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 MOTION (I) FOR DETERMINATION THAT WELLS FARGO BANK, N.A.'S FAILURE TO COMPLY WITH THIS COURT'S CLAIMS ADMINISTRATION PROCESS EXTINGUISHED ITS PURPORTED INTERESTS IN RECEIVERSHIP PROPERTIES, AND (II) FOR RELEASE OF PROCEEDS OF SALE OF SARASOTA PROPERTY.

Burton W. Wiand, as Receiver (the "Receiver"), for Valhalla Investment Partners, L.P. ("Valhalla Investment"); Viking Fund, LLC ("Viking Fund"); Viking IRA Fund, LLC, ("Viking IRA Fund"); Victory Fund, Ltd. ("Victory Fund"); Victory IRA Fund, Ltd. ("Victory IRA Fund"); and Scoop Real Estate, LP ("Scoop Real Estate") (collectively, the "Hedge Funds") respectfully files this Motion (I) For Determination that

Wells Fargo Bank, N.A.'s Failure to Comply with this Court's Claims Administration Process Extinguished Its Purported Interests in Receivership Properties, and (II) For Release of Proceeds of Sale of Sarasota Property ("Motion").[1]

In relevant part, Wells Fargo Bank, N.A.[2] ("Wells Fargo" or "the Bank") identifies itself as follows: (1) a second priority secured lender with respect to the approximately 420 acres held by the Receiver in Buncombe and McDowell counties, North Carolina ("Laurel Mountain Property") and (2) a loan servicer on a first priority secured loan held by Bank of America ("BoA") and a second priority secured lender on former Receivership property located at 464 Golden Gate Point, Unit 703, Sarasota, Florida (the "Sarasota Property") (collectively, "the Properties"). The Receiver sold the Sarasota Property (*See* Docs. 1175 and 1177) and any interests Wells Fargo had in it were transferred to the proceeds of the sale until resolution by the Court. The Laurel Mountain Property currently remains an asset of the Receivership. This Motion relates to these Properties and loans.

Wells Fargo never submitted a claim related to either of the Properties. As demonstrated below, in April 2011—months after this Court's Claims Bar Date—the Receiver provided the Bank an opportunity to submit a belated Proof of Claim, and that if it believed there were circumstances justifying its failure to submit a timely claim, the

[1] The parties previously briefed this matter (see Docs. 740, 755, 762) but the Court deferred ruling pending resolution of *Wiand v. Wells Fargo Bank, N.A.*, et al Case No. 8:12-cv-557 (M.D. Fla.) (See Doc. 955). That matter is pending before the Eleventh Circuit Court of Appeals on the Receiver's appeal of summary judgment in favor of Wells Fargo. (*See Burton Wiand v. Wells Fargo Bank N.A.*, Case No. 15-10968-CC (11th Cir.)). However, the Receiver respectfully believes that in light of opinions recently issued by this Court barring purported secured and unsecured creditors who failed to timely file proofs of claim from recovering from the Receivership Estate, the result of the Receiver's appeal will not impact the narrow range of procedural arguments relevant to this Motion. Consequently, the Receiver submits that these limited issues are now ripe for adjudication.

[2] Wells Fargo Bank, N.A. is successor-in-interest to Wachovia Bank, N.A.

Receiver would consider them. Wells Fargo refused to respond to the Receiver's instructions. Instead, the Bank moved for a determination by this Court that the filing of proofs of claim is not necessary to preserve secured creditors' state law security interests in, and claims against, collateral in the Receiver's possession, or in the alternative, leave to file late claims pursuant to Federal Rule of Civil Procedure 60(b) ("Motion for Determination") (Doc. 740).

Wells Fargo's obstinacy on this matter has frustrated the Receiver's attempts to dispose of the Properties. Although the Court previously deferred ruling on the Motion for Determination, the pending appeal of the Receiver's case against Wells Fargo will not impact the arguments for denial made in this motion. Accordingly, the Receiver brings this Motion to resolve some outstanding issues so that he can proceed with selling and distributing Receivership assets to move closer towards winding down the Receivership.

Of specific relevance, this Court has already held that secured creditors like Wells Fargo must file timely proof of claim forms in compliance with the claims administration process to preserve their claims, just as unsecured creditors must. As such, Wells Fargo's status as a secured creditor does not excuse its failure to file timely proof of claims forms. Additionally, the Bank is not entitled to any relief under Rule 60(b) because its request was untimely and it did not meet its burden of establishing "excusable neglect." Accordingly, the Receiver respectfully requests entry of an order granting this Motion[3].

CHRONOLOGY OF RELEVANT DATES

[3] Wells Fargo has yet to file claims related to the Properties. As such, the Receiver's arguments articulated herein pertain exclusively to the procedural relief sought by the Bank (*see* Doc. 740). Should this Court allow Wells Fargo to file belated claims, or determine that, as a secured creditor, it did not need to file claims, the Receiver reserves his right to approve or reject such claims on their merits. So as to preserve Receivership assets, the Receiver is not addressing the merits of any of Wells Fargo's claims at this stage.

