

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

CASE NO.: 8:09-cv-0087-T-26TBM

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

vs.

ARTHUR NADEL, SCOOP CAPITAL,  
LLC, SCOOP MANAGEMENT, INC.,

Defendants,

SCOOP REAL ESTATE, L.P.,  
VALHALLA INVESTMENT PARTNERS, L.P.,  
VALHALLA MANAGEMENT, INC.,  
VICTORY FUND, LTD,  
VIKING IRA FUND, LLC,  
VIKING FUND, LLC, AND  
VIKING MANAGEMENT, LLC,

Relief Defendants.

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**BB&T'S MOTION FOR TURNOVER OF SALE PROCEEDS OF FAIRVIEW  
PROPERTY SUBJECT TO MORTGAGE INTEREST  
AND SUPPORTING MEMORANDUM OF LAW<sup>1</sup>**

Secured Creditor, BB&T, moves the Court for entry of an order directing the Receiver to turn over \$267,720.59, the segregated net proceeds of the sale of the Fairview Property (as defined below), even if Receiver did not timely receive BB&T's formal secured proof of claim on BB&T's purchase-money mortgage loan to Arthur and Marguerite Nadel ("Nadels"). The

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<sup>1</sup> Unless otherwise indicated, all emphasis and brackets are added. "BB&T" is Branch Banking and Trust Company. "Receiver" is Burton W. Wiand, as Receiver. "NOF" is BB&T's notice of filing in support of this motion. "GR Decl." is the Declaration of David S. Hendrix, and "Miller Decl." is the Declaration of Richard Miller and "Dombovary Decl." is the Declaration of Elizabeth B. Dombovary. Other capitalized terms are defined herein.

Court recently granted the Receiver's motion sell the Fairview Property with BB&T's mortgage lien attaching to the net proceeds, which the Receiver is holding in a segregated trust account pending the Court's ruling on BB&T's entitlement to the funds. *See* DE 1150 and 1151. This motion seeks that determination.

### INTRODUCTION

As secured creditor, BB&T's mortgage lien rides through the Receivership, even if the Receiver did not receive the proof of claim on time. Moreover, BB&T's lien should not be forfeited because the Receiver became aware of BB&T's secured claim in early 2009, well before the September 2, 2010 claims deadline, and reported it to the Court and creditors. The Receiver continued to report the secured claim for five years (from 2009-2014) in 15 Interim Receiver Reports and website marketing of the Fairview Property, all disclosing the estate's liability to BB&T of "approximately \$248,560.62" secured by the first lien.

BB&T intended to submit its proof of claim on time, and if the Receiver did not receive it, the delivery failure was caused by excusable neglect. Before the claims deadline, BB&T prepared and signed the proof of claim and intended timely delivery, just as BB&T was doing at the same time on a secured proof of claim on a separate mortgage loan in default, which BB&T timely delivered to the Receiver. From January 2011 to April 25, 2012, BB&T's counsel, unaware that the Receiver had not received the subject claim, consistently advised the Receiver's counsel of BB&T's lien on the Fairview Property for the outstanding loan. During this period, the Receiver's counsel did not indicate that the Receiver had not received the proof of claim.

On April 26, 2012, the Receiver's counsel advised BB&T's counsel, for the first time, that the Receiver had no evidence of receipt of the claim. BB&T's counsel immediately emailed the proof of claim and supporting documents. Thereafter, the Receiver never filed any motion

seeking review of any determination on the claim. To the contrary, from May 2012 through November 2014, the Receiver filed six additional Interim Reports and advertised the sale of the Fairview Property, continuing to report the estate's liability on the BB&T loan "of approximately \$248,560.62" secured by the first lien.

BB&T acted in good faith at all times. The delivery failure, if it occurred, was not calculated or strategic; it resulted from excusable inadvertence. Honoring the secured claim would not prejudice the estate as the funds have been segregated since the November 2014 sale and any remaining distributions to unsecured creditors do not include the funds. Relief should be granted to BB&T under these unique circumstances.

## **FACTUAL BACKGROUND**

### **A. Fairview Loan and Laurel Preserve Loan**

#### **1. The Fairview Loan**

On June 14, 2004, BB&T made a purchase-money mortgage loan of \$268,000 ("Fairview Loan") to enable the Nadels to buy a second residence and associated property at 131 Garren Creek Road, Fairview, North Carolina 28730 ("Fairview Property"). The Nadels delivered a note ("Note") and first-priority Deed of Trust ("Mortgage") as collateral. NOF at Exhibit 1, Miller Decl. ¶¶ 5-6, Exhibits A and B.<sup>2</sup> In 2009, following the Nadels' default, BB&T sent the file to North Carolina counsel for foreclosure. *Id.* at ¶ 7. After BB&T learned of the Receivership, it halted the foreclosure. *Id.* at ¶ 8.

#### **2. The Laurel Preserve Loan**

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<sup>2</sup> As discussed below, the Receiver also filed the Fairview loan documents on March 27, 2009 with his motion to take title to and possession of the Fairview Property. DE 99.

BB&T also made a \$394,000 commercial mortgage loan to Laurel Preserve LLC (“Laurel Preserve Loan”), secured by a first mortgage on a cottage home located in Buncombe County, North Carolina (“Laurel Preserve Property”). *Id.* at ¶ 9, Exhibits C and D. This loan is not the subject of this motion, although facts concerning it are pertinent to show BB&T’s intent to submit on a timely basis the proof of claim on the Fairview Loan.

