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.: 8:09-0087-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.
_____/

WELLS FARGO'S MOTION FOR ORDER DIRECTING RECEIVER TO TURNOVER RENTS FROM RITE AID PROPERTY

Wells Fargo Bank, N.A. ("**Wells Fargo**" or "**Bank**")[1] moves this Court for an Order compelling the Receiver to turnover rents from the Rite Aid Property, and states:

[1] Wells Fargo is successor by merger to Wachovia Bank, N.A. ("**Wachovia**").

SUMMARY OF THE ARGUMENT

Despite repeated trips to the Eleventh Circuit where the Bank prevailed, the Receiver continues to improperly hold Wells Fargo's property without articulating a valid basis for doing so. The crux of the current dispute relates to $1,322,923.20 in rent (collectively, the "**Rents**") paid by a non-party for the use of the Bank's collateral, a Rite Aid store located at 841 South Main Street, Graham, North Carolina (the "**Rite Aid Property**"). Pursuant to North Carolina law, the original borrower transferred all rights, title and interest in the Rents to Wells Fargo at the time the Loan Documents (including a separate absolute assignment of the Rents) were recorded, almost four years before this receivership commenced.[2] At the same time, the borrower was granted a conditional, limited license to use the rents prior to default. While the Receiver stands in the shoes of the original borrower who previously held a license to use these monies, that license was automatically revoked upon default pursuant to the Loan Documents. The Loan Documents establish that an Event of Default occurred before the creation of this receivership estate, no later than when the relief defendants consented to the injunctive relief and the filing of this case. As a result, the Receiver has no valid basis for withholding the Rents from Wells Fargo. Nonetheless, despite clear direction from the Eleventh Circuit to the contrary,[3] the Receiver continues to dispute Wells Fargo's property rights in the Rents, which

[2] The Loan Documents (as defined below) were duly recorded in accordance with North Carolina law on May 24, 2005.

[3] As this Court may recall, Wells Fargo did not file proofs of claim for loans concerning the La Bellasara and the Laurel Mountain Properties. Wells Fargo filed a motion seeking a determination that the filing of a proof of claim was unnecessary to preserve its security interests in the La Bellasara and Laurel Mountain Properties (the "**Late Claim Motion**"), which this Court denied. (Dkts. 740, 1222). After an appeal, the Eleventh Circuit held that Wells Fargo's security interests remained intact as to the La Bellasara and Laurel Mountain

vested long before this receivership proceeding commenced. Wells Fargo requests that this Court enter an Order compelling the Receiver to return Wells Fargo's property to the Bank.[4]

FACTUAL BACKGROUND

A. THE RITE AID PROPERTY

The receivership entity Scoop Real Estate L.P. ("**Scoop**"), purchased the Rite Aid Property in May 2005 by executing a promissory note with Wells Fargo (formerly Wachovia Bank) in the amount of $2,655,000 (the "**Note**"). A copy of the Note is attached as Exhibit 1. The Note is secured by a Deed of Trust and Security Agreement (the "**Deed of Trust**"). A copy of the Deed of Trust is attached as Exhibit 2. The Note is also secured by an Assignment of Rents and Leases (the "**Assignment of Rents**"). A copy of the Assignment of Rents is attached as Exhibit 3. Scoop is defined as the "Grantor" in the Deed of Trust and as the "Assignor" in the Assignment of Rents. As of June 21, 2017, the total indebtedness on the Rite Aid Note was not less than $4,171,531.64 (the "**Rite Aid Claim**")[5]. The Note, Deed of Trust, and Assignment of Rents are referred to collectively as the "**Loan Documents.**"

Properties even though Wells Fargo did not file proofs of claim, determining that the receivership court does not have the authority to extinguish a creditor's state law property rights (*e.g.*, security interests) that vested prior to the commencement of the receivership. *See SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017).

[4] By separate motion, the Bank will also be requesting payment of its fees and costs incurred in enforcing its loan documents as administrative expenses prior to any further distributions being made to holders of lower priority claims, including investors.

[5] Total debt amount is calculated as follows: Principal ($2,655,000.00); Contract Rate Interest ($503,488.81); Default Rate Interest ($619,057.50); Appraisal Fee ($6,840.00); Legal Fees/Costs Trenam ($20,047.29); Legal Fees/Costs KL Gates ($15,144.90); Legal Fees/Costs Akerman (not less than $351,953.14) with fees and costs continuing to accrue.