Wells Fargo alleges it was not on notice of the claims administration process and that its failure to timely file proof of claims was the result of "excusable neglect." (*See, e.g.*, Docs. 690, 740, 762). Below is a chronology of dates relevant to these assertions.

Feb. 11, 2009	Order expanding Receivership to include Laurel Preserve, LLC, entity holding title to Laurel Mountain Property. (Doc. 44)
Feb. 13, 2009	Orders appointing Receiver and expanding Receivership to include Laurel Preserve, LLC filed in Buncombe County, N.C., where part of Laurel Mountain Property is located. (Doc. 713, ¶8).
Mar. 9, 2009	Receiver sends letter to Wells Fargo Legal Group identifying Laurel Preserve, LLC as Receivership Entity and enclosing copy of Order expanding the Receivership to include Laurel Preserve, LLC. (Doc. 713-5).
Mar. 17, 2009	Wachovia's counsel sends letter to Receiver advising that Wachovia issued mortgage to Laurel Preserve and that loan is in default. (Doc. 713-6).
Mar. 25, 2009	Order of Preliminary Injunction and Order expanding Receivership to include Laurel Preserve, LLC filed in McDowell County, N.C., where part of Laurel Mountain Property is located. (Doc. 713, ¶12).
Apr. 8, 2009	Order of Preliminary Injunction filed in Buncombe County, N.C. (Doc. 713, ¶9).
June 9, 2009	Wells Fargo's counsel emails Receiver regarding his marketing of Laurel Mountain and advising that Wells Fargo issued mortgage related to the property. (Doc. 713-7, p.5).
June 10, 2009	Receiver files Order Reappointing Receiver in W. D. of North Carolina, where Buncombe County is located. (Doc. 713-1).
June 26, 2009	Wells Fargo's counsel emails Receiver advising the Bank wants to have appraisal performed of Laurel Mountain. (Doc. 713-7, p.9).
July 22, 2009	Receiver emails Wells Fargo's counsel to provide update regarding marketing Laurel Mountain (Doc. 713-7, p.11).
Jan. 28, 2010	Order granting Receiver possession of and title to Sarasota Property. (Doc. 327).
Jan. 29, 2010	Receiver mails copy of Notice of Filing to counsel for both BoA and Wells Fargo. This notice includes: (a) Order appointing Receiver; (b) Order of Preliminary Injunction; and (c) Order granting Receiver title to Sarasota Property. (Doc. 756-3).
Feb. 1, 2010	Receiver files Notice of Filing in foreclosure action styled *Bank of America, National Association v. Neil Moody*, et al. Case No. 2009 CA 017517 NC (12th Cir. Fla.). (Doc. 756-2).
Feb. 4, 2010	Receiver emails Wells Fargo's counsel to set conference call to discuss Laurel Mountain. (Doc. 713-7, p.16).
Feb. 25, 2010	Order granting Receiver title to Sarasota Property is recorded in

	Official Records of Sarasota County, Florida. (Doc. 756-1).
Apr. 21, 2010	Order granting Receiver's motion to approve procedure to administer claims and proof of claim forms and to establish deadline for filing proof of claims. (Doc. 391)
June 4, 2010	Receiver mails claim packets to BoA and Wells Fargo. (Docs. 713-10; 756-5).
Sept. 2, 2010	Claims Bar Deadline.
Sept. 2, 2010	Wells Fargo timely files its Claim Form for Rite-Aid Property, but does not file claim form for either of the Properties. (Doc. 713-11).
Oct. 28, 2010	Receiver emails counsel for BoA and Wells Fargo reiterating that Receiver has possession of Sarasota Property and requesting both provide itemized payoff figures. Only Wells Fargo responds. (Doc. 756-6).
Nov. 2, 2010	Receiver again emails BoA and Wells Fargo's counsel requesting BoA's itemized payoff figure. BoA responds that it will provide the requested information. (Doc. 756-8).
Nov. 22, 2010	Wells Fargo sends a letter to Receiver informing that it possesses loan payoff information but needed borrower's authorization. (Doc. 756-9).
Dec. 30, 2010	Wells Fargo confirms to Receiver's counsel that it is servicer on first mortgage loan, currently assigned to BoA, and that it originated second mortgage in amount of $880,000 on May 23, 2006. Letter additionally states that Wells Fargo will not negotiate fees or costs with Receiver. (Doc. 756-10).
Jan. 26, 2011	Receiver again informs Wells Fargo that Sarasota Property is part of Receivership Estate and that Wells Fargo is prohibited from interfering with Receiver's possession of the Property. (Doc. 756-11).
Feb. 17, 2011	Wells Fargo sends Receiver a Beneficiary's Demand Statement related to Sarasota Property which provided details of all fees and costs. (Doc. 756-12).
Apr. 5, 2011	Receiver sends Wells Fargo letter advising that claims bar date expired, but that it is free to submit a claim with an explanation for its failure to timely file. (Doc. 713-8).
July 21, 2011	Findings of Fact and Conclusion of Law and Order Vacating Easement entered in *Wiand v. Carolina Mtn. Land Conservancy*, Case No. 8:09-cv-2443-T-27BM (M.D. Fla. May 24, 2011) filed in Buncombe County. (Doc. 713-2).

