UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

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

Defendants, **CASE NO.: 8:09-0087-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.
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OBJECTION AND MEMORANDUM OF LAW OF WELLS FARGO BANK, N.A. IN OPPOSITION TO RECEIVER'S UNOPPOSED MOTION TO (1) APPROVE DETERMINATION AND PRIORITY OF CLAIMS, (2) POOL RECEIVERSHIP ASSETS AND LIABILITIES, (3) APPROVE PLAN DISTRIBUTION, AND (4) ESTABLISH OBJECTION PROCEDURE

Wells Fargo Bank, N.A. ("Wells Fargo"), a valid secured creditor and party in interest herein, hereby files this objection (the "Objection") and memorandum of law in opposition to *Receiver's Unopposed Motion to (1) Approve Determination and Priority of Claims, (2) Pool Receivership Assets and Liabilities, (3) Approve Plan Distribution, and (4) Establish Objection Procedure* (the "Motion") (Doc. No. 675), and in support thereof, states as follows:

PRELIMINARY STATEMENT

Wells Fargo absolutely denies any wrongdoing in connection with its arms'-length lending and other transactions with Scoop Real Estate, L.P., Arthur and Marguerite Nadel, and Neil and Sharon Moody. Wells Fargo has valid secured claims against the following properties: (1) 841 South Main Street, Graham, North Carolina (the "Rite Aid Property"); (2) approximately 420 acres near Asheville, North Carolina in Buncombe and McDowell counties (the "Laurel Mountain Property"); (3) 30393 Upper Bear Creek Road, Evergreen, Colorado (the "Evergreen Property"); and (4) 464 Golden Gate Point, Unit 703, Sarasota, Florida (the "Sarasota Property"). The Receiver has failed to address the Laurel Mountain Property,[1] the Evergreen Property, and the Sarasota Property in his Motion.[2] Accordingly, this Objection is filed by Wells Fargo solely with respect to the Rite Aid Property; *however*, to the extent that the Receiver purports to affect the secured claims of Wells Fargo with respect to the Evergreen Property or the Sarasota Property, this Objection is hereby filed in response thereto.

[1] The Laurel Mountain Property has been forfeited to the United States pursuant to a forfeiture proceeding styled *United States v. Arthur G. Nadel*, Case No. 1:09-cr-00433-JGK-1, pending in the United States District Court for the Southern District of New York, before Judge John G. Koeltl (the "Forfeiture Proceeding"). Accordingly, this Court lacks jurisdiction over the Laurel Mountain Property. Additional counsel for Wells Fargo is filing a separate objection to the Receiver's Motion with respect to the Laurel Mountain Property.

[2] Presumably the Receiver did not address these valid secured claims because no proofs of claim were filed in this case with respect to those claims. Notwithstanding, these secured claims remain intact despite the receivership proceeding. *See, e.g., SEC v. Madison Real Estate Group, LLC*, 647 F. Supp. 2d 1271, 1277 (D. Utah 2009) ("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.'") (internal citation omitted); *see also Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (recognizing that it had previously held that a discharge in bankruptcy did not release real estate of the debtor from a mortgage created by the debtor prior to the bankruptcy petition); *Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy"); *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991) ("Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim - namely, an action against the debtor *in personam* - while leaving intact another - namely, an action against the debtor *in rem*");. *In re Schwalb*, 347 B.R. 726, 753 (Bankr. D. Nev. 2006) (irrespective of whether a secured creditor files a proof of claim, it is bedrock legal principal "that a secured claim passes through bankruptcy unaffected absent some affirmative action to set it aside.").

Preliminarily, the Motion should be denied with respect to Wells Fargo because the Receiver lacks standing to pursue the purported "shadow account" claims asserted in his Motion. As conceded by the Receiver throughout these proceedings, he represents the Receivership Entities, not the investors, and therefore stands in the shoes of the Receivership Entities only. Thus, the Receiver does not have a right to sue on behalf of the investors. In addition, because the Receiver stands in the shoes of the Receivership Entities, his claims against other alleged tortfeasors are barred by the *in pari delicto* doctrine. Accordingly, the Motion as it relates to Wells Fargo should be denied in its entirety.

