UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ORAL ARGUMENT REQUESTED

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

Defendants,

CASE NO.: 8:09-00087-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.
_____/

RESPONSE OF WELLS FARGO BANK, N.A. IN OPPOSITION TO 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 INTEREST IN RECEIVERSHIP PROPERTIES, AND (II) FOR RELEASE OF PROCEEDS OF SALE OF SARASOTA PROPERTY

Secured creditor Wells Fargo Bank, N.A., successor to Wachovia Bank, National Association ("Wells Fargo" or the "Bank"), responds in opposition to the Receiver's Motion (I) for Determination that the Bank's Failure to Comply with the Court's Claims

Administration Process Extinguished its Secured Interests in Receivership Properties, and (II) for Release of Proceeds from the Sale of Sarasota Property (the "Motion") (Doc. 1209).

The Bank is a non-party secured creditor based on pre-receivership loans extended to Laurel Preserve, LLC ("Laurel Preserve") and Neil Moody, as Trustee of the Neil V. Moody Revocable Trust Agreement dated February 9, 1995. Doc. 822, pp. 5-6. When the loans were made, they were secured by property referred to as the "Laurel Mountain Property" and the "Sarasota Property" (collectively, the "Properties").[1] See, e.g., Doc. 822, pp. 5-6. This Court's receiver, Burton Wiand (the "Receiver"), is asking the Court to destroy the Bank's state law protected property rights so the Receiver may distribute the sale proceeds from the Properties to other creditors. The Receiver advances two arguments to support his position: (1) the Bank's receipt of the security interest in the Laurel Mountain Property was a fraudulent transfer; and (2) this Court can simply destroy a pre-receivership, vested security interest if proofs of claim were not filed in the Receivership. Neither argument has merit.

The Receiver filed a separate lawsuit against the Bank in an effort to avoid the Bank's security interest in the Laurel Mountain Property, but he lost. After three years of litigation and exhaustive discovery, the Bank prevailed and the court concluded the undisputed facts demonstrated the Bank conducted itself in good faith; that it "was unaware of the Ponzi scheme until it became public;" and "other than the Receiver's speculation and innuendo, the Bank's evidence of good faith [was] undisputed." See Wiand v. Wells Fargo Bank, N.A.,

[1] The Receiver states the Bank is a "second priority secured lender" on the Laurel Mountain Property. Doc. 1209, p. 2. That is incorrect. The Bank is a first priority secured lender on this property. Doc. 822, p. 5 n.13.

Case No. 8:12-cv-00557-JDW-EAJ, U.S. District Court, Middle District of Florida (the "Litigation"), Doc. 325, pp. 19 and 21. The Receiver cannot re-litigate those issues here.

That leaves the Receiver with his argument that this Court has the "equitable" power to terminate a secured creditor's vested property rights in collateral if a proof of claim is not filed. That argument fails because the U.S. Constitution prohibits the taking of private property (a security interest) for a private purpose (to compensate those holding equity interests and tort claims against the entities in receivership). Even if security interests could be extinguished if proofs of claim are not filed, the Receiver failed to send claim packets to the Bank for the Properties. For these reasons, the Receiver's motion must be denied.

Alternatively, this Court should allow the Bank to file proofs of claim pursuant to its motion, filed **almost four years ago**, seeking leave to file untimely claims (Doc. 740) (the "Claims Motion"). The Receiver's argument that the Claims Motion is untimely under Federal Rule 60(b) has no merit because it ignores this Court's analysis in the BB&T order (Doc. 1174), where the Court held Rule 60's one-year clock started to tick when the Court entered its March 2012 order granting the Receiver's motion to approve his proposed distribution scheme (the "March 12 Order") (Doc. 776). However, no such deadline has begun to run with respect to the Bank because this Court specifically excluded Wells Fargo from its March 2, 2012 Order (Doc. 776, ¶9), after the Bank lodged comprehensive objections to the Receiver's motion. Docs. 689 and 690.[2] And even if the one-year deadline in Federal Rule 60(c) did apply, the Bank timely filed its Claims Motion **one month before** the Court entered its March 12 Order. Docs. 740 and 776. Equity also strongly favors the

[2] This Court also deferred ruling on all matters related to the Bank pending final adjudication of the Litigation (Doc. 955).

allowance of untimely claims. There will be absolutely no prejudice to the receivership because, at the time the Claims Motion was filed, there was no distribution plan in place, and the Court, all interested parties and the Receiver knew of the Banks' security interests from the outset.

