UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

v. Case No. 8:09-cv-87-T-26TBM

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

Defendants,

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,

Relief Defendants.
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THE RECEIVER'S OPPOSITION TO MOTION OF WELLS FARGO BANK, N.A. (I) FOR RELIEF FROM INJUNCTION OR, IN THE ALTERNATIVE, (II) TO COMPEL THE RECEIVER TO ABANDON THE PROPERTY LOCATED AT 841 SOUTH MAIN STREET, GRAHAM, NORTH CAROLINA

Burton W. Wiand, as Receiver (the "**Receiver**"), moved for approval of the sale of receivership real property located at 841 South Main Street, Graham, North Carolina (Doc. 706), which presently is leased to Rite Aid Corporation and houses a Rite Aid Pharmacy (the "**Property**"). Wells Fargo Bank, N.A., as successor by merger to Wachovia Bank, N.A. (collectively, "**Wells Fargo**"), objected to that motion (the "**Objection**") (Doc. 718) and separately moved for relief from the injunction so it could foreclose on the Property or, in the alternative, to compel the Receiver to transfer it to Wells Fargo (the "**Motion**") (Doc. 719). The Court subsequently denied without prejudice the Receiver's motion for approval of the sale (Doc. 726).

Wells Fargo's Motion and Objection stem from a loan it made to one of the hedge funds at the center of the Ponzi scheme underlying this case, Receivership Entity Scoop Real Estate, L.P. ("**Scoop RE**"), which was purportedly secured by the Property and the rents it generated. Although Wells Fargo filed a claim in the claims process for that loan (designated as Claim No. 502) (the "**Claim**"), the Receiver's motion recommending claim determinations (the "**Claims Motion**") (Doc. 675) recommends denial of the claim based on Wells Fargo extensive misconduct and omissions. Claims Mot. at 55-59. If the recommendation is accepted (in whole or, to some extent, in part), proceeds from the Property's sale will flow to the Receivership estate and, ultimately, defrauded investors with allowed claims.

Rather than being treated like all other claimants, participating in an orderly and efficient claims process, and waiting until the amount of the Claim, if any, is fixed before receiving distributions, Wells Fargo seeks to "jump to the front of the line" and prematurely take assets from the Receivership estate. This approach is inconsistent with applicable law and is inefficient and disorderly. But most importantly, it has no merit since Wells Fargo's Claim has not yet been determined, and without (i) fixing the value of the Claim, if any, and (ii) determining whether its claimed security interest in the Property is even valid, it has no right whatsoever to the Property.

I. WELLS FARGO IS NOT ENTITLED TO THE PROPERTY BECAUSE IT DOES NOT HAVE A VALID SECURITY INTEREST IN IT

The Motion is entirely premised on a mistaken assumption that Wells Fargo has a valid security interest in the Property and its rents. *See, e.g.*, Mot. ¶ 7 ("Wells Fargo has valid, perfected, and not otherwise avoidable first security interests" in the Property and rents). But the transfers of those security interests to Wells Fargo were fraudulent and violated the Florida Uniform Fraudulent Transfer Act, Fla. Stats. §§ 726.101 *et seq.* ("**FUFTA**"), and thus Wells Fargo's claimed security interests are void. Specifically, Section 726.105(1)(a) renders every transfer of an asset made with actual intent to hinder, delay, or defraud any creditor of a debtor fraudulent. The asset-transfer covered by FUFTA includes the "creation of a lien or other encumbrance" like the ones at issue here (Fla. Stats. § 726.102(12)), and all transfers of "assets" from a Ponzi scheme, like the encumbrances at issue here, are made with requisite intent. *In re McCarn's Allstate Fin., Inc.*, 326 B.R. 843, 851 (Bankr. M.D. Fla. 2005) ("[D]ebtor who runs a Ponzi scheme knows that his future investors will lose their money and a debtor's knowledge that future investors will not be paid is sufficient to establish his actual intent to defraud them."); *Terry v. June*, 432 F. Supp. 2d 635, 640 (W.D. Va. 2006) (Ponzi scheme operators "necessarily act with actual intent to defraud creditors due to the very nature of the schemes.").