### **3. Gray Robinson’s Retention**

In 2009, BB&T retained Gray Robinson, P.A. (“GR”) for the limited purpose of conducting specific legal research regarding the Receivership and the two properties held by the Receiver, to provide BB&T with information as to the filing of proofs of claim and then to monitor the sales effort and ultimate sale of the two properties and to report the sales information to BB&T. This limited representation included authority to communicate with Receiver’s counsel regarding the marketing and sale of the two properties. NOF, Exhibit 2, GR Decl. at ¶ 4. GR did not enter an appearance for BB&T in the Receivership.

### **B. Receiver Takes Title to Fairview Property Shortly After Receivership and Reports Fairview Loan and Collateral**

Shortly after his appointment in early 2009, the Receiver discovered that the Nadels had purchased the Fairview Property in part with proceeds of the fraud. *See* DE 1150 at 4. On March 27, 2009, the Receiver moved for possession of and title to the Fairview Property (“Motion for Title”), submitting a supporting declaration (“Receiver’s Declaration”) disclosing BB&T’s purchase-money enabling loan and first lien on the Fairview Property. DE 98-99. The Receiver filed the Note and Mortgage, indicating “the balance of the purchase price was paid [by the Nadels] with [the Fairview Loan].” Receiver’s Declaration at ¶ 30 and Exhibits A-C; F-G; DE 99-2, 99-3, 99-4, 99-7 and 99-8. The Receiver also disclosed the amount and date of

payments to BB&T under the Fairview Loan. Receiver’s Declaration at ¶ 32. On March 30, 2009, the Court granted the Motion for Title, vesting title to and possession of the Fairview Property with the Receiver, subject to the Mortgage. DE 100.<sup>3</sup>

**C. The Receiver Reports Estate’s Secured Liability on Fairview Loan Well Before Claims Deadline**

**1. Receiver’s Interim Reports Before Claims Deadline**

In addition to reporting the Fairview Loan and BB&T’s lien on the Fairview Property in the Motion for Title, from June 9, 2009 to August 18, 2010, the Receiver reported the estate’s liability to BB&T on the Fairview Loan secured by a first lien on the Fairview Property through five Interim Reports substantially as follows:

**g. Fairview, North Carolina.**

On March 30, 2009, the Court granted the Receiver’s motion (Doc. 98) for possession of property located in Fairview, North Carolina (the “**Fairview Property**”). (Doc. 100.) On June 14, 2004, Nadel and his wife purchased the Fairview Property for \$335,000.00. The Fairview Property was a secondary residence of the Nadels that is located in the mountains of North Carolina near the large property owned by Laurel Preserve, LLC (see Section V.B.3, above). **The Fairview Property has one known encumbrance: a loan with BB&T Bank on which there is a remaining balance of approximately \$248,560.62.** Parties interested in marketing or purchasing this property should contact the Receiver directly.

See Second Interim Report dated June 9, 2009, DE 141 at 36; Third Interim Report dated August 14, 2009, DE 176 at 40; Fourth Interim Report dated November 25, 2009, DE 240 at 43; Fifth

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<sup>3</sup> The Receiver did not assert that BB&T knew of the Nadels’ wrongdoing when it made the Fairview Loan. Motion for Title at 5-8; Receiver’s Declaration ¶ 30 and Exhibit C thereto. In recommending allowance of the Laurel Preserve POC, the Receiver acknowledged that he “has no information indicating that [BB&T] had any involvement in or notice of fraud.” See DE 675 at 49. There is similarly no evidence that BB&T knew of Nadel wrongdoing when it made the Fairview Loan.

Interim Report dated March 10, 2010, DE 362 at 48;<sup>4</sup> and Sixth Interim Report dated August 18, 2010, DE 462 at 47-48.<sup>5</sup>

## **2. Receiver's Website Advertising Before Claims Deadline**

From 2009-2010, the Receiver also reported the estate's liability on the Fairview Loan and lien through advertising the property on his website, [www.nadelreceivership.com](http://www.nadelreceivership.com), DE 1150 at 6-7 (describing advertising), as follows:

Location: Fairview, Buncombe County, North Carolina

Size: 3.62 acres

Dwellings: Two-story 200 year-old farm house with over 2,500 square foot of living area; guest house

Other: Detached double garage with unfinished storage or living area on second level; detached storage/tool shed

**Liabilities: BB&T loan with a remaining balance of approximately \$248,000.00.**

NOF, Exhibit 3, Dombovary Decl. at ¶ 2, Exhibits A-C.<sup>6</sup>

## **D. The Fairview and Laurel Preserve Proofs of Claim**

Two separate BB&T departments were handling the defaulted mortgage loans—residential loan recovery was handling the Fairview Loan and commercial loan recovery was handling the Laurel Preserve Loan. BB&T's employees, rather than counsel, were tasked with submitting proofs of claims. Miller Decl. at ¶ 10; GR Decl. at ¶ 6.

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<sup>4</sup> This report also indicated that the Receiver had received two offers on the Fairview Property, one of which was too low, and the Receiver was negotiating with the other offeror.

<sup>5</sup> This report added that the offeror could not obtain financing.

<sup>6</sup> After the Receiver sold the Fairview Property in November 2014 following court approval, he removed the website advertisements, but we were able to obtain the historical website information and have included those we were able to obtain. The Receiver summarized his website advertising of the Fairview Property at DE 1150 at 6-7.

On August 24, 2010, a GR attorney emailed BB&T employees Kade Herrick (“Herrick”) and Holly Decker (“Decker”), in residential and commercial loan recovery, respectively, advising of the September 2, 2010 deadline, the procedure to submit claims, and attaching the proof of claim form. GR Decl. at ¶¶ 7-8, Exhibits A-B.