I. SUMMARY OF ARGUMENT

The security interests the Receiver seeks to destroy were vested and perfected before this proceeding was initiated. A proof of claim was not required to preserve those vested property rights. The failure to file proofs of claim may prohibit the Bank from receiving payment for a deficiency claim, but under no circumstances does it authorize the Court to terminate the Bank's in rem rights to collateral. Those rights are protected and preserved by the U.S. Constitution.

The Receiver's interest in the Properties is limited to the interest the borrowers had in the Properties, and that interest is nothing more than any equity in the Properties. Because there is no equity in the Properties, they do not even constitute Receivership Property.

The failure to file a proof of claim can prohibit a secured creditor from receiving a distribution from an equity receivership for any deficiency that remains after the secured creditor has disposed of its collateral. But, the Bank should be permitted to file a proof of claim for any deficiency that remains on the Laurel Mountain and Moody loans because the Receiver failed to provide a claim packet to the Bank for those loans.

As demonstrated below, the Bank is entitled to: (1) turnover and release of the Laurel Mountain Property from this Court's injunction; (2) the proceeds from the sale of the

Sarasota Property ($2,147,993.69) (Doc. 1181-2, p. 8); and (3) file proofs of claim for deficiencies for the Laurel Mountain loan and the Moody loans.

II. ARGUMENT

This Court is not free to exercise discretion in the name of equity to terminate bona fide interests in specific property that vested pre-receivership. The Federal Rules of Civil Procedure require this Court to administer an equity receivership "in accord with the historical practice of federal courts." See Fed. R. Civ. P. 66. That "historical practice" establishes the fundamental framework for this Court's administration of this equity receivership, and it requires the Court to apply maxims of equity within the confines of constitutional limits. Those limits require the Court to protect and enforce substantive property rights according to applicable state law.

A. Rights of Secured Creditors in an Equity Receivership.

"It is well-established that a 'receiver appointed by a federal court takes property subject to all liens, priorities or privileges existing or accruing under the laws of the State.'" In re Real Prop. Located at Jupiter Drive, 2007 U.S. Dist. LEXIS 65276, at *10 (D. Utah June 7, 2007), adopted by 2007 U.S. Dist. LEXIS 65275, at *1 (D. Utah Aug. 31, 2007) (quoting Marshall v. New York, 254 U.S. 380, 385, 41 S. Ct. 143 (1920)). "It is equally well-established that a receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities existing at the time of his appointment." Id. (quotations and citations omitted); see also 1 Ralph Ewing Clark, A Treatise on the Law and Practice of Receivers (hereinafter "Clark on Receivers") § 269 (3d ed. 1959) ("the receiver takes the property subject to all valid liens,

priorities, equities, charges and encumbrances against the property . . . . Receivers hold property subject to valid legal and equitable liens") and § 362 (receiver succeeds only to such rights as the receivership entity had in property made the subject of receivership proceedings). The fair and equitable standard that applies to **cash distributions** from the Receivership does not apply to a secured creditor's rights to its collateral. See SEC v. Spongetech Delivery Sys., 2014 U.S. Dist. LEXIS 183297, *27 (E.D.N.Y. Dec. 18, 2014), adopted

by 98 F. Supp. 3d 530, 533 (E.D.N.Y. 2015) (enforcing secured creditor's priority claim to funds after rejecting SEC's argument that court in equity receivership can limit secured claim if it otherwise is fair and reasonable to do so).