Ordinarily, Section 726.109(1) then affords a creditor a defense if it can establish <u>both</u> that it provided reasonably equivalent value for the transfer <u>and</u> that it acted in "good faith". Good faith is measured by the creditor's actions and actual and imputed knowledge, and whether the circumstances would place a reasonable person on inquiry notice of the transferor's fraudulent intent. *See In re World Vision*, 275 B.R. 641, 641 (Bankr. M.D. Fla.

2002); *Quilling v. Stark*, 2007 WL 415351, *3 (N.D. Tex. Feb 7, 2007) ("The relevant inquiry is what the transferee objectively knew or should have known instead of examining the transferee's actual knowledge from a subjective standpoint.") (internal quotations omitted).[1]

Here, however, Wells Fargo cannot show that it acted in "good faith," thus the transfers to it of its claimed security interests were fraudulent under Section 726.105(1). As the Receiver's Claims Motion discusses in more detail, Wells Fargo was intimately familiar with Arthur Nadel ("**Nadel**") and the hedge funds he used to perpetrate his Ponzi scheme, knew (and at a minimum, was on inquiry notice) of numerous "red flags" raised by Nadel's transactions at Wells Fargo, and executed numerous unlawful transactions that allowed Nadel to perpetrate his Ponzi scheme. In part, this resulted from Nadel's use of secretive "shadow" bank accounts at Wells Fargo to commingle money invested in Scoop RE and the other hedge funds and to move it in and out of the hedge funds' "official" trading accounts to fund redemptions and other transfers. Wiand Decl.[2] ¶¶ 7-11. Those shadow accounts not only included ones opened in the name of Scoop RE and Receivership Entity Victory Fund, Ltd., which Nadel had authority to do, but also two accounts which Nadel opened in a "doing

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[1] North Carolina's fraudulent transfer statute contains identical provisions as the Florida provisions implicated here. *See* N.C. Gen'l Stats. §§ 39-23.4(a)(1), 39-23.8(a). As such, Wells Fargo's contention that "the Receiver does not allege – because he cannot – that Wells Fargo's security interests [underlying this matter] ... are not valid under North Carolina law" is not true. Mot. ¶ 16. Wells Fargo's claimed interests are void under North Carolina law for the same reasons they are void under FUFTA.

[2] "Wiand Decl." refers to the Declaration of Burton W. Wiand in Support of the Receiver's Opposition to Motion of Wells Fargo Bank, N.A. (I) for Relief from Injunction or, in the Alternative, (II) to Compel the Receiver to Abandon the Property Located at 841 South Main Street, Graham, North Carolina, which is being filed along with this opposition.

business as" capacity to mimic the name of the three hedge funds for which he was not a principal or otherwise authorized to act – accounts which Wells Fargo knew Nadel had no legitimate reason to open. *Id.* ¶¶ 7-8. Indeed, one of the "dba" accounts mimicked the name of Receivership Entity Viking Fund, LLC ("**Viking Fund**"), a hedge fund Wells Fargo knew intimately because of its investment in it. *Id.* ¶¶ 8, 13.

Wells Fargo not only invested in Viking Fund, it also invested in Scoop RE, the same entity which fraudulently transferred to it the claimed security interests underlying this matter.[3] *Id.* ¶ 13. As a result, it was aware (and, again, at a minimum was on inquiry notice) of the extensive red flags surrounding Nadel, Scoop RE, and the other hedge funds he controlled. Red flags included Nadel's disbarment for stealing client money from his escrow account, eight money judgments against him for failing to pay debts, and his sworn representations to a court that he was destitute and insolvent. *Id.* ¶ 15. They also included "to-good-to-be-true" returns for Scoop RE and Viking Fund – in all of their years in existence, neither ever reported a single quarter with a negative return – and the fact that the disclosed accountant for those and the other hedge funds was misrepresented in offering documents as a "CPA" and had been the subject of an investigation and a cease and desist

[3] Wells Fargo's denial that it was an investor in these hedge funds is simply untrue. *See* Obj. at 11 n.9. Receivership records establish that Wells Fargo affiliate Wachovia Securities International, Ltd., was the offshore broker/dealer which held the investment in a nominal capacity, and that Wells Fargo's predecessor, Wachovia Bank, N.A., and other unrelated entities were the beneficial owners of the investment. Wiand Decl. ¶ 13.

notice from regulators for identifying himself as a CPA when his CPA license had been "null and void" since 1989.[4] *Id.* ¶ 14.

