UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

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

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, LLC.

Relief Defendants.
_____/

RECEIVER'S OPPOSITION TO BB&T'S MOTION FOR TURNOVER OF SALE PROCEEDS OF FAIRVIEW PROPERTY SUBJECT TO MORTGAGE INTEREST

Burton W. Wiand, as Receiver (the "**Receiver**"), opposes the motion filed by Branch Banking and Trust Company ("**BB&T**") for turnover of the proceeds from the Receiver's sale of real property located at 131 Garren Creek Road, Fairview, Buncombe County, North Carolina (the "**Fairview Property**") (the "**BB&T Motion**"), which total $267,720.59 (Doc. 1159). As discussed below, undisputed evidence establishes that: (1) BB&T knew of the September 2, 2010, claims bar date before that date; (2) BB&T never filed a claim relating to the Fairview Property; (3) on April 26, 2012, Receiver's counsel confirmed to BB&T's then counsel that no claim had been filed and the Court had barred and enjoined "any and all" further claims; (4) despite that warning, BB&T did not promptly seek relief from the Court under Federal Rule of Civil Procedure 60(b) ("**Rule 60(b)**") or otherwise; and (5) BB&T ultimately waited until March 5, 2015, to seek any relief from the Court – which is almost 5 years after the claims bar date, almost 3 years after Receiver's counsel told BB&T's counsel it had not filed a claim and additional claims were enjoined and barred, and almost 2 years after the governing deadline for seeking relief under Rule 60(b) expired. As detailed below, these undisputed facts unequivocally establish that BB&T's motion should be denied under Rule 60(b). BB&T contends this federal equity receivership should be governed by bankruptcy law, and that under bankruptcy law, a creditor like BB&T that held a security interest in the Fairview Property was not required to file a proof of claim form ("**POC**") with the Receiver to preserve its interest in that property. But as also detailed below, bankruptcy law does not govern and, in any event, BB&T has not even established that if bankruptcy law rather than receivership law applied here, it would be entitled to its requested relief.

Notably, the Court's earlier decisions about untimely or otherwise deficient claims asserted by Elendow LLC ("**Elendow**") (Doc. 1002) and Fulcrum Distressed Opportunities Fund I, LP ("**Fulcrum**") (Doc. 1061) are dispositive of this dispute. In resolving the Receiver's dispute with Fulcrum, the Court already rejected the application of bankruptcy law to the claims process. Because its status as a secured creditor does not excuse its failure to file a POC, BB&T – like Elendow – must proceed under Rule 60(b), and because the BB&T Motion was filed approximately two years after the expiration of the one-year deadline to seek relief under Rule 60(b), it should be denied as a matter of law. But even if that deadline had not passed, the same reasons why the Court rejected Elendow's argument that its failure to file a timely claim under similar factual circumstances constituted excusable neglect under Rule 60(b) apply equally to BB&T's arguments. Based on Fulcrum and Elendow, the Court should deny BB&T's motion and release the sale proceeds to the Receivership estate. Ultimately, scenarios like this one – in which a non-party forces a receiver to waste resources litigating its entitlement to receivership assets despite not having filed a claim – are precisely those the claim bar date is meant to prevent.

BACKGROUND

Sale Of The Fairview Property. The Receivership estate previously held title to the Fairview Property pursuant to a March 30, 2009, Order. *See* Doc. 100. On November 17, 2014, the Receiver moved for approval of the sale of the Fairview Property to Sarah Z. Pearsall (the "**Purchaser**") for $287,500 pursuant to 28 U.S.C. § 2001(b) (the "**Motion for Approval**"). *See* Doc. 1150. The Court granted the Motion for Approval on November 18, 2014. Doc. 1151. The sale then promptly closed, and the Purchaser wired $267,720.59 –

i.e., the net sale proceeds after deducting closing costs – to Receiver's counsel's trust account, where it remains pending resolution of the BB&T Motion. As explained below and in the Motion for Approval, BB&T held an encumbrance on the Fairview Property, but it failed to submit a timely POC relating to that interest. As such, BB&T is barred from asserting any claim regarding the Fairview Property and all of the proceeds from the sale of the Fairview Property should be released to the Receivership estate. Because the Purchaser's loan commitment was set to expire, the Receiver filed the Motion for Approval and asked the Court to address BB&T's entitlement to any of the sale proceeds at a later time. The BB&T Motion seeks that determination.