B. A Proof of Claim is Not Required to Preserve a Secured Creditor's Vested Property Rights.

A proof of claim is required in an equity receivership only if the creditor wants to share in **distributions**, but a proof of claim is not required to enforce rights in collateral based on pre-receivership, perfected security interests like the ones at issue. See SEC v. Madison Real Estate Group, LLC, 647 F. Supp. 2d 1271, 1276 (D. Utah 2009). A secured creditor's right to exercise its property rights in collateral (in rem rights) is distinct from its right to receive a cash distribution from the liquidation of general receivership assets (in personam rights). The Receiver fails to recognize this critical distinction. Instead, he relies on this Court's decision that denied BB&T's motion for turnover of sale proceeds pursuant to its secured interest in certain real property. See Doc. 1174. BB&T's argument focused on

the treatment of security interests in bankruptcy. See Doc. 1159, pp. 14-18.[3] Although an equity receivership may not be bound by bankruptcy rules or decisions interpreting them, an equity receivership is bound by the U.S. Constitution.

C. The Court Cannot Constitutionally Extinguish the Bank's Security Interests.

Security interests are property interests protected by state law, and equity cannot ignore the law. See e.g., In re Real Prop. Located at Jupiter Drive, 2007 U.S. Dist. LEXIS 65276, at *10-*11 (court's discretion in equity receivership does not permit it to ignore state law lien priorities); Clinchfield Fuel Co. v. Titus, 226 F. 574, 579-581 (4th Cir. 1915) (court in equity must follow the law and recognize judgment creditor's priority lien on sale proceeds); Westerman v. United States, 718 F.3d 743, 752 (8th Cir. 2013) (stating "courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law"); U.S. Bank N.A. v. Farhood, 153 So. 3d 955, 958 (Fla. 1st DCA 2014) ("Courts of equity have no power to overrule established [lien priority] law.").

Security interests are protected by the Fifth Amendment from public taking without just compensation. See U.S. CONST. amend. V; United States v. Security Indus. Bank, 459 U.S. 70, 75-78 (1982); Armstrong v. United States, 364 U.S. 40, 46-49 (1960) (holding government's destruction of lien rights constituted a taking); Chrysler Credit Corp. v. Ruggiere, 727 F.2d 1017, 1019 (11th Cir. 1984) (Fifth Amendment requires bankruptcy court to protect security interest from dissipation). Here, the Receiver, an officer of this Court, seeks to destroy property rights without compensation so the Bank's collateral can be sold

[3] The differences between the issues the Court faced in the BB&T order and the issues now before the Court are addressed in more detail infra at pages 14-15.

and the proceeds given to holders of equity interests in the receivership entities. See Doc. 706, p. 12; Doc. 822, p. 14. The Receiver has stated there is "an understanding between [him] and representatives of the U.S. Attorney's Office… [that] the [Laurel Mountain Property] will be liquidated through the Receivership and used to compensate victims through the claims process in this case." Doc. 712, p. 5 ¶ 2. This Court's Receiver and the U.S. Attorney have no authority to enter into such an agreement without subjecting the United States to liability for an unconstitutional taking.

Allowing the Receiver to take the Bank's property by destroying its security interests, will result in a taking by this Court for a private purpose, which is never permitted. See Lion Raisins, Inc. v United States, 416 F.3d 1356, 1362 (Fed. Cir. 2005) ("There is no question that the United States, in general, incurs takings liability for the acts of its agents. That is, a takings 'claim against the United States' may be based on the acts of an agent of the United States."); Montgomery v. Carter County, 226 F.3d 758, 765 (6th Cir. 2000) (takings for private uses are not permitted). Even if the taking is for a public purpose, the Bank must be paid just compensation equal to the value of its security interests.