B. THE LOAN DOCUMENTS ASSIGNED AND TRANSFERRED TITLE OF THE RENTS TO WELLS FARGO

The Security Agreement and Assignment of Rents are governed by the laws of North Carolina, a title theory state. *See* Ex. 2, § 6.9; Ex. 3, ¶ 16. Under the Deed of Trust, TRSTE, Inc., held the entire fee simple title to the Rite Aid Property for the benefit of the Bank. *See* Ex. 2, p. 1. Under the Deed of Trust, Scoop "collaterally" assigned the Rents to the Bank, retaining a license to use the Rents prior to any default. *See* Ex. 2, § 2.1. Separately, under the Assignment of Rents, all of Scoop's "right, title and interest in and to" the "rents, income, issues, profits, revenues, rights and benefits arising hereafter from the [Rite Aid Property]" were irrevocably and absolutely conveyed, transferred and assigned to the Bank, to secure the Rite Aid Loan, and then licensed to Scoop so long as no Event of Default occurred. *See* Ex. 3, ¶ 2.[6] To be clear, while the Assignment of Rents did provide for a limited license to use rents pre-default, the default automatically terminated that license. *See* Ex. 3, ¶ 7 ("From and after the occurrence of an Event of Default (whether or not Assignee shall have exercised Assignee's option to declare the Note immediately due and payable), **such license shall be automatically revoked without any action required by Assignee**.") (Emphasis added).

C. THE DEFAULTS UNDER THE LOAN DOCUMENTS

The Loan Documents define several Events of Default. First, any Event of Default under the Deed of Trust or Note also constituted an Event of Default under the Assignment of Rents:

[6] The language of the Assignment of Rents broadly confirms the irrevocable, absolute and unconditional transfer of the Rents to the Bank.

> Events of Default. The term "**Events of Default**" as used herein shall mean the occurrence of any one of the following: … (b) If a default shall occur under the Note, the Deed of Trust or any Loan Documents and shall not be cured within any applicable curative period as stated therein).

See Ex. 3, ¶ 6(b).

Scoop's voluntary consent to an Order of Preliminary Injunction and Other Relief (Dkt. 3, consent signed January 20, 2009) and the subsequent initiation of this case by the SEC against Scoop on January 21, 2009 seeking to freeze its assets, appoint a receiver to control it, and to disgorge any profits from it, each constituted an Event of Default under the Deed of Trust, and thus, the Assignment of Rents. In the relevant part, the Deed of Trust provides:

> **5.1. Events of Default**. Any one or more of the following shall constitute a "Default" under this Deed of Trust and the Note hereby secured: … (f) "the consent of Grantor or any guarantor to the appointment of a receiver, …." (h) … the initiation of an action or proceeding for the dissolution, termination or liquidation of Grantor or any guarantor."

See Ex. 3, § 5.1(f) and (h).

In addition to 5.1(f) and (h), several other Events of Default under the Loan Documents occurred, both prior to and subsequent to the filing of this case.[7] The Rents at issue were paid after the Receiver was appointed. Thus, any defaults prior to the defaults under 5.1(f) and (h) do not affect the analysis necessary for this motion. Because the Events of Default under

[7]*See, e.g.*, Ex. 2, § 1.21 (transfer without lender consent); § 5.1(a) (failure to pay note when due); § 5.1(e) (the assertion of other liens/encumbrances on the property); § 5.1(g) (the filing of a petition for bankruptcy or reorganization under the bankruptcy code or similar law, such as this receivership proceeding); and § 5.1(j) (lender's determination of a material adverse change in financial condition of Grantor). In addition, the Note matured by its terms, was accelerated and became due on May 23, 2009.

section 5.1(h) and (f) are undeniable and sufficient for the relief sought in this motion, this motion does not address the others in detail.

D. THE EVENTS OF DEFAULT AND THIS RECEIVERSHIP PROCEEDING

The SEC initiated this action against Arthur Nadel and his entities, including Scoop, and sought a preliminary injunction on January 21, 2009. (Dkts. 1-2). The SEC also moved to appoint the Receiver on the same date. (Dkt. 6). The entity defendants, including Scoop Capital LLC and the Rite Aid Loan Borrower, Scoop Real Estate, L.P. (defined as "Scoop" above), consented to the preliminary injunction and other relief the day before, on January 20, 2009, which contemplated the appointment of a Receiver, and which was filed simultaneously with the SEC's motion to appoint the Receiver. (Dkt. 3, at ¶¶ 3-5, and 10). The Court immediately entered the Order of Preliminary Injunction and Other Relief against the entity defendants and the Order Appointing Receiver. (Dkts. 7-8).[8] As a result of the Order Appointing Receiver, the Receiver took possession of a commercial building located on the Rite Aid Property. No later than March 17, 2009, Wells Fargo had notified the Receiver that Scoop was in default on the Note. (Dkt. 713-6). Wells Fargo timely filed a proof of claim in this case with respect to the Rite Aid Property loan, which claim has been designated No. 502 by the Receiver. As set forth in its proof of claim, Wells Fargo claimed property rights and a security interest in the Rite Aid Property and the Rents based upon the Loan Documents.