The Receiver's Motion also provides no opportunity for discovery, imposes unrealistic time schedules to submit evidence, and violates the due process of rights of claimants of the receivership estate. Wells Fargo, the holder of a valid secured claim exceeding $3 Million (the "Wells Fargo Claim")[3], requests that the Court deny the Motion and implement procedures which provide due process by, *inter alia*, allowing discovery and the opportunity to rebut the Receiver's unsubstantiated allegations.

The Court should also require the Receiver to prove his *prima facie* case for the disallowance of Wells Fargo's Claim based on the Receiver's specious and unsubstantiated claims asserted in his Motion. Finally, the priority scheme set forth in the Receiver's Motion is illogical, unfair and inequitable as it seeks to distribute funds to equity holders who assumed the risk of their investments in exchange for the greatest amount of upside, before valid unsecured creditors of the estate, who did not assume the risk with respect to any such investment and who

[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.

lacked the potential upside gain enjoyed by investors.[4] For these reasons and the reasons that follow, this Court should grant Wells Fargo's Objection and deny the Receiver's Motion.

A. The Receiver Lacks Standing to Pursue "Shadow Account" Claims Against Wells Fargo on Behalf of Third Party Investors

The Receiver's Motion should be denied because the Receiver lacks standing to pursue the purported "shadow account" claims against Wells Fargo, on behalf of third party investors. In fact, the Receiver attempts to pursue claims similar to those he raised and which were denied by Judge Whittemore in *In re Wiand*, No. 8:05-cv-1856-T-27MSS, 2007 WL 963165, at *2 (M.D. Fla. Mar. 27, 2007) (holding receiver had standing to pursue fraudulent conveyance claims on behalf of the receivership entities, but not damage claims on behalf of third parties, the investors); *see also Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 549-51 (Fla. 2d DCA 2003) (holding that an investment corporation could not be held liable for breach of fiduciary duty and that the receiver did not have standing to bring claims on behalf of creditors).[5]

In *Wiand*, a Ponzi scheme was perpetrated by Howard Waxenberg. *See* 2007 WL 963165, at *1. After Waxenberg's death, an action was commenced by the SEC and Burton W. Wiand was appointed as receiver for the receivership entities, which included Waxenberg's corporate entities. *Id.* The receiver brought actions against investors seeking to recover amounts distributed in the Ponzi scheme, via claims under Florida's Uniform Fraudulent Transfer Act

[4] As noted, Wells Fargo's Claim currently exceeds $3 Million. According to the Receiver, he has entered into a contract for the sale of the Rite-Aid Property for $2.4 Million. Thus, if the current value of the Rite Aid Property is $2.4 Million, Wells Fargo will have a significant unsecured claim against the receivership estate. Nonetheless, Wells Fargo has advised the Receiver that it will not consent to the sale of its collateral for less than the full amount of its claim. Moreover, Wells Fargo is entitled to credit bid the full amount of its claim in connection with any sale of the Rite Aid Property. As such, the Receiver should immediately turnover the Rite Aid Property and its accompanying collateral to Wells Fargo forthwith.

[5] Applying Florida law, courts have routinely recognized that a receiver has standing to allege claims on behalf of receivership entities, but not on behalf of third-party creditors/investors. *See Wiand*, 2007 WL 963165, at *2; *Dean Witter*, 865 So. 2d at 549-51 Similarly, the 11th Circuit has recognized that a bankruptcy trustee's standing is limited to claims by the debtor, and does not extend to claims owned by creditors. *See Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149-50 (11th Cir. 2006).

("FUFTA"), claims for unjust enrichment, and claims for disgorgement. *Id.* In *Wiand*, Judge Whittemore considered motions to dismiss brought by multiple defendants in separate suits and the global report of the magistrate judge, which recommended dismissal. *Id.* The defendants argued that the receiver lacked standing because the true parties in interest were the investors injured by the Ponzi scheme, and not the receiver, who represented the entities allegedly used by Waxenberg to effect the scheme. *Id.* at *2.

