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.
_____/

RECEIVER'S REPLY IN SUPPORT OF (DOC. 1419) HIS MOTION TO AUTHORIZE THE RETENTION OF $100,000 EARNEST MONEY DEPOSIT AND IN RESPONSE TO (DOC. 1423) ARCHER'S RESPONSE IN OPPOSITION

Burton W. Wiand, as receiver (the "**Receiver**") for Quest Energy Management Group, Inc. ("**Quest**") submits this reply in response to the opposition (Doc. 1423) (the "**Opposition**") filed by Archer Petroleum ("**Archer**") to the Receiver's Verified Motion to Authorize the Retention of a $100,000 Earnest Money Deposit (Doc. 1419) (the "**Deposit**" and the "**Motion**"). The Receiver is also filing a contemporaneous declaration (the "**Wiand**

Decl.") to address the factual inaccuracies in the affidavit of Drew Hudson (Doc. 1423-6) (the "**Hudson Aff.**"), who is the President of Archer.[1]

INTRODUCTION

After several months of good-faith negotiations, and just ***two-days*** prior to the Court's entry of an order (Doc. 1407) (the "**Order**") approving the sale of the Quest Assets (as defined in the Motion), Archer purported to cancel the Asset Purchase Agreement ("**APA**") by reneging on its deal with the Receiver and demanding a refund of the Deposit. In the Opposition, Archer offers no clarification regarding its reasons for the attempted cancellation of the transaction, and instead, simply reiterates that it took the Receiver an "unreasonable" amount of time to seek approval of the sale with the Court. Without elaborating on how this purported "delay" prejudiced Archer in any way or had a material effect on Archer's ability to close the deal, Archer instead argues that because the *entirety* of the APA was contingent upon the Court entering an order approving the transaction, then Archer was free to seek its Deposit back at any time prior to that point. Archer's interpretation of the APA does not comport with its terms, and Archer offers no authority entitling it to the return of the Deposit.

First, Archer's argument ignores that the Deposit is for the Receivership's benefit and its contemplated purpose was to ***prevent Archer from doing exactly what it is now trying to do***: escape the terms of the deal it agreed to without providing adequate security to the Receiver. If the Court were to accept Archer's interpretation of the contingencies, it would lead to absurd results that would render earnest-money deposits meaningless. Second, the

[1] *Cf. Lightsey v. Potter*, 268 F. App'x 849, 852 (11th Cir. 2008) ("The district court did not err in considering the declaration attached to the … reply brief."); *Bennett v. Publix Supermarkets, Inc.*, 2012 WL 2358301, at *1 (M.D. Fla. June 20, 2012).

APA in no way contemplates that time "is of the essence," and as a result, Archer's purported cancellation was ineffective. In any event, Archer has done nothing in its Opposition to demonstrate that it was prejudiced by any delay. Simply put, Archer breached the terms of the APA, and the Receiver is entitled to retain the Deposit.

ARGUMENT

I. THE COURT'S ORDER APPROVING THE SALE WAS A CONDITION PRECEDENT TO *CLOSING*; ARCHER HAD NO RIGHT TO TERMINATE THE TRANSACTION OR SEEK THE RETURN OF THE DEPOSIT PRIOR TO THE ENTRY OF THE ORDER.

Archer contends that it was not obligated to perform under the APA until the Court entered its Order approving the transaction. While the Receiver concedes that Archer would not be required to *close* the sale without the Court's approval, Archer was nevertheless required to pay the Deposit prior to entry of the Order, and the Deposit was only refundable if the Court specifically refused to approve the transaction. Archer was not free to demand the return of the Deposit prior to the Court's entry of the Order because its purported cancellation was ineffective, as a matter of law. Otherwise, the requirement of a Deposit would be superfluous. Both the terms of the APA and relevant law support this conclusion.