BACKGROUND

On April 21, 2010, the Court granted the Receiver's motion to, in relevant part, approve a procedure to administer claims and proof of claim forms ("POCs") and to

establish a deadline for filing POCs. (Doc. 391.) The Order directed that each "entity that asserts a claim against the Receivership arising out of or related in any way to the acts, conduct, or activities of Receivership Entities must submit an original, written Proof of Claim ... **to be received on or before the later of 120 days from the entry of this Order or 90 days from the mailing of the Proof of Claim Form to known possible Claimants** ..." ("Claim Bar Date"). Order ¶ 2 (emphasis in original). Further, it explained that any "entity that fails to submit a Proof of Claim ... on or before the Claim Bar Date ... shall be forever barred and precluded from asserting any claim against the Receivership or Receivership Entities ...." *Id.*

In accordance with the procedures adopted by the Court, the Receiver provided notice to every potential claimant by mailing a claim packet consisting of a cover letter, a Notice of Deadline Requiring Filing Of Proofs Of Claims On Or Before September 2, 2010 ("Claim Bar Date Notice"), and a Proof of Claim form. (Doc. 713-10.) The cover letter explained that, "[m]ost importantly, to have your claim considered, you **MUST** submit a completed and signed Proof of Claim form ... that provides responses to all of the questions in the Proof of Claim form, so that it is **received on or before September 2, 2010** at the address provided in the Proof of Claim Form and Notice." *Id*. Similarly, the Claim Bar Date Notice explained that "the Court entered an order (the "**Claim Bar Date Order**") establishing September 2, 2010 (the "**Claim Bar Date**") as the last date for each person or entity ... to file a Proof of Claim against the Receivership Entities." Claim Bar Date Notice at 2-3. It also explained that "[i]f you think that you may have a claim, you **MUST** file a Proof of Claim to share in distributions from the Receivership Estate." *Id.* at 3. It added that,

> If you were not an investor, but believe you are or may be a creditor of one o[r] of the Receivership Entities, you must provide to the Receiver by the Claim Bar Date (1) the amount you contend you are owed from any Receivership Entity; (2) any amounts received from any Receivership Entity; and (3) legible copies of all documents on which you base your claim (i.e., all invoices for services or goods provided, loan documents, etc.) or, if any such documents are not available, a detailed explanation as to why any such documents are not available.

Id. at 4. Finally, the Claim Bar Date Notice warned as follows:

> **4. CONSEQUENCES OF FAILURE TO FILE A PROOF OF CLAIM BY THE BAR DATE**
>
> ANY HOLDER OF A CLAIM OR POTENTIAL CLAIM THAT FAILS TO FILE A PROOF OF CLAIM ... BY THE CLAIM BAR DATE WILL BE FOREVER BARRED, ESTOPPED, AND ENJOINED FROM ASSERTING SUCH CLAIM AGAINST THE RECEIVERSHIP ENTITIES ... THEIR RESPECTIVE PROPERTY, THE RECEIVER, OR THE RECEIVERSHIP ESTATE, AND FROM PARTICIPATING IN ANY DISTRIBUTION FROM THIS RECEIVERSHIP.

Id. at 5 (emphasis in original). The Proof of Claim form itself 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 <u>received</u> on or before **September 2, 2010** ...." *Id*. at 10. It adds that, "IF THIS COMPLETED FORM, SIGNED UNDER PENALTY OF PERJURY, IS NOT <u>RECEIVED</u> 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 RECEIVE ANY DISTRIBUTIONS FROM THE RECEIVER." *Id.*(emphasis in original).

<u>Wells Fargo Had Proper Notice Of Its Need To File A Claim Relating To Its Purported Interest In Laurel Mountain.</u> Wells Fargo has been on notice of this Receivership, of the Laurel Mountain Property's association with the Receivership, of the

requirement of filing a claim and of the Claim Bar Date for years. Wells Fargo received the claim packet and understood its contents as demonstrated by its timely filing of a pre-printed Proof of Claim form mailed by the Receiver. (Doc. 712 at 9; Doc. 713 ¶ 24). That claim, however, related **only** to its loan purportedly secured by real property generally referred to in this Receivership as the "Rite Aid Property", and **not** to either of the Properties. (*See, e.g.*, Docs. 713-11, 713-12). The Receiver informed Wells Fargo of this Receivership shortly after it started (Doc. 690-2) and of Laurel Preserve, LLC's (the record owner of the Laurel Mountain Property) inclusion in the Receivership on March 9, 2009—less than a month after it was included in the Receivership (Doc. 713-5). On March 17, 2009, counsel for Wells Fargo informed the Receiver of its security interest in the Laurel Mountain Property (Doc. 713-6), and communications between Wells Fargo and the Receivership relating to that property continued (Doc. 713-7). Further, on June 4, 2010, the Receiver mailed a claim packet to Wells Fargo that specifically identified Laurel Preserve as a Receivership entity and, as detailed above, clearly explained the claims process and consequences of not filing a timely claim. (Doc. 713-10).