Months later, on April 21, 2010, this Court entered an order establishing a claims administration process by which potential claimants could file their claims against the

[8] Within two weeks, by February 2, 2009, Arthur Nadel consented to a preliminary injunction and other relief. (Dkt. 24-2). The Court entered its Order of Preliminary Injunction and Other Relief the next day. (Dkt. 29).

Receivership Estate. The claims bar date for claims against the Receivership Entities was September 2, 2010. The order also barred any claims asserted after that date. (Dkt. 391). On December 7, 2011, the Receiver filed a proposed plan for claims determination and priority of claims (including an objection to the Rite Aid Claim), which the Court granted in part. (Dkts. 675 and 776). The Court reserved ruling on (1) Wells Fargo's Objection to the procedures and the Receiver's objection to the Rite Aid Claim; (2) the Bank's Motion to Abandon the Rite Aid Property; and (3) the Bank's Late Claim Motion. Thus, the Receiver's objection to the Rite Aid Claim remains pending. Notably, the only basis alleged by the Receiver in his objection to the Rite Aid Claim was the Bank's alleged complicity in the Ponzi scheme and all of those claims, including fraudulent conveyance claims, seeking to disallow Wells Fargo's security interests in the Rite Aid collateral, were denied on summary judgment by District Judge Whittemore, and affirmed on appeal by the Eleventh Circuit (the "**Litigation**"). *See Wiand v. Wells Fargo Bank, N.A.*, 86 F. Supp. 3d 1316 (M.D. Fla. 2015) (granting summary judgment for Wells Fargo, on all counts), *aff'd Wiand v. Wells Fargo Bank, N.A.*, No. 15-10968, 677 F. App. 573 (11th Cir. Jan. 26, 2017).

On January 6, 2012, the Receiver filed a motion to approve the sale of the Rite Aid Property (Dkts. 706 and 823) free and clear of all liens. Although Wells Fargo objected to the sale of the Rite Aid Property based upon the Loan Documents,[9] the Court entered its Order authorizing the sale of the Property over Wells Fargo's objection (Dkt. 840) (the "**Court's Sale**

[9] The Bank also moved to compel the Receiver to abandon the Rite Aid Property or, alternatively, for relief from the Court's injunction so that it could foreclose (Dkt. 719). In the motion to abandon, Wells Fargo noted that the Rent collected to date (1.19.2012) was estimated to exceed $1.19 Million because it was accruing at $33,073.08 per month. *See* Dkt. 719 at 3.

Order").[10] The Court found: "After careful consideration, the Court concludes that the Receiver's motion should be granted and his proposed order be entered as the Court's order." (Court's Sale Order, at 2). In overruling Wells Fargo's objection to the sale, this Court specifically noted that "Wells Fargo's specific claim with respect to the Rite-Aid property can and will be determined later." *Id.* at 2. In a footnote on this point, the Court stated: "The Court is ever mindful that the state lawsuit filed by the Receiver against Wells Fargo for participation in the Ponzi scheme is on-going." *Id.* at 2 n.4.[11] On that same day, May 8, 2012, the Court entered the proposed Order submitted by the Receiver, approving the sale of the Rite Aid Property to Trinet West, LLC (the "**Purchaser**") free and clear of all claims, liens, and encumbrances (the "**Receiver's Sale Order**") (Dkt. 842). In relevant part, the Receiver's Sale Order provided—

> Any and all existing claims, liens, and encumbrances relating to the property located in Alamance County, North Carolina (the "Property"), including any held by Wells Fargo Bank, N.A. as successor to Wachovia Bank, N.A., arising from a loan provided to Scoop Real Estate, L.P., shall be transferred to the proceeds of the sale ordered herein, and the Property shall become free and clear of any and all such existing claims, liens, and encumbrances.

Dkt. 842, at 1.