A. The Parties' Actions Demonstrate That The Terms Of The APA Were Applicable And In-Force Prior To The Court's Order.

The APA, by its express terms, is contingent upon the Court's entry of an order approving the contemplated sale (among other things). The question is whether that contingency applies to the enforceability of the APA as a whole or whether it applies to the parties' specific obligations within the APA—namely, the obligation to close the transaction. When read in conjunction with the other terms in the APA, the Court-approval contingency

should not be construed so narrowly as to vitiate the entire APA until the Court entered its Order. "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)[2] (citations omitted); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 224 (1981) ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."). "A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. Conditions may, therefore, relate either to the formation of contracts or to liability under them." *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976) (citations omitted). If there is a condition precedent to the formation of a contract, then no binding contract will arise until the specified condition has occurred or been performed. On the other hand, if a term is a condition precedent to performance, the lack of performance does not preclude the formation of a binding contract. *See id.*

When the provisions of the APA are read as a whole, it is clear that the parties accepted that the terms of the contract were in force and applicable, even prior to the occurrence of the contingencies. In other words, the contingencies applied to the parties' obligations to perform under the contract, not to the contract's enforceability as a whole. For example, the APA provides that Archer was to deliver the Deposit "within three (3) days of the execution of this Agreement by both parties hereto." (*See* APA ¶ 4). Archer assented to the terms of the APA not only by executing it, but further, by actually delivering the Deposit. If the parties were to construe the condition precedent of Court approval as being applicable

[2] The APA contains a Texas choice of law provision. *See* APA ¶ 19.

to *enforceability* of the contract, then logically, Archer would not have been obligated to even deliver the Deposit in the first place until the Court entered its Order. But the parties' performance suggests otherwise—by delivering the Deposit, Archer agreed that the terms of the APA were in force at the time. The other terms of the APA further support such a conclusion. Indeed, paragraph 20 of the APA provides:

> 20. Remedy. In the event that Seller receives a Bona Fide Offer or the Court does not approve of the sale of the Assets, i.e., if the Contingencies are not satisfied on or before the Closing Date, Buyer acknowledges and agrees that its sole and exclusive remedy is to seek return of the Deposit from Seller. Seller's sole and exclusive remedy for any breach of this contract by Buyer is to keep the Deposit. Seller shall have no specific performance remedy. ***This Agreement, when duly executed by the Parties, constitutes the express waiver in writing of any other remedy, whether legal or equitable, that may be available to the Buyer***.

APA ¶ 20 (underline in original; italic emphasis added). Here, the parties agreed to certain rights and waivers when the APA "is duly executed by the parties." If the APA was not effective until the Court's approval of the transaction, then again, this provision would be rendered meaningless. This was not and is not the parties' intent.

B. Archer Was Not Entitled To Terminate The APA At Its Option Prior To The Court Entering An Order Approving The Transaction.

Archer further argues that because the sale was contingent upon Court approval, then Archer was free to walk away from the deal at any point prior to the entry of the Court's Order. Archer bases its argument on the statement in the APA that "the Earnest Money Deposit becomes nonrefundable on the date the Court enters an Order … approving the sale of the Assets to Buyer." (*See* APA, ¶ 4(a)). While Archer would like to isolate this provision from the rest of the APA to afford the company an unfettered ability to terminate, when read in conjunction with the other terms of the agreement, it is clear that Archer was

not provided this right. *See Coker v. Coker,* 650 S.W.2d 391, 393 (Tex. 1983) (each part of contract should be given full effect and the court should "examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless); *Guardian Tr. Co. v. Bauereisen*, 121 S.W.2d 579, 583 (Tex. 1938) ("No one phrase, sentence or section [of a contract] should be isolated from its setting and considered apart from the other provisions.").

The APA contains a specifically-designated "Contingencies" paragraph, describing the conditions precedent agreed-to by the parties.[3] The paragraph in its whole is as follows:

> 2. Contingencies. This Agreement is contingent upon (1) compliance with the publication procedures required by 28 U.S.C. § 200l(b), and (2) the non-receipt by Seller of a bona fide offer, under conditions prescribed by the Court, as described in 28 U.S.C. § 2001(b) (a "Bona Fide Offer"). Buyer understands and acknowledges that 28 U.S.C. § 2001(b) prohibits the Court's approval and confirmation of the transaction contemplated by this Agreement if Seller receives a Bona Fide Offer. As such, **upon receipt of a Bona Fide Offer, Seller shall have the exclusive right to terminate** this Agreement, and Buyer's sole and exclusive remedy for such termination is limited to the return of its Deposit, as set forth below. If the Seller does not receive a Bona Fide Offer after compliance with the publication procedures required by 28 U.S.C. § 2001 (b), 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 this transaction and (2) Buyer's quiet enjoyment of all assets assigned to and assumed by Buyer (collectively, the "Contingencies").