In considering this argument, Judge Whittemore noted that the seminal case on whether the receiver has standing to set aside fraudulent transfers by a perpetrator of a Ponzi scheme is *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995) (finding no objection in equity to action by receiver against beneficiaries of fraudulent conveyances to recover corporate assets). Judge Whittemore recognized that many courts, as in *Scholes*, found that a receiver had standing to maintain fraudulent transfer claims against the recipients of money acquired in a Ponzi scheme under various states fraudulent transfer acts. *Wiand* at *2. In *Wiand*, the receiver pled that his claims were brought on behalf of the receivership entities and their investors. *Id.* While the receiver could bring FUFTA claims on behalf of the receivership entities to recover fictitious profits and the like, the receiver could not assert the rights of third parties.[6] *Id.* Simply stated, Judge Whittemore found that the receiver lacked standing to bring damage claims on behalf of the investors. *Id.*

In *Dean Witter*, the receiver, appointed for a company that perpetuated a Ponzi scheme, sued an investment corporation, its agent, and the law firm of the company's principal for damages under theories including aiding and abetting fraud, breaches of fiduciary duty, and

[6] In *Scholes*, the Illinois fraudulent conveyance statute at issue, unlike FUFTA, allowed creditors as well as "other persons" to set aside fraudulent conveyances. *See Wiand*, 2007 WL 963165, at *3 (dismissing receiver's claim under FUFTA because the receiver failed to allege that it was a "creditor" under the statutory definition).

negligence. *See* 865 So. 2d at 545. In one count, the receiver alleged that Dean Witter owed a fiduciary duty to make certain that funds deposited into accounts "were properly used" and not diverted for personal use. *Id.* at 549. The Second District recognized that the law generally refuses to transform a banking relationship from a debtor/creditor relationship to one involving fiduciary duties. *Id.* The court refused to "radically alter the law of banking" by requiring banks to review credit card accounts and checking accounts to make certain customers were spending wisely. *Id.* In other words, the court refused to impose a fiduciary duty on a banking institution when the relationship was merely that of a debtor/creditor. In considering the other claims raised by the receiver, the court held that the receiver could not pursue claims owned directly by the creditors/investors. *Id.* at 550. "Although a receivership is typically created to protect the rights of creditors, the receiver is not the class representative for creditors and receives no general assignment of rights from the creditors. Thus, the receiver can bring actions previously owned by the party in receivership for the benefit of the creditors, but he or she cannot pursue claims owned directly by the creditors." *Id.*[7]

In addition to the foregoing authorities, U.S. District Judge Rakoff recently dismissed similar claims commenced against HSBC and a number of other financial institutions by the trustee appointed in the Bernard Madoff Ponzi scheme case pending in the Southern District of New York. *See Picard v. HSBC Bank PLC*, 454 B.R. 25, 30 (S.D.N.Y. 2011); *see also Picard v. JPMorgan Chase & Co.*, 2011 WL 5170434, at *3 (S.D.N.Y. Nov. 1, 2011) (McMahon, J.) (holding trustee lacked standing to pursue common law claims against certain JPMorgan Chase and UBS entities that allegedly aided and abetted fraud, either in representative capacity or as

[7] The Florida Supreme Court has determined that Florida's Uniform Fraudulent Transfer Act does not create a cause of action against a non-transferee bank for aiding and abetting a fraudulent transfer. *See Freeman v. First Union National Bank*, 865 So. 2d 1272, 1277 (Fla. 2004) (answering certified question from 11th Circuit in the negative). Therefore, according to the authorities discussed above, a receiver cannot assert claims on behalf of investors/creditors and cannot assert claims for aiding and abetting a fraudulent transfer.

successor in interest to brokerage firm). In *HSBC Bank*, Judge Rakoff issued an opinion dismissing more than $6.5 billion in common law claims, including claims that HSBC aided and abetted the Madoff fraud by failing to adequately investigate Madoff Securities despite being confronted with "myriad red flags and indicia of fraud", on the ground that the trustee lacked standing to bring those claims under the Securities Investors Protection Act, the Securities Exchange Act of 1934, and the Bankruptcy Code. *See HSBC Bank*, 454 B.R. at 28-37; *see also JPMorgan Chase & Co.*, 2011 WL 5170434, at *3 (same).

As in Judge Rakoff's Madoff opinion, the cases discussed above hold, *inter alia*, that any potential tort claim commenced by the Receiver against Wells Fargo must be dismissed because: (1) Wells Fargo did not owe any fiduciary duty to the Receivership Entities or investors; and (2) the Receiver lacks standing and thus cannot sue for claims owned by investors and/or creditors. Based on all of the foregoing, the Receiver's Motion as it relates to Wells Fargo should be denied in its entirety.

