UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. **CASE NO.: 8:09-cv-0087-VMC-CPT**

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.

ARCHER PETROLEUM'S RESPONSE IN OPPOSITION TO THE RECEIVER'S VERIFIED MOTION (Dkt #1419) TO AUTHORIZE THE RETENTION OF EARNEST MONEY AND MEMORANDUM AND POINTS OF AUTHORITIES IN SUPPORT THEREOF

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TABLE OF AUTHORITIES

* *Avila v. Gonzalez*, 974 S.W.2d 237 (Tex. App.—San Antonio 1998)

* *Berman v. M. O. Rife, III*, 644 S.W.2d 574, 575-76 (Tex. App.--Fort Worth 1982, writ ref'd n.r.e.)

* *Cal-Tex. Lumber Co. v. Owens Handle Co.*, 989 S.W.2d 802, 809 (Tex. App.—Tyler 1999, no pet.)

* *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992); **Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)

* *City of Harker Heights v. Sun Meadows Land, Ltd.,* 830 S.W.2d 313, 319 (Tex. App.--Austin 1992, no writ)

**Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)

* *Dill v. Helms*, 468 S.W.2d 608 (Tex. Civ. App., Waco 1971, no writ)

* *Dodds & Wedegartner, Inc. v. Reed*, 69 S.W.2d 165 (Tex. Civ. App., Dallas 1934, writ dism'd)

* *Hall v. Hall*, 158 Tex. 95, 308 S.W.2d 12 (1958)

**Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996)

* *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976)

* *Knox v. Townes*, 470 S.W.2d 290, 291 (Tex. Civ. App.--Waco 1971, no writ)

* *Levine v. Bayne, Snell & Krause, Ltd*., 40 S.W.3d 92, 95 (Tex. 2001)

* *Live Oak Dairy Corp. v. Kaase*, 45 S.W.2d 657 (Tex. Civ. App., San Antonio 1931, writ ref'd)

**MCI Telecomms. Corp. v. Tex. Utils. Elec. Co*., 995 S.W.2d 647, 650-51 (Tex. 1999)

* *Montclair Corporation v. Earl N. Lightfoot Paving Co.,* 417 S.W.2d 820 (Tex. Civ. App., Houston 1st Dist. 1967, writ ref'd n.r.e.)

* *Moore v. Dilworth*, 142 Tex. 538, 179 S.W.2d 940 (1944)

* *Price v. Horace Mann Life Insurance Company*, 590 S.W.2d 644 (Tex. Civ. App. -- Amarillo 1979, no writ)

* *Securities and Exchange Commission v. Arthur Nadel, et al.,* Case No: 8:09-cv-87-T-26TBM

* *Shaper v. Gilkison* (Tex. Civ. App., 1949, writ ref. n.r.e.), 217 S.W.2d 878, 880

* *State & Cty. Mut. Fire Ins. v. Macias*, 83 S.W.3d 304, 307 (Tex. App.—Corpus Christi 2002)

* *Tower Contracting Co. v. Flores*, 294 S.W.2d 266 (Tex. Civ. App., Galveston 1956, modified and affirmed 157 Tex. 297, 302 S.W.2d 396)

* *Watkins v. Williamson*, 869 S.W.2d 383, 384 (Tex. App.--Dallas 1993, no writ)

* *Wells Fargo Bank, Minn., N.A. v. N. Cent. Plaza I, L.L.P*., 194 S.W.3d 723, 726 (Tex. App.-Dallas 2006, pet. Denied

* *WesternGeco, L.L.C. v. Input/Output, Inc*., 246 S.W.3d 776, 784 n.6 (Tex. App.—Houston [14th Dist.] 2008, no pet.)

I. INTRODUCTION

Archer Petroleum, respectfully submits this memorandum of points and authorities in support of its Response In Opposition To the Receiver's Verified Motion (Dkt #1419) to Authorize the Retention of Earnest Money and Application for Declaratory Relief. Archer Petroleum respectfully requests the Earnest Deposit Money be returned to it because the Receiver breached the contract. In the alternative, Archer Petroleum respectfully requests the Earnest Deposit Money be returned to it because Archer was prevented from performing under the contract due to the Receiver's unreasonable delay and, failure to return the Earnest Money Deposit would unjustly enrich the Receiver.