On August 27, 2010, Herrick sent GR counsel two emails, the first attaching BB&T’s proof of claim on the Fairview Loan (“Fairview POC”) completed and signed by BB&T Vice President Michael Pocisk (“Pocisk”) on that date and supporting documents, and the second indicating that Herrick was sending the Fairview POC to the Receiver via Maya M. Lockwood, Esq. (“Lockwood”). *Id.* at ¶ 9, Composite Exhibit C. The Fairview POC contained the same information already known to the Receiver, the Court and creditors, including the estate’s liability to BB&T secured by the lien.<sup>7</sup> *Id.*

On September 2, 2010, Decker emailed to Lockwood, with a copy to GR counsel, BB&T’s Proof of Claim on the Laurel Preserve Loan (“Laurel Preserve POC”), completed and signed by Decker, and supporting documents. *Id.* at ¶ 2; Exhibit D. Decker also timely delivered the original Laurel Preserve POC to Lockwood. *Id.* at Exhibit K.

**E. BB&T Believes in Good Faith that Fairview POC is Timely Submitted**

Prior to April 26, 2012, BB&T’s management overseeing the Fairview Loan believed in good faith that the Fairview POC had been timely submitted, its interests were perfected, and BB&T would receive the net proceeds of the sale of the Fairview Property. Miller Decl. at ¶ 12.<sup>8</sup> On November 18, 2010, consistent with BB&T’s understanding, the Receiver filed his

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<sup>7</sup> The Fairview POC reflects the amount owing as about \$271,000 whereas the Receiver had reported about \$268,000 as owing.

<sup>8</sup> The Receiver has denied that Lockwood received the Fairview POC by September 2, 2010.

Seventh Interim Report, noting the estate's liability to BB&T of "approximately \$248,560.62" secured by a first lien. DE 540 at 50-51.

**F. Receiver's Counsel's Communications Post-Claims Deadline with GR Counsel Concerning Secured Debt on Fairview Property**

On January 25, 2011, in response to GR counsel's request for an update on the sale efforts, Receiver's counsel emailed GR counsel the links to the listings for the two properties. GR Decl., Exhibit F. Shortly thereafter, on March 14, 2011, the Receiver filed his Eighth Interim Report, with the same estate liability statement as the prior six Interim Reports—"The Fairview Property has one known encumbrance: a loan with BB&T Bank on which there is a remaining principal balance of approximately \$248,941.73." DE 609 at 48.

On May 23, 2011, GR counsel sent the Receiver's counsel an email regarding sale efforts. Receiver's counsel responded the next day, indicating both properties continued to be marketed. GR Decl., Exhibit F. In February and July 2011, the Receiver's website reported the estate's liability to BB&T on the Fairview Loan secured by a first lien on the Fairview Property. Dombovary Decl. at ¶ 2, Exhibits D-E.

On June 8, 2011, GR counsel requested an "update from the broker regarding the properties encumbered by BB&T's liens[.]" GR Decl., Exhibit G. Receiver's counsel emailed the same day a marketing update on the Fairview Property. *Id.* at Exhibit H. Shortly thereafter, on July 21, 2011, the Receiver filed his Ninth Interim Report, with the same estate liability statement on the Fairview Loan as the prior seven Interim Reports quoted above. *See* Ninth Interim Report, DE 647 at 48-49.

On September 21, 2011, GR counsel requested an update from Receiver's counsel on "the two properties in which BB&T holds liens." GR Decl. Exhibit I. During that month, the



Receiver's website marketing the Fairview Property contained the same estate liability statement on the Fairview Loan. Dombovary Decl. at ¶ 2, Exhibits E-F (showing no change in the advertising from July 2011 to February 2012). This was consistent with the Receiver's Tenth Interim Report dated December 15, 2011, containing the same estate liability statement. *See* Tenth Interim Report, DE 685 at 32.

On March 12, 2012, GR counsel requested an update from Receiver's counsel "with respect to the two properties in which BB&T holds liens." GR counsel sent a follow-up email on March 22, 2012. GR Decl., Composite Exhibit J. During that month, the Receiver's website disclosed the same estate liability statement on the Fairview Loan. Dombovary Decl. at ¶ 2, Exhibit G.

At no time from September 2, 2010 to April 25, 2012 did the Receiver's counsel ever advise GR or BB&T of non-receipt of the Fairview POC. GR Decl., Exhibits F-J. During this period, the Receiver's Interim Reports and website advertisements also reported the estate's liability on the Fairview Loan of "approximately \$248,560.62" secured by a first lien. Dombovary Decl. at ¶ 2, Exhibits A-G.

**G. Receiver's Motion to Approve Claims Determinations and Priority of Claims Omits Discussion of Fairview POC**

Following the claims deadline, the Receiver conducted disallowance/allowance/priority determinations. On December 7, 2011, about 15 months after the deadline, the Receiver moved the Court to approve his determinations, to establish a procedure for creditors to object to claim determinations and other relief ("Claims Determination Motion"). DE 675.

The Receiver reported that BB&T had made the Laurel Preserve Loan, secured by a first mortgage, and recommended allowance of the Laurel Preserve POC (Claim No. 482) in part for

\$360,157.37, the principal amount owing when the Receiver was appointed, to be paid solely from the sale proceeds of the Laurel Preserve Property, minus fees and costs. *See* Claims Determination Motion at 17-18, 38, 45-48, and Exhibit E, DE 675 at 22-23, 43, 50-53, and 675-5. The Receiver recommended a Second Priority Class 2 status, *id.* at 34-35, DE 675 at 39-40, with “priority over all other classes with respect to the proceeds of the sale of the asset securing each of the respective secured claims.” *Id.* at 35, DE 675 at 40. The Receiver argued for BB&T’s priority, noting all creditors need not be treated alike, but similarly-situated creditors should be so treated. *Id.* at 35-36, DE 675 at 40-41 (and cases cited). According to the Receiver, BB&T should not receive a deficiency because “secured creditors have an advantage as they have an identifiable asset over which they enjoy priority in relation to other creditors, including defrauded investors. Accordingly, [the Laurel Preserve POC] should be paid only out of the proceeds of the sale of [BB&T’s] collateral.” *Id.* at 45; DE 675 at 50.