B. The Receiver's Claims Against Wells Fargo Are Barred by the *In Pari Delicto* Doctrine

The doctrine of *in pari delicto* is an equitable doctrine that states "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." *Official Committee of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1152 (11th Cir. 2006) (quoting Black's Law Dictionary 794 (7th ed.1999)). This common law defense "derives from the Latin, *pari delicto potior est conditio defendentis:* 'In a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one.' " *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 306 (1985). The doctrine of *in pari delicto* is based on the policy that "courts should not lend their good offices to mediating disputes among wrongdoers" and

"denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." *Id.*

Wiand, *Dean Witter*, *HSBC Bank* and a number of other cases originating out of the Bernard Madoff Investment Securities cases, all demonstrate that a receiver is barred by *in pari delicto* from asserting claims in tort against third-parties, including those involving "myriad red flags and indicia of fraud", on behalf of receivership entities, which were guilty in committing the fraud. *See HSBC Bank*, 454 B.R. at 37-38; *Wiand*, 2007 WL 963165, at *6-7 ("Florida courts have accordingly held that *in pari delicto* bars receivers from pursuing independent tort claims for damages . . .") (internal citation omitted); *Dean Witter*, 865 So. 2d at 550-51 (distinguishing fraudulent transfer actions, like *Scholes*, by corporations 'cleansed' through receivership from tort claims against third parties to recover damages);[8] *see also Knauer v. Jonathon Roberts Fin. Group, Inc.*, 348 F.3d 230 (7th Cir. 2003) (finding that receiver was barred from suing bank in tort action for damages by *in pari delicto* doctrine)). Accordingly, because the Receiver stands in the shoes of the Receivership Entities, not investors, his claims against other alleged tortfeasors are barred by the *in pari delicto* doctrine.

C. <u>The Receiver's Equitable Subordination Claims Have No Merit</u>

The Receiver contends, at minimum, the Wells Fargo Claim should be equitably subordinated to the allowed and allowed in part claims of other Claimants. (Doc. 675 p. 59, fn.20). The burden of proof to establish an equitable subordination claim lies with the Receiver

[8] The distinction between cases involving fraudulent transfers and cases involving tort damages has been recognized and discussed by other courts. *See, e.g., Myatt v. RHBT Financial Corp.*, 635 S.E.2d 545, 547 (S.C. Ct. App. 2006) (affirming summary judgment denying a receiver's claims as barred by the doctrine of *in pari delicto* after considering *Scholes* and *Knauer*). The *Myatt* court recognized that the action at issue was closer to that of *Knauer* because it involved a receiver seeking tort damages from the bank, rather than an action to recover diverted funds via fraudulent conveyance claims. *See* 635 S.E.2d at 548. "[I]n the absence of a fraudulent conveyance case, the receiver of a corporation used to perpetuate fraud may not seek recovery against an alleged third-party co-conspirator in the fraud." *Id.* Thus, the doctrine of *in pari delicto* bars claims by the Receiver against a third-party such as Wells Fargo for tort damages, including the alleged "shadow account" claims.

and his burden with respect to Wells Fargo, a non-insider of the Receivership Entities, is extremely high, because courts generally are "reluctant to find the requisite level of misconduct in arms-length transactions." *Capital Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (In re 604 Columbus Ave. RealtyTrust)*, 968 F.2d 1332, 1361 (1st Cir. 1992). Moreover, equitable subordination is an extreme remedy and should be applied sparingly and only in egregious circumstances. *See, e.g., Henry v. Lehman Commercial Paper, Inc. (In re First Alliance Mortg. Co.)*, 497 F.3d 977, 1006 (9th Cir. 2006); *Fabricators, Inc. v. Technical Fabricators, Inc. (Matter of Fabricators, Inc.)*, 926 F.2d 1458, 1464-65 (5th Cir. 1991) (noting that the proponent of equitable subordination with respect to a non-insider creditor, carries the entire burden of proving that the conduct of the creditor was gross, egregious, and shocking to the conscious of the court). Indeed, the United States Supreme Court has admonished that equitable subordination may not be used as a categorical abrogation of the general priority scheme provided for in the Bankruptcy Code. *See United States v. Nolan*, 517 U.S. 535, 543 (1996).