Notably, Wells Fargo's extensive relationship with Nadel's scheme overlaps with Wells Fargo's admitted willful failure to implement federally mandated policies and mechanisms to stop money-laundering activities such as those Nadel consistently used to perpetrate his scheme. Specifically, in 2010 Wells Fargo entered into a Deferred Prosecution Agreement with the U.S. Department of Justice for admittedly failing to "maintain programs designed to detect and report suspicious activity that might be indicative of money laundering and other financial crimes" and "willfully fail[ing] to establish an anti-money laundering program, including, at a minimum, ... the development of internal policies, procedures, and controls designed to guard against money laundering" between May 2003 and June 2008 in violation of the Bank Secrecy Act. *U.S. v. Wachovia Bank, N.A.*, Case No. 10-cr-20165 (S.D. Fla.), Information at 1, 2. This was the exact time that Nadel's scheme flourished.

Under these facts, Wells Fargo cannot satisfy the "good faith" requirement of the fraudulent transfer defense offered by Section 726.109(1). Accordingly, the claimed security

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[4] Importantly, these extensive and longstanding ties between Wells Fargo and Nadel's scheme set the facts of this matter far apart from those of many other receiverships, including the one in *S.E.C. v. Madison Real Estate Group, LLC*, 647 F. Supp. 2d 1271 (D. Utah 2009), a case upon which the Motion relies heavily. The pertinent creditors in that case had isolated and limited ties to the underlying scheme because they merely loaned money for the purchase of real estate. In light of this limited relationship and the absence of any proof showing the creditors had information placing them on inquiry notice of fraud, the court in that case concluded those creditors could satisfy the good faith defense to a fraudulent transfer claim. *Id.* at 1280-83. In contrast, here Wells Fargo's relationship with Nadel and his scheme does not warrant the same conclusion.

interests underlying this entire matter are void as fraudulent transfers. Without a valid security interest in the Property, Wells Fargo has no right whatsoever to the Property, and thus the Motion should be denied.[5]

II. WELLS FARGO IDENTIFIES NO REASON FOR DISTRIBUTING RECEIVERSHIP ASSETS TO IT BEFORE ITS CLAIM IS RESOLVED

The Motion also should be denied because if the Claim is denied as recommended by the Receiver, then Wells Fargo will have no entitlement to any proceeds from the sale of the Property. Alternatively, the Court could allow the Claim only in part, which would then require a division of the proceeds of the Property's sale between the Receiver and Wells Fargo.[6] But if Wells Fargo is allowed to foreclose on the Property or if it is otherwise transferred to Wells Fargo, then Wells Fargo will have a right to recover all of the money it believes it is owed irrespective of whether or in what amount its Claim may ultimately be allowed. In other words, granting the Motion would be tantamount to distributing Receivership assets before it is even determined that the recipient is entitled to any distributions.

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[5] Of course, the Court need not decide whether Wells Fargo has valid security interests to resolve the Motion. The appropriate and efficient forum for adjudication of that issue is the claims process, and this further demonstrates the inappropriate nature of the Motion's effort to circumvent that procedure.

[6] For example, one of Wells Fargo's own cited cases which, unlike here, involved no misconduct by a secured creditor nevertheless denied, on equitable grounds, that creditor's request for any amount owed under the loan contract other than principal and simple interest. *See In re Real Property Locate at Jupiter Dr., Salt Lake City, Utah,* Case No. 2:05-cv-01013-DB, Special Master's Rep. & Recommendation at 8-9 (D. Utah Sept. 4, 2007) ("***Jupiter Drive***"), attached as **Exhibit A**. Here, Wells Fargo's Claim includes almost $350,000 in penalties and costs (Obj. at 2 n.2), which would have been denied by *Jupiter Drive*; of course, Wells Fargo's misconduct warrants denial of additional amounts.