Vested property rights are not terminated if the property owner does not satisfy procedural requirements, such as filing a claim. The issue before this Court is analogous to the treatment of security interests in the administration of decedents' estates under both Florida and North Carolina law, or to proceedings to enforce a mortgage or other lien on a decedent's property. See Fla. Stat. § 733.702(4)(a) (excepting from the claims process a proceeding to enforce a security interest); N.C. Gen. Stat. § 28A-19-3(g) (same); Denton v. Getson, 637 So. 2d 82, 83 (Fla. 4th DCA 1994) (action on promissory note not barred for

failure to timely file claim against estate because proceeding to enforce liens excepted from claims process); Wells Fargo Bank, N.A. v. Coleman, 768 S.E.2d 604, 610-611 (N.C. Ct. App. 2014) (applying North Carolina law, foreclosure action not barred for same reason) , review denied, 777 S.E. 2d 871 (N.C. 2015); see also Summers v. Fin. Freedom Acquisition LLC, 2015 U.S. App. LEXIS 18507, at *8-*13 (1st Cir. Oct. 23, 2015) (failure to file claim against estate does not extinguish security interest). Similarly, in eminent domain proceedings, secured lienholders must be compensated when their property interests are taken, even if they fail to appear in the proceeding. See Fed. R. Civ. P. 71.1(e)(3) ("But, at the trial on compensation [in an eminent domain proceeding], a defendant—whether or not it has previously appeared or answered—may present evidence on the amount of compensation to be paid and may share in the award").

D. <u>The Bank Is Entitled to Release of the Laurel Mountain Property</u>.

The Receiver cites Clark on Receivers § 646 for the contention that "every creditor claiming an interest in property included in this Receivership Estate, whether the interest is secured or unsecured was required to file a timely claim with the receiver to preserve its interests for adjudication by this Court." Doc. 1209, p. 13. But that section states only the unremarkable proposition that one who seeks to share in a distribution of general receivership assets (as opposed to enforcing rights in specific collateral) must file a claim.

In its section titled "Secured claims—generally," the treatise explains secured creditors' rights to recover from debtors in receivership:

> The appointment of a receiver does not invalidate liens existing at the time the receiver is appointed, although it may affect or change the remedy or remedies which the lienholder may use to enforce his lien. Generally speaking the person who has a specific lien on property is entitled by following proper

> procedure to pay himself out of the property and if it be insufficient, then to prove his claim for the deficiency. In the case of receivership such claim must come out of the proceeds of property not covered by the specific lien and such claim for deficiency must prorate with the unsecured creditors. Generally speaking no other creditor except the lienholder is entitled to any part of the proceeds of property covered by a lien until the lienor is first paid.

Clark on Receivers § 679, p. 1248; see also id. at § 667.4, p. 1213-14 (even where a secured creditor has submitted a claim, "the maxim equality is equity . . . does not mean that courts of equity will disregard liens, charges or priorities held by a claimant").

The "proper procedure" for a secured creditor seeking to "pay himself out of the property" that is his collateral is to seek entry of an order of the receivership court: (1) directing the receiver to abandon or release collateral in the receiver's possession; or (2) granting the creditor relief from the litigation injunction to enforce state law remedies against the collateral. Clark on Receivers § 640.1; Docs. 690 and 740; see also SEC v. Wing, 599 F.3d 1189 (10th Cir. 2010) (addressing secured creditor's request for relief from receivership litigation injunction); SEC v. Stanford Int'l Bank, Ltd., 2011 U.S. Dist. LEXIS 80293 (N.D. Tex. May 6, 2011) (lifting stay to allow lien foreclosure to proceed in state court). A secured creditor **may** file a proof of claim in an equity receivership, and thereby submit to the jurisdiction of the receivership court for a just determination of its claim in the course of the receivership's administration. See Clark on Receivers §§ 546-547, 646-647 (explaining that a creditor may choose to file a claim in receivership court, but thereby consents to jurisdiction for receivership court to determine both the claim and any counterclaim in summary or ancillary proceedings; or secured creditor may seek leave of the receivership court to intervene in the receivership or to institute a separate suit to enforce any claim against specific property held by the receiver); see also, e.g., Doc. 713-10, p. 7 (Receiver's

claim packet, stating that those who file claims waive jury trial rights and submit to jurisdiction for the receivership Court). But a secured creditor cannot be ordered to either submit its claim for determination by the receivership court or else suffer the complete destruction of its vested property rights as the court appropriates the value of its collateral for the benefit of others.