See APA ¶ 2 (emphasis added). Notably, the above paragraph is the only express provision in the APA that permits Archer to terminate the transaction. Specifically, the APA allows Archer to terminate the transaction only "upon receipt" of a Bona Fide Offer; it does not state

[3] The Receiver interprets the parties' use of the term "continency" to be in line with the general understanding of a "condition precedent."

that Archer can terminate the transaction "until" the receipt of a Bona Fide Offer. While the APA does not similarly contain an express right to terminate relating to the Court's approval of the sale, this condition should be read similarly. In other words, Archer's right to terminate the agreement would arise *only if* the Court specifically declined to enter an order approving the sale. Archer's ability to terminate does not exist "until" Court approval.

The fact that the APA states that the Deposit becomes "nonrefundable" upon the Court entering an order approving the sale is not inapposite. Indeed, there are a number of conditions in the APA which, *if they occurred*, permitted the Deposit to be "refunded" to Archer (*e.g.*, if a Bona Fide Offer was received or if the Court declined to approve of the sale). However, these contingencies were for the benefit of ***both*** Archer and the Receiver, as neither would be able to close the transaction if either of these contingencies occurred. Archer—by attempting to terminate the agreement just two-days shy of the Court entering its Order—cannot now take advantage of a contingency meant to benefit both parties as an excuse for itself to breach. *See Dorsett v. Cross*, 106 S.W.3d 213, 220 (Tex. App. 2003) ("A party to a contract may not set up his own breach to relieve himself of his contractual obligations; nor may he set up his breach as the basis for rescission of the contract or as the ground for his own recovery.").

II. ARCHER HAS NOT DEMONSTRATED THAT IT WAS PREJUDICED BY THE AMOUNT OF TIME IT TOOK TO APPROVE THE SALE.[4]

While Archer devotes a large portion of its Opposition to the amount of time it took the Receiver to file the Motion, nowhere does Archer state how this purported delay—even if

[4] The Receiver believes he has fully described in his Motion how the time it took for him to seek the Court's approval of the sale was reasonable and will not rehash those facts here.

"unreasonable"—had any material effect on the transaction as a whole or how Archer was prejudiced in any way by the timing of events. Archer intimates (though does not expressly state) that the reason for its attempted cancellation of the transaction was based on the fact that Quest's production declined in June 2019 (*see* Hudson Aff. ¶ 10), but as explained in the Wiand Declaration, the decline was due to a clerical issue by the Texas Railroad Commission, and the issue was quickly resolved. Normal production resumed the following month. *See* Wiand Decl. ¶ 14 & Exs. C, D. Archer raised several other excuses in the Hudson Affidavit, including that the Receiver was purportedly preoccupied by another receivership and that Archer did not understand the nature of the claims against Quest's assets or the complexities of resolving them, but these pretexts are without merit. *See generally* Wiand Decl. That Hudson may have come to view the transaction as a "bad-deal" or even just more complicated than he expected does not excuse Archer's performance. *See Grayson v. Grayson Armature Large Motor Div., Inc*., No. 14-09-00748-CV, 2010 WL 2361432, at *5 (Tex. App. June 15, 2010) ("[A] party cannot escape contract liability by claiming subjective impossibility; subjective impossibility neither prevents the formation of the contract nor discharges a duty created by a contract."); *see also* Wiand Decl. ¶ 15 (describing effect on Receivership of Archer's conduct). Given these circumstances, Archer is not entitled to a refund of the Deposit under principles of either law or equity.

CONCLUSION

For the reasons stated above and in the Receiver's Motion, this Court should enter an order permitting the Receiver to retain the $100,000 earnest-money deposit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 4, 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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