Wells Fargo contends it is entitled to the entire Property simply because, it claims, it has a valid security interest in the Property under North Carolina law, and the institution of this Receivership did not impact that interest. *See* Mot. ¶ 16. But whether or not the mere institution of this Receivership impacted any security interest, or whether or not the Receiver took all property subject to existing liens, those matters are very different from whether this Court has authority to eliminate, subordinate, or otherwise affect Wells Fargo's Claim based on its misconduct and omissions. The Court has this power. *See Quilling v. Trade Partners, Inc.*, 2006 WL 1144196, *2-3 (W.D. Mich. 2006) (denying secured creditor's state law entitlement to interest on promissory note based on equitable principles of "fairness and justice"); *see also S.E.C. v. Elliott*, 953 F.2d 1560, 1569-70 (11th Cir. 1992) ("A district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership."); *Liberte Capital Group, LLC v. Capwill*, 148 Fed. Appx. 426, 434 (6th Cir. 2005) ("[A] court sitting in equity has the discretionary authority to deny state law remedies as inimical to the receivership."); *U.S. v. Vanguard Inv. Co., Inc.*, 6 F.3d 222, 226 (4th Cir. 1993) (same); *S.E.C. v. Byers*, 637 F. Supp. 2d 166, 183 (S.D.N.Y. 2009) (denying secured creditors' rights to recover on deficiency claims due to equitable concerns and holding that disqualifying "those involved in the fraudulent scheme when distributions are being made is eminently reasonable and is supported by caselaw"); *S.E.C. v. Am. Board of Trade*, 719 F. Supp. 186, 195-96 (S.D.N.Y. 1989) (subordinating creditors' claims due to inequitable conduct).

Rather than citing any cases addressing a receivership court's authority to impact <u>claim amounts</u>, the Motion relies on cases focused on the <u>priority of liens</u>. But even putting that discrepancy to the side, although the Motion's cited cases did not change secured creditors' priority, the relevant facts in those cases were not even remotely close to those involving Wells Fargo here as discussed in Section I above. These factual distinctions are critical because none of Wells Fargo's cases held that a receivership court lacks authority to change secured creditors' state or federal rights. Rather, they each merely found the equities of the particular case did not warrant changing the outcome afforded by applicable creditors' rights laws. *See, e.g.*, *Jupiter Drive* at 2-4, 8-9 (although "general rule is that a court should respect lien priorities created under state law," court "administering equity receivership has discretion in the distribution of assets"); *S.E.C. v. Homeland Commc'ns Corp.*, 2010 WL 2035326, *8 (S.D. Fla. 2010).[7]

Indeed, although *Jupiter Drive* did not find the equities of that case warranted a creditor priority that was inconsistent with the one afforded by state law, it nevertheless concluded the equities required that secured creditors only receive simply interest and no penalties, fees, or costs to which they may be entitled under the applicable loan contracts. *Jupiter Drive* at 8-9. Similarly, *Homeland Communications* concluded there was no basis to

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[7] Wells Fargo also cites *S.E.C. v. Halgiannis*, 608 F. Supp. 2d 444 (S.D.N.Y. 2009), but although that case was an S.E.C. enforcement matter, it was not a receivership and thus the court did not address ubiquitous authority holding federal courts have very broad powers to resolve claims to receivership assets.

Two other cases cited by Wells Fargo, *In re Hedged-Investments Assocs., Inc.*, 380 F.3d 1292 (10th Cir. 2004), and *In re First Alliance Mortg. Co.*, 471 F.3d 977 (9th Cir. 2006), do not help Wells Fargo because they address matters governed by the Bankruptcy Code and, in pertinent part, are limited to discussions of certain doctrines like equitable subordination, and do not address a receivership court's equitable powers. Further, the facts surrounding the pertinent creditors in those cases are, like the rest of Wells Fargo's cited cases, far different than those surrounding Wells Fargo here.

stray from the priority created by a landlord's statutory lien, but it nevertheless reduced the amount claimed under the pertinent lease and specifically noted that, unlike here, the secured creditor in that case had no culpability. 2010 WL 2035326 at *8. In short, even cases cited by Wells Fargo demonstrate that, contrary to Wells Fargo's contention, this Court is empowered to deny Wells Fargo's Claim and to prevent it from exercising any right it may have to the Property. That is precisely what is warranted.

