UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. Case No. 8:09-cv-87-T-26TBM

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.
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RECEIVER'S RESPONSE TO LANDMARK BANK'S OBJECTION TO PROPOSED OBJECTION PROCEDURE

Burton W. Wiand, as Receiver (the "**Receiver**"), recently filed a motion relating to claims determinations and the claims process (the "**Motion**") (Doc. 675). In relevant part, it addressed two claims submitted by LandMark Bank ("**LandMark**"). Those claims involve a line of credit extended to a principal of three of the funds used to perpetrate the scheme underlying this case, Christopher Moody ("**Moody**"), by a bank whose Chairman and Executive Officer was Moody's accountant, and, specifically, to that bank's attempt to recover purported security interests in Moody's (1) "investment" in one of those funds and (2) Bonds.com stock and notes.[1] As the Motion explains, LandMark's claims should be denied for five independent reasons, including that LandMark had actual notice of fraud when it received Moody's Bonds.com interests and that transfer of those interests violated the Court's Temporary Restraining Order and Order Appointing Receiver. LandMark has objected (the "**Objection**") (Doc. 677) to the Motion's Proposed Objection Procedure (the "**Proposed Procedure**") (*see* Mot. at 80-84) because, according to LandMark, it does not permit discovery, "imposes unrealistic time schedules," and violates due process. As discussed below, LandMark is wrong and its Objection should be overruled.

I. THE PROPOSED PROCEDURE SATISFIES DUE PROCESS

LandMark contends the Proposed Procedure violates due process. In its place, LandMark asserts the Receiver should first have to give a claimant whose claim has been rejected – but <u>before</u> the claimant objects – all of the law, facts, and "documents, sworn statements and other evidence" supporting his claim determination; then give the claimant 90

[1] The Receiver and LandMark previously had a dispute over Moody's Bonds.com interests. *See* Docs. 154, 155, 166, 168, 169. Contrary to LandMark's assertion (*see* Obj. n.5), those very filings include proof that Moodys' Bonds.com interests were funded with scheme proceeds.

days to serve a "notice" of its objection with "initial disclosures" (but not, as the Receiver is required to do, provide all of the law, facts, and evidence the objection is premised upon); then give the claimant six months for discovery; then have some undisclosed process for determining whether there are disputed material facts; and if there are, then set the matter for a full-blown trial and require all pre-trial disclosures. Obj. at 7.[2]

As an initial matter, LandMark ignores this claims process is focused on defrauded investors. *See SEC. v. Mutual Benefits Corp.*, Case No. 0:04-cv-60573, Order Granting Receiver's Mot. For Final Determination Of Allowed Claims at 3 (S.D. Fla. 2008) (attached as **Ex. K** to Mot.) ("[T]his is an SEC enforcement action designed to protect the *investors*, not the creditors...."). Further, the Objection reflects a misunderstanding of the Proposed Procedure. In relevant part, any claimant that disputes the Receiver's claim determination can serve a written objection within 20 days after applicable notice, along with "all supporting statements and documentation the Claimant wishes the Receiver and the Court to consider." Mot. at 81. The Receiver and the claimant will then have time to resolve the objection and, if necessary, exchange additional information without the cost of formal discovery. If they cannot resolve it, the Receiver will file the objection and all supporting statements and documents provided by the claimant.[3] *Id.* at 82. Once submitted to the Court,

[2] In fact, LandMark suggests the Receiver should have "to file separate lawsuits against the alleged fraudulent transferees." Obj. at 2 n.2. But this ignores the Receiver is not affirmatively attempting to recover anything from LandMark; it ignores that summary proceedings are the norm in these circumstances; and it relies on cases that did not involve claim determinations.

[3] LandMark misrepresents the Proposed Procedure when it claims the Receiver will file with the Court "any supporting documents or statements he considers as appropriate." Obj. at 3. For unresolved objections, the Receiver will file the objection "with supporting statements and documentation, as served on the Receiver by the Claimant." Mot. at 82. Separately, the Receiver did not propose a deadline for submitting unresolved objections to the Court because he could not determine how much time would be appropriate to try to resolve

the Court can then set tailor-made procedures before ruling on the objection.

Contrary to LandMark's contention, the Proposed Procedure satisfies due process. As the Motion explains, due process requires that the proceeding be fair and that affected parties be given notice and an opportunity to be heard. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). The Proposed Procedure satisfies those requirements, and "the use of summary proceedings in equity receiverships, as opposed to plenary proceedings under the Federal Rules of Civil Procedure, is within the jurisdictional authority of a district court." *FDIC v. Bernstein*, 786 F. Supp. 170, 177-78 (E.D.N.Y. 1992); *Elliott*, 953 F.2d at 1566. Importantly, a claimant challenging summary procedures must show how it will be prejudiced by those procedures and how it will be better able to defend its interests in a plenary proceeding. *Elliott*, 953 F.2d at 1567. The Objection does not satisfy these requirements. Similarly, it is appropriate for the claimant to bear the burden of proof to show entitlement to recovery and to "prove his or her claim satisfactorily prior to obtaining recovery." *U.S. v. Penny Lane Partners, L.P.*, 2010 WL 5796465, *6 (D.N.J. 2010) (Rep. & Recommendation adopted at 2011 WL 550883).