Although the Receiver knew of BB&T’s secured claim on the Fairview Loan in early 2009, and knew as of December 2011 that he had no evidence of receipt of the Fairview POC, the Receiver did not refer to the Fairview Loan and did not ask the Court to approve any determination as to the claim, in the Claims Determination Motion. On March 2, 2012, the Court granted the Claims Determination Motion in part, reserving on whether Wells Fargo Bank, N.A. (“WFB”) had forfeited its mortgage lien interest on three properties on which it had not timely submitted proofs of claim. DE 776 at ¶ 9. The Court made no determinations on the Fairview POC. *Id.* at DE 776.

#### **H. The April 26, 2012 Letter**

On April 26, 2012, about 45 days after the order on the Claims Determination Motion, the Receiver’s counsel sent GR counsel a letter responding to GR’s counsel’s March 2012

inquiry for sale updates on the two properties (“April 26, 2012 Letter”). GR Decl., Exhibit K. The April 26, 2012 Letter indicated for the first time that although BB&T had timely submitted the Laurel Preserve POC, the Receiver had no evidence of receiving the Fairview POC. *Id.* That afternoon, GR counsel emailed the Receiver’s counsel the Fairview POC and the Laurel Preserve POC with supporting documents, previously sent to her by Herrick and Decker, respectively, in August-September 2010. *Id.* at Exhibit L.

Despite contending in the April 26, 2012 Letter that BB&T had forfeited its claim on the Fairview Loan, about one month later, on May 31, 2012, the Receiver filed his Eleventh Interim Report, repeating that “[t]he Fairview Property has one known encumbrance: a loan with BB&T Bank on which there is a remaining principal balance of approximately \$248,941.73.” DE 863 at 28. During the same period, the Receiver’s website continued to indicate the estate’s liability on the Fairview Loan to BB&T secured by its lien. Dombovary Decl. at ¶ 2, Exhibits F-G.

On October 23, 2012, the Receiver filed his Twelfth Interim Report, repeating the estate’s liability on the Fairview Loan “of approximately \$248,941.73” secured by a first lien. DE 929 at 29-30. On November 5, 2012, GR counsel emailed the Receiver’s counsel advising that she was unable to send proof of transmittal as Herrick had left the bank.<sup>9</sup> GR Decl., Exhibit M. Following this, the Receiver did not file any motion with the Court seeking a claims determination on the Fairview POC.

**I. Post-November 2012 Interim Reports and Website Advertisements  
Continue to Recognize Estate’s Liability on Fairview Loan**

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<sup>9</sup> Herrick left BB&T on October 28, 2010. According to BB&T’s retention policy in effect, BB&T would have purged his emails, both incoming and sent items, within 120 days of the date he left the bank. Accordingly, by April 2012, when BB&T learned of the Fairview POC issue, it would not have been able to obtain a copy of Herrick’s email transmittal to the Receiver. Miller Decl. ¶ 14. Moreover, despite our diligent attempts, we have been unable to locate Herrick to determine the facts concerning transmittal of the Fairview POC. *See* Dombovary Decl. at ¶¶ 3-7.

From November 2012 to November 2014, the Receiver filed 4 additional Interim Reports, all indicating the estate's liability on the Fairview Loan of "approximately 248,941.73" secured by a first lien on the Fairview Property. *See* Thirteenth Interim Report dated April 8, 2013, DE 1001 at 25-26; Fourteenth Interim Report dated October 17, 2013, DE 1077 at 28; Fifteenth Interim Report dated March 7, 2014, DE 1106 at 21; and Sixteenth Interim Report dated August 12, 2014, DE 1135 at 21 (all reporting that "[t]he Fairview Property has one known encumbrance: a loan with BB&T Bank on which there is a remaining principal balance of approximately \$248,941.73."). Similarly, during this period, the Receiver continued to report substantially the same information in website advertisements for the sale of the Fairview Property. *See* NOF Exhibits Dombovary Decl. at ¶ 2, Exhibits J-M (Receiver's website advertisements dated April 2, 2013, May 16, 2013, June 16, 2013, and July 18, 2013, all identifying estate's liability as "BB&T loan with a remaining balance of approximately \$248,000.00.").

**J. The November 17, 2014 Motion for Sale**

On November 17, 2014, the Receiver sought leave to sell the Fairview Property on an urgent basis ("Motion for Sale"). DE 1150. For the first time in a court filing, and contrary to all of the prior Interim Reports and advertisements, the Receiver indicated that he was contesting the validity of BB&T's lien, but the Receiver did not ask the Court to rule on a recommended claim denial on the Fairview POC. Instead, the Receiver sought immediate approve of the sale without the Court's determining the validity of BB&T's lien for the balance owing,<sup>10</sup>

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<sup>10</sup> The Motion for Sale incorrectly reported the balance owing as \$101,710.77. *See* DE 1150 at 4. The Receiver later corrected this. *See* Receiver's Seventeenth Interim Report dated

representing the lien would transfer to proceeds, which the Receiver would hold in a segregated trust account to protect BB&T's lien interest. *Id.* at 3-5, 9-10, 14.<sup>11</sup>