Further, the Motion ignores there are two components to Wells Fargo's creditor status: one component is the amount purportedly owed to it under the note reflecting the terms of the loan it made to Scoop RE, and the other component is the purported security interest it has which collateralizes the amount, if any, to which it is entitled.[8] Nothing it argues or cites impacts the Court's unquestionable authority to reduce or eliminate the amount Wells Fargo should receive under the note to achieve an equitable result – *i.e.*, its Claim amount. Without an allowed Claim amount, it has no right to foreclose on or to take the Property or to otherwise enforce its claimed security interest. In other words, even assuming Wells Fargo had a security interest in the Property, that does not mean it is entitled to any particular allowed amount for its Claim.

[8] This is one of several reasons why Wells Fargo's contention that it has valid secured claims arising from loans on receivership properties in connection with which it never filed a claim in the claims process is false. Obj. at 2 n.2. Setting aside the fact that all of the cases it cites involve bankruptcy, although its <u>liens</u> on those properties may not have been automatically impacted by its failure to file a claim, without having timely filed a claim it simply has no claim amount which is secured by that interest and consequently it is not entitled to take or foreclose on those properties – indeed, it is not entitled to anything.

III. WELLS FARGO IS NOT ENTITLED TO THE REQUESTED RELIEF FROM THE INJUNCTION BECAUSE IT DID NOT SATISFY ITS BURDEN UNDER THE APPLICABLE BALANCING TEST

Finally, the portion of the Motion seeking relief from the injunction so Wells Fargo can initiate a foreclosure proceeding also should be denied because each of the relevant considerations favor maintaining the injunction. Specifically, in deciding whether to dissolve the injunction, the Court should consider: (i) whether refusing to dissolve it genuinely preserves the status quo or imposes substantial injury on Wells Fargo; (ii) the current time in the course of the Receivership; and (iii) the merits of Wells Fargo's substantive claim for which it seeks dissolution. *See S.E.C. v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984). Importantly, "the interests of the Receiver are very broad and include not only protection of the receivership *res*, but also protection of defrauded investors and considerations of judicial economy." *S.E.C. v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985). Because Wells Fargo has not satisfied its burden of proving that its very narrow interest – to pay itself – outweigh the Receiver's far broader interests, that portion of the Motion also should be denied. *See F.T.C. v. 3R Bancorp*, 2005 WL 497784, *2 (N.D. Ill. 2005); *U.S. v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 450 (3d Cir. 2005) (movant bears burden of proof).

A. Wells Fargo Has No Need To Foreclose In Light Of The Opportunities It Has Had And Will Have In This Case

As an initial matter, the request for relief from the injunction fails because the entire premise for allowing a potential litigant to petition a court for permission to proceed with litigation involving a receiver or a receivership asset is absent here. Specifically, such an opportunity is available "so that litigants are not denied a day in court during a lengthy stay." *Acorn Tech. Fund*, 429 F.3d at 443. Here, however, Wells Fargo has already fully availed itself of its "day in court," and thus it has no need to proceed outside of this Receivership. Wells Fargo already filed its Claim relating to the same interest in the Property it wishes to foreclose (*see* Doc. 675); it already filed <u>two</u> objections to the claims process procedures recommended by the Receiver (*see* Docs. 689, 690); and it already filed an objection to the Receiver's efforts to sell the Property (*see* Doc. 718). Further, the claims process will afford Wells Fargo all necessary rights to press the same arguments it would press in a foreclosure proceeding, including the purported validity of its security interest. As such, Wells Fargo has failed to demonstrate any need to proceed in another forum.