The Proposed Procedure also is efficient because it avoids a one-size-fits-all approach (like LandMark's approach), which would unnecessarily deplete Receivership resources. For example, with the latter, a claimant could immediately serve voluminous discovery requests requiring expenditure of Receivership resources even though ultimately the objection could be resolved amicably, thus rendering discovery unnecessary. The Proposed Procedure avoids this by giving the Receiver and the claimant time to resolve the objection, and, if appropriate,

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each objection. Of course, the Receiver is cognizant of the need to act expeditiously so that defrauded investors may receive the relief the claims process is designed to provide.

exchange information without the burdensome obligations of full-blown discovery, before the objection is submitted to the Court. Once before the Court, the Court can impose whatever procedures are necessary and consistent with the goals of the claims process.

On the other hand, LandMark's proposed procedure will significantly lengthen the claims process and impose unnecessary burdens on the Receivership, even though it is LandMark, and not the Receiver, that asserts an affirmative right to assets in the Receivership estate. This is so because it requires the Receiver to give every claimant whose claim has been rejected (presumably in whole or in part) all facts, law, and evidence; then gives the claimant three months to decide whether to even lodge an objection; then allows for six months for discovery; and only then is the dispute submitted to the Court, where LandMark wants a full-blown trial and pre-trial procedures. That process is inconsistent with the goals of receiverships, is burdensome for the Court and the Receivership, and is simply unnecessary. *See Elliott*, 953 F.2d at 1566 ("A summary proceeding reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets."); *SEC v. Wencke*, 783 F.2d 829, 837 (9th Cir. 1986). LandMark has provided no cognizable reason or supporting authority to justify its efforts to convert the claims process into conventional, full-blown litigation.[4]

II. LANDMARK'S OBJECTION IGNORES FOUR ADDITIONAL INDEPENDENT BASES FOR THE DENIAL OF ITS CLAIMS

The Objection focuses on fraudulent transfers and ignores that there are four other

[4] LandMark's claim that *Elliot* requires formal discovery (Obj. at 5) is incorrect. In relevant part, *Elliott* found the receiver's procedure in that case was improper because it only included a very limited opportunity to submit information. Here, the Proposed Procedure places no limit on documents and information that LandMark can submit to the Receiver and the Court.

independent bases for denying LandMark's claims. LandMark's claim relating to the security interest in Moody's investment in Viking Fund also should be denied because (1) Moody's conduct severed his interest in Viking Fund as a matter of equity; and (2) in any event, that interest is worthless as a matter of law. Mot. at 61-63. LandMark's claim relating to the purported security interest in Bonds.com collateral also should be denied because: (1) LandMark Bank had actual notice of fraud when it entered into the transaction purportedly giving rise to that claim; and (2) that transaction violated a Temporary Restraining Order (Doc. 9) and the Order Appointing Receiver in this case (Doc. 8). *Id*. at 63-66.

It is apparent why LandMark did not address these additional grounds in its Objection: they involve very narrow issues and thus would be inconsistent with LandMark's insistence on a lengthy and burdensome process. Further, these additional grounds for denying LandMark's claims help demonstrate the benefits of the Proposed Procedure. Specifically, that procedure will allow the Receiver and the claimant to address all grounds for denial of claims in trying to resolve an objection, and if it remains unresolved, the Court will be able to tailor procedures to the specific needs and requirements of each particular objection. So, if no factual issues exist with respect to one basis for denial of a claim, the Court could decide it in an expeditious manner without having to address other bases that might require a more burdensome process. *See Elliott*, 953 F.2d at 1566 ("[A] hearing is not required if there is no factual dispute.").

III. ALL TRANSFERS OF ASSETS FROM A PONZI SCHEME ARE PRESUMPTIVELY FRAUDULENT

In support of its claimed need for a burdensome and lengthy procedure, LandMark argues the Receiver must demonstrate the fraudulent transfers underlying LandMark's claims

were made in furtherance of Nadel's scheme. Obj. at 6. But LandMark misstates an important legal principle which significantly simplifies the matter. Although LandMark acknowledges the existence of the so-called "Ponzi scheme presumption" – that every transfer of an asset from a Ponzi scheme is made with "intent to hinder, delay, or defraud" creditors under Section 726.105(1)(a) of the Florida Uniform Fraudulent Transfer Act ("**FUFTA**") – it claims that presumption does not apply here because it only applies to transfers "in furtherance of the scheme."

That argument, however, is inconsistent with the plain language of Section 726.105(1)(a), which does not limit avoidable transfers to only those "in furtherance of" a scheme. The cases cited by LandMark are inconsistent with the weight of authority, which applies the Ponzi scheme presumption to all transfers of assets from a Ponzi scheme entity, and not only to transfers "in furtherance of" the scheme. *See, e.g.*, *Wing v. Horn*, 2009 WL 2843342, *5 (D. Utah 2009) ("[I]nference of fraudulent intent applies to all transfers from a Ponzi scheme"; categorizing transactions "is inconsistent with fraudulent transfer law's focus on the transferor") (emphasis added); *In re Christou*, 2010 WL 4008191, *3 (Bankr. N.D. Ga. 2010) ("Any transfers made during the course of a Ponzi scheme are presumptively made with intent to defraud.") (emphasis added). In other words, LandMark's claim that it needs lengthy discovery because of the supposed complexity of relevant fraudulent transfer principles relies on an incorrect reading of applicable law.[5]

[5] Similarly, any claimed need for lengthy discovery on whether there was a Ponzi scheme ignores Nadel's guilty plea and its preclusive effect in this matter, which is currently the subject of the Receiver's pending motions for partial summary judgment in clawback cases. *See, e.g.*, Case No. 10-cv-246 (Doc. 44).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 22, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on December 23, 2011, I will mail the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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