II. BACKGROUND AND PROCEDURAL HISTORY

1. Archer Petroleum entered into an asset purchase agreement with Burton W. Wiand, as the Receiver for Quest Energy Management Group, Inc., a Delaware limited liability company, whose address is 5505 West Gray Street, Tampa, Florida 33609. ***See*** **Exhibit "A."**

2. The Asset Purchase agreement entered into between Archer Petroleum and the Receiver states:

> THIS ASSET PURCHASE AGREEMENT (the "Agreement"), **effective** as of thirty days after the court in Securities and Exchange Commission v. Arthur Nadel, et al, Case No: 8:09-cv-87-T-26TBM in the United States District Court for the Middle District of Florida issues its final order approving the sale described herein (**the "effective Date"**) …

See **Exhibit "A", first sentence (emphasis added).**

3. The Asset Purchase Agreement also provided the following:

> "2. ….this agreement is further **contingent** upon *Seller obtaining an Order* in substantially the form as Exhibit "B" attached hereto (the "Order") approving: (1) the sale of the Assets described in Exhibit "A" to Buyer free and clear of all liens, claims, encumbrances, and restrictions as provided for in the order of the United States District Court approving the transaction

and (2) Buyer's quiet enjoyment of all assets assigned to and assumed by Buyer (collectively, the "Contingencies").

***See* Exhibit "A," p. 2. (emphasis added)**

4. The Asset Purchase agreement further provided:

> "4. Earnest Money Deposit. Within three (3) days of the execution of this Agreement by both parties hereto, the Buyer will deposit with the Escrow Agent the sum of ONE HUNDRED THOUSAND DOLLARS AND N0/100 ($100,000) in readily available funds as an earnest money deposit ("Earnest Money Deposit"). Buyer and Seller mutually agree that Wiand Guerra King P.A. shall serve as the Escrow Agent. The Earnest Money Deposit shall be applied at Closing to the Purchase Price to be paid to Seller by Buyer at Closing. The terms of this Agreement shall serve as the escrow instructions for this transaction.
>
> (a) **Buyer hereby acknowledges and agrees that the Earnest Money Deposit becomes nonrefundable on the date the Court enters an Order in substantially the form as Exhibit "B" approving the sale of the Assets to Buyer**.
>
> (b) In the event that Seller cannot satisfy the Contingencies within thirty (30) days from the date of the issuance of the Order (the "Contingencies Period") or is otherwise unable to conclude the transaction contemplated hereunder, Seller shall return the Earnest Money Deposit to Buyer within fifteen (15) business days following the expiration of the Contingencies Period."

***See* Exhibit "A," p. 2, paragraph 4(a).**

5. On May 8, 2019, Archer Petroleum received the executed Asset Purchase Agreement from the Receiver. ***See* Exhibit "B."**

6. In reliance upon the language in the Asset Purchase Agreement that the earnest money deposit would become nonrefundable only on the date that the Court entered the referenced order, on April 2, 2019 and April 9, 2019, Archer Petroleum paid the Receiver the earnest money in two (2) deposits in the amount of ONE HUNDRED THOUSAND DOLLARS AND N0/100 ($100,000). ***See* Exhibit "C."**

7. Additionally, in tendering the earnest money, Archer relied on statements made by the Receiver prior to it's the payment being made that the motion for approval of the Asset Purchase Agreements would be filed in June. This is evidenced in the email exchanged between the Receiver and Archer dated June 11, 2019, wherein the Receiver stated:

> "Drew, today I reached agreement with the remaining creditors. That includes all taxing authorities so you have no worries with respect to taxes. We hopefully will be filing the motion for approval this week and look forward to a closing in the coming weeks. Thanks for your patience."

***See* Exhibit "D."**

8. However, the motion was not filed by the receiver that week. In fact, the motion was not filed until 6 weeks later on July 24, 2019.

9. On August 7, 2019, Archer Petroleum requested the return of its earnest money. ***See* Exhibit "F."** At that time, the Court had not yet entered the referenced order. As such, and because (a) the Asset Purchase Agreement specifically stated that the earnest money deposit would become nonrefundable only on the date that the Court entered the referenced order and that had not yet occurred, and (b) the Asset Purchase Agreement specifically stated that it did not become effective until 30 days after the referenced order had been entered and that had not yet occurred, Archer Petroleum requested a return of the earnest money. ***See* Exhibit "F."**

9. On August 9, 2019, <u>two days after</u> Archer Petroleum canceled the Asset Purchase Agreement, the United States District Court for the Middle District of Florida issued its final order approving the sale described herein in *Securities and Exchange Commission v. Arthur Nadel, et al.,* Case No: 8:09-cv-87-T-26TBM. ***See* Exhibit "G."**

10. On October 3, 2019, the Receiver filed his 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.

III. ARGUMENT

A. CONTRACT INTERPRETATION

11. The interpretation of an unambiguous contract is a question of law for the court. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co*., 995 S.W.2d 647, 650-51 (Tex. 1999). The court's primary concern in interpreting a written contract is to determine the mutual intent of the parties as manifested in the contract. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). The parties' intent must be taken from the agreement, and the agreement must be enforced as written. *Wells Fargo Bank, Minn., N.A. v. N. Cent. Plaza I, L.L.P*., 194 S.W.3d 723, 726 (Tex. App.-Dallas 2006, pet. denied). The court's favor an interpretation that affords some consequences to each part of the agreement so that none of the provisions will be rendered meaningless. *See Coker*, 650 S.W.2d at 394. Unless the agreement shows that the parties used a term in a technical or different sense, we give the terms their plain, ordinary, and generally accepted meaning. *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996).

