UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARTHUR NADEL, et al.,

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

SCOOP REAL ESTATE, L.P., et al.

Relief Defendants.
_____/

RECEIVER'S REPLY BRIEF IN SUPPORT OF HIS 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, AND INCORPORATED OPPOSITION TO WELLS FARGO BANK, N.A.'S REQUEST FOR ORAL ARGUMENT

In his 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 for Determination") (Dkt. 1209), the Receiver argues that because Wells Fargo Bank, N.A. ("Wells Fargo" or "the Bank") refused to file timely claims related to its purported interests in the Laurel Mountain and Sarasota Properties[1] (collectively "the Properties"), it is barred from pursuing those interests. In addition, the Receiver argues that

[1] Wells Fargo is servicer on a first priority secured loan held by Bank of America ("BoA") and a second priority secured lender on the Sarasota Property.

Wells Fargo's request for relief under Federal Rule of Civil Procedure 60(b) should be denied because it is untimely and because the Bank failed to meet its burden of establishing excusable neglect.

In its response, Wells Fargo argues that: (1) a proof of claim form is not required to preserve a secured creditor's rights; (2) the Receiver is attempting to "destroy" the Bank's property rights in violation of the Fifth Amendment's public takings clause; (3) its Rule 60(b) request was timely because it was filed before the Court's March 2, 2012 Order approving the Receiver's Motion to Approve Determination and Priority of Claims, Pool Receivership Assets and Liabilities, Approve Plan of Distribution, and Establish Objection Procedure; and (4) its failure to timely file proofs of claims was excusable neglect because the Receiver did not send enough claims packets to the Bank.

ARGUMENT

The Receiver's Motion for Determination relates solely to Wells Fargo's conduct **after** the Receivership was created. The manner in which the Bank governed itself pre-Receivership is, therefore, not at issue here[2]. As this Court has already determined, all parties—both secured and unsecured—were required to comply with the Court's unambiguous claims administration process. (Dkt. 1174). Among the purposes of the claims administration process was to give parties an opportunity to preserve **all** interests in Receivership Property, not just to receive cash distributions as the Bank suggests. Adherence to this claims process' clear provision that failure to comply with the Claims Bar Date

[2] As the Receiver already stated, should the 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. Only then will Wells Fargo's conduct pre-Receivership, including its status as an investor in two of the Receivership Entities, be relevant to these proceedings.

extinguished interests in Receivership Property, does not violate the Fifth Amendment's public takings clause. Government action is required to trigger that constitutional protection, and contrary to the Bank's assertions, the Receiver's efforts to derive as much value as possible from the Properties to satisfy the Receivership Entities' liabilities to their creditors are those of a private actor acting on behalf of private Receivership Entities to pay private parties. As such, there is no government action in this dispute and thus no violation of the Fifth Amendment.

Similarly, Wells Fargo's request for relief under Fed. R. Civ. P. 60(b) should be denied because it is untimely. Even if Wells Fargo's request for relief is timely, the Bank has failed to satisfy its burden of establishing "excusable neglect" under Rule 60(b). The Receiver mailed a claims packet to Wells Fargo at the exact address the Bank provided on its loan invoices. (Dkt. 713-10). The packet included a Proof of Claim form which neither specified which Wells Fargo loan the form was related to, nor limited the Bank's ability to identify any of its purported interests in Receivership Property. (*Id*.) The packet also contained a Notice which unequivocally explained that a **non-investor** asserted creditor, like the Bank, had to submit to the Receiver by the Claim Bar Date the amount the non-investor was owed, and amounts already received from a Receivership Entity, and legible copies of all documents underlying the claim – as it applied to **non-investor** asserted creditors like the Bank who received blank Proof of Claim forms, the Notice said nothing about such asserted creditors receiving multiple forms.