The Motion for Sale did not inform the Court that (a) despite knowing as of December 2011 that the Receiver had no evidence of receipt of the Fairview POC, the Claims Determination Motion did not contain any claim determination on the Fairview Loan, let alone a recommended disallowance triggering a duty to object, and the Receiver had not filed any document after December 2011 seeking approval of a claim denial on the Fairview POC; (b) the Receiver had reported the estate's liability for the principal balance on the Fairview Loan and existence of the mortgage lien for over 5 years and well before and after the claims deadline as evidenced by his Motion for Title on March 27, 2009, 15 Interim Receiver's Reports from June 2009 to August 2014, and 2009-2014 website advertising of the Fairview Property; (c) the Receiver had communicated with BB&T's counsel on numerous occasions over a 14 month period from January 2011 to March 2012, in which BB&T's counsel had consistently referred to the estate's obligation on the Fairview Loan secured by a first lien, to which the Receiver's counsel never objected or indicated an issue on the Fairview POC; (d) as soon as BB&T's counsel became aware of the claimed non-receipt of the Fairview POC on April 26, 2012, she forwarded the Fairview POC and supporting documents to the Receiver's counsel; (e) thereafter, the Receiver did not file any motion seeking a claims determination and instead continued to report in 6 Interim Reports from May 2012 to August 2014 and website advertisements during

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December 17, 2015, DE 1154 at 20 n. 6 (acknowledging inaccuracy as representing the amount to reinstate the Fairview Loan, not the accelerated amount due and owing).

<sup>11</sup> As the Receiver noted: "Importantly for BB&T, although the Court can order the Fairview Property's sale free and clear of all claims, liens, and encumbrances, those claims, liens, and encumbrances do not evaporate. Rather, upon sale of the Fairview Property, BB&T's encumbrance will transfer to the sale's proceeds." DE 1150 at 9.

the same period the estate's liability of "approximately \$248,560.62" to BB&T secured by a first lien on the Fairview Property. On November 18, 2014, the Court approved the sale, making no determination on the validity of the Fairview POC or the lien. DE 1151.

### ARGUMENT

#### **A. As Secured Creditor, BB&T Was Not Required to Submit Fairview POC to Protect Its Lien Interest**<sup>12</sup>

The Court has the inherent power to grant relief in a securities receivership, *see Bendall v. Lancer Management Group, LLC*, 523 Fed.Appx. 554, 557 (11th Cir. 2013) (citing *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992)), whose goal is to achieve a fair and just outcome for affected creditors. *SEC v. Wealth Mgmt. LLC*, 628 F.3d 323, 334 (7th Cir. 2010). In determining allowability and priority of claims, "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." *S.E.C. v. Credit Bancorp, Ltd.*, 2000 WL 1752979, at \*13 (S.D.N.Y. 2000), *aff'd*, 290 F.3d 80 (2d Cir. 2002). *See also* DE 675 at 34-36; 39-41 (Receiver's recommending priority for BB&T lien and right to proceeds on sale of Laurel Preserve Property); DE 776 (approving BB&T's priority). The Receiver also takes all estate property subject to existing liens perfected under state law. *See Marshall v. People of State of New York*, 254 U.S. 380, 385 (1920).

In this Circuit, where there is no definitive precedent in a receivership case on the issue presented, the Court is informed by cases interpreting the Bankruptcy Code. *See Bendall*, 523 Fed. Appx. at 557 (and cases cited) ("Given that a primary purpose of both receivership and

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<sup>12</sup> WFB has taken the same position with respect to the Receiver's contention that WFB forfeited its mortgage liens by failing timely to submit 3 proofs of claim. Following briefing, DE 740, 755, 762, the Court entered orders deferring ruling on the issue. DE 776 at ¶ 9; DE 955.

bankruptcy proceedings is to promote the efficient and orderly administration of estates for the benefit of creditors, we will apply cases from the analogous context of bankruptcy law, where instructive, due to limited case law in the receivership context.”); *S.E.C. v. Elliott*, 953 F.2d 1560, 1572-73 (11th Cir. 1992) (analyzing bankruptcy law to resolve issue in receivership context). As the Eleventh Circuit has noted, other circuits have taken the same approach. *See Bendall*, 523 Fed. Appx. at 557 (and cases cited).

In the analogous bankruptcy context, a secured creditor is not obligated to submit a proof of claim to preserve its lien interest; the lien rides through the bankruptcy regardless whether the creditor files a proof of claim or files it after the claims deadline. *See In re Thomas*, 883 F.2d 991 (11th Cir. 1989) (secured creditor’s lien on mobile home not affected by failure to file claim in Chapter 13 proceeding; proof of claim only necessary to preserve deficiency claim,<sup>13</sup> quoting from and adopting Judge Posner’s reasoning in *Matter of Tarnow*, 749 F.2d 464, 465 (7th Cir. 1984), that “[a] long line of cases, though none above the level of bankruptcy judges since the Bankruptcy Code was overhauled in 1978, allows a creditor with a loan secured by a lien on the assets of a debtor who becomes bankrupt before the loan is repaid to ignore the bankruptcy proceedings and look to the lien for the satisfaction of the debt.”); *In re Bateman*, 331 F.3d 821, 827 (11th Cir. 2003) (“An unsecured creditor is required to file a proof claim for its claim to be allowed, but filing is not mandatory for a secured creditor. *See* Fed. R. Bankr.P. 3002(a). In fact, a secured creditor need not do anything during the course of the bankruptcy proceeding because it will always be able to look to the underlying collateral to satisfy its lien.”) (citing, *inter alia*, *In re Folendore*); *In re Folendore*, 862 F.2d 1537, 1539 (11th Cir. 1989) (“Because an

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<sup>13</sup> BB&T is not pursuing a deficiency claim in the action.