This Court intentionally entered two sale orders: (1) the Court's Sale Order for the benefit of the Wells Fargo and the Receiver, to address the Receiver's sale motion and the

[10] Notably, in the Court's Sale Order, the Court specifically rendered the Bank's motion to abandon moot and reserved ruling on the Rite Aid Claim.

[11] With the issues in the Litigation resolved in favor of Wells Fargo by the Eleventh Circuit, there is no longer any basis for the Receiver to contend that the Rite Aid Claim is subject to setoff or dispute.

Bank's objection, and to reserve ruling on the amount and priority of the Rite Aid Claim; and (2) the Receiver's Sale Order to deliver free and clear title of the real estate to the Purchaser. To be clear, the purpose and intent of the Receiver's Sale Order was only to deliver clear title to the Purchaser, and does not (and cannot) transfer Wells Fargo's property rights in the Rents to the Receiver, nor can it impair the Bank's security interests in the Rite Aid Sale Proceeds or the Rents. Indeed, one day before the Sale Orders were entered, this Court granted – over the Bank's objection – the Receiver's motion to make a first interim distribution, stating, "After this first interim distribution [the Receiver] will have more than sufficient assets to satisfy Wells Fargo's [Rite Aid] claim in the amount it has valued that claim in the event the Court rules in favor of Wells Fargo… Wells Fargo's monetary fears are totally unfounded." Dkts. 831, 838.

After certain closing costs, the proceeds from the sale of the Rite Aid Property were approximately $2,229,463.15 (the "**Rite Aid Sale Proceeds**"). The Receiver incurred expenses in connection with the Rite Aid Property of approximately $9,200 for an appraisal of the Rite Aid Property and $300 for certain processing fees. The parties previously agreed to split the costs of the appraisals and Wells Fargo also agreed to reimburse the Receiver $300 for the processing fees. Almost five years after the sale of the Rite Aid Property, upon motion and Court Order dated June 21, 2017 approving settlement (Dkt. 1296), Wells Fargo received a $2,224,563.15 distribution on the Rite Aid Claim leaving a deficiency of approximately $1,955,876.52 as of October 11, 2017.[12] Several factors contributed to the almost five-year gap

[12] Total debt amount is calculated as follows: Principal ($430,436.85); Contract Rate Interest ($508,194.17) (per diem $40.47302); Default Rate Interest ($623,260.17) (per diem $35.86974); Appraisal Fee ($6,840.00); Legal Fees/Costs Trenam ($20,047.29); Legal

between the sale and the distribution of the Rite Aid Sale Proceeds, including two Eleventh Circuit decisions not rendered until earlier this year.

In the first appeal, the Eleventh Circuit affirmed Judge Whittemore's grant of summary judgment in the Bank's favor on all counts in the Litigation, and confirmed the district court's conclusions that the undisputed facts demonstrated Wells Fargo 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, [Wells Fargo's] evidence of good faith [was] undisputed." *Wiand v. Wells Fargo Bank, N.A.*, Case No. 15-10968, 677 F. App'x 573 (11th Cir. Jan. 26, 2017) (citing Case No. 8:12-cv-557, Dkts. 325 at 19, 21). Notably, in the Litigation, the Receiver sought to avoid Wells Fargo's liens against the Rite-Aid Property and lost, and the Receiver did not appeal that issue to the Eleventh Circuit. Thus, with these issues finally resolved, the Rite Aid Claim is no longer subject to setoff or dispute.

In the second appeal, the Eleventh Circuit reversed this Court's February 2016 order extinguishing Wells Fargo's other secured claims because the Bank did not file proofs of claim with respect to those properties. *See SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017). This second decision is critically important to this motion because it made one issue clear: a receivership court does not have the authority to extinguish a secured creditor's state law property rights or security interests that were vested prior to the Receivership Proceeding. *See id.* at 1344 (holding "a federal district court… does not have the authority to extinguish a

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Fees/Costs KL Gates ($15,144.90); Legal Fees/Costs Akerman (not less than $351,953.14), with fees and costs continuing to accrue.

creditor's pre-existing state law security interest"). After the second decision, there is absolutely no basis to disallow the Bank's claim to the Rents.