Crucially, Wells Fargo does not dispute that it was aware that the Properties were part of the Receivership Estate and that it had knowledge of the Claims Bar Deadline. In fact, the

Bank does not even dispute that it received a claims form packet. Instead, Wells Fargo, for the first time, argues it was excused from filing timely Proofs of Claim for the Properties because it did not have enough copies of the claims forms and because the Receiver mailed the claims packet to Wells Fargo's loan department address in Georgia, rather than in Virginia. As demonstrated below, the record refutes this argument because the Receiver, in compliance with the Court's Order governing the claims administration process, mailed the claims packet to the exact address Wells Fargo provided on its own loan invoices. Notably, this argument also ignores that the Receiver specifically wrote to Wells Fargo giving it an opportunity to file a late claim along with an explanation for its failure to file a claim. [cite to docket] The Bank never responded, which defeats its argument that it did not file claims because it never received proper notice.

I. WELLS FARGO WAS REQUIRED TO COMPLY WITH THE CLAIMS BAR DATE AND ITS FAILURE TO DO SO PRECLUDES IT FROM PRESERVING ITS PURPORTED SECURITY INTERESTS

A. Wells Fargo Needed to File Proofs of Claim To Preserve Any Interests In Receivership Properties.

Secured and unsecured creditors were required to comply with this Court's order governing the claims administration process. (Dkt. 1174). A Proof of Claim was required to preserve a secured creditor's interest in Receivership Property, whether those interests are property rights in the collateral or to participate in cash distributions. Further, the burden rests on the creditor "to protect its rights pursuant to the framework clearly set forth in the conduct of this receivership." (*Id*. at p.7). 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. As a result, its interests in any Receivership Properties are extinguished. (*Id*.)

(describing the claims process in this Receivership as "unambiguous" and clearly requiring "that claimants follow a particular procedure or suffer their claims forever barred.").

Wells Fargo's arguments that it only needed to file Proofs of Claims if it wished to participate in a cash distribution of Receivership proceeds, but not to enforce its purported security interests, is a distinction without a difference. The Court's Order establishing a procedure to administer claims and Proof of Claim forms and setting the deadline for filing Proofs of Claim 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 …." (Dkt. 391).

Nothing in this Order suggests that the claims administration process was limited only to parties who wished to receive cash distributions. Moreover, the Order does not exclude parties wishing to preserve rights to any collateral that may be part of the Receivership Estate. Rather, the Order applies to any entity which intended to preserve any interest in Receivership Property, not just to receive cash distributions. Consequently, since Wells Fargo failed to submit Proofs of Claim for the Properties, its purported interests have been extinguished, and as such, the Bank is not entitled to release of the Laurel Mountain Property or to receive any cash distributions from the proceeds of the sale of the Properties.

B. The Takings Clause of the Fifth Amendment Is Not Relevant in Federal Equity Receiverships

Wells Fargo argues that the Receiver's Motion for Determination seeks to "destroy" the Bank's purported security interests in the Properties in violation of the Fifth Amendment's Takings Clause. (Dkt. 1216 at 7-9). This argument ignores the nature of the Receiver's relevant efforts and does not rely on any relevant authority.

Wells Fargo's Takings Clause argument means that every time court-appointed receivers recover property for their receivership estates, it constitutes government action that triggers the Fifth Amendment. However, receivers across the country routinely recover properties from non-parties for the benefit of their receivership estates with court approval, yet there is not a single case supporting the Bank's position. This is because the Takings Clause is not implicated because there is no government action.

A Fifth Amendment "taking" "is a direct **government** appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (emphasis added). Thus, without government action, there can be no taking. *Cranley v. Nat'l Life Ins. Co. of Vt.*, 318 F.3d 105, 112 (2d Cir. 2003). Critically, federal receivers are considered private parties who stand in the shoes of the private entities placed in receivership – and not of the Government – when pursuing efforts on behalf of those entities to pay their creditors. *See United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir.1994) (Receiver acts as a "private, non-governmental entity, and is not the Government" when pursuing litigation on behalf of a receivership entity for the benefit of its creditors and shareholders); *see also U.S. v. Stanford*, 805 F.3d 557, 568 (5th Cir. 2015) (same). Therefore, since the Receiver's recovery of property on behalf of Receivership Entities for the benefit of their creditors does not constitute government action, the Fifth Amendment is not triggered here.

