motion and found the proposed objection procedure "logical, fair, and reasonable." Doc. 1384.

B. Legal Standard

Courts sit as courts of equity over securities fraud receiverships. *See S.E.C. v. Elliott,* 953 F.2d 1560, 1566 (11th Cir. 1992). As such, the Court has "broad powers and wide discretion" to fashion appropriate relief, including to devise a plan for distributing receivership assets. *See id.* In resolving claims submitted in a claims process, courts consider a wide variety of factors, with the ultimate goal of fashioning an equitable system

that treats similarly situated claimants equally. *See S.E.C. v. Homeland Commc'ns Corp.,* 2010 WL 2035326, at *1 (S.D. Fla. May 24, 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.") (quotation omitted); *Cunningham v. Brown*, 265 U.S. 1, 13 (1924) (as among "equally innocent victims, equality is equity"); *Elliott*, 953 F.2d at 1570 (same). Put simply, equity requires that similarly situated investors be treated equally. *See Quilling v. Trade Partners, Inc.*, 2006 WL 3694629, at *1 (W.D. Mich. 2006).

C. The Claimant's Objection Should Be Denied

Claim Number 17 was allowed in part as a Class 3 Investor Claim for the allowed amount of $42,492.53. The Claimant did not object to the allowed amount of this claim, but asserted that the claim was improperly designated as a Class 3 claim. The Claimant has failed, however, to provide any evidence other than false and unsupported representations from Quest that her investment was actually secured. Although it was often fraudulently represented to investors in Quest that their investments were "secured," "senior," or "preferred," the Receiver has been unable to identify any such valid security interests.

In the Claimant's initial objection, she stated that she has "a senior secured investment and should be moved to Class 2." In support of her position, she referenced two endorsed orders, docket 1385 on March 15, 2019, and docket 1388 on March 27, 2019. Docket 1385 is an endorsed order which states that the Court received a letter from Artisuk and directs the Receiver to proceed as if the letter had been filed in accordance with the Receiver's objection procedure approved by the Court. A copy of the referenced letter dated

January 3, 2019, which encloses a previously submitted letter dated September 14, 2018 is attached as **Exhibit 5**. Neither the letter nor the Court's order establishes that Claim 17 is a secured claim. Docket 1388 is also an endorsed order,[2] but does not reference Claim 17 or provide any support for why this claim should be treated as a secured claim.

In the September 14, 2018 letter, the Claimant asserted that she is a senior secured lender, but she did not provide any evidence of the secured interest. *See* Ex. 5. The Claimant attached subscription documents for her Quest investment, the Receiver's Interim Report on Quest ("**Interim Report**"), and an application for a drilling permit submitted by Quest. None of these documents provide any evidence that the Claimant's investment was secured. The subscription documents are for the "Offering of Seventy (70) Senior Preferred Notes with a Conversion Option" at $50,000 per note. This is not a secured note. The Receiver has not found any evidence that any security interest was perfected by the Claimant or any other party relating to this investment, and the Claimant has failed to provide any evidence of a perfected interest. *See* Affidavit of Jeffrey Rizzo attached as **Exhibit 6**.

In response to the Receiver's Notification which explains the above to the Claimant, the Claimant again provided documents from Quest which contain numerous misrepresentations including that (1) the investment is "secured;" (2) investors will participate in the "[r]eturn of 125% of the Principal amount of the Secured Corporate Note in April, 2012, plus an annual rate of 10% interest will be paid on a quarterly basis to the

[2] This endorsed order relates to Bank of Albany's Motion to Alter Judgment and directs the Receiver and the SEC to file a joint response to address the arguments raised by the Bank of Albany and also "address the right of those with secured claims like First National Bank of Albany to respond/object to the Receiver's motion." Doc. 1388.

Investors starting in April of 2009;" and (3) "Investors are participating in low risk development of PROVEN RECOVERABLE RESERVES." *See* Ex. 4, at 2 and 4 (emphasis in original).[3] None of these statements were true. As stated in the Interim Report, Quest (1) was insolvent almost since its inception in 2006; (2) was severely mismanaged and expenses were outpacing revenue by more than two to one; (3) owed investors and others millions of dollars but virtually had no revenue with which to repay this debt; and (4) was sustained exclusively by money from new investors who were misled about the company's financial state or potential. *See* Doc. 1054 at 4-5. Quest's misrepresentations regarding the priority or security of an investment are no different than its misrepresentations regarding the potential for returns and safety of the investment.[4]

[3] Claimant also provided a copy of the claim form she submitted in connection with a Chapter 7 bankruptcy proceeding initiated by Jeffrey Downey and his wife. This document merely contains representations by the Claimant. It is not a determination by the bankruptcy court that the Claimant has a valid, perfected security interest.

[4] The SEC asserted claims against Paul Downey, Quest's Chief Executive Officer, and Jeffrey Downey, Quest's Chief Operating Officer (collectively, 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.

Indeed, as part of its scheme, Quest regularly misrepresented to investors that their investments would receive higher priority over other investments. As is evident from the title of the Claimant's subscription documents alone, Quest contemplated that at least 70 investors would be offered this "preferred note." There is no evidence that any investments made by general investors were treated differently by Quest. All investor funds appear to have been commingled and treated as one pool in typical Ponzi scheme fashion. While the Receiver is sympathetic to the Claimant's situation along with that of the other victim investors, Claim 17 is not secured. It is fair and equitable to treat Claim 17 in the same manner as the other similarly situated claimants in Class 3.

Courts routinely hold that treating similarly situated parties alike in claims processes is fair and equitable. *See S.E.C. v. Elliott*, 953 F. 2d 1556, 1566 (11th Cir. 1992); *United States v. Petters*, 2011 WL 281031, *7 (D. Minn. 2011). There is no requirement, however, that all claimants be treated in the same manner; rather, fairness only requires that similarly situated claimants should be treated alike. *See, e.g., S.E.C. v. Byers*, 637 F. Supp. 2d 166, 184 (S.D.N.Y. 2009) ("The Receiver's proposal to treat differently those involved in the fraudulent scheme when distributions are being made is eminently reasonable and is supported by caselaw."); *Quilling v. Trade Partners, Inc.*, 2006 WL 3694629, *1 (W.D. Mich. 2006) (distinguishing between fraud victims and general creditors). In the end, "[a]n equitable plan is not necessarily a plan that everyone will like." *S.E.C. v. Credit Bancorp*, 2000 WL 1752979, *29 (S.D.N.Y. 2000). Indeed, "when funds are limited, hard choices must be made." *Byers*, 637 F. Supp. 2d at 176 (quoting *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 84 (2d Cir. 2006)).

CONCLUSION

For the foregoing reasons, the Receiver moves the Court to overrule the objection by Artisuk to the Receiver's determination of Claim 17.

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. As evidenced by the objection and related correspondence submitted to the Receiver, Artisuk maintains her objection and opposes the relief sought in this motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 16, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on August 16, 2019, I caused a true and correct copy of the foregoing to be sent via email and mailed by first-class mail delivery to the following non-CM/ECF participants:

Ruth P. Artisuk
1920 Dawn Point
Davis, IL 61019

s/Jared J. Perez
Jared J. Perez, FBN 0085192
jperez@wiandlaw.com
WIAND GUERRA KING P.A.
5505 West Gray Street
Tampa, FL 33609
Tel: 813-347-5100
Fax: 813-347-5198

Attorney for the Receiver, Burton W. Wiand