E. THE RECEIVER HAS BEEN PLACED ON NOTICE AND THE RENTS HAVE BEEN PRESERVED

The Receiver has repeatedly been placed on notice – and has acknowledged – that monies must be reserved to return the Rents to Wells Fargo. *See, e.g.*, Dkt. 713-6 (showing that Receiver was notified of default on Note by March 17, 2009); Dkt. 689 at 3 n.3 ("The Wells Fargo Claim is secured by, among other things, the Rite Aid Property and rents generated from the operation of a Rite-Aid Pharmacy on the property. Wells Fargo timely filed a proof of claim in this case with respect to the Rite Aid Property, which claim has been designated No. 502 by the Receiver."). That claim clearly asserted a claim for Rents. In the first interim distribution motion, the Receiver stated the receivership's $9 million in cash "would be more than sufficient to cover any potential obligation the Receivership may have based on Wells Fargo's claim and asserted interest (in the Rite Aid property)." Dkt. 825 at 12. In response to that motion, on May 2, 2012, the Bank filed a limited objection, asking the Court to require the Receiver to reserve an additional $1.2 Million for payment of Wells Fargo's Claim – which is, importantly, the amount of the rent collected during the relevant period – and reserving its right to seek "full recovery on its secured claims." *See* Dkt. 831. Replying to the Bank's objection, the Receiver stated that he and the Bank, and the Court, all agreed that the Bank's claims secured by the Rite Aid Property would be considered and resolved by the Court at a later date. *See* Dkt. 836. On May 7, 2012 – **one day before the Sale Orders were entered** – the Court entered an Order granting the first distribution motion and stating, "After this first interim distribution [the Receiver] will have more than sufficient assets to satisfy Wells Fargo's

claim in the amount it has valued that claim in the event the Court rules in favor of Wells Fargo… Wells Fargo's monetary fears are totally unfounded." *See* Dkt. 838.

Wells Fargo has continued to raise the Rents issue with this Court and the Receiver cannot claim he is unaware of the issue or that the Rent monies have not been preserved. On December 20, 2016, four-and-a-half years after the sale of the Rite Aid Property, the Receiver filed a motion for authority to make a sixth interim distribution. *See* Dkt. 1253. In that motion, the Receiver asked for permission to *increase* "certain reserves for Wells Fargo's claim and asserted interests." *See id.* On December 21, 2016, the Bank filed a response in opposition addressing the rents collected, separate from the sale proceeds, because it was not clear whether the Receiver would maintain sufficient funds to pay the Bank's entire claim. *See* Dkt. 1254. The Bank objected to the extent that the motion sought to "extinguish Wells Fargo's secured lien on approximately $1 million in rent collected by the Receiver" and asked that the Court require the Receiver to maintain sufficient cash in his accounts to satisfy the Rite Aid Claim, a claim for fees, and the Cost Award in full. *See id.* In his reply, the Receiver asserted for the very first time that Wells Fargo's property rights in the Rents were somehow extinguished, yet he still voluntarily increased the amount of reserves. *See* Dkt. 1258. On January 10, 2017, the Court granted the Receiver's motion after finding that "the interests of Wells Fargo are adequately protected" because the Receiver had almost $10 million[13] in cash in the receivership accounts. *See* Dkt. 1259.

[13] As of December 5, 2016, the total funds in all Receivership accounts were $9,962,964.22. *See* Dkt. 1253.

The Receiver is holding $1,322,923.20 in Rents generated from the Bank's collateral, the Rite Aid Property in North Carolina. Pursuant to the Bank's valid and enforceable Assignment of Rents, described below, the Rents are the property of Wells Fargo and should be turned over to the Bank in further partial satisfaction of its secured claim. Yet, the Receiver unreasonably refuses to turn over the Rents. In an attempt to resolve this dispute, the Receiver and Wells Fargo participated in mediation in September 2017. Because the efforts at mediation were not successful, Wells Fargo requests that this Court resolve this issue.

MEMORANDUM OF LAW

A. THE LAWS OF NORTH CAROLINA GOVERN THIS ISSUE

An assignment of rents, like any interest in property, is governed by the law of the situs of the real property. *See Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 918 ("Property interests are created and defined by state law."). North Carolina is a "title theory" state,[14] meaning that the lender receives legal title to the property for security purposes. *See In re Grandfather Mountain L.P.*, No. 2:96CV85, 1997 WL 34740256, at *3 (M.D.N.C. Jan. 29, 1997) (citing *Neil Realty Co. v. Med. Care, Inc.*, 110 N.C. App. 776, 778, 431 S.E.2d 225, 226 (1993) ("North Carolina is considered a title theory state with respect to mortgages, where a mortgagee does not receive a mere lien on mortgaged real property, but receives legal title to