The Receiver cites Riehle v. Margolies, 279 U.S. 218, 313 (1929) for the proposition that "the only way a secured creditor can seek a determination of its rights" to enforce its lien against the proceeds of a receivership sale of encumbered assets is for the creditor to timely file a proof of claim. Doc. 1209, p. 13. But Riehle neither stands for that proposition nor supports the Receiver's arguments; it does not even address a secured creditor's rights. In Riehle the court held that in the absence of a statute or order providing otherwise, an **unsecured** creditor was free to liquidate its claim against a debtor in receivership to establish the amount due. Because the debtor's assets already were held in custodia legis in receivership, the creditor could not perfect a judgment lien against the debtor's property, and could not collect on the **unsecured** judgment except by filing a claim in the receivership court.

Because there is no equity in the Laurel Mountain Property, it is not Receivership Property. See Madison Real Estate, 647 F. Supp. 2d at 1284 (property subject to a lien is not receivership property unless there is equity in the property.); Doc. 1209, p. 24 (Receiver stating the Laurel Mountain Property "is encumbered by Wells Fargo's purported lien for a loan that exceeds the current value of the Property."). The absence of a proof of claim has no effect on the Bank's rights in its collateral. As the court stated in In re Real Prop. Located at

Jupiter Drive, 2007 U.S. Dist. LEXIS 65276, at *27, "the law is clear. Equity has its limits, and they fall short of where the Receiver. . . wants them to be." The law does not permit a court to disregard property rights in the name of equity. See id. Accordingly, the Laurel Mountain Property should be released from this Court's injunction.

E. <u>The Bank Is Entitled to the Sale Proceeds from the Sarasota Property</u>.

The proceeds from the Sarasota Property also are subject to priority security interests that exceed the amount of the sale proceeds. See Doc. 1175, p. 5 (stating the amount due on the secured loans as of April 8, 2014); Doc. 1208, pp. 16-17 (Receiver acknowledging receipt of sale proceeds in the amount of $2,147,993.69). The Receiver's only argument regarding the Sarasota Property is that the Receivership is entitled to the sale proceeds because proofs of claim were not filed. That argument fails for all of the reasons discussed above. The Court should order the Receiver to turn over to the Bank the Sarasota Property sale proceeds.[4]

F. <u>The Bank Is Entitled to File a Deficiency Claim for the Laurel Preserve Loan</u>.

Despite his contentions to the contrary, the Receiver did not send a proof of claim form for the Laurel Preserve loan. Although his motion lists a series of communications regarding the Laurel Mountain Property (Doc. 1209, pp. 4-5), it does not identify a claim packet regarding that Property. The Receiver's claim forms state that a claim packet will be sent for "each" account. See Doc. 713-14, p. 3. The Bank received only a single claim form, which the Bank completed and filed for the Rite Aid loan. See Doc. 713-11; see also Doc.

[4] The liens on the Sarasota Property were transferred to the proceeds by Court order. Doc. 1177, p. 2.

1209, p. 23 (acknowledging that Receiver sent only a single claim packet to the Bank). Two other claim forms were sent to "Wachovia Securities Int'l, Inc." (not the Bank) regarding Carrelage Multi-Strategy Offshore Fund, Ltd.'s limited partnership interest in Scoop Real Estate and Carrelage Multi-Strategy Offshore Fund, Ltd.'s limited partnership interest in Viking Fund, LLC. See Docs. 713-10 – 713-12 & 713-14.