Notably, on April 5, 2011, the Receiver's counsel informed Wells Fargo's counsel in writing that the Claim Bar Date had expired in September 2010, and added that if "[Wells Fargo] believes there are circumstances that justify its failure to file a Proof of Claim, it remains free to submit one and an explanation for the delay and any other materials or information which it deems appropriate." (Doc. 713-8). That letter also explained that if Wells Fargo did not file a claim, "then its interest will not be considered by the Receiver, and the Court…." *Id*. Despite the Receiver's invitation, Wells Fargo did not respond or file a claim.

Wells Fargo Had Proper Notice Of Its Need To File A Claim Relating To The Sarasota Property. Similarly, both Wells Fargo (the servicer on one relevant loan and holder of a second relevant loan) and BoA (the holder of the relevant loan serviced by Wells Fargo) received timely notice relating to the Sarasota Property and both had notice of this property's inclusion in this Receivership before the Claim Bar Date. The Court approved this property's inclusion in the Receivership on January 28, 2010 (the "Sarasota Property Order"") (Doc. 327). BoA had initiated a foreclosure proceeding and the case was pending at that time. (*See* Doc. 324 at 2, 10.). On February 1, 2010, the Receiver filed in the foreclosure proceeding a notice of filing accompanied by the Sarasota Property Order, the Order Appointing Receiver, the Order of Preliminary Injunction and Other Relief as to Defendants Scoop Capital, LLC and Scoop Management, Inc. and All Relief Defendants, and an Order Reappointing Receiver. (Doc. 756-2). He also served a copy of this notice and orders on BoA's and Wells Fargo's attorneys in the foreclosure case on January 29, 2010. (Doc. 756-3, 4). On February 25, 2010, a copy of the Sarasota Property Order was recorded in the Sarasota County public records. (Doc. 756-1).

As previously noted, the Receiver then mailed to Wells Fargo a claims packet on June 4, 2010, which Wells Fargo received and understood. A claim packet was also mailed to BoA on June 4, 2010. (Doc. 756-5). After the Claim Bar Date, the Receiver's representatives continued to communicate with BoA's and Wells Fargo's respective outside counsel that were handling the Sarasota Property and internal employees about the Receivership and its control over that property. In those communications, it is evident the banks and their representatives were aware the Sarasota Property was part of the Receivership. (Doc. 756-6,7,8). Nevertheless, neither bank filed a claim relating to either

of the loans purportedly secured by the Sarasota Property.

ARGUMENT

Though it was on notice of its obligation to file POCs, Wells Fargo chose not to file POCs relating in any way to the Properties. Instead, months after the Claims Bar Date, it filed its Motion for Determination. Notably, Wells Fargo has the burden of proof on its Motion and its purported claims regarding the Properties. (*See* Doc. 675 at 82 ("The Claimant shall have the burden of proof.")); (Doc. 776 (approving procedures set forth in Doc. 675)).

As argued below, the Motion for Determination should be denied because this Court has already held that secured creditors were required to comply with this Court's order governing the claims administration process, just like unsecured creditors. Wells Fargo failed to do this and its status as a purported secured creditor did not relieve it of its obligation to comply with this Court's process. Additionally, the Bank is not entitled to relief under Federal Rule of Civil Procedure 60(b) as a matter of law for two independent reasons: first, because it did not seek relief within the one-year period set forth in the rule, and second, because even if it had complied with that deadline, it did not satisfy the substantive requirements for relief under Rule 60(b).

I. THE COURT HAS ALREADY HELD IN THIS RECEIVERSHIP THAT SECURED CREDITORS MUST TIMELY FILE PROOFS OF CLAIMS TO BE ENTITLED TO PROCEEDS FROM THE RECEIVERSHIP ESTATE.

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, or it will be precluded from later pursuing its claims. *See Callahan v. Moneta Capital Corp.*, 415 F.3d 114, 117-18 (1st Cir. 2005) (potential claimants that did not submit their claims by bar date lacked

"standing to object to the adjudication of a pending claim in the Claims Disposition Order"); *SEC v. Princeton Econ. Int'l Ltd.*, 2008 WL 7826694, *4 (S.D.N.Y. 2008) ("All persons or entities with a claim that failed to file a proof of claim prior to the Bar Date and were not excused from filing a proof of claim under the Plan are forever barred, estopped, and permanently enjoined.").

Nevertheless, Wells Fargo did not file any claims relating to the Properties and argued it did not have to because it is a secured creditor. However, the Court established an unambiguous claims process here with specific filing requirements and deadlines. (*See* Docs. 390, 391). Critically, Wells Fargo **complied with those deadlines with respect to the Rite Aid Property**, but did not comply with them with respect to the Properties in spite of receiving notice of its responsibilities. Thus, the Bank's own actions are inconsistent with its position that no POC was necessary to preserve its purported secured claims.

