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.
_____/

BB&T'S REPLY MEMORANDUM ON MOTION FOR TURNOVER OF SALE PROCEEDS OF FAIRVIEW PROPERTY[1]

A. Fairview POC Was Unnecessary Because Receiver Knew Of and Reported Claim Well Before Deadline.

In March 2009, the Receiver became aware of BB&T's secured claim and continuously reported it for the next five and one-half years. Despite this, the Receiver asks the Court to forfeit the lien interest because he did not timely receive the formal claim—information of which he was already aware. The Receiver fails to address the directly contrary authority, *Bankers*

[1] Unless otherwise indicated, all emphasis and brackets are added and capitalized terms have the definitions in the motion for turnover (DE 1159) ("Motion"). Response is the Receiver's memorandum opposing the Motion (DE 1163).

Trust Co. v. Florida East Coast Ry. Co., 31 F.Supp. 961, 963 (S.D. Fla. 1940), holding that the receiver's knowledge of a preferred claim before the deadline obviates a formal claim because there was "no substantial reason for requiring further proof of such a claim." *Id.* at 963.[2]

B. BB&T Has Satisfied Burden of Proof.

The Receiver contends that BB&T's failure to prove transmittal of the Fairview POC by September 2, 2010, by itself, justifies denying the Motion. *See* Response at 6. The threshold issue, however, is whether the Receiver's knowledge and reporting of the Fairview claim before the deadline obviated the need for a formal claim. *Bankers Trust* rejects the Receiver's assertion of lien forfeiture under these facts.

BB&T has also shown excusable neglect and its good faith belief from September 2010 to April 2012 that the Fairview POC had been timely delivered. As soon as she learned of the Receiver's non-receipt, BB&T's counsel provided the Fairview POC and supporting documents and later informed the Receiver that the bank could not produce proof of transmittal because of Herrick's departure and non-retention of emails. Thereafter, the Receiver did not send any official claims determination or move to approve disallowance, triggering BB&T's obligation to object or seek relief. Instead, the Receiver continued to report for the next two years that the estate was liable to BB&T for the principal balance on the Fairview Loan secured by a first lien on the Fairview Property.

C. March 2, 2012 Order Did Not Adjudicate BB&T's Claim on Fairview.

The Receiver urges the Court to deny relief because the March 2, 2012 order (DE 776) ("March 2 Order") provides that all further claims were barred and enjoined *absent further order*

[2] Contrary to the Receiver's position, *see* Response at 8, the Receiver not only reported BB&T's lien, but also the estate's "liability" for the principal balance. This is the same information in the Fairview POC, which is why a formal claim was unnecessary.

GARBETT, STIPHANY, ALLEN & ROZA, P.A., ATTORNEYS AT LAW
80 SOUTHWEST EIGHTH STREET, SUITE 3100, MIAMI, FLORIDA 33130 • TELEPHONE (305) 579-0012

of the Court. *See* March 2 Order at ¶ 8. The emphasized portion reflects that the bar is not absolute. As of filing of the Claims Determination Motion, the Receiver was aware of and had reported BB&T's secured claim on Fairview via 9 Receiver Reports and two years of Website advertisements, and the Receiver did not make or seek approval of any determination on the claim. The March 2 Order does not adjudicate the issue whether a formal claim was required when the Receiver has already reported the claim to the Court and creditor-body.

Neither the Claims Determination Motion nor the Receiver's letter to BB&T on December 9, 2011 (DE 1164-2) contains any disposition of or reference to the Fairview claim, triggering BB&T's duty to object after the March 2 Order.[3] From September 2010 through April 2012, BB&T in good faith believed that it had timely submitted the Fairview POC. *See* Motion at 7-8; Miller Decl. at ¶ 12, DE 1160-1 at 5. From January 25, 2011 to March 2012, BB&T's counsel consistently referred to BB&T's secured claim on the Fairview Property in seeking sale updates from the Receiver's counsel. *See* Motion at 8-9; GR Decl. at Exhibits E-J.[4] And from March 2009 to November 2014, the Receiver reported BB&T's secured claim on the Fairview Property via the motion to take title and 15 Receiver Reports and Website advertising. The purpose of the claims process is to inform the Receiver of claims, *see, e.g., S.E.C. v. Morriss*, 2014 WL 585395, at *2 (E.D. Mo. 2014), but the Receiver knew of and reported the Fairview