B. ARCHER PETROLEUM IS ENTITLED TO A REFUND OF THE EARNEST MONEY DEPOSIT BECAUSE BUYER WAS NOT OBLIGATED TO PERFORM UNTIL RECEIVER MET THE CONDITION PRECEDENT

1. Receiver was obligated to obtain an order from this Court as a condition precedent to the Asset Purchase Agreement becoming effective.

12. A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation. *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex.

1992); *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976). When a contract contains a condition precedent, the condition must either have been met or excused before the other party's obligation can be enforced. *Cal-Tex. Lumber Co. v. Owens Handle Co.*, 989 S.W.2d 802, 809 (Tex. App.—Tyler 1999, no pet.)). Many Texas cases have construed contingent provisions in contracts as conditions precedent. *See e.g.*, *Knox v. Townes*, 470 S.W.2d 290, 291 (Tex. Civ. App.--Waco 1971, no writ)(clause stating contract is contingent on obtaining financing creates a condition precedent that must be met before buyer is obligated to perform contract); *Watkins v. Williamson*, 869 S.W.2d 383, 384 (Tex. App.--Dallas 1993, no writ)(residential earnest money contract contingent on satisfactory financing contains a condition precedent; the contract depends upon the condition being met); *Berman v. M. O. Rife, III*, 644 S.W.2d 574, 575-76 (Tex. App.--Fort Worth 1982, writ ref'd n.r.e.)(contract "subject to approval" of a conventional loan is condition precedent inserted for benefit of buyer to avoid forfeiture or penalty).

13. In *Knox*, the Court considered whether Townes was entitled to a refund of $ 1,000 earnest money paid as a deposit to purchase real estate. Under the terms of the contract, the earnest money would be forfeited to Knox if Townes failed to consummate the sale. *Knox*, 470 S.W.2d at 291. The agreement contained this clause: "This contract is contingent upon purchaser obtaining satisfactory financing." *Id.* The contract of sale was never performed. *Id.* Townes sought a return of the $ 1,000 deposit. *Id.*

14. The contract before the Court, by express terms, was "contingent upon purchaser obtaining satisfactory financing." *Id.* At 292. The Court reasoned that "Contingent," as there used, means "dependent for effect on something that may or may not occur." *Id. citing*

Shaper v. Gilkison (Tex. Civ. App., 1949, writ ref. n.r.e.), 217 S.W.2d 878, 880. Based on this reasoning, the Court held that unless financing satisfactory to Towne was obtained, he was under no obligation to perform the contract with appellant. *Id.*

15. The *Knox* case is analogous to the case at bar. In this case, the Asset Purchase Agreement provided the following:

> "2. ….this agreement is further **contingent** upon *Seller obtaining an Order* in substantially the form as Exhibit "B" attached hereto (the "Order") approving: (1) the sale of the Assets described in Exhibit "A" to Buyer free and clear of all liens, claims, encumbrances, and restrictions as provided for in the order of the United States District Court approving the transaction and (2) Buyer's quiet enjoyment of all assets assigned to and assumed by Buyer (collectively, the "Contingencies").

***See* Exhibit "A," p. 2. (emphasis added).** Thus, a condition precedent to the contract was that the Seller obtain an Order from this Court approving the sale of the assets to Archer Petroleum and Archer Petroleum's quiet enjoyment of all assets assigned to and assumed by it.