B. The Injunction Genuinely Preserves The Status Quo And Does Not Substantially Injure Wells Fargo

But even assuming *arguendo* Wells Fargo has some cognizable need to proceed with a foreclosure, it still failed to satisfy its burden under the applicable balancing test. Wells Fargo contends the Receiver has failed to maintain the status quo and that it has suffered substantial injury, and bases this on the Receiver's failure to make payments under the pertinent loan after October 2009. Mot. ¶¶ 13-14. This contention is wrong because Wells Fargo has failed to establish it has any right to such payments. *See Trade Partners, Inc.*, 2006 WL 1144196 at *2-3 (denying secured creditor's state law entitlement to interest on promissory note based on principles of "fairness and justice"). But even assuming *arguendo* Wells Fargo has such a right, its failure to receive those funds does not rise to the requisite substantial injury necessary to merit dissolution of the injunction.[9] *See Acorn Tech. Fund*,

[9] As previously noted, the Motion is simply an attempt to remove assets from the Receivership estate before other creditors are paid; not being allowed to do that does not constitute requisite substantial injury. *See Acorn Tech. Fund*, 429 F.3d at 449 ("Not being

429 F.3d at 449 (noting that in instances where courts find sufficient injury, "the degree of injury has been far more severe").

The cases Wells Fargo cites in support of its claimed right to those payments are either irrelevant or distinguishable from the circumstances here. *Orix Credit Alliance, Inc. v. Delta Resources, Inc.*, 54 F.3d 722 (11th Cir. 1995), *Old West Annuity & Life Ins. Co. v. Apollo Group*, 2006 WL 2735158 (M.D. Fla. 2006), and *In re Murray Indus., Inc.*, 121 B.R. 635 (Bankr. M.D. Fla. 1990), have no factual similarities to this matter and are otherwise inapposite. Those cases involve bankruptcy proceedings, the automatic stay imposed in bankruptcies by 11 U.S.C. § 362, and grounds for relief enumerated in that statute. In contrast, this is a federal equity receivership, where principles of equity govern, the Bankruptcy Code does not apply, and the interests of victims of securities laws violations are paramount. *See, e.g.*, *Quilling v. Trade Partners, Inc.*, 2007 WL 107669, *1 (W.D. Mich. 2007) ("This proceeding is a federal equity receivership and the Bankruptcy Code does not apply."); *Liberte Capital Group, LLC v. Capwill*, 248 Fed. App'x 650, 672 (6th Cir. 2007) ("[B]ankruptcy cases are factually and legally distinguishable from cases concerning equity receiverships ...."); *Marion v. TDI, Inc.*, 2006 WL 3742747, *2 (E.D. Pa. 2006) ("[A] bankruptcy proceeding differs significantly from an equity receivership imposed at the request of a government agency such as the SEC. The whole purpose of the SEC proceeding is to remedy violations of the securities laws for the benefit of investors."); *TLC Invs.*, 147 F. Supp. 2d 1031 at 1036 ("[T]he Court concludes that it would be unwise to require the

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allowed the first bite at the apple is not the kind of substantial injury we will recognize under the first prong of *Wencke*.").

Receiver to follow bankruptcy procedures more than he already is," denying motion to lift stay citing concerns such as delays in approving liquidation of property).

Although the only other case relied upon by Wells Fargo – *Madison Real Estate Group*, 647 F. Supp. 2d 1271 – involved an equity receivership, that case did not find the secured creditor had an absolute right to be paid and, further, the relevant facts here are significantly different than those in that case. Specifically, as discussed above in footnote 4, each of the pertinent creditors in that case merely loaned money for the purchase of real estate. *Id.* at 1280-83. In contrast, here Wells Fargo and Nadel's scheme had extensive and longstanding ties that were not even remotely present between the pertinent creditor and the scheme in *Madison Real Estate Group*. Further, the receiver in that case had already committed to relinquishing certain pertinent properties, but then sought approval to sell them and to impose on the lender modifications of the terms of notes secured by those properties. *Id.* at 1276-77. Those circumstances also are distinguishable from the ones here as the Receiver's motion to sell the Property here was denied, no new motion for approval to sell it is currently pending, the Receiver did not seek to modify in any way the actual terms of the pertinent loan, and if the sale had been approved, Wells Fargo's claimed security interests would have transferred to the proceeds of the Property pending further order.

