UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

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

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,

Relief Defendants.
_____/

VERIFIED MOTION TO AUTHORIZE THE RECEIVER TO RETAIN A $100,000 EARNEST MONEY DEPOSIT DUE TO THE PURCHASER'S FAILURE TO CLOSE THE COURT-APPROVED SALE OF QUEST ASSETS

On July 24, 2019, Burton W. Wiand, as receiver (the "**Receiver**") for Quest Energy Management Group, Inc. ("**Quest**" and the "**Quest Estate**") filed a motion seeking the Court's approval of a proposed transaction between the Receiver and Archer Petroleum, Ltd. ("**Archer**"). Doc. 1403 (the "**Approval Motion**"). As explained in more detail below, the parties executed an Asset Purchase Agreement, attached hereto as **Exhibit 1** (the "**APA**"), which required Archer to pay the Receiver $1 million in exchange for the transfer of certain

Quest assets (free and clear of all claims, liens, and encumbrances), including oil and gas leases (the "**Quest Assets**"). The APA also required Archer to pay an earnest money deposit of $100,000, which is currently being held in escrow (the "**Deposit**").

On August 9, 2019, the Court granted the Approval Motion along with a related motion seeking approval of settlements with relevant secured creditors (the "**Claims Settlement Motion**"). *See* Docs. 1406, 1407. The Court also ordered the Receiver to file a report "regarding the status of the proceedings and the necessity of further judicial involvement, especially as it concerns judicial involvement following completion of the contemplated sale of Quest Energy Management Group, Inc." Doc. 1408; *see also* Doc. 1413. Unfortunately, the Receiver seeks judicial involvement much sooner than anticipated because Archer refused to close the transaction. Archer claims the Receiver required too much time to obtain the Court's approval of the sale, but that claim is disingenuous, and the APA does not allow (or even contemplate) Archer's purported cancelation on that basis. The Receiver thus moves the Court for an order (1) authorizing the Receiver to ultimately retain the Deposit for the benefit of the Quest Estate due to Archer's failure to close the transaction and (2) permitting the Receiver to transfer the Deposit to the Court's registry, pending the resolution of this issue.

BACKGROUND

As explained below, the Receiver used the time between the execution of the APA and the Court's approval of the transaction to negotiate settlements with secured creditors holding claims against the Quest Assets and to comply with both the APA and statutory requirements. The Receiver intended these activities to benefit Archer by eliminating

uncertainty and ensuring a smooth closing. The Receiver kept Archer fully apprised of his activities, but the company nevertheless refused to comply with its contractual obligations.

The Receiver's Negotiations to Resolve Claims by Secured Creditors

The APA contains a number of contingencies, including this Court's approval of the sale and transfer of the Quest Assets to Archer free and clear of all liens, claims, encumbrances, and restrictions. *See* APA § 2. 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 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. *See* Doc. 1383 (the "**Claims Determination Motion**"). That motion contained a detailed objection procedure for any claimants who disagreed with the Receiver's determinations. *See id.* at 41-45. On March 15, 2019, the Court granted the Claims Determination Motion and found the proposed objection procedure "logical, fair, and reasonable." Doc. 1384. The objection procedure required claimants to serve any objections on the Receiver by April 19, 2019. *Id.*

Claimants served objections in connection with 11 of the 93 claims. In relevant part, five Texas-based taxing authorities (the "**Taxing Authorities**") and First National Bank of Albany (the "**Bank**") objected to the Receiver's determinations of their claims. Doc. 1395.

Both the Taxing Authorities and the Bank held secured claims against the Quest Assets. Pursuant to the objection procedure, the Receiver began negotiations with the Taxing Authorities and the Bank to resolve their objections. Specifically, on April 29, 2019, the Court held a hearing on a motion filed by the Bank (*see* Docs. 1387, 1391, 1397), and immediately following that hearing, the Receiver began providing the Bank with informal discovery to avoid additional, unnecessary litigation.