unchallenged lien survives the discharge of the debtor in bankruptcy, a lienholder need not file a proof of claim under section 501.”);<sup>14</sup> accord *In re Tarnow*, 749 F.2d at 465 (secured creditor did not forfeit lien because it failed to file proof of claim by deadline; secured creditor need only file timely proof of claim to preserve deficiency claim against estate); *SLW Capital, LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin)*, 530 F.3d 230 (3d Cir. 2008) (adversary proceeding required to invalidate lien in Chapter 13 proceeding; lien remains intact despite failing to file claim or objecting to confirmation of plan which provided claim was unsecured); *In re Hamlett*, 322 F.3d 342 (4th Cir. 2003) (affirming bankruptcy and district court’s ruling that secured party’s failure timely to file proofs of claim does not extinguish mortgage liens in Chapter 7); *In re Alexander*, 435 F. App’x 563, 565 (7th Cir. 2011) (“[A] secured creditor need not file a ‘proof of claim’ unless the creditor wishes to take part in the distribution of estate assets; here the creditors sought to separate the mortgaged property from the bankruptcy estate and vindicate their claims in foreclosure proceedings in state court, as the bankruptcy code permits.”); *Shelton v. CitiMortgage, Inc. (In re Shelton)*, 477 B.R. 749, 752 (B.A.P. 8th Cir. 2012) (affirming bankruptcy court’s ruling that mortgagee’s failure timely to file secured proof of claim by bar date did not extinguish lien; “Liens pass through bankruptcy unless avoided on their merits. And here, the Debtors have not asserted, let alone proved, that CitiMortgage’s lien is avoidable on any ground other than the untimeliness of CitiMortgage’s proof of claim.”); *Newman v. First Sec.*

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<sup>14</sup> This was also the rule under the prior Bankruptcy Code. See *Long v. Bullard*, 117 U.S. 617, 620-21 (1886) (“Here the creditor neither proved his debt in bankruptcy nor released his lien. Consequently his security was preserved notwithstanding the bankruptcy of his debtor.”); *Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991) (“Ordinarily, liens and other secured interests survive bankruptcy”); *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991) (“Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim -- namely, an action against the debtor *in personam* -- while leaving intact another -- namely, an action against the debtor *in rem*”).



*Bank of Bozeman*, 887 F.2d 973 (9th Cir. 1989) (under prior Bankruptcy Code, mortgagee need not file proof of claim in Chapter 7 proceeding to preserve lien, which rode through bankruptcy unaffected by debtors' discharge); *Bisch v. United States (In re Bisch)*, 159 B.R. 546, 550 (9th Cir. BAP 1993) (secured creditor, IRS, failed to file proof of claim for unpaid taxes on debtor's real property; lien not extinguished because "[f]ailure to file a secured proof of claim in a bankruptcy case might mean that the lien holder will not receive a distribution from the estate. This may mean forfeiting any right to a deficiency, but it does not waive the lien."); *In re Simmons*, 765 F.2d 547, 556-57 (5th Cir. 1985) (adopting *In re Tarnow*; secured creditor with valid state statutory lien on estate property who failed to object to confirmation of Chapter 13 plan listing debt as unsecured did not forfeit perfected lien); *Clem v. Johnson*, 185 F.2d 1011, 1013 (8th Cir. 1950), *cert. denied*, 341 U.S. 909 (1951) (under prior Bankruptcy Code, secured creditor holding mortgage on aircraft was entitled to enforce lien in Chapter 7 proceeding despite failing to file proof of claim by claims bar deadline); *In re Schwalb*, 347 B.R. 726, 753 (Bankr. D. Nev. 2006) (even if secured creditor does not file proof of claim, "a secured claim passes through bankruptcy unaffected absent some affirmative action to set it aside."); *In re Prestige Ltd. Partnership-Concord*, 223 B.R. 203, 208 (Bankr. N.D. Cal. 1998) (secured creditor in Chapter 11 proceeding not required to file proof of claim to preserve interest in collateral); *In re Penrod*, 50 F.3d 459, 461 (7th Cir. 1995) ("A secured creditor can bypass his debtor's bankruptcy proceeding and enforce his lien in the usual way, which would normally be by bringing a foreclosure action in a state court. This is the principle that liens pass through the bankruptcy unaffected."); *In re Pence*, 905 F.2d 1107, 1110 (7th Cir. 1990.); *In re Brawders*, 325 B.R. 405, 411 (B.A.P. 9th Cir. 2005) ("Absent some action by the representative of the bankruptcy estate, liens ordinarily pass through bankruptcy unaffected, regardless whether the

creditor holding that lien ignores the bankruptcy case, or files an unsecured claim when it meant to file a secured claim, or files an untimely claim after the bar date has passed.”), *aff'd*, 503 F.3d 856 (9th Cir. 2007). Accordingly, BB&T’s failure to submit the Fairview POC on time, if true,<sup>15</sup> does not justify forfeiting its lien interest.<sup>16</sup>

**B. The Receiver Knew of and Reported All Information in Fairview POC Well Before Deadline**

This is not a case where the Receiver and creditors were uniformed as to BB&T’s secured claim; to the contrary, throughout the last 5 years, the Receiver knew of and reported BB&T’s secured claim to the Court and creditors. Shortly after his appointment, the Receiver discovered and reported the estate’s liability and BB&T’s lien on the Fairview Property and submitted the loan documents to the Court. Thereafter, in 15 Interim Receiver Reports and continuous website advertisements, from 2009 to 2014, the Receiver continually reported the estate’s liability to BB&T of “approximately \$248,560.62” secured by a first lien on the Fairview Property. A formal proof of claim by September 10, 2010 was not necessary to inform the Receiver and parties in interest of that which they already knew. As the district court reasoned in *Bankers Trust Co. v. Florida East Coast Ry. Co.*, 31 F.Supp. 961, 963 (S.D. Fla. 1940), in permitting a late-filed preferred claim in a receivership seeking priority payment on account of a state court judgment:

Those objecting to the petition also make the point that petitioner's claim was not filed within the time fixed by the Court's former orders herein relating to claims

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<sup>15</sup> We have not taken discovery of the Receiver to verify his statement of non-receipt, but assume its truth; as discussed, even if true, the facts and law do not support forfeiture of BB&T’s lien and right to net proceeds.