Wells Fargo's reliance on *United States v. Security Indus. Bank*, 459 U.S. 70, 75-78 (1982) is misplaced. There, the Court considered whether a Bankruptcy Code provision (11 U.S.C.A. § 522(f)(2)) authorizing the avoidance of certain liens to the extent they impair the

debtor's exemptions, should apply to liens which existed before the effective date of the Code. The Court held that it should not because there was "substantial doubt whether the retroactive destruction of the appellees' liens in this case comports with the Fifth Amendment." *Id*. at 78. The Court adopted the principle that "[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress." *Id*. at 81. The absence of retroactive application of any legislative enactments sharply distinguishes the instant case from Wells Fargo's sole authority – indeed, in this case, there is no legislative action whatsoever that would trigger the Fifth Amendment. *See also In re Persky*, 134 B.R. 81 (E.D. N.Y. 1991) (bankruptcy statute permitting trustee to sell certain jointly owned property free and clear of nondebtor-co-owner's interest therein could not be applied **retroactively** to interest which had vested and matured prior to statute's effective date and was unconstitutional violation of takings clause.) Further, implicit in that decision was the assumption that there was no unconstitutional taking effected by § 522(f) as to liens created **after** the effective date of the statute; in other words, contrary to the Bank's argument, security interests can be eliminated even by Congress. *See United States v. Rodgers*, 461 U.S. 677, 697, note 24 ("If there were any Takings Clause objection to [Internal Revenue Code] § 7403, such an objection could not be invoked on behalf of property interests that came into being after enactment of the provision.").

Moreover, "the Takings Clause is implicated only when the taking in question is for a **public** use[.]" *Scott v. Jackson*, 297 Fed.Appx. 623, 625–26 (9th Cir.2008) (emphasis added); *see also Bennis v. Michigan*, 516 U.S. 442 (1996). Here, the Receiver is a private

actor who has administered and managed Receivership assets for eventual distribution to injured, private investors, not for public use. As such, since there is no public use, there can be no taking. *See Crocker v. United States*, 37 Fed.Cl. 191, 196, aff'd, 125 F.3d 1475, 1476 (1997) (holding that a takings claim "must not be that the Government's conduct in and of itself violated law, but that the effect of a valid exercise of sovereign immunity resulted in the taking of private property for public use, but without payment.").

In any event, Wells Fargo received sufficient notice of the claims administration process (*see, infra*, Section II. B) that, to the extent the Takings Clause is even triggered here, the Bank's constitutional rights have not been violated. *See Georgia v. City of Chattanooga*, 264 U.S. 472, 483, 44 S.Ct. 369, 68 L.Ed. 796 (1924) (In the eminent domain context, the federal constitution's due process clause is satisfied so long as property "owners [have] reasonable notice and [the] opportunity to be heard before the final determination of judicial questions that may be involved in the condemnation proceedings-e.g., ... whether the taking is for a public purpose."); *see also Bickerstaff Clay Products Co., v. Harris County, Ga. Ny and Through Bd. Of Com'rs*, 89 F.3d 1481, 1491 (11th Cir. 1996) ("A property owner cannot claim a violation of the Clause unless the state provides the landowner **no procedure** (such as an action for inverse condemnation) for obtaining just compensation.") (emphasis added) (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985)). Wells Fargo was aware of the claims administration process, received a claims packet, and had numerous communications with the Receiver regarding the Properties before the Claims Bar Date expired. Wells Fargo was, therefore, given an opportunity to protect its purported interests in the Properties, and assert its Takings Clause argument, by filing Proofs

of Claim with the Receiver. The Bank chose not to do that. Wells Fargo cannot elect to sit on its hands throughout the claims administration process and then later assert that its constitutional rights have been compromised when it did nothing to protect its own purported interests in Receivership Properties in spite of receiving adequate notice as to these proceedings. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545–548 (1985) (The essential requirements of "due process" are notice and an opportunity to be heard). Accordingly, the Receiver taking possession of Laurel Mountain and the sale proceeds of the Sarasota Property free and clear of any liens or encumbrances does not violate the Fifth Amendment.