In the midst of this process, the Receiver and Archer executed the APA on or about May 8, 2019. The Receiver's negotiations with the Bank and the Taxing Authorities began to bear fruit in late May and early June 2019. Specifically, the Receiver and counsel for the Taxing Authorities participated in a conference call on June 7, 2019, which resulted in an executed settlement agreement on June 17, 2019. Doc. 1402, Ex. 2. The Receiver's negotiations with the Bank were somewhat more complicated. After reaching an agreement in principal, the Receiver sent counsel for the Bank a draft settlement agreement on June 18, 2019. Following substantial correspondence between the parties and additional informal discovery, the Receiver and the Bank executed a settlement agreement on July 24, 2019. *Id*. Ex. 3. That same day, the Receiver filed both the Approval Motion (Doc. 1403) and the Claims Settlement Motion (Doc. 1402). The activity described above was, in relevant part, for Archer's benefit. Archer was informed of these matters and recognized that these resolutions were for its benefit. The Receiver intended to satisfy the express contingencies in the APA and to ensure that secured creditors would not object to the proposed sale.

The $100,000 Earnest Money Deposit and Archer's Failure to Close

As required by the APA, Archer paid a $100,000 earnest money deposit in early April 2019, which the Receiver's law firm is holding in escrow. *See* APA § 4.a. & Ex. B. The APA also required the transaction to close within 30 days of the Court's approval of the sale – *i.e.*, on or before September 8, 2019. *See* APA §§ 5, 6. At closing, Archer was required to deliver the $1 million purchase price (with the Deposit being applicable to that amount), and the Receiver was required to deliver to Archer (among other things) a Bill of Sale and Assignment, transferring the Quest Assets free and clear of all liens, claims, and encumbrances. *See* APA §§ 7, 8 & Ex. C. Importantly, the parties contemplated that the sale of the Quest Assets would be a "hard" agreement—*i.e.*, once the contingencies were satisfied, the Deposit would become nonrefundable. This was clear from the March 2019 email exchange between the Receiver and Drew Hudson, the principal of Archer (attached as **Exhibit 2**). The Deposit was not refundable unless the Court refused to approve the sale or the Receiver failed to close within 30 days of the entry of the Court's order.

As noted above, the Receiver filed the Approval Motion on July 24, 2019—the same day it received an executed settlement agreement from the Bank. On July 26, 2019, the Receiver filed a notice of publication of the terms of the sale in the Abilene Reporter-News, as contemplated by the Approval Motion and 28 U.S.C. § 2001(b). *See* Doc. 1404. No individual or entity submitted a "bona fide offer" during the statutory 10-day window (or otherwise). *See* Doc. 1405. On August 7, 2019—just two days prior to this Court entering its order approving the sale—Archer sent correspondence to the Receiver in which it expressed a desire to cancel the purchase of the Quest Assets and requested the return of the

Deposit. *See* August 7, 2019 letter and email from Archer to Receiver, attached as **Composite Exhibit 3**. In its letter, Archer stated as its concern the amount of time the Receiver required to file the Approval Motion after the execution of the APA.[1] *See id.*

The email from Archer requested that the Receiver call Archer regarding the transaction, and the Receiver did so within 24 hours. Mr. Hudson asked the Receiver if the Deposit would be returned and requested a second call between the Receiver and other individuals associated with Archer to discuss the matter. The Receiver advised Mr. Hudson that the Deposit would not be refunded, and the second call was scheduled for August 9, 2019 at 9 AM. Mr. Hudson cancelled that call, but another call took place with Mr. Hudson and a lawyer on August 12, 2019. During that call, the Receiver made clear that Archer was obligated to close the transaction and that the company would forfeit the Deposit if it failed to do so. Mr. Hudson and his lawyer made clear that Archer would not close and again requested the return of the Deposit. Sometime thereafter, a broker working with Mr. Hudson called the Receiver and indicated that Archer was still interested in the transaction but needed to find new investors.

On September 6, 2019, the Receiver advised Mr. Hudson that Archer's final day to close was September 8, 2019 and asked if he intended to close the transaction. The Receiver spoke with Mr. Hudson on September 10, 2019 (after the contractual closing date) and again

[1] Archer also stated that it was concerned about fluctuating oil prices, but this is a red-herring, as oil prices are an inherent consideration in any oil and gas deal. In addition, oil prices did not materially change during the time period at issue, and they have been much lower in the past (as compared to the date of Archer's failure to close the transaction).

asked if Archer intended to close the transaction. Mr. Hudson responded that Archer was not in a position to close. As a result, the Receiver believes this motion is necessary.