[3] The December 9, 2011 letter refers solely to the Laurel Preserve Claim. There is no evidence that the addressee, Ms. Decker, knew that the Receiver had not received the Fairview POC or that she was monitoring any issues involving Fairview. She worked in a different department and was only responsible for the Laurel Preserve POC. *See* Miller Decl., DE 1160-1 at 4 ¶¶ 9-10; GR Decl., DE 1160-2 at 2-3 ¶¶ 7-9.

[4] The Receiver suggests that BB&T's counsel's first inquiry on the Fairview Property occurred in April 2012. *See* Response at 5. The record shows, however, that counsel first referred to the secured claim on Fairview in January 2011 and thereafter through March 2012. GR Decl. at Exhibits E-J.

claim virtually from inception of his appointment. *See Bankers Trust*; *cf. In re PCH Associates*, 949 F.2d 585, 605 (2d Cir. 1991) (under-secured creditor's failure to file claim in Chapter 11 did not preclude claim because debtor and creditors were aware of potential of claim via debtor's adversary proceeding against creditor).

D. <u>The Elendow and Fulcrum Claim Denials Are Not Controlling</u>.

The Court's prior orders denying unsecured claims by Elendow and Fulcrum (DE 1002 and 1061) are not dispositive. *See* Response at 2, 9-10.[5] We have already addressed why the denial of the Elendow claim does not apply. *See* Motion at 22-23. Moreover, unlike here, the Receiver had recommended denial of Elendow's unsecured claim as late-filed, *see* DE 675-7, and the Court approved that determination on March 2, 2012. *See* DE 980; DE 1002 at 5. The Receiver promptly informed Elendow of the Court's denial and objection procedure, and Eldendow then failed to submit an objection as required by the March 2 Order. DE 1002 at 5. The Court also found prejudice because the Receiver had not set aside sufficient funds to cover Elendow's significant claim. *Id.* at 5-6. By contrast, the Receiver was aware of BB&T's secured claim well before the deadline, obviating a formal claim, *see Bankers Trust*, and the Receiver has not filed a claims determination on Fairview or asked the Court to approve such a determination. The subject funds are segregated and not part of any planned distribution.

The Fulcrum denial is further afield. The Court refused Fulcrum's request to amend a timely-filed unsecured claim because the initial claimant and Fulcrum refused to disclose the beneficial owners despite request, thus precluding the Receiver from determining the validity of

[5] The Receiver does not consider the claim bar deadline as jurisdictional or absolute. Rather, he determines whether to accept late claims based on extent of delay, prejudice, and extenuating circumstances. *See* Claims Determination Motion at 22 (suggesting allowance of 11 late-filed unsecured claims); March 2 Order (approving recommendation). Another relevant criterion should be whether he is already aware of the claim. *See Bankers Trust.*

GARBETT, STIPHANY, ALLEN & ROZA, P.A., ATTORNEYS AT LAW
80 SOUTHWEST EIGHTH STREET, SUITE 3100, MIAMI, FLORIDA 33130 • TELEPHONE (305) 579-0012

the claim. The Court also found that Fulcrum did not act in good faith. DE 1061. By contrast, the Receiver informed the Court and creditors of BB&T's secured claim on Fairview from March 2009 to November 2014 and does not challenge BB&T's good faith. *See* Response at 20.

Neither *Morriss* nor *S.E.C. v. Aquacell Batteries, Inc.*, 2009 WL 1854671 (M.D. Fla. 2009), Response at 11, precludes relief. *Morriss* denied intervention to a shareholder-claimant who failed to file a claim. Unlike here, the *Morriss* Receiver was unaware of the claim, and the claimant provided no reason for failing to file it. *Aquacell* denied an unsecured investor claim for untimeliness and lack of factual support, noting no explanation for the untimely submission. Here, the Receiver knew of BB&T's secured claim before the deadline, the claim has been fully documented, and the record reflects a timely-prepared Fairview POC and BB&T's excusable neglect in failing to transmit it as intended.