BB&T Knew Of The Claim Bar Date And That It Had To File A Claim To Preserve An Interest In Receivership Property. Importantly, BB&T holds an encumbrance on another piece of real property in the Receivership estate and followed proper procedures with respect to that interest. Specifically, on or about May 1, 2007, BB&T issued a loan to Nadel's Laurel Preserve, LLC, which was secured by real property located at 10 Laurel Cottage Lane, Black Mountain, North Carolina, 28711 (the "**Laurel Property**"). On September 2, 2010, BB&T timely submitted a proof of claim form to the Receiver with respect to its interest in the Laurel Property. *See* Morello Decl. Ex. A.[1] On December 9, 2011, the Receiver sent a letter to BB&T in which he explained that, in relevant part, he had filed a motion making certain claim determinations (Doc. 675) (the "**Determination**

[1] Notably, the proof of claim form explained that "to be eligible to receive a distribution from the Receivership Entities' assets, you must complete and return this Proof of Claim form and, if applicable, provide the requested documentation, so that it is received on or before **September 2, 2010** ...." *Id.* It adds that, "IF THIS COMPLETED FORM, SIGNED UNDER PENALTY OF PERJURY, IS NOT RECEIVED BY THE RECEIVER ... BY **SEPTEMBER 2, 2010**, YOU WILL BE FOREVER BARRED FROM ASSERTING ANY CLAIM AGAINST THE RECEIVERSHIP ENTITIES' ASSETS AND YOU WILL NOT BE ELIGIBLE TO RECEIVER ANY DISTRIBUTIONS FROM THE RECEIVER." *Id.* (original emphasis).

Motion") and assigned BB&T's claim regarding the Laurel Property number 482.[2] *See* Morello Decl. Ex. B. The letter also directed BB&T to consult the Determination Motion and its exhibits to learn the Receiver's recommendation to the Court regarding BB&T's claim (*id.*):

> The Receiver recommends that this claim be allowed in the amount of the principal balance of the loan at the time of the Receiver's appointment ($360,157.37), but only be allowed to receive distributions from the proceeds of the sale of the Laurel Cottage up to the Allowed Amount less fees and expenses incurred by the Receivership to maintain and sell the Laurel Cottage.

Doc. 675-5; *see also* Doc. 675 at 17-18 & 44-48.

On March 2, 2012, the Court granted the Determination Motion. *See* Doc. 776 ¶ 3 ("The Receiver's determination of claims and claim priorities as set forth in the motion and in Exhibits B - J attached to the motion is fair and equitable and is approved."). Importantly, that Order also barred and enjoined the filing of any other claims:

> To bring finality to these matters and to allow the Receiver to proceed with distributions of Receivership assets, any and all further claims against Receivership Entities, Receivership property, the Receivership estate, or the Receiver by any Claimant taxing authority, or any other public or private person or entity and any and all proceedings or other effects to enforce or otherwise collect on any lien, debt, or other asserted interest in or against Receivership Entities, Receivership property, or the Receivership estate are hereby barred and enjoined absent further order from this Court.

Id. ¶ 8 (emphasis added).

On March 8, 2012, the Receiver sent a letter to BB&T explaining the Court approved his determination of its claim, and pursuant to the procedures set forth in the Determination Motion, BB&T had until March 28, 2012, to serve a written objection to the Receiver's

[2] All claimants received similar letters. *See* Doc. 675 at 6-7.

determination.[3] *See* Morello Decl. Ex. C. The letter also informed BB&T that **"[f]ailure to properly and timely serve an objection to the determination of your claim … shall permanently waive your right to object to or contest the determination of your claim."** *Id.* at 2 (original emphasis). Given the foregoing, BB&T indisputably knew about the claims process, the claims bar date, its need to file a claim to preserve any interest it held in Receivership property, and the consequences of failing to file a claim.

BB&T's Interest In The Fairview Property And Its Failure To File A Claim Relating To That Property. None of the foregoing activities and correspondence occurred with respect to the Fairview Property because BB&T did not timely file a POC regarding its interest in that property. Specifically, in April 2012 – *i.e.*, approximately 19 months after the claim bar date – BB&T's counsel asked Receiver's counsel about the status of purported claims relating to both the Laurel Property and the Fairview Property. On April 26, 2012, Receiver's counsel sent a letter to BB&T's counsel explaining that BB&T never submitted a proof of claim form regarding the Fairview Property, and because the pertinent deadline had long since passed, BB&T was barred and enjoined from asserting any such claim. *See* Morello Decl. Ex. D. Later that day, BB&T's counsel emailed[4] Receiver's counsel copies of two proof of claim forms, one for the Laurel Property, which is not in dispute, and one for the Fairview Property, dated August 27, 2010. *See id.* Ex. E. The Receiver, however, had never received a proof of claim form for the Fairview Property. *Id.* ¶ 3, Ex. D. Receiver's counsel thus asked BB&T's counsel to provide evidence of timely service, but BB&T's

[3] All claimants received similar letters. *See* Doc. 675 at 81 ¶ (b).