As explained above and below, the amount of time the Receiver required to file the Approval Motion was not unreasonable given the terms and complexity of the transaction. In fact, the principal delay was due to the Receiver's negotiations with the Taxing Authorities and the Bank. The purpose of those negotiations was to resolve objections filed by secured creditors against the Quest Assets and to thus facilitate a smooth transition of those assets to Archer. In any event, the Purchase Agreement does not allow cancellation by Archer on this basis because it does not contemplate that time is of the essence (nor did the parties' dealings suggest timing was critical). The Receiver kept Archer fully apprised of the status of filing the Approval Motion, and Archer never complained about the timing. Indeed, during the last week of June, Mr. Hudson had a conversation with the Receiver and, after being advised of the status of the transaction, requested that the Receiver assure him the transaction would not close until August because his investors wanted to attend the closing, and they would be in Scotland until that time. Archer has not provided any valid reason for reneging on the transaction, and the Court should enforce the terms of the APA by allowing the Receiver to retain the Deposit.

MEMORANDUM OF LAW

I. THE COURT HAS BROAD POWERS OVER THIS RECEIVERSHIP'S ADMINISTRATION

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). The goal of a receiver charged with liquidating assets is to obtain the best value available under the circumstances. *Fleet Nat'l Bank v. H & D Entertainment, Inc.*, 926 F. Supp. 226, 239-40 (D. Mass. 1996) (citations omitted). Further, the paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate. *See, e.g., Four B. Corp. v. Food Barn Stores, Inc.*, 107 F.3d 558, 564-65 (8th Cir. 1997).

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).

The APA expressly provides that "all disputes and matters whatsoever arising under, in connection with, or incident to this Agreement shall be exclusively litigated before this Court as a summary proceeding" in this action. *See* APA § 19.

II. THE COURT SHOULD ENFORCE THE TERMS OF THE PURCHASE AGREEMENT BY AUTHORIZING THE RECEIVER TO RETAIN THE DEPOSIT FOR THE BENEFIT OF THE QUEST ESTATE

A. The Amount Of Time The Receiver Required To File Its Motion Seeking Approval Of The Sale Was For Archer's Benefit And Not Unreasonable.

The parties executed the APA on or around May 8, 2019. The APA expressly contemplates that it is contingent upon the Receiver obtaining an order from the Court approving the sale of the Quest Assets free and clear of all liens, claims, encumbrances, and restrictions. *See* APA § 2. The APA does not require the Receiver to seek the Court's approval of the sale by an express or implied deadline, nor does it otherwise state that "time is of the essence." The only deadline specified in the APA is that the deal must close within 30 days of this Court's approval of the transaction. *See id.*

The Receiver's actions in seeking approval of the sale were reasonable, given the nature of the transaction, which was complicated by secured claims against the Quest Assets. The APA required that the Receiver not only comply with the publication procedures set forth in 28 U.S.C. § 2001(b), but it also required that the Receiver seek approval from this Court to sell the Quest assets "free and clear of all liens, claims, encumbrances, and restrictions." *See e.g.,* APA § 2. As explained more fully above and in the Approval Motion, the Quest Assets were encumbered by a number of secured claims and related objections in an amount that would otherwise make the sale of the assets impracticable if the secured claims could not be resolved. *See* Doc. 1403 at 17-19 (explaining that the value of the claims

against the Quest Assets was far greater than the value of the assets and that no commercially-reasonable purchaser would agree to acquire Quest or its assets subject to its extensive liabilities).

While the Receiver was preparing the Approval Motion, he negotiated a resolution of all claims by secured creditors through the Quest Claims Process and related objection procedure. *See id*. As explained above, the Receiver filed the Approval Motion and the Claims Settlement Motion on the same day—as soon as the Receiver obtained a signed settlement agreement from the Bank. It was anticipated that Archer's purchase of the Quest Assets would resolve all significant matters in the Quest Receivership and allow for the resolution of all secured creditors' claims. The negotiation of the secured claims was necessary to ensure that the secured creditors' interests would not adversely affect the sale of Quest and also that the Quest Assets could be sold, pursuant to the APA, without any liens, claims, or other encumbrances. Not surprisingly, the ongoing negotiations between the creditors and the Receiver, the coordination of the sale given the secured claims, and the drafting of the respective motions seeking approval of both was a complex process, which took a considerable amount of resources on the part of the Receiver and his legal team. The Receiver regularly informed Archer about the status of this process.

Simply put, the period of time from when the APA was fully executed (on or around May 8, 2019) and the filing of the Approval Motion and the Claims Settlement Motions (July 24, 2019) was not unusual or unreasonable given the circumstances. It was also a process that served Archer's interests.