2. The Receiver failed to obtain the Court's order within a reasonable period of time.

16. When no time for performance is given in a contract, the law will imply that the time of performance was to be a reasonable time. *Moore v. Dilworth*, 142 Tex. 538, 179 S.W.2d 940 (1944); *Price v. Horace Mann Life Insurance Company*, 590 S.W.2d 644 (Tex. Civ. App. -- Amarillo 1979, no writ). If the contract is silent as to the time fixed for performing an act under the contract, the law presumes the parties intended a reasonable time. *Price*, 590 S.W.2d at 646. Although "reasonable time" is a relative term, it never means an indulgence in unnecessary delay; instead it denotes such promptitude as the circumstances will allow for the action called for by the contract. *Id*. The period of time

that is a "reasonable time" for performance of a contract without a specified term is a question of fact to be determined by the circumstances of the parties and the subject matter of the contract. *Hall*, 308 S.W.2d at 16-17; *Avila v. Gonzalez*, 974 S.W.2d 237 (Tex. App.—San Antonio 1998); *see also WesternGeco, L.L.C. v. Input/Output, Inc*., 246 S.W.3d 776, 784 n.6 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (if a court implies a "reasonable time" as the duration of an agreement, the determination of the length of the "reasonable time" is a question of fact based on the circumstances surrounding the making of the agreement, the parties' situations when they entered the agreement, and the subject matter of the agreement).

17. In this case, the Receiver failed to obtain the necessary Court order within a reasonable period of time. Archer Petroleum paid the earnest money deposit in two deposits - on April 2, 2019 and April 9, 2019 – totaling $100,000. ***See*** **Exhibit "C**." On April 11, 2019, Andrew Hudson received an email stating that the Receiver was "…working on preparing a final version so that we can present the agreement to the Court for approval." ***See*** **Exhibit "E."**

18. On May 28, 2019, at 8:36 a.m., Archer Petroleum president, Drew Hudson, inquired of the receiver via email as follows:

> *"Please let me know your anticipated timing of each remaining step towards closing: motion filing, court order, notice period, close date, etc.*

See **Exhibit "D."** On June 11, 2019, at 7:52 p.m., the Receiver, Burton Wiand, replied:

> *"Drew, today I reached agreement with the remaining creditors. That includes all taxing authorities so you have no worries with respect to taxes. We hopefully will be filing the motion for approval this week and look forward to a closing in the coming weeks. Thanks for your patience. BW"*

***See* Exhibit "D."**

19. However, the Receiver did not file the motion for approval the week of June 11, 2019. Instead, the Receiver waited 6 more weeks and filed the motion on July 24, 2019.

20. On May 28, 2019, Mr. Hudson received an email from Mr. Wiand stating, "We should be filing the motion this week," with no mention of the additional ongoing creditor and tax negotiations. ***See* Exhibit "E."** Two weeks later, on June 11, 2019, Mr. Hudson received an email from Burton Wiand informing him that Wiand had reached an agreement with the remaining creditors, including all taxing authorities and stating that Mr. Hudson should have no worries with respect to taxes. ***See* Exhibit "E."** He also stated that he would hopefully be filing the motion for approval that week and closing in the coming weeks. ***See* Exhibit "E."** Yet again it was not filed that week. It wasn't until six more weeks, that the Motion was filed - 80 days after the execution of the asset purchase agreement.

21. The Receiver's continuous delay in the filing of the motion prevented Archer from being able to complete the performance of the agreement – specifically closing the asset purchase. ***See* Exhibit "E."**

22. Based on the circumstances surrounding the making of the Asset Purchase Agreement, the parties' situations when they entered the agreement, and the subject matter of the agreement, it is clear that the Receiver did not perform his duties under the contract within a reasonable time, thereby breaching the contract.

C. BECAUSE THE RECEIVER BREACHED THE CONTRACT, ARCHER PETROLEUM IS ENTITLED TO A REFUND OF THE EARNEST MONEY AS EXPRESSLY PROVIDED FOR IN THE CONTRACT

23. The Asset Purchase Agreement specifically states the following:

> (a) Buyer hereby acknowledges and agrees that the Earnest Money Deposit becomes nonrefundable on the date the Court enters an Order in substantially the form as Exhibit "B" approving the sale of the Assets to Buyer.

***See* Exhibit "A," p. 2, paragraph 4(a).** Based on the plain language of the agreement, the parties contemplated one or more situations in which the Court would or could not enter an Order approving the agreement. By the parties agreeing that the Earnest Money Deposit was nonrefundable *on the date the Court enters the Order*, the parties clearly intended that the Earnest Money Deposit was refundable until that time. On August 7, 2019, the Court had not approved the Asset Purchase Agreement and, therefore, the money was refundable on that date when Archer Petroleum requested its return. To the extent the Receiver argues to the contrary, it must be pointed out that the Receiver drafted the contract and therefore any ambiguity in its language must be construed against it. *Levine v. Bayne, Snell & Krause, Ltd*., 40 S.W.3d 92, 95 (Tex. 2001); *State & Cty. Mut. Fire Ins. v. Macias*, 83 S.W.3d 304, 307 (Tex. App.—Corpus Christi 2002).