[4] Counsel's email was insufficient to preserve BB&T's rights because BB&T's purported claim was already barred and enjoined by order of this Court (Doc. 776 ¶ 8) as of March 3, 2012. As explained below in Section IV, BB&T was required to obtain relief from the Court under Rule 60(b), but it never did so.

counsel advised she could not because the individual who purportedly sent the proof of claim form was no longer employed by BB&T. *See* Morello Decl. Ex. F ("Ms. Herrick is no longer with BB&T; therefore, I am unable to obtain confirmation and/or a copy of the transmittal email."). Although BB&T was aware of the claims process and its governing, Court-approved procedures as demonstrated by its submission of a claim for the Laurel Property, it never sought further relief from the Court regarding the Fairview Property. Rather, BB&T did nothing for several years until very recently when the Receiver was in the process of selling the Fairview Property.

ARGUMENT

I. BB&T HAS, YET CANNOT SATISFY, THE BURDEN OF PROOF

As an initial matter, BB&T has the burden of proof on its Motion and its purported claim regarding the Fairview Property. *See* Doc. 675 at 82 ("The Claimant shall have the burden of proof."); Doc. 776 (approving procedures set forth in Doc. 675); Doc. 1061 at 8-9 ("[T]he burden of proof in this proceeding lies on the claimant who filed the proof of claim pursuant to the objection procedure approved by this Court."). This is important for two independent reasons. First, because BB&T concedes it cannot prove it submitted a POC for the Fairview Property. Mot. at 20 ("we cannot say whether Herrick sent the Fairview POC via email to the wrong address or omitted to send it"). Under the claims process procedures, that alone warrants denial of the BB&T Motion.

Second, because BB&T repeatedly faults the Receiver for failing to file motions on BB&T's behalf even though the Receiver had no obligation to do so since the burden of seeking relief was squarely on BB&T. For example, it argues that "[a]lthough 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." Mot. at 10. But this completely ignores the clear rule that the burden rested with BB&T. Not only did BB&T fail to file a pertinent POC, but BB&T's counsel did not email a copy of the purported Fairview POC to Receiver's counsel until April 16, 2012. Thus, when BB&T asserts the Receiver knew "as of December 2011 that he had no evidence of receipt of the Fairview POC," what it really means is that the Receiver should have had the burden of reviewing all 631 POCs he received, determined which potential creditors had not filed a POC, and then treated any creditor that had not filed a POC as though that creditor instead had filed one. BB&T has the matter backwards. As the claims process filings unequivocally establish, it is not the Receiver's responsibility to protect creditors who sleep on their rights. *See* Docs. 675 at 82; 776; and 1061 at 8-9. BB&T should have submitted the purported Fairview POC in a reliable, documented manner. It should have reviewed the Determination Motion and realized it had not been assigned a claim number with respect to the Fairview Property. After receiving correspondence regarding the Laurel Property, it should have recognized it received no such correspondence regarding the Fairview Property. It did none of those things.

Similarly, BB&T faults the Receiver because, after its counsel emailed the purported Fairview Property POC to Receiver's counsel on April 16, 2012, "the Receiver never filed any motion seeking review of any determination on the claim." Mot. at 2-3, *see also* 11. But as explained below in Section IV, as Receiver's counsel explicitly told BB&T's counsel

(Morello Decl. Ex. D), by that time BB&T's purported claim was barred and enjoined by order of this Court (Doc. 776 ¶ 8). As other creditors with untimely claims have done (unsuccessfully), it was BB&T's responsibility to seek relief from the Court's order under Rule 60(b), but it did nothing until almost 3 years later.