Significantly, none of the cases cited by the Receiver have determined it proper to equitably subordinate a creditor's valid secured claim based merely on the presence of red flags or the indicia of fraud, particularly in connection with a wholly unrelated transaction. This is so because these "red flag" types of claims are more akin to negligence claims, and there is little dispute that negligence alone does not satisfy the equitable subordination standard. *See, e.g., Grede v. Bank of New York Mellon*, 441 B.R. 864, 896 (N.D. Ill. 2010). Wells Fargo also categorically denies the Receiver's assertion that there were any "red flags" or "indicia of fraud" regarding the Nadel-related accounts maintained at the bank.[9] Moreover, in a case significantly

[9] The Receiver also alleges that Wells Fargo was on inquiry notice of the fraud because its predecessor Wachovia Bank was an investor in two Nadel-related Hedge Funds. (Doc. No. 675, p. 58). The Receiver's contention is factually inaccurate and disingenuous at best. On January 29, 2010, the Receiver filed an amended complaint against Wells Fargo Securities International, Ltd. ("Wells Fargo Securities") f/k/a Wachovia Securities International,

more egregious than the circumstances here, the Tenth Circuit Court of Appeals held that: (1) a lender's loan to a thinly capitalized corporate debtor that was being operated by its principal as part of Ponzi scheme should not be recharacterized as an equity investment; and (2) neither lender's lack of due diligence in making loan nor similarities existing between lender's return on the loan and returns promised to investors in Ponzi scheme rose to level of "inequitable conduct" on lender's part, of kind required for equitable subordination of lender's claim. *See Sender v. The Bronze Group, Ltd. (In re Hedged Investments Assocs., Inc.)*, 380 F.3d 1292, 1298-1303 (10th Cir. 2004); *see also In re First Alliance Mortg. Co.*, 471 F.3d at 1007 (determining equitable subordination was not appropriate, thus allowing Lehman's $77 Million claim despite Lehman's alleged involvement in aiding and abetting the debtor's fraudulent lending practices). Accordingly, just as the Receiver's "shadow account" claims fail, his equitable subordination claims must likewise fail.

D. The Proposed Objection Procedure Violates Wells Fargo's Due Process Rights

The Receiver has set forth nine broad categories of reasons why some claims should be rejected. Some are relatively simple, such as the failure to cure deficiencies in the proof of claim forms. Many of the claims rejection categories are much more complex and are based on unproven assertions by the Receiver, such as whether claimants knew or should have known of the fraud – *e.g.*, the "shadow account" claim theory. (Doc. No. 675, pp. 27-28, 48-69). Despite this broad spectrum of factual issues involved in the different claim rejection categories, the Receiver's Motion does not differentiate between the complexity of the issues involved in the claims. (Doc. No. 675 p. 81). While the proposed objection procedure may work for the

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Ltd. and Carrelage Multi-Strategy Offshore Fund, Ltd. ("Carrelage") to recover sums received by Carrelage in excess of the funds Carrelage invested in the Hedge Funds (the "Carrelage Action"). As the Receiver is well aware, Wells Fargo Securities was only a mere conduit of the funds transferred to its client Carrelage by the Receivership Entities, and the settlement agreement (Doc. No. 639), which was approved by this Court (Doc. No. 640), resulted in no payment to the Receivership Entities by Wells Fargo Securities.

simplest of claims rejection reasons (such as failing to cure deficiencies in the proof of claim form), it is woefully insufficient to afford claimants due process in more complex matters such as with respect to the "shadow account" claims asserted against Wells Fargo. As noted in Sections A through C above, the Receiver has no legitimate "shadow account" or equitable subordination claims against Wells Fargo, and certainly none which can be resolved through the Receiver's proposed summary procedures.

The Motion imposes a wholly inappropriate deadline of 20 days for claimants to file all evidence rebutting the Receiver's reasons for rejection of the claims. The Receiver proposes to send notice to the claimants of his disallowance of the claims, requiring claimants who object to the Receiver's decision to provide written objections and "provide **all** supporting statements and documentation the claimant wishes the Receiver to consider" **within 20 days** from the date of the Receiver's notice. (Doc. No. 675 p. 81 para. (c) (emphasis supplied). There can be no valid reason for such an abbreviated time schedule. Twenty days is simply too short a time analyze the legal issues, collect all evidence, and submit it to the Receiver, particularly with respect to the "shadow account" claims asserted against Wells Fargo, which have not been identified with any particularity. Moreover, the Receiver's Motion is devoid of any evidentiary proof whatsoever in support of these mysterious "shadow account" claims asserted against Wells Fargo. Moreover, in order to pursue these types of claims, the Receiver is required to commence a lawsuit against Wells Fargo. Irrespective, the Receiver offers nothing but vague allegations as to the shadow account and equitable subordination claims, which are insufficient as a matter of law to support an action against Wells Fargo. At a minimum, the Court should provide Wells Fargo with 120 days to respond to the Receiver **after the Receiver establishes sufficient legal**

and factual bases for his claims, especially given that the Receiver proposes no deadlines for him to bring the matter to the Court's attention.