E. *Barton* Doctrine Does Not Apply.

The Receiver argues that under *Riehle v. Margolies*, 279 U.S. 218, 224 (1929), "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." *Id.* This rule, known as the *Barton* Doctrine,[6] does not inform the issues; neither *Riehle* nor the Barton Doctrine addresses forfeiture of a lien interest for failing timely to submit a claim where the Receiver already knows of and has reported the claim before (and after) the deadline.

F. Reference to Bankruptcy Decisions by Analogy is Appropriate Absent Controlling Precedent in Receivership Case.

[6] So named after *Barton v. Barbour*, 104 U.S. 126 (1881) (once receivership court has jurisdiction of assets, no other court has subject matter jurisdiction to adjudicate rights in assets without receivership court's permission). *See Patco Energy Express, LLC v. Lambros*, 353 Fed.Appx. 379, 380 (11th Cir. 2009) (discussing doctrine).

We did not argue that the Court is bound by bankruptcy decisions or the Code, but reference to the long-standing rule that a secured creditor's failure to file a claim in bankruptcy does not forfeit its lien interest is appropriate given the lack of any Eleventh Circuit precedent on the issue in a Receivership. *See* Motion at 14-18.[7] The Receiver's dismissive stance is inappropriate as the court may refer to bankruptcy cases "where instructive, due to limited case law in the receivership context." *Id.* at 15.[8]

None of the Receiver's cases precludes such reliance. *Quilling v. Trade Partners, Inc.*, 2007 WL 107669 (W.D. Mich. 2007), for instance, recognized that receivership courts may look to the Code for guidance where appropriate. *Id*. at *1. *Marion v. TDI, Inc.*, 2006 WL 3742747, at *2 (E.D. Pa. 2006), *vacated*, 591 F.3d 137 (3d Cir. 2010), merely ruled that unlike the rule in bankruptcy, an equity receiver's recovery is not barred by *in pari delicto*—an inapplicable ruling. *In re Strong*, 203 B.R. 105 (Bankr. N.D. Ill. 1996), and *In re Macias*, 195 B.R. 659 (Bankr. W.D. Tex. 1996), both observed, consistent with our position, that nothing in the Code requires a secured creditor to file a claim to preserve a lien interest and right to collateral proceeds. *In re Strong*, 203 B.R. at 112; *In re Macias*, 195 B.R. at 660. Both also discussed

[7] The Receiver does not cite any case forfeiting a secured creditor's lien in a Receivership because of an untimely claim, particularly where, as here, the Receiver and creditors were aware of the claim before the deadline. The only direct precedent on the issue, *Bankers Trust*, rejects forfeiture.

[8] The Receiver claims that BB&T is estopped to argue that it need not submit a claim because it timely submitted the Laurel Preserve POC and intended timely to submit the Fairview POC. *See* Response at 16. The issue here is whether BB&T's lien interest should be forfeited where the Receiver and creditors knew of the claim before the deadline. The fact that in bankruptcy, a secured creditor need not submit a claim to preserve its lien interest also supports BB&T's position that a formal claim was unnecessary.

whether a secured creditor who fails to file a claim may participate in a Chapter 13 plan—an immaterial discussion because there is no distribution plan involving the segregated proceeds.

In re Parrish, 326 B.R. 708 (Bankr. N.D. Ohio 2005), supports BB&T's position; the court concluded that a secured creditor in a Chapter 13 need not file a claim to preserve its collateral position, *id.* at 718-19, but if it does not do so, it may not rely on the presumption of validity in favor of claim-filers. *Id.* at 719. The Receiver has continuously reported the estate's liability to BB&T of "approximately $248,560.62" on the Fairview Loan so there is no issue as to the principal amount owed for which a presumption is necessary.