B. The Purchase Agreement Does Not Contemplate Or Permit Cancellation Of The Agreement Because The Agreement Does Not State That Time Is Of The Essence, The Receiver Kept Archer Fully Apprised Of Developments To Ensure Closing, And Archer Never Objected To The Receiver's Efforts.

Archer purportedly refused to close based on the amount of time the Receiver required to file the Approval Motion after the execution of the APA.[2] This, however, is not a valid ground for Archer to cancel or otherwise refuse to close the transaction. To be sure, the APA contains a number of contingencies that must occur prior to closing (and that have occurred), but time being of the essence is not one of them. If timing was a material term that Archer required to complete the transaction, it could have included such a provision in the APA, but it failed to do so.

Courts will generally not imply a requirement that "time is of the essence" into an agreement unless it is expressly stated in the agreement or the context of the transaction otherwise imputes such a requirement. *See, e.g., Bank of Am., N.A. v. Zaskey*, 2016 WL 4991223, at *4 (S.D. Fla. Sept. 19, 2016); *Christopher V. Perry Family, L.P. v. Whatever, L.L.C.*, 2009 WL 3672834, at *2 (S.D. Tex. Nov. 3, 2009) ("Ordinarily, time is not of the essence for contract performance. … Instead, the contract must expressly make time of the essence or there must be something in the nature or purpose of the contract and the circumstances surrounding it making it apparent that the parties intended that time be of the essence.") (citations and internal quotations omitted); *Mirage Interests, Inc. v. Anchor Ins.*

[2] The Receiver views Archer's stated grounds for cancellation to be pretextual, as Archer did not inform the Receiver of its intent to cancel the transaction until August 7, 2019, ***after*** Archer knew that the Receiver had already filed the Approval Motion on July 24, 2019. It would appear that Archer's true motivation for cancelling the closing related to its own issues with investors.

Holdings, Inc., 2017 WL 2999418, at *4 (W.D. Tex. Mar. 28, 2017), adopted 2017 WL 2999688 (W.D. Tex. May 2, 2017) (even if a contract specifies a date for performance, that does not, of itself, mean that time is of the essence).

Here, not only is the APA silent with respect to the timing of filing the Approval Motion, but the context of the transaction did not suggest that timing was critical. Indeed, during the time period between the execution of the APA and the filing of the Approval Motion and Claims Settlement Motion, the Receiver kept Archer fully apprised of the progress regarding satisfying the contingencies of the sale, including preparing a notice of the sale, as well as preparing the associated motions mentioned above.[3] *See, e.g.,* May – June 2019 emails between Receiver and Archer, attached as **Exhibit 4**. At no point (prior to attempting to renege on the sale) did Archer complain that it was being prejudiced by the passage of time or that closing by a particular date was of the essence.[4] *See id.* Simply put, Archer had no right to cancel the contract because the Receiver did not breach the APA and satisfied the pertinent contingencies.[5]

[3] In fact, the Receiver informed Archer that he was negotiating the claims of the Taxing Authorities—a contingency about which Archer expressed significant concern. The Receiver provided Archer with a copy of the Approval Motion once it was filed.

[4] To the contrary, Archer had expressed its desire to not close before August 2019.

[5] Even if time were of the essence, courts have held that non-material delays in performance do not relieve the other party from carrying through on its obligations under the suit. *See Janney Montgomery Scott LLC v. Helman*, 2005 WL 8154585, at *6 (S.D. Fla. Dec. 7, 2005) ("Florida courts do not lightly sanction unilateral termination of contracts when a default causes no harm to the party seeking to avoid performance") (citing *Burger King Corp. v. Mason*, 710 F.2d 1480, 1490 (11th Cir. 1983)).

CONCLUSION

Based on the above, the Receiver respectfully requests that the Court enforce the terms of the APA regarding the Deposit. Pending the resolution of this motion, the Receiver requests that the Court permit him to deposit with the Court's registry the $100,000 earnest money deposit, which is currently being held by the escrow agent under the terms of the APA. The Receiver ultimately requests an order from the Court allowing the Receiver to retain the $100,000 earnest-money deposit for the benefit of the Quest Estate. It is further requested that, upon resolution of this motion, the Clerk be directed to forthwith deliver the funds to the Receiver.

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. The Receiver has conferred with Archer, and Archer has indicated that it does not intend to close the transaction.

Respectfully submitted,

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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 October 2, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I have also served the foregoing by mail and email on the following non-CM/ECF participants:

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