In addition, the Motion provides no opportunity for discovery, and no opportunity for claimants to supplement their disclosure after conducting discovery. Instead, the Receiver proposes that once he receives the 20 day disclosures, he will file with the Court, at "such time as the Receiver deems appropriate", "any supporting documents or statements he considers as appropriate." (Doc. No. 675 p. 82 para. (g)). The Receiver envisions the Court to make a final determination based on these submissions or with a hearing. (Doc. No. 675 p. 82 para. (h)). The objection procedure should include the opportunity to conduct discovery, test the Receiver's evidence supporting his claims, and allow for the orderly submission of evidentiary facts and legal arguments after the discovery has been completed.

"A district court has broad powers and wide discretion to determine the appropriate relief in equity receivership." *Securities and Exchange Commission v. Elliot*, 953 F. 2d 1560, 1566 (11th Cir. 1992), *rev'd in part on other grounds*, 998 F.2d 922 (11th Cir. 1993). As a result, a district court may use summary, or abbreviated, procedures in receivership cases. However, such does not mean an absence of procedure at all, nor does it allow due process to be eliminated. *Id.* at 1567. "Due process essentially requires that the procedures be fair." *Id.* at 1566. "The process that is due varies according to the nature of the right and to the type of proceedings." *Id.* "Summary proceedings are inappropriate when parties would be deprived of a full and fair opportunity to present their claims and defenses." *Id.* at 1567. However, a district court does not generally abuse its discretion if its summary procedures permit parties to present evidence when the facts are in dispute and to make arguments regarding those facts." *Id.* at 1567.

As noted by the Eleventh Circuit in *Elliot*, due process requires that claimants be given the opportunity to conduct discovery, and to present evidence and arguments rebutting the Receiver's arguments. *See Elliot,* 953 F.2d at 1568 (voiding as fraudulent a transfer, without providing the opportunity to conduct discovery and be given an opportunity to dispute facts asserted by the Receiver violates due process). In fact, this Court has made clear that "there will come a time when 'the Court will implement a claims procedure designed to afford all disaffected investors the process they are due under the law with regard to their claimed interest in the estate's assets consistent with the principles of Securities and Exchange Commission v. Elliott, 953 F.2d 1560 (11th Cir. 1992).'" (Doc. Nos. 192, 207).[10] As noted above, discovery is essential in Wells Fargo's case because the Receiver's Motion is devoid of any legal and factual bases whatsoever in support of the alleged "shadow account" and equitable subordination claims. Without the opportunity to conduct discovery, Wells Fargo will not have any realistic ability to have a full and fair opportunity to test the Receiver's allegations and prove its defenses.

E. Basic Legal Principals and Justice Require the Receiver to Prove His Claims Against Wells Fargo

The Receiver wants Wells Fargo to prove its defenses to his specious and unarticulated "shadow account" and equitable subordination claims, while absolving himself of his burden to prove the elements of these claims (Doc. No. 675 pp. 55-59, & fn.20). Procedures must be put in place to require the Receiver to prove his case in chief with respect to the "shadow account" and equitable subordination claims, prior to allowing him to reject a wholly unrelated, valid secured claim of Wells Fargo.

[10] Wells Fargo is cognizant of this Court's prior orders denying a number of creditors' motions to intervene and its determination that Section 21(g) of the Securities Exchange Act of 1934 automatically bars intervention in this case. (Doc. No. 207). Accordingly, Wells Fargo files this Objection without a motion to intervene, consistent with this Court's prior orders (*see, e.g.*, Doc. Nos. 45, 169, 190, 207), in order to protect, among other things, its due process rights in accordance with the Eleventh Circuit's opinion in *Elliot*.