U.S. Nat. Bank in Johnstown v. Chase Nat. Bank of N.Y.C., 331 U.S. 28, 33 (1947), is inapplicable as it merely stands for the proposition that if the secured party wishes to participate in dividends from collateral in the possession of the bankruptcy court, the creditor must file a proof of claim. *See Newman v. First Sec. Bank of Bozeman*, 887 F.2d 973, 975-76 (9th Cir. 1989); *Clem v. Johnson*, 185 F.2d 1011 at 1012-13 (8th Cir. 1950), *cert. denied*, 341 U.S. 909 (1951) (both rejecting *Johnston* in holding that secured party did not forfeit lien by failing to submit claim in bankruptcy case, as *Johnston* dealt with different issue).

In re MarketXT Holdings Corp., 336 B.R. 67, 71 (Bankr. S.D.N.Y. 2006), is not contrary to BB&T's position. The court held that a general unsecured creditor with an alleged future lien interest was required to file a claim under the specific Chapter 11 bar order directing the filing of all claims "secured or unsecured, contingent or fixed, liquidated or unliquidated" by a date certain. *Id.* at 71. The court did not deal with any facts remotely resembling ours.

Finally, *In re PCH Associates*, 949 F.2d 585 (2d Cir. 1991), supports BB&T's position, as the court reasoned that the under-secured creditor's failure to file a claim in a Chapter 11 proceeding did not preclude the unsecured deficiency claim because the debtor and other

creditors were otherwise aware of the potential of a claim because of the debtor's adversary proceeding against the creditor. *Id.* at 605. The same result obtains here.[9]

G. One Year Time Limit Does Not Preclude Relief for Excusable Neglect

The Receiver asserts that the Court may not grant relief for excusable neglect because the Motion was filed more than one year after the March 2 Order. The one year period did not start with the order. Despite knowing of the Fairview claim and non-receipt of the formal proof of claim, the Receiver sought no approval of any determination on the Fairview claim. On April 26, 2012, the Receiver's counsel informed BB&T's counsel, for the first time, that the Receiver had no evidence of receipt of the Fairview POC. BB&T's counsel immediately emailed a copy with supporting documents, and in November 2012, advised that BB&T could not provide proof of transmittal owing to Herrick's departure. Thereafter, the Receiver's counsel did not serve a claims determination or seek approval of a suggested disallowance, triggering the objection process under the March 2 Order. To the contrary, he continued to report the estate's liability for the principal amount owing secured by a lien on the Fairview Property, thus reflecting his continuing acknowledgment of the validity of the Fairview POC. Even in his urgent Motion for Sale filed on November 17, 2014 (DE 1150), he asked the Court to defer consideration of the validity of the Fairview POC pending the filing of BB&T's motion for relief so he could sell the property, with BB&T's lien attaching to proceeds. The one year limit does not apply to this sequence of events.

H. No Prejudice to Estate or Case Administration[10]

[9] The cases cited at Response at 13 similarly conclude that receivership courts are not bound strictly by bankruptcy law. None holds, however, that reference to such law is inappropriate under these circumstances.

The Receiver claims prejudice because if the Court honors BB&T's secured claim, the Receiver will not be able to pay the proceeds to unsecured creditors. Response at 19. He cites no case supporting this theory of prejudice and none exists.[11] The prejudice factors are whether the Receiver knew of the claim before the deadline (he did); or whether honoring the claim will force return of payments, affect planned distributions, harm reorganization, or prompt like claims (it will not). *See* Motion for Sale at 21-23 (and cases cited).[12] The Receiver's claimed prejudice that he will not be able to distribute the windfall to unsecured creditors is without merit. *See In re Cendant Corp. PRIDES Litigation*, 235 F.3d 176, 184 (3d Cir. 2000) (rejecting same argument; "Cendant's argument that it is now prejudiced because the settlement money which might now go to Santander [the claimant asserting excusable neglect] will not be 'leftover' for