Ultimately, *Madison Real Estate Group* actually supports denial of the Motion because it demonstrates the broad authority and discretion this Court possesses to determine the most equitable manner in which to resolve Wells Fargo's Claim and any security interest it may ultimately be found to have. *Id.* at 1277 ("While this court may have broad powers to carry out the purpose of the Receivership, the court is disinclined to put the interests of the buyers and the Receivership over the interests of secured creditors."). Although *Madison Real Estate Group* concluded under the circumstances of that case it was appropriate to allow secured creditors that acted in good faith to foreclose on the pertinent properties, the circumstances surrounding Wells Fargo here are materially different and require a different outcome. At a minimum, they require a resolution of Wells Fargo's Claim in the claims process before taking any step with respect to the Property that will be detrimental to the Receivership estate. In short, Wells Fargo does not and cannot show that preserving the status quo will substantially injure it.

C. The Current Time In The Course Of This Receivership Also Warrants Maintaining The Injunction

Next, Wells Fargo contends the injunction should be dissolved because the Receiver has controlled the Property since 2009 and thus has had "sufficient time to understand the assets under his control." Mot. ¶ 15. This misses the point, however, because although this Receivership has been pending for three years and the Receiver has obviously made great strides in his investigation and identification of Receivership assets, the Motion is entirely based on Wells Fargo's purported interest in the Property and that interest – and the interests associated with over 500 other claims – have yet to be adjudicated in this case. In other words, although some time has passed since the Receivership's inception, it is still premature to grant the requested relief. *See Acorn Tech. Fund*, 429 F.3d at 449-50 (denying motion to lift stay in receivership pending for 30 to 36 months); *Universal Fin.*, 760 F.2d at 1039 (denying motion to lift stay in four-year-old receivership); *cf. Wencke*, 742 at 1232-33 (noting that in receivership with no apparent claims process, it was time to lift stay after over seven years of receivership so investor could proceed with tort claims against receivership entity).

D. Wells Fargo Has No Claim To The Property

Finally, Wells Fargo contends that it has at least a "colorable" claim to the Property because of its purported security interest. Mot. ¶ 16. As Section I above demonstrates, however, Wells Fargo is wrong: it has no claim because it received its claimed security interests as fraudulent transfers. *See Acorn Tech. Fund*, 429 F.3d at 444 ("If it appears that a claim has no merit on its face, that of course may end the matter."). The Motion does not address this fact, and instead focuses on other bases for why Wells Fargo's misconduct requires denial of its claim to Receivership assets. In doing so, Wells Fargo contends, in relevant part, the Receiver lacks standing to assert claims based on the "shadow" accounts; such claims are precluded by the *in pari delicto* doctrine; and its Claim cannot be subordinated based on the purported circumstances here. *See* Mot. ¶ 17. All of these arguments were raised in Wells Fargo's objection to the Claims Motion (Doc. 689), and the Receiver's reply to that objection (Doc. 714) establishes that, in truth, the Receiver has standing to assert his claims against Wells Fargo, that those claims are not precluded by *in pari delicto*, and that the circumstances here warrant subordinating Wells Fargo's Claim. Doc. 714 at 3-8.

But even assuming *arguendo* Wells Fargo has a colorable claim, it still would not tip the balance in favor of dissolving the injunction. "A district court should give appropriately substantial weight to the receiver's need to proceed unhindered by litigation, and the very real danger of litigation expenses diminishing the receivership estate." *Acorn Tech. Fund*, 429 F.3d at 443. Here, if Wells Fargo is allowed to initiate a foreclosure proceeding, in that proceeding it must first establish the validity of its claimed security interest in the Property. However, that same issue also must be resolved right here in the claims process, and thus the duplicative expense that will be necessary for the Receiver to retain separate counsel in North Carolina to litigate that same issue in a foreclosure proceeding is simply an unnecessary waste of receivership resources. This provides "substantial weight" in favor of maintaining the injunction.[10]

CONCLUSION

For all of these reasons, the Motion should be denied.

[10] The Motion also incorporates the Objection's arguments (*see* Mot. at 5 n.4), but those arguments focus on the previously sought sale of the Property, they are irrelevant here, and, in any event, none warrants turning the Property over to Wells Fargo or allowing it to foreclose before its Claim is resolved. Further, they are presently moot since the Court denied without prejudice the motion for approval of the sale (Doc. 726) and no new motion has been filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 1, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on February 2, 2012, I will email the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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