[14] "In 'title theory' states, the mortgagee holds title to the land from the outset of the loan until the debt has been satisfied. In 'lien theory' states, the borrower holds title to the land and the mortgagee has a lien on the property. Finally, in 'intermediate theory' states, the borrower maintains title to the property; however, once the loan goes into default, the mortgagee immediately receive title and the right to possess the property." *In re Millette*, 186 F.3d 638, 644 n.10 (5th Cir. 1999) (concluding, for property in Mississippi, an intermediate theory state, that party's interest was perfected when party recorded deed of trust containing the assignment of rents clause).

the land for security purposes.")). In other words, in North Carolina, the mortgage lender receives legal title to the land, including the rents, but the mortgagor remains in possession of that property. *Id.* "In 1991, the North Carolina legislature codified the rule that an assignment of rents is 'valid and enforceable" and perfected from the date of recording." *Id.* (citing N.C. Gen. Stat, § 47-20(c)). With this codification, the lenders interest in post-petition rents was perfected and secured by pre-petition recording. *Id.* Both before and after the statute, parties were always "free to contract with respect to rents." *Id.* at *8.

B. WELLS FARGO HAS AN ABSOLUTE ASSIGNMENT OF THE RENTS

In this case, Wells Fargo has an absolute assignment of the rents under North Carolina Law by contract. *See* Ex. 3, ¶ 2 ("Assignor hereby grants, conveys, transfers and assigns to Assignee all of its right, title and interest in and to (i) the rents, income, … rights and benefits arising now and hereafter from the Property (collectively the "**Rents and Profits"**), together with …") (emphasis in original).[15] Although the Rents were absolutely assigned to Wells Fargo, Scoop maintained a limited, revocable license to use the Rents so long as no Event of Default occurred. *Id.* at ¶ 7. But, upon the occurrence of an Event of Default, that license was automatically revoked. *See* Ex. 3, ¶ 7 ("From and after the occurrence of an Event of Default (whether or not Assignee shall have exercised Assignee's option to declare the Note immediately due and payable), **such license shall be automatically revoked without any action required by Assignee**.") (Emphasis added); N.C. Gen. Stat, § 47-20(c) (stating that assignment of rents is valid, enforceable, and perfected from time of recording). As explained

[15] Separately, the Deed of Trust also contains an assignment of rents section, which provided Wells Fargo with title to the Rents. *See* Ex. 2, § 2.1 ("Grantor hereby collaterally assigns and transfers to Lender all the leases, subleases, franchises, rents, issues and profits of the Property …").

below, while the Receiver stands in the shoes of the borrower, inheriting all rights and obligations, the borrower's license was automatically revoked before the Receiver was appointed. *Id.*

C. SCOOP'S LICENSE TO USE THE RENTS WAS REVOKED NO LATER THAN JANUARY 20, 2009.

On January 20, 2009, Scoop executed a Consent to the Order of Preliminary Injunction and Other Relief. (Dkt. 3 at 3-9). This consent constituted a default under the Loan Documents. *See* Ex. 3, § 5.1(f) ("the consent of Grantor or any guarantor to the appointment of a receiver, …."). Then, on January 21, 2009, the SEC filed its Complaint for Injunctive and Other Relief in this action (Dkt. 1), and its emergency motion for a temporary restraining order (Dkt. 2). Also on January 21, 2009, this Court entered the Order of Preliminary Injunction (Dkt. 7) and the Order Appointing Receiver (Dkt. 8). These events also constituted an Event of Default under the Loan Documents. *See* Ex. 3, § 5.1(h) (… the initiation of an action or proceeding for the dissolution, termination or liquidation of Grantor or any guarantor."). Wells Fargo notified the Receiver of the default immediately after the case was filed. *See* Dkt. 713-6.

Under the plain terms of the Assignment of Rents, Scoop's license to use the rents automatically terminated no later than these Events of Default. *See* Ex. 3, ¶ 7 ("From and after the occurrence of an Event of Default (whether or not Assignee shall have exercised Assignee's option to declare the Note immediately due and payable), **such license shall be automatically revoked without any action required by Assignee**.") (Emphasis added). Thus, by the time the Receiver was appointed in this case, Scoop's license to use the rents had already been automatically revoked by the terms of the parties' agreements. *Id.* In other words, by the time the Receiver was appointed, the Rents were solely the property of Wells Fargo. *Id.* This is