24. Further, the Asset Purchase Agreement specifically states that it is only effective "as of thirty days after the court in *Securities and Exchange Commission v. Arthur Nadel, et al.,* Case No: 8:09-cv-87-T-26TBM in ***the United States District Court for the Middle District of Florida issues its final order*** approving the sale described herein." ***See* Exhibit "A," p. 1 (first sentence)**. Archer Petroleum requested a refund of its earnest money on August 7, 2019. As of this date, the Court had not entered the order, thirty days from its

entry had not passed and, therefore, the Asset Purchase Agreement was not yet in effect. As the payment of the earnest money was made before the Asset Purchase Agreement was in effect, Archer Petroleum asks the Court order that it be returned.

D. IN THE ALTERNATIVE, ARCHER PETROLEUM IS ENTITLED TO A REFUND UNDER THE EQUITABLE PRINCIPLES OF RESTITUTION

25. Recovery under principles of unjust enrichment is appropriate when a contemplated agreement is unenforceable, impossible, not fully performed, thwarted by mutual mistake, or void for other legal reasons. *City of Harker Heights v. Sun Meadows Land, Ltd.,* 830 S.W.2d 313, 319 (Tex. App.--Austin 1992, no writ). In cases where plaintiff's complete performance has been prevented by defendant's breach, Texas authorities support that plaintiff may elect either to recover his damages under the contract or treat the contract as rescinded and recover the reasonable value of his work in quantum meruit. *Dill v. Helms*, 468 S.W.2d 608 (Tex. Civ. App., Waco 1971, no writ); *Montclair Corporation v. Earl N. Lightfoot Paving Co.,* 417 S.W.2d 820 (Tex. Civ. App., Houston 1st Dist. 1967, writ ref'd n.r.e.); *Tower Contracting Co. v. Flores*, 294 S.W.2d 266 (Tex. Civ. App., Galveston 1956, modified and affirmed 157 Tex. 297, 302 S.W.2d 396); *Dodds & Wedegartner, Inc. v. Reed*, 69 S.W.2d 165 (Tex. Civ. App., Dallas 1934, writ dism'd); *Live Oak Dairy Corp. v. Kaase*, 45 S.W.2d 657 (Tex. Civ. App., San Antonio 1931, writ ref'd).

26. On April 11, 2019, Andrew Hudson received an email stating that the Receiver was "…working on preparing a final version so that we can present the agreement to the Court for approval." ***See*** **Exhibit "E."** On May 28, 2019, Mr. Hudson received an email from Mr. Wiand stating, "We should be filing the motion this week," with no mention of the additional ongoing creditor and tax negotiations. ***See*** **Exhibit "E."** Two weeks later, on

June 11, 2019, Mr. Hudson received an email from Burton Wiand informing him that Wiand had reached an agreement with the remaining creditors, including all taxing authorities and stating that Mr. Hudson should have no worries with respect to taxes. ***See* Exhibit "E."** He also stated that he would hopefully be filing the motion for approval that week and closing in the coming weeks. ***See* Exhibit "E."** Yet again it was not filed that week. It wasn't until six more weeks, that the Motion was filed - 80 days after the execution of the asset purchase agreement.

27. The Receiver's continuous delay in the filing of the motion prevented Archer from being able to complete the performance of the agreement. ***See* Exhibit "E."**

28. Archer Petroleum's complete performance under the Asset Purchase Agreement was prevented by the Receiver's breach – specifically his failure to act within a reasonable time period to file the Motion for Approval of Private Sale of Assets of Quest Energy Management Group, Inc. Should the Court find that Archer is not entitled to a refund of the Earnest Money Deposit under the specific language of the contract, Archer, in the alternative, asks that this Court treat the Asset Purchase Agreement as rescinded and prays that it recover the Earnest Deposit Money in quantum meruit. The Receiver has not been damaged in this matter. To allow the Receiver to retain the Earnest Money Deposit, would unjustly enrich the Receiver.

VI. CONCLUSION

29. Based on the above, Archer Petroleum respectfully requests that the Court find that the Receiver breached the Asset Purchase Agreement and order the return the Earnest Money Deposit to Archer Petroleum. In the alternative, Archer Petroleum

respectfully requests that the Court treat the Asset Purchase Agreement as rescinded and order the return of the $100,000.00 Earnest Deposit Money under principles of quantum meruit or at the very least, the reasonable value of his work in quantum meruit. The Receiver has not been damaged in this matter. To allow the Receiver to retain the Earnest Money Deposit, would unjustly enrich the Receiver.

Respectfully submitted,

WORMINGTON & BOLLINGER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 25, 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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