II. WELLS FARGO'S REQUEST FOR RELIEF UNDER FEDERAL RULE 60(b) SHOULD BE DENIED.

A. The Bank's Rule 60 Motion Should Be Denied Because it is Untimely.

The 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. Federal Rule of Civil Procedure 60(c)(1) authorizes courts to reopen judgments for reasons of 'mistake, inadvertence, surprise, or excusable neglect,' but only on motion made within one year of the relevant judgment. Wells Fargo argues that under this Rule, the relevant judgment is the March 2, 2012 Order (Dkt. 776) which granted 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 ("Claims Determination Motion"). This argument is wrong.

Wells Fargo erroneously asserts that, in the Court's Order denying BB&T's motion for turnover of sale proceeds of Receivership Property (Dkt. 1174) (the "BB&T Order"), the

Court previously determined that "Rule 60's one-year clock started to tick when the Court entered its March 2012 Order on the Receiver's [Claims Determination Motion]" and that "the Court has already considered, and rejected the Receiver's position that the time started to run before March 2012." (Dkt. 1216, pp.14-15). This mischaracterizes the BB&T Order. In the dispute with BB&T , the parties did not litigate whether, under Rule 60(c)(1), BB&T's one-year window began on the Claims Bar Date or on the date of the March 2012 Order because **BB&T did not satisfy either deadline**. Therefore, the Court did not squarely address which date applied and its Order does not specifically find that the Rule 60(c)(1) one-year window could not have started before the March 2012 Order. As previously noted, failure to file a claim by the Claims Bar Date forever barred that claim, and the March 2012 Order simply re-confirmed that bar. (Dkt. 776, at ¶8).

Finally, while the March 2, 2012 Order also provided 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 exempt Wells Fargo from either the claims process, the Claims Bar Date, or the Order governing the claims process.

Therefore, for purposes of the Court's Rule 60 analysis, the March 2, 2012 Order is not the applicable judgment. Rather, the correct date is the Claims Bar Date, which was September 2, 2010. As such, the Bank had until September 2, 2011 to request Rule 60 relief, and because it did not file its motion until February 8, 2012, its motion is untimely and should be denied.

B. <u>Wells Fargo Has Failed to Meet its Burden of Showing Excusable Neglect.</u>

On June 4, 2010, the Receiver mailed a claims packet to Wells Fargo at Wachovia Commercial Loan Services, P.O. Box 740502, Atlanta, Georgia, 30374-0502. (*Id*.) This was the same address that Wells Fargo provided the Receiver on its loan invoices for both the Rite-Aid and Laurel Mountain Properties. (Dkt. 1210-1). The packet included a Proof of Claim form which was blank and did not otherwise indicate that it was to be used for a specific loan.

Under Rule 60(b), the burden is upon the party moving to have the judgment set aside to plead and prove excusable neglect. *See In re Worldwide Web Systems, Inc.* 328 F.3d 1291, 1294 (11th Cir. 2003). Wells Fargo still offers almost no evidence to support a finding of excusable neglect, but instead, argues that the Receiver is to blame for the Bank's failure to file timely claims. Specifically, Wells Fargo now argues that it did not file claims for the Properties because it only received one claims packet, which the Receiver mailed to an address in Atlanta, Georgia, and as such, did not receive adequate notice. As shown below, this explanation does not satisfy Wells Fargo's burden under Rule 60. First, the Bank's new argument is not even relevant to the issue of excusable neglect because it offers no evidentiary support, such as affidavits or declarations, stating that the reason the Bank did not file claims is because it only received one claims packet. Second, the Receiver complied with the Court's notice requirements by, among other things, sending Wells Fargo a claims packet to the mailing address which the Bank provided to the Receiver. (Dkt. 1216, pp. 15-16). Therefore, the Receiver provided Wells Fargo with proper notice that the Properties were part of the Receivership Estate and that, to preserve its interests in the Properties, the Bank had to file any and all claims by the Claims Bar Date.