The Receiver cannot credibly contend the single claim form was for both the Rite Aid loan and the Laurel Mountain loan (and the Moody loan) when his own form states a claim packet will be sent for "each" account. Significantly, the single form sent to the Bank was sent to P.O. Box 740502, Atlanta, GA 30374-0502. Doc. 713-10. The Laurel Preserve loan documents clearly require notices to be sent to Wachovia Bank, National Association, Mail Code VA7628, P.O. Box 13327, Roanoke, VA 24040 or to Wachovia Bank, National Association, Mail Code VA7628, 10 South Jefferson Street, Roanoke, VA 24011. Doc. 740-4, pp. 8, 24. Because the Receiver failed to send the Bank a claim packet for the Laurel Preserve loan, the Court should permit the Bank to file a late claim for the deficiency on the Laurel Preserve loan.

G. <u>The Bank Is Entitled to File a Deficiency Claim for the Moody Loans</u>.

The Receiver also failed to send claim packets for the Moody loans. The Receiver contends he mailed claim packets to Bank of America and the Bank but the claim packets were **not** sent to the addresses required by the loan documents. Doc. 1209, p. 5 (citing Docs. 713-10 and 756-5). The Receiver mailed a claim packet to Bank of America at P.O. Box 15710, Wilmington, DE 19886-5710, but Bank of America's loan documents require notices to be sent to Wells Fargo Home Mortgage, P.O. Box 17339, Baltimore, MD 21297-1339.

Doc. 740-2, pp. 2, 7-8. The claim packet mailed to the Bank was sent to Wachovia Commercial Loan Services, P.O. Box 740502, Atlanta, GA 30374-0502, but the Bank's loan documents require notices to be sent to Wells Fargo Bank, N.A. 420 Montgomery Street, San Francisco, CA 94104. Doc. 740-3, pp. 22, 28. As discussed above, a claim packet was required for "each" account. There are three separate loans from Wells Fargo at issue: the Rite Aid loan, the Laurel Preserve loan, and the second priority Moody loan. The Receiver has identified only one claim packet sent to Wells Fargo, which the Bank completed and returned for the Rite Aid loan. See Doc. 1209, p. 5; Docs. 713-11 – 713-13. Because the Receiver did not send claims packets for the Moody loans, the Court should permit Wells Fargo to file late claims for the deficiency on the Moody loans. Moreover, the one claim packet sent to the Bank contained nothing to indicate that it would have been proper to file a claim in connection with the Moody loans. Moody's name is not even mentioned in the claim packet. See Doc. 713-10 and Doc. 756-5.

H. <u>Federal Rule of Civil Procedure 60 Does Not Bar the Bank's Claims</u>.

The Receiver argues the Bank's request to file proofs of claims for the Laurel Preserve and Moody loans should be denied because the Bank: (1) did not comply with the one-year deadline for seeking relief under Federal Rule of Civil Procedure 60(b)(1); and (2) the Bank failed to demonstrate excusable neglect. Doc. 1209, p. 16. Neither argument is persuasive.

The argument that the Bank failed to meet the Rule 60(b)(1) deadline is a red herring. Moreover, it ignores this Court's analysis in the BB&T Order, where the Court held Rule 60's one-year clock started to tick when the Court entered its March 2012 Order on 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. Thus, the Court already has considered, and rejected, the Receiver's position that the time started to run before March 2012. See Doc. 1174, p. 3 (denying BB&T relief because it "did not file an objection to the claim determination after entry of the March 2012 Order") and p. 6 (stating "BB&T did not seek to set aside the March 2012 order within one year," and "[s]ubmissions of excusable neglect may not be considered here because one year elapsed from the entry of the March 2012 order").