A review of the law and procedures set forth in the Bankruptcy Code and Rules is instructive. *See US v. FDIC*, 899 F. Supp. 50, 54 (D. RI. 1995) (noting that courts look to federal bankruptcy laws for guidance). A proof of claim filed under section 501 of the Bankruptcy Code is deemed allowed unless a party in interest objects. *See* 11 U.S.C. § 502(a); *In re St. Johnsbury Trucking Co., Inc.*, 206 B.R. 318, 323 (Bankr. S.D.N.Y 1997). Moreover, even if a trustee files an objection, a properly filed proof of claim constitutes *prima facie* evidence of both the validity and amount of the claim. *See* Fed. R. Bankr. P. 3001(f) ("[a] proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim."); *In re St. Johnsbury Trucking Co., Inc.*, 206 B.R. at 323. Here, Wells Fargo properly filed a proof of claim in this case, and the Receiver has not alleged otherwise. Accordingly, Wells Fargo's proof of claim should be deemed *prima facie* valid.

In order to overcome the presumption of validity, the party opposing a claim must present evidence equal in force to the *prima facie* case. *See In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173 (3d Cir. 1992); *In re Craner*, 110 B.R. 111, 121 (Bankr. N.D.N.Y. 1988), *reversed on other grounds*, 119 B.R. 124 (N.D.N.Y. 1989). The evidence presented must be of substance, as the mere denial of the validity or amount is not sufficient. *See Sherman v. Novak (In re Reilly)*, 245 B.R. 768, 773 (2d Cir. B.A.P. 2000) (citations omitted). Moreover, "the burden of going forward with the proof is on the objecting [party], not the claimant. That burden is not satisfied by the mere filing of an objection." *In re Lanza*, 51 B.R. 125, 127 (Bankr. D. N.J. 1985) (citations omitted); *Riverbank, Inc. v. Make Meat Corp. (In re Make Meat Corp.)*, 1999 WL 178788, at *3 (S.D.N.Y. March 31, 1999). A trustee must document his objection with substantial probative evidence to satisfy its burden going forward. *See In re Frederes*, 98 B.R. 165, 167 (W.D.N.Y.

1989); *In re Hemingway Transp., Inc.*, 993 F.2d 915, 925 (1st Cir. 1993) ("[t]he interposition of an objection does not deprive the proof of claim of presumptive validity unless the objection is supported by substantial evidence").

Here, in his Motion, the Receiver merely sets forth conclusory allegations regarding the invalidity of the Wells Fargo Claim based on specious "shadow account" and equitable subordination claims, and has failed to document his objection with substantial probative evidence sufficient to satisfy his burden going forward. The Receiver's procedures instead seek to shift the entire burden of proof on Wells Fargo to disprove what the Receiver is required to prove in the first instance, in addition to requiring Wells Fargo to bear the burden of proof on its affirmative defenses. (Doc. No. 675, p. 87 para. (g)). This impermissibly shifts the entire burden of disproving the Receiver's allegations on Wells Fargo. Based on the foregoing, the Motion as it relates to the Wells Fargo Claim is insufficient as a matter of law and should be denied.

F. The Priority Scheme Set Forth in the Receiver's Motion is Illogical, Unfair and Inequitable

Finally, the priority scheme set forth in the Receiver's Motion is illogical, unfair and inequitable as it seeks to distribute funds to equity holders who assumed the risk of their investments in exchange for the greatest amount of upside, before valid unsecured creditors of the estate, who did not assume the risk with respect to any such investment and who lacked the potential upside gain enjoyed by investors. A review of the priority scheme set forth in the Bankruptcy Code is instructive. *See US v. FDIC*, 899 F. Supp. at 54 (noting that courts look to federal bankruptcy laws for guidance in determining the priority of claims in receivership proceedings).

"Bankruptcy law has codified the long-standing and well-established priority scheme whereby secured debts are generally entitled to be paid ahead of unsecured debts, and unsecured

debts are entitled to a distribution of a debtor's assets ahead of the holders of equity interests." *See In re Arts Dairy, LLC,* 2009 WL 1758760, at *3 (Bankr. N.D. Ohio June 19, 2009); *see also* 11 U.S.C. § 1129(b) (codifying absolute priority rule, which provides that all senior priority claims must be paid in full before equity receives any distribution); § 725 (disposition of secured property); § 726 (distribution of estate property); § 507 (priority of claims). The Bankruptcy Code establishes a system in which contributions to capital receive a lower priority than general creditors because "the essential nature of a capital interest is a fund contributed to meet the obligations of a business and which is to be repaid only after all other obligations have been satisfied." *See Diasonics, Inc. v. Ingalls,* 121 B.R. 626, 630 (Bankr. N.D. Fla. 1990) (quotation omitted); *see also Braunstein v. McCabe,* 571 F.3d 108, 118 (1st Cir. 2009) ("the bankruptcy estate is distributed in accordance with the scheme of priorities set out in the Bankruptcy Code, and the nature of bankruptcy is equity.").