BB&T also places blame for its inaction on the Receiver's interim reports and the manner in which the Receiver advertised the Fairview Property for sale on the Receivership's website (*see, e.g.,* Mot. at 11-14) because they disclosed a lien on that property in favor of BB&T. But BB&T ignores that there was a lien on that property until the Court recently ordered the Receiver to transfer that property to the Purchaser free and clear of all encumbrances (Doc. 1151). BB&T's failure to timely file a POC for the Fairview Property did not immediately dissolve the lien; rather, it barred BB&T from enforcing the lien against the sale proceeds by asserting a claim against the Receivership estate. When he filed the Motion for Approval, the Receiver asked the Court to transfer BB&T's interest in the Fairview Property to the sale proceeds so he could timely close the sale and give BB&T an opportunity to be heard, and it was not until then that BB&T sought the affirmative relief it should have sought as long ago as December 2011 when it should have realized it had not been assigned a claim number or April 2012 when the Receiver's counsel expressly informed BB&T's counsel that BB&T's purported claim had not been received and now was barred and enjoined by this Court. BB&T also ignores that the claims process procedures contained no language whatsoever exempting secured creditors from filing a POC. In addition, during this entire time, BB&T was aware of the claims process, its requirements, and the Receiver's determinations because it was receiving correspondence regarding the Laurel Property. Put

simply, BB&T failed to carry its burden at every step of the claims process and this dispute relating to the Fairview Property.

II. BARRING LATE-FILED CLAIMS IS NECESSARY, AND THE COURT HAS PREVIOUSLY DONE SO

It is axiomatic that any person or entity with a claim against a receivership estate must assert that claim in the court overseeing the receivership. *Riehle v. Margolies*, 279 U.S. 218, 224 (1929) ("Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him."); *see* Ralph E. Clark, *Clark on Receivers* § 646 at 1132 (3d ed. 1992). For efficiency, courts overseeing receiverships typically establish a claims process, require submission of claim forms, and set pertinent deadlines. *See Riehle*, 279 U.S. at 224 ("[I]n the receivership proof of the claim [must] be made in an orderly way, so that it may be established who the creditors are and the amounts due them."). To achieve finality, courts also set a claim bar date and disallow late-filed claims. *See S.E.C. v. Princeton Econ. Int'l Ltd.*, 2008 WL 7826694, *4 (S.D.N.Y. 2008) (entering bar date); *Callahan v. Moneta Capital Corp.*, 415 F.3d 114, 117-18 (1st Cir. 2005) (potential claimants that did not submit claims by bar date lacked "standing to object to the adjudication of a pending claim in the Claims Disposition Order").

Here, the Court established a claims process with specific deadlines. *See* Docs. 390, 391. BB&T complied with those deadlines with respect to the Laurel Property, but did not comply with respect to the Fairview Property. This Court has previously barred untimely claims under similar circumstances. For example, on March 1, 2013, Elendow filed a Motion To Modify Order Disallowing Claim, asking "the Court [to] reconsider that portion of its

March 2, 2012 Order disallowing Elendow's late-filed claim (Docket No. 776) and enter a new order allowing Elendow to participate in distributions to victims of Nadel's schemes." Doc. 980 at 2. In opposing the motion, the Receiver explained Elendow's many failures to comply with pertinent deadlines:

- "The Court set September 2, 2010, as the deadline to file a Proof of Claim form, but Elendow missed that deadline by almost a month.
- The Receiver then allowed Elendow the opportunity to explain in writing the reasons for missing the deadline, but it did not respond to the Receiver's letter – if at all (*see infra* Section II.A.) – for six months.
- After the Court denied Elendow's claim, Elendow never submitted an objection, and the deadline for objections expired on March 28, 2012.
- Instead, Elendow waited almost one year and filed its Motion seeking relief under Rule 60(b), which relief is only granted in extraordinary circumstances."

Doc. 990 at 1. Even after "[g]iving Elendow the benefit of the doubt" regarding contested facts, the Court nevertheless denied its motion:

> Elendow not only filed a late proof of claim without timely explanation but also failed to object to the priority of claims in March 2012. This case does not present any exceptional circumstances other than an extremely late attempt to challenge the denial of Elendow's claim without a persuasive reason. Consequently, the motion in all respects is denied.

Doc. 1002 at 10. The Court should reach the same result here. BB&T indisputably knew about the claims process because it filed a POC with respect to the Laurel Property, and it received correspondence from the Receiver regarding that claim. Even if BB&T thought it had submitted a POC with respect to the Fairview Property, it would have learned that the Receiver had no record of any such claim had it reviewed the Determination Motion or simply noticed that the Receiver's correspondence only ever referenced a single claim relating to the Laurel Property. *See* Doc. 1002 at 8-9 ("Elendow was remiss in not locating

the Receiver's motion referenced in the letter to confirm whether Claim 458 was allowed or denied. If Elendow had desired to know the Receiver's recommended determination of Claim 458, he easily could have located the motion filed in the public records and available on the Receiver's website.").