This Court has already held in this Receivership that the requirement of filing timely claims applies to everyone, including secured creditors. Most recently, Branch Banking and Trust Company ("BB&T") filed a motion substantively identical to Wells Fargo's Motion for Determination. Specifically, BB&T moved for turnover of the proceeds from the sale of real property in which it had a secured interest. Like Wells Fargo here, BB&T failed to submit a timely claim despite having received notice, and argued that its status as a secured creditor exempted it from having to file a claim.

This Court rejected BB&T's argument. Significantly, this Court explained that the order outlining the claims process in this Receivership was "unambiguous" and clearly required "that claimants follow a particular procedure or suffer their claims

forever barred." (Doc. 1174 at p.7). Noting the inapplicability of the Bankruptcy Code and its rules to federal equity receiverships, the Court found that the burden rests on the secured creditor "to protect its rights pursuant to the framework clearly set forth in the conduct of this receivership. The claims process procedure did not contain any language exempting secured creditors from filing a proof of claim." *Id*. As such, BB&T's failure to timely file a POC barred it from enforcing any interest it may have had in the sale proceeds. *Id.*

The Court also has refused to recognize other purported creditors' late claims because they, like Wells Fargo, failed to comply with the claims procedures and deadlines promulgated in this case. For example, on March 1, 2013, investor Elendow LLC ("Ellendow") 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: (1) Elendow missed the September 2, 2010, deadline to file a Proof of Claim form by almost a month; (2) the Receiver then allowed Elendow the opportunity to explain the reasons for missing the deadline, but it did not timely respond to the Receiver's letter; (3) after the Court denied Elendow's claim, Elendow never submitted an objection although the objection deadline was March 28, 2012; and (4) 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 denied its motion. (Doc. 1002 at 10; *see*

also Doc. 1204 (Order granting Receiver's Motion to Overrule Objection to Determination of Claim of MMG Bank & Trust, Ltd., because it "failed to comply with the claims procedures and deadlines promulgated by this Court, and the information belatedly supplied in its objection did not cure the deficiency.")).

Based on this precedent and other applicable cases, the Court should reach the same result here. Every creditor claiming an interest in Receivership property, whether the interest is secured or unsecured, unequivocally was required to file a timely claim with the Receiver to preserve its interests for adjudication by this Court. *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) ("Every person who has any claim or demand against the estate or property in the custody of the court through the receiver, ... must assert such claim or demand in the court in which such receiver was appointed."). For efficiency and finality, 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").

Not a single **receivership** case supports Wells Fargo's position that secured creditors do not have to comply with the Court's claims process. Instead, the Bank relies exclusively on the Bankruptcy Code and its corresponding cases to support its argument. The Court has previously dispatched these cases in finding that the bankruptcy opinions do not control this federal equity receivership. (*See* Doc 822 at pp. 12-13 "[A]lthough federal district courts presiding over federal equity receiverships, such as this SEC case, may look for guidance from bankruptcy law, [footnote omitted] they are not restricted by the dictates of bankruptcy law."); (*see also* Doc 1061 at pp. 7-8 ("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."). The Court's reasoning is correct and there is copious authority supporting the Court's analytical distinction. *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. 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.").

Here, the Court's claims process procedures did not exempt secured creditors from timely filing claims to preserve their interests in Receivership property. As demonstrated above, the Bank was given proper notice of its need to file POCs for the Laurel Preserve and Sarasota Properties. Moreover, Wells Fargo indisputably knew about the claims process (and its applicability to both secured and unsecured creditors) because it filed a POC with respect to the Rite Aid Property, and it received correspondence from the Receiver regarding that claim. This Court has now held that secured creditors were required to timely file POCs. Wells Fargo failed to do this and is precluded from asserting its claims with respect to the Properties. *See 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). Accordingly, the Court should find that Wells Fargo's purported interests are extinguished.

II. WELLS FARGO'S REQUEST FOR RELIEF TO FILE UNTIMELY CLAIMS UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(b) SHOULD BE DENIED

Wells Fargo also argues that its failure to timely file POCs regarding the Properties should be excused under the exceptions in Federal Rule of Civil Procedure 60(b)(1), which allows a court to relieve a party from a final judgment or order for "excusable neglect." Relief under Rule 60(b)(6) is available only "upon a showing of

exceptional circumstances." *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir.1993). 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 Inv. Servs. Co. v. Brunswick Associated Ltd. P'ship*, 507 U.S. 380, 395 (1993); *see also 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)).

Wells Fargo effectively asks the Court to modify its Order barring untimely claims and its request should be denied for two separate reasons. First, it fails as a matter of law because Wells Fargo has not complied with the strict one-year deadline for seeking relief under Rule 60(b)(1). Second, it fails because Wells Fargo has wholly failed to satisfy its burden of demonstrating "excusable neglect."

A. <u>Wells Fargo's Request for Relief is Untimely Under Federal Rule 60(b).</u>

Wells Fargo's request for relief under Rule 60(b)(1) fails as a matter of law because any such motion **must** be made within one year of the entry of the order in question. *See* Fed. R. Civ. P. 60(c)(1) (emphasis added); *see also Pioneer Inv. Servs. Co.*, 507 U.S. at 393 ("The same is true of Rule 60(b)(1), which permits courts to reopen judgments for reasons of 'mistake, inadvertence, surprise, or excusable neglect,' but only on motion made within one year of the judgment").