<sup>16</sup> Indeed, as WFB pointed out, the Receiver has not cited a single receivership case holding that a secured creditor’s failure to submit a proof of claim on time justifies forfeiture of the lien or proceeds on disposition. We have not found any such case either.

generally, and therefore that the claim is barred. The object of requiring the filing of claims within a stated period is to give the Receivers timely notice of the existence thereof. As counsel who specifically consented to the entry of this judgment were also counsel for the Receivers, there was ample notice of its existence. There is no substantial reason for requiring further proof of such a claim.

This Court need go no further in ruling that BB&T should receive the net disposition proceeds. The purpose of a proof of claim on Fairview Loan was satisfied as soon as the Receiver took title to the Fairview Property subject to the mortgage and reported the estate's liability on the Fairview Loan.

**C. Delay in Submitting Fairview POC was Excusable Neglect**

The Court has broad discretion to permit a tardy proof of claim. *See, e.g., Callahan v. Moneta Capital Corp.*, 415 F.3d 114, 120 (1st Cir. 2005). As the Court has recognized, excusable neglect will justify relief for untimely submission of a proof of claim. *See* DE 1002 at 7 (involving unsecured creditor and citing *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993)). Four factors inform the inquiry: “(1) the danger of prejudice to the receivership, in this case; (2) the length of delay and its potential impact on the judicial proceedings; (3) the reasons for the delay; and (4) the good faith of the movant.” DE 1002 at 7 (citing *Pioneer*).

By definition, excusable neglect includes negligence. *See Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996) (applying *Pioneer* factors to relieve party for counsel's failure to timely move for *de novo* review of non-binding arbitration award; negligence will support relief); *Yang v. Bullock Financial Group, Inc.*, 435 Fed.Appx. 842, 843-44 (11th Cir. 2011) (reversing district court for failing to consider *Pioneer* factors; “With respect to *Pioneer's* inquiry into the ‘reason for the delay,’ we recognize that untimely filing caused by

inadvertence, mistake, or carelessness may still constitute ‘excusable neglect.’”) (citing *Advanced Estimating Sys., Inc. v. Riney*, 77 F.3d 1322, 1323 (11th Cir.1996), and *Cheney*).

An inadvertent delay may constitute excusable neglect, which does not require that the delay result from uncontrollable events. *Pioneer*, 507 U.S. at 391-92. Rather, the determination is an equitable one, and the primary factor is whether there is prejudice to the opposing party. *See Cheney*, 71 F.3d at 850 (“In *Pioneer*, the Supreme Court accorded primary importance to the absence of prejudice to the nonmoving party and to the interest of efficient judicial administration in determining whether the district court had abused its discretion.”); *accord In re Eagle Bus Mfg. Co., Inc.*, 62 F.3d 730, 737-38 (5th Cir. 1995) (“Under *Pioneer*, the central inquiry is whether the debtor will be prejudiced.”).

If the Receiver did not receive the Fairview POC on time, the failed delivery was excusable. BB&T employee Pocisk prepared the Fairview POC before the deadline and delivered it to Herrick, who was tasked with transmitting it to Lockwood by September 2, 2010. Herrick certainly intended to do so, as reflected by his email to GR counsel on August 27, 2010 expressing that intent. Because his sent items were not available when BB&T learned of the claimed non-receipt, we cannot say whether Herrick sent the Fairview POC via email to the wrong address or omitted to send it, but either way the failed delivery was, at worse, the result of carelessness, oversight or inadvertence, any of which is sufficient to establish excusable neglect under *Pioneer*. *See Pioneer*, 507 U.S. at 388, 392 (excusable neglect for untimely filings “encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness .... Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control. [Moreover], “it is clear that ‘excusable

neglect' under Rule 6(b) is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant.") (footnote omitted); *Cheney*, 71 F.3d at 850 (attorney's failure timely to file motion for *de novo* review of arbitration award constituted excusable neglect resulting from failure in communication between associate and lead attorney; although error was within their control, "their noncommunication and resulting inaction amounts only to an 'omission[ ] caused by carelessness[,] [i]n other words, their failure to comply with the filing deadline is attributable to negligence."); *Avon Contractors, Inc. v. Secretary of Labor*, 372 F.3d 171 (3d Cir. 2004) (receptionist's failure properly to route mail causing movant's failure to provide timely notice of contest to OSHA's Citations and a Notice of Penalty, constituted excusable neglect warranting relief under *Pioneer*).

1. **No Prejudice to Receivership Estate**

In considering prejudice, the Court inquires: (1) whether the Receiver was aware of the claim; (2) whether honoring the claim would force return of payments or affect distributions; (3) whether honoring the claim would adversely affect the estate or success of a reorganization; and (4) whether honoring the claim would open the floodgates to future claims. *In re Cable & Wireless USA, Inc.*, 338 B.R. 609, 614 (Bankr. D. Del. 2006) (citing *In re Inacom Corp.*, 2004 WL 2283599, at \*4 (D. Del. 2004) and *In re O'Brien*, 188 F.3d 116 at 125–26 (3d Cir. 1999)). These factors show no prejudice here.