BB&T did not inform the Receiver it had purportedly submitted a POC relating to the Fairview Property until late April 2012 – almost 20 months after the claims bar date and one month after the deadline for submitting objections to the Receiver's claim determination. *See* Morello Decl. Ex. E. BB&T was then unable to provide any evidence of its timely filing of a proof of claim form. *Id.* Ex. F. It also was explicitly informed at that time that any claim it had regarding the Fairview Property had been enjoined and barred by the Court, yet it took no further action for almost three years until the Receiver recently contacted BB&T in connection with the Motion for Approval. Under such circumstances, BB&T is barred from asserting an entitlement to any portion of the sale proceeds. *See* Doc. 1002 at 8 ("Elendow certainly never followed up with the Receiver concerning whether the reasons given were satisfactory…"); *see also S.E.C. v. Morriss*, 2014 WL 585395, *3 (E.D. Mo. 2014) (nonparty who failed to filed a claim by the claim bar date "ha[d] forfeited his rights to either claim or object to a distribution . . . ."); *S.E.C. v. Aquacell Batteries, Inc.*, 2009 WL 1854671, *1 (M.D. Fla. 2009) (disallowing claim filed after the claim bar date).

III. THOUGH A SECURED CREDITOR, BB&T WAS NEVERTHELESS REQUIRED TO SUBMIT A POC FOR THE FAIRVIEW PROPERTY

The fact that BB&T is a secured creditor does not distinguish it from Elendow. Specifically, BB&T argues it was not required to submit a POC for the Fairview Property because it was a secured creditor, and under the Bankruptcy Code, "a secured creditor is not

obligated to submit a proof of claim to preserve its lien interest." Mot. at 15. BB&T is wrong for three independent reasons: (1) as the Court has already determined, this federal equity receivership is not governed by the Bankruptcy Code; (2) even under the Bankruptcy Code, courts sometimes require secured creditors to submit claim forms; and (3) having submitted a POC for the Laurel Property consistent with its "standard practice" in both bankruptcies and receiverships, BB&T is estopped from arguing it was not required to submit a POC for the Fairview Property.

A. As The Court Has Already Determined, This Federal Equity Receivership Is Not Governed By The Bankruptcy Code

BB&T asks the Court to decide this matter under the Bankruptcy Code, but as the Court has already determined, this federal equity receivership is not governed by bankruptcy law: "[A]lthough federal district courts presiding over federal equity receiverships, such as this SEC case, may look for guidance from bankruptcy law, they are not restricted by the dictates of bankruptcy law." Doc. 822 at 13 (citing *Quilling v. Trade Partners, Inc.*, 2007 WL 107669, *1 (W.D. Mich. 2007); *S.E.C. v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 332 (5th Cir. 2001)). Further, in denying the Fulcrum objection, the Court expressly rejected the application of bankruptcy law to this claims process:

> Any attempted analogy between the significance of a proof of claim under bankruptcy law with respect to any presumption of its validity and one submitted in the course of this equity receivership is unavailing. This Court's order approving the claims determination established the objection procedure and specifically found the procedure to be "logical, fair, and reasonable."

Doc. 1061 at 8 (quoting Doc. 776 at 3; emphasis added). BB&T argues its lien is still valid here because it purportedly would have been valid under the Bankruptcy Code, but as the Court has already concluded, such arguments are "unavailing." *Id.* And the Court is not

alone in reaching that conclusion. *See, e.g., S.E.C. v. TLC Inv. & Trade Co.,* 147 F. Supp. 2d 1031, 1039 (C.D. Ca. 2001) ("Therefore, balancing the Applicants' position against the need to protect and marshal the assets of the Receivership estate, protect defrauded and innocent investors, and judicial economy, the Court DENIES the Applicants' request to require the Receiver to follow all aspects of the bankruptcy code."); *S.E.C. v. Sunwest Mgmt., Inc.*, 2009 WL 3245879, *8 (D. Or. 2009) ("Federal equity receivership courts are not required to exercise bankruptcy powers nor to strictly apply bankruptcy law."); *S.E.C. v. Forex Asset Mgmt LLC,* 242 F.3d 325, 332 (5th Cir. 2001) ("[W]e need not rely on bankruptcy law for this non-bankruptcy case."); *S.E.C. v. Heartland Group, Inc.*, 2003 WL 1089366, *1 n.1 (N.D. Ill. 2003) (rejecting argument that "receivership actions are different from other forms of litigation and are more akin to bankruptcy court proceedings"); *S.E.C. v. Capital Consultants LLC*, 453 F.3d 1166, 1170 n.4 (9th Cir. 2006) ("Although similarities between receivership and bankruptcy proceedings certainly exist, differences exist as well."); *Marion v. TDI, Inc.*, 2006 WL 3742747, *2 (E.D. Pa. 2006) ("a bankruptcy proceeding differs significantly from an equity receivership imposed at the request of a government agency such as the SEC."). As such, the bankruptcy cases cited at pages 15 through 18 of the BB&T Motion are inapplicable.