1. The Bank has not presented record evidence of excusable neglect.

Wells Fargo's new argument that it did not receive proper notice is not evidence of "excusable neglect." Wells Fargo offers no affidavits or declarations from any Bank employees affirming that the reason it did not file Proofs of Claim forms on either of the Properties is because it only received one copy of the claims packet. In fact, this explanation is noticeably absent in the Bank's only declaration that it filed in support of its previous request for Rule 60 relief. (Dkt. 740, Ex. E.). In that declaration, Elizabeth A. Ryan, a Wells Fargo mortgage analyst, declared that the reason Wells Fargo did not file claims on the Properties was because "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." (*Id*. at ¶ 5). She further declared that she presumed that "Wells Fargo could stand upon its Mortgage and secured position and no Proof of Claim was required." (*Id*.). While Ms. Ryan did declare that she (as opposed to Wells Fargo) did not receive notice of the Receivership Action until April 2011, she did not state that Wells Fargo did not receive notice or that the Bank did not file a claim related to the Properties because it only received one claims packet.

2. The Receiver provided Wells Fargo and BoA adequate notice of the claims administration process and Claims Bar Date.

Contrary to Wells Fargo's assertions, the Receiver certainly did provide the Bank with adequate and sufficient notice of the claims administration process and the Claims Bar Date. The Court's Order establishing the claims administration process specifically states that notice is "sufficient and reasonably calculated to provide notice to all creditors if" mailed to the last known address, published in *The Wall Street Journal* and *The Sarasota Herald-*

Tribune, and made available on the Receiver's website. (Dkt. 391, p. 2). The Receiver complied with all of these requirements.

Wells Fargo confirmed it had notice that the Laurel Mountain Property was part of the Receivership when it began sending the Receiver its invoices for the Laurel Preserve loan in May 2009. (Dkt. 1210-1). Thereafter, the Receiver and Wells Fargo continued to communicate regarding the Properties through 2010 and he provided a Proof of Claim form (which identified Laurel Mountain Preserve, LLC as a Receivership Entity) to both Wells Fargo and BoA. The Receiver mailed a claims packet to Wells Fargo's Commercial Loan Services Department at the address that Wells Fargo provided on its loan invoices for both the Laurel Mountain and Rite-Aid loans. Finally, the Bank confirmed that it was aware of the Claims Bar Date and understood the claims administration process when it timely filed a claim related to the Rite-Aid Property.

The Bank's argument that it could only file one claim because it only received one claims packet is meritless. (Dkt. 1216, pp.15-16). First, the claim form itself provided space for entities with more than one interest in any Receivership Entity, which allowed the Bank to use one claim form for all of its purported interests in the Properties. (Dkt. 713-14, p.12). Second, as the claims packet made clear, copies of the claim form were available at www.nadelreceivership.com. (*Id*. at p. 2). Third, Wells Fargo could easily photocopy the blank claims form it received.

Relatedly, Wells Fargo's argument that the Receiver was required to send a claims packet for each of the Bank's purported interests in the Properties is also misplaced. (Dkt. 1216, p. 16). While the claim packet states that if you have multiple accounts, a Proof of

Claim form would be mailed for each account, this language clearly applied only to multiple **investor** accounts, rather than creditors claiming an interest in one of the Receivership Entities. (*See Id*. at p. 8) ("Investors who, according the Receiver's records, have multiple accounts will receive a Proof of Claim Form for each account."). For non-investor claims, the claims packet clearly states:

> If you were not an investor, but believe you are or may be a creditor of one or more 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 such documents are not available.

(*Id.*).

Indeed, Wells Fargo's position that it did not file timely claims for the Properties because it only received one claims packet is also belied by the fact that it refused to file claims even after the Receiver wrote to the Bank that the Claims Bar Date had passed, but 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*. Wells Fargo never responded to that letter or filed a claim; that the Bank remained silent establishes that it was responsible for its failure to file timely Proofs of Claims—not the Receiver.