From early 2009-2014, the Receiver reported to the Court and parties in interest BB&T's secured claim. The estate sold the Fairview Property, and the lien attached to the net proceeds, held by the Receiver in a segregated trust account: "On November 21, 2014, the Receiver received the net amount of \$267,720.59 from the sale of the property after payment of commission and normal closing costs. This amount is being held until a potential dispute with

BB&T is resolved.” Receiver’s Seventeenth Interim Report dated December 17, 2014, DE 1154 at 20. The Receiver’s knowledge of the secured claim before the deadline precludes a finding of prejudice. *See In re Leisure, Inc.*, 400 B.R. 837, 840 (Bankr. M.D. Fla. 2008) (no prejudice to debtor from late-filed claim because debtor was aware of potential claim prior to and during case); *In re Smith*, 200 B.R. 135, 137 (Bankr. S.D. Miss. 1996) (debtors’ knowledge of claim, including correspondence with claimant concerning claim, precluded prejudice even if formal proof of claim was not filed by deadline).

The Receiver has not proposed any distribution plan that includes the net proceeds. No party in interest has relied on the proceeds being part of any distribution.<sup>17</sup> The Receiver will not have to seek return of any prior distributions, and there will be no impairment to a reorganization as this is a liquidation. Honoring the claim will not lead to a floodgate of like claims.<sup>18</sup> *See In re Pappalardo*, 210 B.R. 634, 645-46 (no prejudice inured to estate on permitting late-filed claim because no one had voted on plan and estate’s potential liability to claimant was known to parties in interest); *In re Majorca Isles Master Association, Inc.*, 2014 WL 1323180, at \*3 (Bankr. S.D. Fla. 2014) (granting relief for late filing; no reorganization plan before court).

BB&T is aware that the Court found estate prejudice in denying the unsecured creditor’s motion to allow a tardy \$700,000 claim. DE 1002 at 8. But the Court reasoned that the Receiver had already made two distributions to unsecured creditors and had not reserved any funds for the unsecured claimant with a significant claim amount, and even after the Receiver had

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<sup>17</sup> In any event, prejudice, if any, to unsecured creditors is not the relevant test under *Pioneer*. *See In re Eagle Bus Mfg.*, 62 F.3d 730, 737–39 (5th Cir. 1995); *In re Pappalardo*, 210 B.R. at 645.

<sup>18</sup> We are not aware of any secured creditors in a like position other than WFB.

recommended denial of the claim in the Claims Determination Motion, the claimant did not promptly seek relief. *Id.* at 7-8. By contrast, this is a secured claim, the Receiver has set aside the funds on which BB&T's lien remains, and the funds have never been earmarked for unsecured creditors or general estate expenses. The Claims Determination Motion and order granting it in part did not include any disposition of the Fairview POC, triggering a duty to object. BB&T filed this motion promptly as invited by the Receiver in its Motion for Sale and following our investigation of the issues.

2. **No Impact to Administration of Case**

For the same reasons, allowing the Fairview POC poses no threat to the case administration. From inception, the Receiver reported the estate's liability to BB&T and lien to the Court and parties in interest. No one could have reasonably relied on the disposition of funds being part of general estate assets. As noted, the Receiver is holding the subject funds in trust and segregated pending the Court's ruling. This issue will not delay completion of this case; indeed, the Court has the same issue pending on WFB's application to submit late secured POCs.

3. **BB&T's Belief That Fairview POC Was Submitted**

BB&T and its counsel believed that the Fairview POC had been timely submitted. From September 2, 2010 to April 2012, based on information provided to it, BB&T's management responsible for the Fairview Loan believed that the Fairview POC had been timely submitted, BB&T's rights were perfected, and it would receive the sale proceeds. From January 2011 to March 2012, GR counsel consistently referred to BB&T's secured claim in communicating with the Receiver's counsel, who never indicated that the Fairview POC had not been timely received. After the claims bar date, the Receiver reported the estate's liability to BB&T and its lien interest in numerous Interim Reports and website advertisements. The Claims Determination Motion did

not mention or seek any determination on allowability of claim on the Fairview Loan. As soon as the Receiver's counsel advised on April 26, 2012 of non-receipt of the Fairview POC, GR counsel emailed it with supporting documents. There was no delay in curing the non-receipt—information of which the Receiver was then already long aware.

4. **BB&T Has Always Acted in Good Faith**

*Pioneer's* “good faith” factor is assessed by “whether the movant intentionally sought advantage by untimely filing.” *Yang*, 435 Fed.Appx. at 844 (citing *Cheney*, 71 F.3d at 850). There is no such evidence. BB&T intended to comply, timely prepared the Fairview POC, and the employee tasked with submitting it expressed his intent to do so. *In re Pappalardo*, 210 B.R. at 647 (no evidence that creditor acted in bad faith by making strategic decision to delay filing proof of claim; mere mistake does not amount to bad faith) (and cases cited). BB&T's failure to deliver the Fairview POC by September 2, 2010, if true, was inadvertent, unintended and caused by human error.

**CONCLUSION**

The Court should allow the Fairview POC and direct the Receiver to turn over the \$267,720.59 net proceeds to BB&T.

**LOCAL RULE 3.01(g) CERTIFICATION**

Counsel to BB&T has conferred with counsel to Receiver. The Receiver's counsel objects to the requested relief.

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By: /s/ David S. Garbett  
David S. Garbett

**CERTIFICATE OF SERVICE**

I certify that on March 5, 2015 , I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List authorized to receive electronic notice via transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ David S. Garbett

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