Here, the Court's claims process procedures did not exempt secured creditors from timely filing a claim to preserve their interest in Receivership property. Allowing secured creditors to evade the claims process would reverse the burden of proof discussed above in Section I and undermine the important goals discussed above in Section II. Further, it would require the Receiver to conduct burdensome and expensive global searches of UCC filings

and multiple other public records databases in every state, and even throughout the world, to identify anyone with a security interest in any Receivership property. It would undermine the finality of the Court's orders and its critical ability to convey title free and clear of encumbrances. BB&T's argument simply is unworkable in an equity receivership.

B. Even Under Bankruptcy Law, BB&T Would Have Been Required To File A Timely Proof Of Claim

Importantly, even though BB&T heavily relies on its argument that it is not required to file a proof of claim here because it would not have been required to file one under the Bankruptcy Code (Mot. at 15-18), the cases it relies upon paint an incomplete picture: in many instances – including some that share similar characteristics to those at issue here – secured creditors must file claims in bankruptcy proceedings to preserve their rights. *See, e.g., U.S. Nat. Bank in Johnstown v. Chase Nat. Bank of N.Y.C.*, 331 U.S. 25, 33 (1947) (secured creditor "must file a secured claim, however, if the security is within the jurisdiction of the bankruptcy court and if he wishes to retain his secured status, inasmuch as that court has exclusive jurisdiction over the liquidation of the security."); *In re Strong*, 203 B.R. 105, 112 (Bankr. N.D. Ill. 1996) ("If a secured creditor seeks distribution from the Chapter 13 Standing Trustee administering a confirmed plan it must file a proof of claim."); *In re Parrish*, 326 B.R. 708 (Bankr. N.D. Ohio 2005) (secured creditor trying to recover deficiency balance must file a proof of claim). By not filing a claim, a secured creditor loses its right to receive distributions from the bankruptcy estate.[5]

[5] *See also In re Macias*, 195 B.R. 659, 663 (Bankr. W.D. Tex. 1996) ("If a secured claim [in a Chapter 13 bankruptcy proceeding] is untimely filed, the trustee is entitled (perhaps even obligated) to object to its filing as untimely. Such disallowed claims will not be entitled to any distribution under the plan, nor will the creditor's failure to timely file permit the debtor to later argue a lack of adequate protection."); *In re MarketXT Holdings Corp.*, 336 B.R. 67, 71-72 (Bankr. S.D.N.Y. 2006) ("[The creditor's] failure to file a proof of claim in

Additionally, there are significant distinctions between bankruptcies and equity receiverships. Sometimes, a bankruptcy does not impact a secured creditor's lien because, at the conclusion of the bankruptcy proceeding, the collateral remains subject to the lien. Thus, even if the secured creditor does not file a claim in the bankruptcy proceeding, it retains the ability to foreclose on the collateral if the underlying obligation is not paid. That is not and was never the case here. When the Court appointed the Receiver, it simultaneously enjoined "all persons, including creditors, banks, investors, or others, with actual notice of this Order … from filing a petition for relief under the United States Bankruptcy Code without prior permission from this Court, or from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Defendants or the Relief Defendants." Doc. 8 ¶ 15. Pursuant to 28 U.S.C. § 754, the Court – through the Receiver – obtained "complete jurisdiction and control" over the Fairview Property when the Receiver made the filings required by that statute in the United States District Court for the Western District of North Carolina in 2009 and 2010. *See S.E.C. v. Nadel et al.*, Case No. 1:09-mc-00027-LHT (W.D.N.C.). As such, BB&T could only have sought a determination of its rights with respect to Fairview Property or the proceeds of its sale by filing a proof of claim. *See Riehle*, 279 U.S. at 224. This is true for every secured creditor that asserts a right to Receivership