consistent with how such assignments are treated under North Carolina law. *See In re Grandfather Mountain L.P.*, 1997 WL 34740256, at *6 (recognizing that under North Carolina law this type of assignment "entitles the lender access to rents upon the condition of default… [it] secures the debt and obviates the need for appointment of a receiver or possession after foreclosure on the deed of trust.") (citing *In re Tripplet*, 84 B.R. 84, 89 (Bankr. W.D. Tex. 1988)). It is also consistent with how such assignments are treated under the laws of other "title theory" states. *See, e.g.*, *In re Town Center Flats, LLC*, 855 F.3d 721, 727 (6th Cir. 2017) ("In summary, Michigan law treats a complete assignment of rents as a change of ownership and the assignor of those rents does not retain residual property rights in the assigned rents."); *First Fidelity Bank, N.A. v. Eleven Hundred Metroplex Associates*, 190 B.R. 510 (S.D.N.Y. 1995) (Sotomayor, J.) (holding that bankruptcy estate had no interest in rents after default based upon language of assignment); *In re Jason Realty, L.P.*, 59 F.3d 423 (3d Cir. 1995) (concluding that assignment agreement that provided the debtor a license to use the rents pre-default was an absolute assignment, and the rents were not part of the bankruptcy estate).

> We are not moved by the fact that the assignment was part of a financing transaction and served as additional security for repayment of the note. An assignment clause within a mortgage may be independent of the mortgage security. … Moreover, we are impressed that the instant assignment was contained in an agreement separate from the mortgage. First Fidelity proceeded here as an assignee of rents under rights conferred on a special instrument bearing the title "Assignment of Lease or Leases," App. at 78, and not in its capacity as a mortgagee enforcing rights contained in the instrument bearing the title "mortgage." App. at 55.

In re Jason Realty, L.P., 59 F.3d at 428. Here, like in *Jason Realty* and *Eleven Hundred Metroplex*, Wells Fargo seeks turnover of the Rents under an Assignment of Rents that was separate and independent of the Deed of Trust (*i.e.*, separate from the mortgage). And similarly,

here, the "assignment, though conditional, became absolute upon default." *Eleven Hundred Metroplex*, 190 B.R. at 512 (internal quotation omitted). Here, like in *Jason Realty* and *Eleven Hundred Metroplex*, even though the Assignment of Rents afforded Scoop a conditional license to use the rents and was executed to secure a loan, the default automatically revoked the license, leaving only the absolute assignment. *Id.*[16] Thus, Wells Fargo had title to and exclusive rights to the Rents prior to the commencement of this receivership under the Assignment of Rents. Accordingly, the Rents are not property of the Receivership Estate and must be turned over to Wells Fargo.

D. AT A MINIMUM, WELLS FARGO HAS A SECURITY INTEREST IN THE RENTS.

As explained above, Wells Fargo has absolute title to the Rents pursuant to North Carolina law, a title theory jurisdiction. The sale of the Rite Aid Property and the Receivers' possession of the Rents do not change the analysis, even if Wells Fargo was deemed to only have a lien on (rather than title to) the Rents. As noted above, this Court intentionally entered two orders in connection with the sale of the Rite Aid Property: (1) the Court's Sale Order for the benefit of the Wells Fargo and the Receiver, to address the Receiver's sale motion and

[16] The assignment considered by Judge (now Justice) Sotomayor was similar to the one in this case:

> 1. So long as there shall exist no "Event of Default," as such term is defined in the Notes, the Mortgage or any other loan document, there is reserved to the Assignor a license to collect as they become due, but not prior to accrual, all rents, income, issues and profits from the Premises and to retain, use and enjoy the same. Upon the occurrence of an Event of Default under the Notes, the Mortgage or any other loan document, such license granted to the Assignor shall be immediately revoked without further demand or notice from the Assignee....

First Fid. Bank, N.A. v. Eleven Hundred Metroplex Assocs., 190 B.R. 510, 512 (S.D.N.Y. 1995).

Bank's objection, and to reserve ruling on the amount and priority of the Rite Aid Claim; and (2) the Receiver's Sale Order to deliver free and clear title of the real estate to the Purchaser. Indisputably, the purpose and intent of the Receiver's Sale Order was only to deliver clear title to the Purchaser, and does not (and cannot) transfer Wells Fargo's vested property rights in the Rents to the Receiver, nor can it impair the Bank's security interests in the Rents. Indeed, the Eleventh Circuit has provided this Court with clear guidance when it held that the Court could not extinguish the Bank's security interests in property that vested prior to the commencement of the receivership, notwithstanding Wells Fargo's failure to file proofs of claim. *See SEC v. Wells Fargo Bank, N.A.*, 848 F.3d at 1345. Here, the Bank's property rights and security interests in the Rents vested almost four years before this receivership commenced, therefore, this Court cannot extinguish the Bank's rights in the Rents in this case either.