If the one-year period did not begin to run for BB&T until the March 2012 Order was entered, then it did not begin to run for the Bank before then either. However, unlike BB&T, the Bank filed its Claims Motion—in which it sought leave to file late claims—on February 28, 2012 (Doc. 740), **before** the March 2012 Order was even entered. The Bank's Claims Motion cannot be considered untimely under Rule 60(b)(1) when the motion was filed before the one-year period under Rule 60 even began to run. Additionally, the March 2012 Order had no impact on the Bank or its claims. Doc. 776, pp. 3-4.

I. The Court Should Grant Wells Fargo Leave to File Proofs of Claim Under the Excusable Neglect Standard.

The Receiver's last argument—that the Bank has "wholly failed to satisfy its burden of demonstrating 'excusable neglect'" (Doc. 1029, p. 16)—is equally ill-fated. It is certainly excusable for the Bank not to have filed proofs of claim for loans when the Receiver—despite having actual knowledge of those loans—failed to properly send claim packets for those loans.

There are four loans relevant to this issue: (1) the Rite Aid loan; (2) the Laurel Preserve loan; (3) the first priority loan on the Sarasota Property; and (4) the second priority loan on the Sarasota Property. Nonetheless, the Receiver admits that he sent only a single claim packet to the Bank, which the Receiver states gave the Bank "all the notice it was entitled to about what it had to do to preserve its interests and have them adjudicated." Doc. 1209, p. 23. But the Receiver's claim packet specifically states if "you have multiple accounts, you will receive a Proof of Claim for each account." Doc. 713-10, p. 3 (emphasis in original). The sole claim packet the Receiver sent failed to identify the specific loan account for which the claim packet was intended. Id. at p. 15. Accordingly, the Receiver's own statements, and the record, establish: (1) the Receiver sent, and the Bank received, only one claim form which, as the Receiver acknowledges, the Bank timely completed for the Rite Aid loan (Doc. 1209, p. 20); and (2) the Bank did not receive "all the notice it was entitled to" because it was entitled to receive a claim form for each account. That one packet the Receiver sent was not sent to the address required by the loan documents for notice under the Laurel Preserve loan, or to the address for notice in the loan documents for the Moody second priority loan, and that packet does not even mention Moody or the second priority loan. Doc. 713-10. Likewise, the packet the Receiver sent to Bank of America for the Moody first priority loan was not sent to the address required for notice in the loan documents and the packet did not mention Moody or the Moody loan. Doc. 756-5.

Because the Receiver's claim packet informed creditors they would receive a proof of claim form for each account, the Receiver was required to send, and the Bank was entitled to receive, a proof of claim form for each loan. See City of New York v. New York, N.H.H.R.

Co., 344 U.S. 293, 297 (1953) (creditor's failure to file claim did not bar creditor's claim when proper notice was not given; stating when "the judge ordered notice by mail to be given to appearing creditors [the creditor] acted reasonably in waiting to receive same treatment," and "even creditors who have knowledge of a reorganization have a right to assume that the [required] notice will be given them before their claims are forever barred").

The record establishes the Receiver has known of the loans at issue since the inception of the Receivership. A review of the Receiver's recitation on pages 4 and 5 of his Motion establishes that knowledge, as do the interim reports he has filed in this proceeding. Addressing an analogous situation, the Eleventh Circuit concluded it "defies common sense" for a receiver to argue a creditor's claim should be denied when the receiver knew of the claim since the controversy began. The court stated its "concern is not with art form but with the rights of parties who have furnished goods and services and are entitled to qualify to be paid." FDIC v. LaCentra Trucking, Inc., 157 F.3d 1292, 1305 (11th Cir. 1998), rehearing denied, 170 F.3d 190 (11th Cir. 1999). The court there flatly rejected the receiver's argument that claims should be denied because they were not on the proper forms where the receiver "not only failed to give mail notice; it did not furnish forms or instructions." Id. Because the Receiver failed to properly send claim packets for each of the loans now at issue, his argument that the absence of proofs of claims is "inexcusable" should be rejected.