The Court's Order establishing a Deadline for Filing Proofs of Claims (Doc. 391) was entered on April 21, 2010, and set a Claim Bar Date of September 2, 2010. This Order was "clear and unambiguous" and all parties, including Wells Fargo, were advised

that failure to comply with the Claims Bar Date would "forever bar[] and preclude[] [them] asserting any claim against the Receivership or Receivership Entities …." (*See* Docs. 1174, p. 6, n. 10; 713-10). In other words, by operation of this court's April 21, 2010 Order, Wells Fargo was barred from pursuing the purported interests underlying its Motion for Determination on September 2, 2010.

Under Rule 60(b)(1), at best for Wells Fargo, it had until September 2, 2011, which was one year after the Claims Bar Date (if not only until April 21, 2011), to seek relief under the "excusable neglect" standard since it became barred from pursuing any interest it may have had in the Properties on September 2, 2010.[4] Wells Fargo, however, waited until February 8, 2012 to seek relief. (Doc. 740).

The Court has previously denied as untimely motions seeking to file late claims under Rule 60(b). (*See* Doc. 1174). Because like BB&T, Wells Fargo did not file its Motion for Determination within one year after it was barred from pursuing the interests it pursues in that Motion, as a matter of law Wells Fargo's requested relief must be denied.

B. <u>Wells Fargo Submitted No Relevant Proof And Otherwise Failed To Satisfy Its Burden Under Rule 60(b).</u>

Even assuming *arguendo* that the Motion for Determination was timely filed, it should still be denied because Wells Fargo has not satisfied its burden for establishing excusable neglect. *See Pelican Production Corp. v. Marino*, 893 F.2d 1143 (10th Cir.

[4] The Court's March 2, 2012, Order granting the Receiver's Motion to (1) Approve Determination and Priority of Claims, (2) Pool Receivership Assets and Liabilities, (3) Approve Plan of Distribution, and (4) Establish Objection Procedure (Doc. 776) re-confirmed that any person or entity that failed to comply with the Claims Bar Date was barred from pursuing any claim. And while that Order also stated that the dispute between the Receiver and Wells Fargo over the Bank's purported interests in the Properties would be resolved by a later order after the Court resolved Wells Fargo's motion to disqualify the Receiver, that Order did not in any way change that the April 21, 2010 Order, unequivocally barred Wells Fargo from pursuing those interests on September 2, 2010.

1990) ("The burden is upon the party moving to have the judgment set aside to plead and prove excusable neglect."). Wells Fargo does not "prove" excusable neglect because Wells Fargo offers almost no evidence to support a finding of excusable neglect, such as affidavits or declarations. Rather, Wells Fargo primarily relies on argument, which does nothing to prove excusable neglect.

Wells Fargo does attach a Declaration of Elizabeth A. Ryan (the "Ryan Declaration") in support of its Motion (Doc. 740-E). However, the Ryan Declaration falls short of providing the requisite supporting evidence of excusable neglect. Ms. Ryan identifies herself as a "Mortgage Quality Assurance Analyst at Wells Fargo Home Equity Group" (Doc. 740-E, ¶ 1) and offers her unfounded opinion that "in [her] experience a secured lender is not required to file a Proof of Claim and can simply stand upon its state law property interest as evidenced by its mortgage and security interest." (Doc. 740-E, ¶ 5). As discussed above, there is no support for this proposition in receivership law, and Ms. Ryan does not even specify that she is referring to her "opinion" in a receivership setting. Finally, Ms. Ryan declares that she did not receive notice of the above-captioned proceeding until April 2011, one year and five months after the bar date for filing Proofs of Claim in this case (September 2, 2010).

This is not evidence of excusable neglect. That a "mortgage analyst" incorrectly "presumed" (Doc. 740-E, ¶ 5) that secured creditors do not need to file claims in "a bankruptcy proceeding" is not tantamount to relevant evidence; it is simply an incorrect "opinion" of a Wells Fargo employee which has no relevancy in a federal equity receivership like this one and is insufficient as a matter of law to establish "excusable neglect." *See McDowell-Bonner v. District of Columbia*, 668 F. Supp.2d 124 (D.C. Cir.

2009) ("inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect") (internal citation omitted).

Moreover, although Ms. Ryan states that she did not receive notice of this proceeding until April 2011, she fails to identify what, if any, involvement or responsibility she had for the Properties or for deciding whether to file a claim. Further, Ms. Ryan makes no mention of whether other Wells Fargo employees or officers received timely notice of the instant proceedings well in advance of the Claim Bar Date. As shown by Wells Fargo's filing of a claim relating to a different property (the Rite Aid Property) the clear answer is that Wells Fargo received timely notice and clearly understood the Court's Order establishing the claims process, the Bank's requirements under that Order, and the consequences of failing to abide by the Order.