In fact, throughout this receivership proceeding the Bank closely monitored the Receiver's disbursements to his law firm and third parties to ensure that the Rite Aid Claim was preserved in its entirety and that the funds in the Receiver's bank account never fell below the total amount of the Rents in his possession. *See* Dkts. 831, 1253 (objecting to interim distributions and reserve amounts). Notably, in his August 31, 2017 motion to approve a seventh interim distribution, the Receiver indicated that he was reserving $1,322,923.20 – the entire amount of the Rents – for the purposes of finally resolving the issues described in this motion.[17] *See* Dkt. 1308 at 6. Thus, any contention by the Receiver that the Bank's security

[17] The Receiver has repeatedly been put on notice - and has acknowledged - that monies must be reserved to return the Rents to Wells Fargo. *See, e.g.*, Dkt. 689 at 3 n.3. The Receiver is estopped from now taking any inconsistent position. *See Muldrow v. Credit Bureau Collection Servs., Inc.*, No. 09-61792-CIV, 2010 WL 5393373, at *1 (S.D. Fla. Dec. 22, 2010) (judicial estoppel "precludes a party from asserting a position in a legal proceeding inconsistent with a

interests/property rights in the Rents were impaired when the Rents were commingled in his general trust account has absolutely no merit.

Article 9 of the Uniform Commercial Code and courts in the Second, Fourth and Eleventh Circuits have signified their approval of the "lowest intermediate balance" rule, an equitable tracing method that analyzes commingled accounts on the premise that rent proceeds are the last monies to be removed from a commingled account. Here, the lowest intermediate balance in the Receiver's trust account never fell below $1,322,923.20 – which is the amount of the Rents, according to the Receiver. Therefore the Bank did not lose its property rights and security interest in the Rents by those funds being deposited in the Receiver's trust account. *See* § 679.3151, Fla. Stat., comment 3; N.C.G.S.A. § 25-9-315, comment 3; *Sony Corp. of America v. Bank One, West Virginia, Huntington NA*, 85 F.3d 131, 138 (4th Cir. 1996) (enforcing creditor's security interest in proceeds based on the court's application of the "lowest intermediate balance" rule, which, according to the Court, "preserves the proceeds to the greatest extent possible as the account is depleted."); *In re Rothstein, Rosenfeldt, Adler, PA*, 717 F.3d 1205 (11th Cir. 2013) (citing *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1159 (2d Cir. 1986)). Indeed, the Receiver himself recently argued *for* application of the "lowest intermediate balance" rule in a related bankruptcy case and won. *See Wiand v. Lee* (*In*

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position taken by that party in the same or a prior litigation") (citation omitted); *Terrell v. Rathman*, No. 1:11-cv-00197-WMA-HGD, 2012 WL 4953128, at *11 (N.D. Ala. Sept. 13, 2012) (magistrate finding petitioner "should be judicially estopped" from taking inconsistent position in "same proceeding"), *rep. and rec. adopted*, 2012 WL 4953124 (N.D. Ala. Oct. 11, 2012); *see also Harrington v. Wells*, No. 2:13-cv-103, 2016 WL 111439, at *7 n.5 (S.D. Ga. Jan. 11, 2016) (rejecting argument that was "inconsistent" with party's prior argument in same case).

re Lee), Case No. 8:15-bk-01038-KRM, Adv. Pro. No. 8:15-ap-464- KRM, Doc. 29, *11-12 (Bankr. M.D. Fla. Jun. 22, 2017) (granting Receiver's motion for summary judgment, holding that the "'lowest intermediate balance rule' is an acceptable method for treating trust proceeds that have been commingled with other funds").

WHEREFORE, Wells Fargo respectfully requests that the Court enter an order in the form attached as Exhibit 4 (i) granting this Motion; (ii) directing the Receiver to disburse $1,322,923.20 in Rents to Wells Fargo, within three days of the Court's Order; and (iii) granting such other and further relief as this Court deems just and proper.

LOCAL RULE 3.01(g) CERTIFICATION

Counsel for Well Fargo has conferred with counsel for the Receiver and counsel for the Securities and Exchange Commission. The Receiver has indicated that he objected to and would oppose the relief requested in this Motion. The SEC has indicated that it has no position regarding the relief requested in the Motion.

LOCAL RULE 3.1(j) REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.1(j), Wells Fargo requests oral argument on this Motion and estimates the time required for both sides to make their presentation to be one hour.

Respectfully submitted,

/s/ Steven R. Wirth

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

Steven R. Wirth
Attorney