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MarketXT's Chapter 11 case is thus fatal to its demand to share in the proceeds of the litigation. The 'bar date order' entered in the Chapter 11 case required all creditors with secured or unsecured, contingent or fixed, liquidated or unliquidated claims to file a proof of claim by a date certain. This order was binding on [the creditor] as an alleged lienholder, whose claims do not 'ride through' a Chapter 11 case in the face of a valid bar order. [The creditor's] failure to file a claim is fatal to its pretensions to have a continuing participation in the existing Claims." (internal citations omitted)); *Liona Corp., Inc. v. PCH Assocs.*, 949 F.2d 585, 605 (2d Cir.1991) (A Chapter 11 secured creditor whose claim is not scheduled or whose claim is characterized as disputed, contingent or unliquidated must file a proof of claim to preserve its rights.).

property. In the absence of filing a claim, the proceeds of a property's sale would be distributed like the rest of a receivership estate's assets – here, to defrauded investors with allowed claims. In short, although sometimes after bankruptcy, a secured creditor can still vindicate its rights independent of the bankruptcy proceeding, in a receivership it cannot do so because all rights to receivership property must necessarily be adjudicated by the receivership court so all receivership assets can be distributed before the receivership is concluded. That is particularly evident here because the Court transferred BB&T's interest in the Property to the proceeds, which are under the Court's control through the Receiver.

C. BB&T's Own Actions And Statements Show It Was Required To File A POC For The Fairview Property

BB&T's argument that, as a secured creditor, it did not have to submit a POC is undermined by its own actions and statements: it did, in fact, submit a POC for the Laurel Property; in its motion, BB&T asserts it intended and tried to submit a POC for the Fairview Property (*see, e.g.*, Mot. at 23-24); and Richard Miller, the employee who oversees BB&T's non-performing residential mortgage loans, including the Fairview Property loan, stated in his declaration that "[i]t was standard practice to directly submit proofs of claim in bankruptcy proceedings and receiverships rather than to use counsel for this purpose." (Doc. 1160-1 ¶ 10). In this claims proceeding governed by equity, BB&T's own actions and statements are inconsistent with its position that no POC was necessary.

IV. BB&T'S ARGUMENT BASED ON EXCUSABLE NEGLECT IS UNTIMELY UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b)

BB&T also argues "excusable neglect will justify relief for untimely submission of a proof of claim" and relies primarily on *Pioneer Investment Services Co. v. Brunswick*

Associated Limited Partnership, 507 U.S. 380 (1993), but that case concerned Rule 9006(b)(1) of the Bankruptcy Code.[6] Because this is not a bankruptcy proceeding, BB&T – like Elendow – must seek relief under Federal Rule of Civil Procedure 60(b), "which permits courts to reopen judgments [or orders] for reasons of 'mistake, inadvertence, surprise, or excusable neglect,' but only on motion made within one year of the judgment." *Pioneer*, 507 U.S. at 393 (emphasis added). "If a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Id.*

Here, BB&T effectively asks the Court to modify its order barring untimely claims by allowing it to submit a late claim or by recognizing the barred and enjoined claim its counsel emailed to Receiver's counsel almost two years after the claim bar date, but the pertinent order was entered no later than March 2, 2012.[7] *See* Doc. 776 ¶ 8 (barring and enjoining further claims against the Receivership). As discussed above, Receiver's counsel wrote BB&T's counsel on April 26, 2012, and clearly set forth the Receiver's position regarding BB&T's purported claim:

> By operation of BB&T's failure to submit a claim relating to its interest in the Garren Creek Home [*i.e.*, the Fairview Property], the expiration of the deadline for submission of claims, and the Court's March 2, 2012, Order barring and enjoining any further claims, BB&T is currently precluded from

[6] Again, this equity receivership is not a bankruptcy proceeding, and even if it were, Rule 9006(b)(1) would not apply here: "The 'excusable neglect' standard of Rule 9006(b)(1) governs late filings of proofs of claim in Chapter 11 cases but not in Chapter 7 cases. The rules' differentiation between Chapter 7 and Chapter 11 filings corresponds with the differing policies of the two chapters. Whereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors." *Pioneer*, 507 U.S. at 389. The Relief Defendants here are not being reorganized; the receiver is marshaling and liquidating their assets for the benefit of creditors with approved claims, who are mostly defrauded investors. As such, even if an analogy to bankruptcy was appropriate, this proceeding would be more analogous to a Chapter 7 liquidation, and thus Rule 9006(b)(1) would not apply.

[7] The Court established the September 2, 2010, claims bar date almost two years earlier on April 21, 2010. *See* Doc. 391 ¶ 2.

> asserting its claim with respect to the Garren Creek Home and the mortgage loan relating to that property.