The Receiver was not obligated to provide notice to every Bank employee or specifically to Ms. Ryan or any other "mortgage analyst." He was simply required to provide notice reasonably calculated, under the circumstances, to apprise Wells Fargo of this Receivership and its right to file timely claims to preserve its interests. *See Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). The Receiver complied with this obligation, and the Bank received timely notice of the Claims Bar Date and of its obligation to file claims. If Wells Fargo did not have in place adequate internal procedures to protect its interests, that is the fault of Wells Fargo, and not of the Receiver, and it does not rise to the level of "excusable neglect."

1. Wells Fargo, Not The Receiver, Has Been Responsible For The Long Delay.

As noted above, the Court's Rule 60(b) analysis must consider the length of Wells Fargo's delay in filing claims and the reason for the delay. *Pioneer Inv. Servs.*, 507 U.S. at 395. Without justification, Wells Fargo blames the Receiver for its failure to file its claims. (Doc. 740, p. 14). But rather than pointing to any facts demonstrating that the Receiver caused Wells Fargo's "delay," Wells Fargo superficially mentions that vague and unidentified complexities of its merger with a failed financial institution combined with its purported misunderstanding of this Court's Claim Bar Date caused its delay and also states that it did "not understand that its failure to file claims before the bar date could result in a loss of its valid state law property rights…." (*Id.*, p. 15). However, with respect to the "merger," Wells Fargo submits no supporting proof to show how any of that impacted its filing of claims. In fact, it did file a claim on the Rite Aid Property but does not explain how it knew to file that claim while not knowing to file claims with respect to the Properties. With respect to its lack of understanding that its rights could be terminated, this is not a valid ground for finding excusable neglect. *See Noah v. Bond Cold Storage*, 408 F.3d 1043 (8th Cir. 2005) ("Neither a mistake of law nor the failure to follow the clear dictates of a court rule constitutes excusable neglect"). It also is inconsistent with Wells Fargo's filing of a claim relating to the Rite Aid Property. That the Bank did file a claim to protect its purported security interest related to another property belies its dubious claim that its 2008 merger—nearly two full years before the claims bar deadline—precluded it from understanding the Court's Order.

As the record demonstrates, Wells Fargo was on notice of the scope of the Receivership and aware of the procedure for filing claims relating to its interests, was

aware of the deadline for filing claims, and had many communications with the Receiver's representatives. Its failure to timely file claims was, at best, a complete lack of diligence and thus not excusable neglect. *See Robinson v. Wix Filtration Corp, LLC.*, 599 F.3d 403 (4th Cir. 2010) ("A party that fails to act with diligence will be unable to establish that his conduct constituted excusable neglect").

2. Wells Fargo Has Not Shown That It Acted In Good Faith.

Under Rule 60(b), the Court must consider whether Wells Fargo acted in good faith. *Pioneer Inv. Servs. Co.*, 507 U.S. 395. Wells Fargo does not establish that it acted in good faith[5] in this proceeding. For example, as outlined above, Wells Fargo was on notice of this Court's and the Receiver's jurisdiction and control over the Laurel Mountain Property as far back as no later than March 2009. Communications between Wells Fargo and the Receivership continued through February of 2010. Wells Fargo's counsel sent a pair of letters to the Receiver in March 2011 which again identified Wells Fargo's interest in that property and demanded payment on the underlying loan. On April 5, 2011, the Receiver responded by letter to Wells Fargo advising the deadline for filing a claim had passed in September 2010, but that if "the Bank believes there are circumstances that justify its failure to file a Proof of Claim, it remains free to submit one and an explanation for the delay and any other materials or information which it deems appropriate." (Doc. 713-8). Well Fargo ignored the Receiver.

Instead, without ever notifying the Court or the Receiver, in June (and again in July) 2011, Wells Fargo filed a petition in the criminal case against Nadel pending in the

[5] Under Rule 60(b)'s "good faith" analysis, only Wells Fargo's conduct during the Receivership proceedings is relevant. As such, while its pre-receivership conduct during Nadel's scheme is relevant to the good faith inquiry under the Florida Uniform Fraudulent Transfer Act, the Bank's pre-Receivership conduct is irrelevant to the arguments in this Motion.

U.S. District Court for the Southern District of New York seeking adjudication of its alleged rights to the Laurel Mountain Property. Not only did Wells Fargo's inexplicable failure to serve or otherwise notify the Receiver or this Court of its petition demonstrate a lack of good faith, but it violated this Court's injunction. It violated the injunctive language of the Order Appointing Receiver (Doc. 8) enjoining all parties with notice of that Order – such as Wells Fargo – "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 Relief Defendants…." *See also* Order Granting Second Unopposed Motion to Expand Scope of Receivership (Doc. 44) (including Laurel Mountain Preserve within the ambit of the Court's Order Appointing Receiver). Rather than filing a late claim, Wells Fargo sought to circumvent this Court and the Receiver in violation of an injunction by seeking relief in New York without giving notice to either this Court or the Receiver. As the Court may recall, it was displeased with Wells Fargo's conduct and found the Bank's jurisdictional arguments to be meritless. (*See* Doc. 786-1). Without question, Wells Fargo's has not acted in "good faith" during these proceedings.