The Receiver's reliance on In re Intelligent Medical Imaging, Inc., 262 B.R. 142 (Bankr. S.D. Fla. 2001) to support his argument of prejudice is misplaced. In Intelligent Medical, the claim for which enlargement was sought was filed after confirmation of a liquidating plan which provided for a fixed percentage distribution to each creditor, the

creditors voted in favor of the plan in reliance on the proposed plan distribution, and allowance of the late claim would have greatly reduced the distribution to creditors. In addition, the late claimant withdrew his objection to confirmation, effectively permitting the plan to be confirmed. Here, there was no fixed percentage distribution set forth in the Receiver's plan, there was no vote and reliance by creditors on a fixed distribution, and the Bank objected to the Receiver's distribution plan and was carved out of the Court's order approving the plan.

The Bank has cited a number of cases to support the proposition that where a distribution plan is not yet confirmed, and the debtor was on notice of the existence of a late claim, there is no prejudice. See Claims Motion, Doc. 740, pp. 13-14. The Receiver does not directly respond to these cases or to this argument. Essentially, the Receiver's response as to **why** he will be prejudiced is to repeat over and over again that he **will** be prejudiced. See Doc. No. 755, p. 20; Doc. No. 1209, pp. 22-25. This circularity does not provide a basis for supporting the Receiver's position. See, e.g., In re O'Brien Envtl. Energy, Inc., 188 F. 3d 116, 127 (3d Cir. 1999) (noting that "prejudice is not an imagined or hypothetical harm; a finding of prejudice should be a conclusion based on facts in evidence.").

About the best the Receiver can say to support his claim of prejudice is that if this Court allows the Bank's claims, the Receiver "will be forced to expend Receivership resources in addressing this dispute to the detriment of the Receivership estate." (See Doc. 755, p. 20; Doc. 1209, p. 24). Essentially, the Receiver's argument as to prejudice is that he will be forced to deal with Wells Fargo's vested and constitutionally protected property rights, and this will cost the receivership estate money. This argument does not trump the

Bank's vested security interests, nor does it amount to prejudice. "Otherwise, 'virtually all late filings would be condemned by this factor.'" In re O'Brien Envtl. Energy, Inc., 188 F.3d at 126 (citing Manousoff v. Macy's Northeast Inc. (In re R.H. Macy & Co.) 166 B.R. 799, 802 (S.D.N.Y. 1994) (holding that the depletion of resources otherwise available for timely filed claims is not prejudice)); In re Papp Int'l, Inc., 189 B.R. 939, 945 (Bankr. D. Neb. 1995).

Wells Fargo has at all times acted in good faith. In fact, in granting summary judgment in favor of the Bank in the Litigation, the court specifically determined that Wells Fargo at all times acted in good faith and that there was no basis in law or in fact to extinguish the Bank's vested state law property rights and security interests in its collateral. The Receiver's only allegations of bad faith concern Wells Fargo's failure to timely file proofs of claims in this case and its prior counsel's attempt to preserve the Bank's security interests in the Laurel Mountain Property in the criminal case against Arthur Nadel in the Southern District of New York. These allegations have no merit as there is absolutely no evidence in the record to suggest that Wells Fargo knowingly or recklessly pursued a frivolous claim or had any dilatory motive; instead, the evidence is clear that the Bank acted expeditiously and in good faith to protect its interests in its collateral. Indeed, as to the good-faith inquiry in a Rule 60(b) motion, the Eleventh Circuit assesses whether the movant intentionally sought advantage by the untimely filing. See Cheney v. Anchor Glass Container Corp., 71 F.3d 848, 850 (11th Cir. 1996). The Receiver does not allege that Wells Fargo intentionally sought an advantage by the alleged untimely filing (because he cannot), and therefore the Bank's good faith remains undisputed.

In further support of this Response and the Bank's entitlement to file late claims, Wells Fargo reasserts the arguments raised in its Claims Motion and reply. See Docs. 740 and 762.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2015, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which provided notice to all CM/ECF participants in this case.

/s/ Steven R. Wirth
Attorney