In addition to having the lowest priority in the distribution scheme, Congress specifically determined in 11 U.S.C. § 510(b) that investors' fraud claims should not be permitted to compete with creditors' recoveries. *See Allen v. Geneva Steel Co.* (*In re Geneva Steel Co.*), 281 F.3d 1173, 1175-78 (10th Cir. 2002); *see also In re Granite Partners, L.P.*, 208 B.R. 332 (Bankr. S.D.N.Y. 1997). In the words of one court, section 510(b) demonstrates "strong congressional disapproval of investor fraud claims in bankruptcy." *In re Geneva Steel Co.*, 281 F.3d at 1179. Another court reasoned that because shareholders expect to take more risk than creditors in return for the right to share in profits, and creditors only expect repayment of a fixed debt, it is not fair to shift risk to creditors because creditors extend credit in reliance on the cushion of investment provided by shareholders. *See In re Betacom of Phoenix, Inc.*, 240 F.3d 823, 829 (9th Cir. 2001). Here, the Receiver purports to give priority to defrauded investors over the claims of

defrauded creditors, despite the fact that equity holders assumed the risk of their investments in exchange for the greatest amount of upside, while unsecured creditors of the estate did not assume such a risk and lacked the potential upside gain enjoyed by investors. As a result, the Receiver's priority scheme set forth in his Motion is inappropriate and should be denied.

RESERVATION OF RIGHTS

Nothing set forth herein is intended, nor shall be deemed, to modify, limit, release, reduce, or waive any of the Wells Fargo's rights, claims, remedies, causes of action, or privileges at law or in equity, all of which are specifically preserved. More specifically, but not limiting the foregoing, Wells Fargo reserves its right to object in greater detail to the Motion or any subsequent motion after discovery has concluded, whether by written or oral objection, or in connection with any subsequent objection to the Wells Fargo Claim or claims, or any subsequent motion to which the Receiver proceeds with respect to an amended or modified distribution plan, on any basis allowable under applicable law. As noted above, the Receiver is required to commence a lawsuit against Wells Fargo in order to pursue his specious and unarticulated "shadow account" and equitable subordination claims, and he should not be permitted to continue to muddy the waters with respect to Wells Fargo's valid secured claims.

The filing of this Objection is also not intended, nor shall be deemed, to modify, limit, release, reduce, or waive any of the Wells Fargo's rights, claims, remedies, causes of action, or privileges at law or in equity, with respect to the Rite Aid Property, the Mount Laurel Property, the Evergreen Property or the Sarasota Property, or any additional claims of Wells Fargo against the Receivership Entities or assets subject to the Forfeiture Proceeding, all of which are specifically preserved.

CONCLUSION

WHEREFORE, Wells Fargo respectfully requests the Court deny the Receiver's Motion with respect to Wells Fargo because: (1) the Receiver lacks standing to pursue the "shadow account" claims asserted in his Motion on behalf of third party investors; (2) the Receiver's claims against Wells Fargo are barred by the *in pari delicto* doctrine; and (3) the Receiver's equitable subordination claims have no merit.

At a minimum, Wells Fargo requests that the Court adopt an objection procedure for complex claims such as Wells Fargo's, which would do the following:

(1) Require the Receiver to provide notice to the claimants of his rejection of the claim or claims, setting forth the elements and facts supporting, among other things, his "shadow account" and equitable subordination claims, and providing the documents, sworn statements and other evidence supporting his claims to the claimants;

(2) Require the claimants who object to the Receiver's claim objection to file a notice with the Receiver within 120 days of its objection and provide initial disclosures to the Receiver as to the information in its possession which it relies upon in support of its position;

(3) Provide the parties with the opportunity for discovery over a minimum six month timeframe;

(4) If disputed issues of material fact exist such that the matter cannot be determined by the Court as a matter of law, set the matter for trial with attendant pre-trial disclosures; and

(5) Include such further procedural safeguards to comport with due process.

Dated this 21st day of December, 2011 in Tampa, Florida.

Respectfully submitted,

AKERMAN SENTERFITT

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following:

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