Notably, Wells Fargo does not argue that it (or BoA) did not receive a claims packet or that it was unaware that the Properties were part of the Receivership Estate. Rather, Wells

Fargo objects to the adequacy of the Receiver's notice because he mailed the claims packet to the Bank's Commercial Loan Services Department it Atlanta, Georgia, rather than its office in Roanoke, Virginia. But the Bank ignores that its own loan invoices for the Laurel Preserve loan clearly provide the address of: Wachovia Commercial Loan Services as P.O. Box 740502, Atlanta, Georgia, 30374-0502. (Dkt. 1210-1). As Wells Fargo concedes, **this is precisely the address where the Receiver mailed the claims packet**. (Dkt. 1216, p. 13). The Bank's assertion that providing notice at the address its own loan invoices disclose was inadequate is frivolous. If Wells Fargo did not have adequate procedures to preserve its interests in Receivership Property, then that is the fault of the Bank, not the Receiver. *Florida Physician's Insurance Co., Inc. v. Ehlers*, 8 F.3d 780, 784 (11th Cir.1993) ("failure to establish minimum procedural safeguards for determining that action is being taken does not constitute excusable neglect"); *North Central Illinois Laborer's District Council v. S.J. Groves & Sons Co., Inc.*, 842 F.2d 164, 167–68 (7th Cir.1988) (district court did not abuse discretion in refusing to set aside judgment when filing or clerical error resulted in failure of in-house counsel to discover plaintiff's service of process); *Picucci v. Town of Kittery*, 101 F.R.D. 767 (D. Me. 1984) (insufficiencies relating to office procedures of counsel may not form basis of "excusable neglect" under Rule 60(b)).

Wells Fargo also contends that the claims packet mailed to Bank of America related to its Sarasota Property loan (which Wells Fargo acts as servicer) did not provide it with adequate notice because it was sent to BoA's loan department in Wilmington, Delaware, rather than Wells Fargo Home Mortgage office in Baltimore, Maryland. This argument

ignores the numerous communications between the Receiver and counsel for Wells Fargo and BoA related to the Sarasota Property which establish that the Bank had adequate notice.

Again, the Court granted the Receiver possession of, and title to, the Sarasota Property on Jan. 28, 2010. (Dkt. 327). The next day, the Receiver mailed to both Wells Fargo and BoA a Notice of Filing which included the Order granting him title to the Sarasota Property. (Dkt. 756-3). Three days later, the Receiver filed the same Notice of Filing in BoA's foreclosure action it had filed on the Sarasota Property. (Dkt. 756-2). On June 4, 2010, the Receiver mailed the claims packets to both BoA and Wells Fargo.

In keeping with this Court's Order, the Receiver provided more than adequate notice to the Bank of his possession of the Laurel Mountain and Sarasota Properties, the existence of the Claims Bar Date, and the requirement to file a claim before that deadline to preserve any purported interests in Receivership Property. *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 Bank's arguments that, despite communicating with the Receiver about the Properties and receiving the claims packet it nevertheless did not receive adequate notice, is also incompatible with this simple fact—it filed a claim on the Rite-Aid Property. In doing so, the Bank demonstrated it understood the Court's unambiguous claims administration process and was fully aware of the Claims Bar Deadline.

The Bank's argument that the Receiver did not provide it with proper notice is without merit. The Receiver has demonstrated that he complied with the Court's notice requirements and provided Wells Fargo with a claims packet at the address the Bank provided. Accordingly Wells Fargo has failed to meet its burden of establishing excusable neglect under Rule 60(b).

RECEIVER'S OPPOSITION TO WELLS FARGO'S REQUEST FOR ORAL ARGUMENT

The issues pending before the Court do no warrant oral argument. The Receiver respectfully submits that the relevant issues before the Court have been thoroughly briefed. Any further argument will not provide any additional clarity and will be a waste of Receivership assets. However, should the Court determine that oral argument is necessary, the Receiver will be fully prepared to present his arguments as to why the Court should grant his Motion for Determination.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January, 11, 2016, 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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