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[10] Some courts look to whether the delay in submitting a claim causes prejudice, but even extended delays will not preclude relief absent prejudice. *See Matter of Papp Intern., Inc.*, 189 B.R. 939, 945-46 (Bankr. D. Neb. 1995) (granting relief to creditor despite 21 month delay in submitting claim in bankruptcy; no prejudice); *In re Beltrami Enters., Inc.*, 178 B.R. 389, 392 (Bankr. M.D. Pa. 1994) (granting relief to creditor despite 2-2 and ½ year delay in submitting claim in bankruptcy; no prejudice because no disclosure statement and plan pending). There was no delay here; as soon as BB&T learned of the non-receipt, its counsel delivered the Fairview POC and supporting documents. No prejudice occurred because the Receiver already knew of the claim and had reported it since March 2009, and continued to report it thereafter, and the funds are not part of any pending distribution plan. BB&T's delay in filing the Motion caused no prejudice either because the Fairview Property was not sold until November 2014 and the funds are segregated pending determination of the issues.

[11] He also claims prejudice because of legal fees incurred to resist the relief sought by BB&T. Response at 19. There is no authority for this position either. If this were a prejudice element, no claimant could ever obtain relief on excusable neglect.

[12] The "hard choices" comment in *S.E.C. v. Byers*, 637 F.Supp.2d 166, 176 (S.D.N.Y. 2009) (quoting from *Official Committee of Unsecured Creditors of WorldCom, Inc.*, 467 F.3d 73 at 84 (2d Cir. 2006)), is inapt as the case did not deal with the prejudice factor or any of the other issues here. And the Receiver's position that the Court should prefer unsecured investor creditors over a *bona fide* secured lender conflicts with his prior position that secured lending creditors should have priority over unsecured creditors to the extent of the lien interest. *See* Motion at 10 (and record citations of Receiver's priority recommendations).

GARBETT, STIPHANY, ALLEN & ROZA, P.A., ATTORNEYS AT LAW
80 SOUTHWEST EIGHTH STREET, SUITE 3100, MIAMI, FLORIDA 33130 • TELEPHONE (305) 579-0012

Cendant to recoup is without merit. In truth, since the only 'prejudice' Cendant would suffer by being forced to pay Santander is the 'loss of a windfall,' we conclude that Cendant will suffer no prejudice at all." (footnote and citation omitted)).[13]

I. Amount of Secured Claim

We agree that the amount subject to turnover is the unpaid principal, $248,941.73, *see* DE 1160-2 at 19 (Fairview POC), and not the $267,720.59 in net sale proceeds. Thus, the Receiver will be entitled to recover about $20,000 from the net proceeds if the Court honors the claim.

CONCLUSION

The Court should direct the Receiver to turn over $248,941.73 of the net proceeds to BB&T.

GARBETT, STIPHANY, ALLEN & ROZA, P.A.
Counsel to BB&T
80 S.W. 8th Street – Suite 3100
Miami, Florida 33130
Telephone: (305) 536-8861
Fax: (305) 579-4722
David S. Garbett, FBN 356425
Elizabeth B. Dombovary, FBN 891711
Email: dgarbett@gsarlaw.com
Email: edombovary@gsarlaw.com

By: /s/ David S. Garbett

CERTIFICATE OF SERVICE

I certify that on March 30, 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

[13] The Receiver's assertion that the excusable neglect was within BB&T's control does not preclude relief because excusable neglect is not limited to events beyond the claimant's control. *See* Motion at 20-21 (and cases cited).

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

SERVICE LIST

Arthur G. Nadel
FCI BUTNER LOW
Federal Correctional Institution
P.O. Box 999
Butner, NC 27509

Gianluca Morello, Esq.
Wiand Guerra King, P.L.
3000 Bayport Drive
Suite 600
Tampa, FL 33607
Counsel to the Receiver

Terry A. Smiljanich, Esq.
James, Hoyer, Newcomer & Smiljanich, P.A.
One Urban Centre, Suite 550
4830 W. Kennedy Blvd.
Tampa, FL 33609
Counsel to the Receiver

Scott A. Masel, Esq.
Andre J. Zamorano, Esq.
Securities & Exchange Commission
Miami Branch Office, SERO
801 Brickell Ave., Suite 1800
Miami, FL 33131