Morello Decl. Ex. D (emphasis added). BB&T's counsel emailed a copy of the purported POC for the Fairview Property to Receiver's counsel in response to the letter, but neither BB&T nor its counsel took any further action despite the fact that the letter made clear BB&T's purported claim was barred and enjoined by "the Court's March 2, 2012, Order." *Id.* (emphasis added). Given the Court's injunction, simply emailing a purported POC to the Receiver was not enough. As discussed above in Section I, the burden to act was on BB&T not the Receiver. Had BB&T sought relief from the Court when Receiver's counsel wrote Gray Robinson in March 2012, its motion would have been timely under Rule 60(b), but having been explicitly alerted to the problem by Receiver's counsel, BB&T did nothing until it filed the BB&T Motion three years later. Put simply, having slept on its rights, as a matter of law BB&T is not entitled to the relief it seeks even if it had established excusable neglect, which as discussed below, it has not. *See* Fed. R. Civ. P. 60(b); *cf.* Doc. 1002 (finding no excusable neglect with respect to Elendow's motion under Rule 60(b), which was filed within the one-year window).

A. Even If BB&T'S Motion Were Timely, Like Elendow, It Cannot Show Excusable Neglect

Relief under Rule 60(b) "is an extraordinary remedy and is granted only in exceptional circumstances." *Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir.2006). Courts must consider "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact upon judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the

movant acted in good faith." *Pioneer*, 507 U.S. at 395; *see Canfield v. Van Atta Buick/GMC Truck, Inc*., 127 F.3d 248, 249-50 (2d Cir.1997) (finding that while *Pioneer* involved the Bankruptcy Code, the analysis was equally applicable to Rule 60(b)). While the Receiver has not questioned BB&T's good faith, all of the other factors weigh against it.

First, BB&T argues granting its motion will not prejudice or impact the administration of the Receivership because the sale proceeds are segregated and thus not part of any proposed distribution (Mot. at 22-23), but that argument ignores reality. If BB&T prevails, the sale proceeds will be distributed to BB&T, which slept on its rights; if BB&T loses, the proceeds will be distributed to defrauded investors – clearly, the BB&T Motion impacts this Receivership. "[W]hen funds are limited, hard choices must be made." *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 176 (S.D.N.Y. 2009). In moving the Court to approve his claim determinations, the Receiver explained that equity generally favors defrauded investors over other creditors in receiverships arising from fraudulent schemes (*see* Doc. 675 at 35-38), and the Court determined the Receiver's procedures were "logical, fair, and reasonable" (Doc. 776 at 3). The same considerations apply here, especially in light of the additional costs imposed on the Receivership estate by having to brief this matter.

Second, BB&T, not the Receiver, controlled the long delay. Importantly, the pertinent delay is the delay in filing its motion. Had it filed the motion in April 2012 when the Receiver's counsel informed BB&T's counsel the Receiver has no record of the Fairview Property POC and "any and all further claims" were barred and enjoined by the Court's March 2, 2012 order (Doc. 776), it may have been entitled to some relief, but in response to that communication, BB&T's counsel only emailed a purported Fairview Property POC to

Receiver's counsel. Due to the Court's injunction, however, BB&T – like Elendow – was required to seek relief from the Court. It did nothing until the Receiver contacted it in connection with the Motion for Approval almost three years later. That delay was both long and entirely within BB&T's control. As such, even if its motion were not untimely under Rule 60(b), BB&T still could not establish excusable neglect. *See* Doc. 1002 (Elendow).

V. IN NO EVENT IS BB&T ENTITLED TO THE FULL SALE PROCEEDS

BB&T asks the Court to "allow the Fairview POC and direct the Receiver to turn over the $267,720.59 net proceeds to BB&T" (Mot. at 24), but if the Court allows the Fairview Property POC, it should do so on the same terms as the Laurel Property POC. As explained above, the Receiver recommended the Laurel Property POC "be allowed in the amount of the principal balance of the loan at the time of the Receiver's appointment…, but only be allowed to receive distributions from the proceeds of the sale of the Laurel Cottage up to the Allowed Amount less fees and expenses incurred by the Receivership to maintain and sell the Laurel Cottage." Doc. 675-5. The Court approved that determination, and BB&T did not object. According to the purported Fairview Property POC, the principal balance of the loan as of September 1, 2010, was $248,941.73, which is almost $20,000 less than the net sale proceeds without even accounting for the Receiver's fees and expenses. BB&T's motion should be denied, but at minimum, its untimely claim should not be treated more favorably than its timely claim.

CONCLUSION

For the foregoing reasons, the Court should deny BB&T's motion for turnover and release all of the proceeds from the sale of the Property to the Receivership estate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 23, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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