3. <u>Allowing Wells Fargo To File A Claim Nearly Five Years After The Deadline Will Prejudice The Receiver And Impact The Proceedings.</u>

The consequences for the Receivership and the injured investors will be significant should Wells Fargo be allowed to file late claims. Wells Fargo is seeking preferential treatment by not having to comply with the same claims procedures that all other purported creditors were required to follow. Such preferential treatment is inconsistent with the equitable principles that govern this proceeding. Allowing the Bank

to file claims nearly five years after the Claims Bar Date would undermine the finality and absolute nature of the Claims Bar Date, and would encourage other claimants to attempt to either file late claims or seek to modify and supplement their previous submissions. The purpose of the Claims Bar Date is precisely to avoid these issues and create finality to the process.

Wells Fargo became aware of this Receivership no later than in a matter of weeks after the inception of this Receivership and, as a sophisticated party with sophisticated counsel, has known about its need to file claims to preserve its interests in Receivership property for equally as long. But in any event, it received the claims packet that was mailed on June 4, 2010, and thus cannot dispute that it received all the notice it was entitled to about what it had to do to preserve its interests and have them adjudicated. Yet, for reasons that still remain a mystery and for which there is no legal support, Wells Fargo chose not to file claims on the Laurel Mountain Property or the Sarasota Property.

As the Court has already found, allowing any late claims at this juncture will prejudice "both the victims of the fraud and the judicial administration of this receivership." (Doc. 1164, at p.6) (citing *In re Intelligent Med. Imaging, Inc.*, 262 B.R. 142, 146 (Bankr. S.D. Fla. 2001). The rule against filing late claims is even more controlling in cases like this, where the Order establishing the claims process is "clear and unambiguous." *Id*. (citing *In re Bautista*, 235 B.R. 678, 683 (Bankr. M.D. Fla. 1999) (finding no excusable neglect based on the unambiguous court orders).

The Bank's conduct has already prejudiced the Receiver. For example, beginning in 2010, the Receiver attempted to sell the Sarasota Property, but was unable to do so because the title insurance company would not issue a policy as a result of Wells Fargo's

purported security interest. (*See* Decl. of Burton W. Wiand, at ¶15). The Receiver attempted to negotiate with the Bank a fair and equitable resolution of its outstanding fees and costs associated with the Sarasota Property loans, but it refused to enter into any negotiations. (*Id.* at ¶14) Consequently, the title insurance company would not issue a policy showing the property was being transferred free and clear of all liens and encumbrances. (*Id.*at ¶15). The Receiver was not able to finally sell the Sarasota Property until April 2015. (*Id*). Additionally, the Receiver has been unable to sell the Laurel Mountain Property because public records reflect that it is encumbered by Wells Fargo's purported lien for a loan that exceeds the current value of the Property. (*Id.* at ¶13)

While the Bank's intransigence has already prejudiced the Receiver, allowing late claims to now be filed—or to have allowed them to be have been filed when the Bank filed its Motion for Determination—will cause additional prejudice because he will be forced to expend Receivership resources in addressing this dispute to the detriment of the Receivership Estate. The main purpose of the claims process is to adjudicate all claims to receivership property in an efficient and timely manner, and to bring finality to those claims so that receivership assets can be distributed to victims. The Bank has already delayed that process, and allowing it to file claims now will prejudice the Receiver.

Further, allowing Wells Fargo to file late claims will also cause additional delay to these proceedings. Wells Fargo has made numerous filings related to the Properties and another Receivership property in this Court and even one in the Southern District of New York in violation of an injunction, causing delays in this proceeding that would have been avoided had Wells Fargo followed its obligation to timely participate in the claims process. To allow Wells Fargo to now submit additional claims will delay the

proceedings even further because of the time and resources needed to address the validity of those claims and, ultimately, delay distributions to defrauded investors. Equally importantly, it would also "open the door" for other would-be claimants who previously ignored the Claim Bar Date from seeking similar relief. The entire purpose of the Claim Bar Date is precisely to avoid situations like this which require receivers to waste scarce receivership resources to address Wells Fargo's failure to comply with these procedures. And for that reason, the hurdle to overcome for receiving permission to file a late claim is very high. Wells Fargo's showing falls far short of satisfying that hurdle, especially in light of its lack of good faith.

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 claims – are precisely those the claim bar date is meant to prevent. As this Court has already held, "[t]he orders in this equitable receivership are clear that the claim bar date and subsequent bar and injunction serve to impose finality, regardless of whether the Receiver had notice that a lien existed." (Doc. 1174, p. 8). Accordingly, the Receiver's Motion should be granted.

CERTIFICATE UNDER LOCAL RULE 3.01(g)

Undersigned counsel for the Receiver has conferred with counsel for the SEC and is authorized to represent that the SEC does not oppose the relief requested in this motion. Undersigned counsel has conferred with counsel for Wells Fargo (and Bank of America through Wells Fargo, as servicer) and is authorized to represent that they do oppose the requested relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 7, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

Respectfully submitted,

JAMES HOYER, P.A.

/s/ Sean P. Keefe

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