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.
_____/

MOTION OF WELLS FARGO BANK, N.A. (I) FOR DETERMINATION THAT THE FILING OF PROOFS OF CLAIM HEREIN IS NOT NECESSARY TO PRESERVE SECURED CREDITORS' VALID STATE LAW SECURITY INTERESTS IN, AND CLAIMS AGAINST, COLLATERAL IN THE RECEIVER'S POSSESSION OR, IN THE ALTERNATIVE, (II) FOR LEAVE TO FILE LATE CLAIMS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)

Wells Fargo Bank, N.A. ("Wells Fargo"),[1] on behalf of itself and as servicer under certain loan documents described below, hereby files this motion (the "Motion"), seeking (i) a determination by this Court that the filing of proofs of claim in this case is not necessary to preserve the Secured Creditors' (as defined below) valid state law security interests in, and claims

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

against, collateral in the Receiver's possession or, in the alternative, (ii) leave to file late claims pursuant to Federal Rule of Civil Procedure 60(b). In support of this Motion, Wells Fargo states as follows:

SUMMARY OF THE ARGUMENT

The Secured Creditors have valid secured claims against, and security interests in, the following properties: (1) 841 South Main Street, Graham, North Carolina (the "Rite Aid Property");[2] (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").[3] With respect to the Rite Aid Property, Wells Fargo timely filed a proof of claim in this case, which claim has been designated No. 502 by the Receiver. For a variety of reasons discussed below, Well Fargo did not file proofs of claim herein with respect to the remaining three properties.[4] This is wholly irrelevant, however, because it is black letter law that secured claims remain intact despite a receivership proceeding

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[2] Among other things, pursuant to the Laurel Mountain loan documents, Wells Fargo holds a deed of trust as security for the debt owed to it under the Laurel Mountain note. Under the Laurel Mountain deed of trust, TRST, Inc. holds the entire fee simple title to the Laurel Mountain Property for the benefit of Wells Fargo. Not surprisingly, as he has done throughout this case, the Receiver has raised yet another baseless claim against Wells Fargo, this time a fraudulent conveyance claim in response to Wells Fargo's motion for abandonment of the Rite Aid Property (Doc. 728), notwithstanding the fact that those claims against Wells Fargo's security interest, established in 2006, are clearly barred by the applicable statute of limitations. *See, e.g.*, N.C. Gen'l Stats. § 39-23.4(a)(1), § 39-23.9(1) (fraudulent conveyance cause of action extinguished four years after date of transfer or one year from discovery of transfer).

[3] Well Fargo is (1) a first priority secured lender with respect to the Rite Aid Property, (2) a second priority secured lender with respect to the Laurel Mountain Property, (3) loan servicer on a first priority secured loan held by Freddie Mac with respect to the Evergreen Property, and (4) loan servicer on a first priority secured loan held by Bank of America, N.A. ("BOFA") and a second priority secured lender with respect to the Sarasota Property. Freddie Mac, BOFA and Wells Fargo are collectively referred to herein as the "Secured Creditors".

[4] The Laurel Mountain Property, the Evergreen Property and the Sarasota Property are collectively referred to herein as the "Properties").

and the filing of a proof of claim is not necessary to preserve a creditor's state law security interests in its collateral.

In the alternative, if the Court determines that the filing of proofs of claim in this case is necessary, this Court should grant Wells Fargo leave to file proofs of claim with respect to the Properties, and deem such proofs of claim as timely filed under the excusable neglect standard established by the Supreme Court in *Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S 330 (1993). Here, any neglect by Wells Fargo is excusable because (1) there will be no prejudice to the receivership estate as the Receiver was at all times aware of the Secured Creditors' valid state law secured claims and security interests, (2) the delay will have no impact on the judicial proceedings, as no distributions to investors or creditors have been made and there is no distribution plan in place, (3) the reasons for the delay are directly related to Wells Fargo's emergency merger with a failing bank during the financial crisis, and Wells Fargo's understanding that the filing of proofs of claim was not necessary to preserve the Secured Creditors' state law property rights, and (4) Wells Fargo has at all times acted in good faith in this case. For these reasons and the reasons that follow, this Court should grant the Motion and determine that the filing of proofs of claim by Wells Fargo is not necessary to preserve the Secured Creditors' valid state law security interests in, and claims against, the Properties or, in the alternative, grant Wells Fargo leave to file untimely proofs of claim with respect to the Properties.

FACTUAL BACKGROUND

A. The Evergreen Property Loan.

On November 17, 2006, River City Mortgage & Financial, LLC ("River City"), as lender, and Sharon Gae Moody individually and on behalf of the Sharon Gae Moody Trust dated July 23,

1990 (collectively, the "Borrowers"), as borrowers, entered into a standard loan transaction (described below) pursuant to which Wells Fargo serves as servicer of the loan made in connection with the Borrower's purchase of the Evergreen Property. The Evergreen Loan Documents (as defined below) were subsequently assigned to Freddie Mac and Wells Fargo continues to act as servicer of the Evergreen Property loan. As of January 25, 2012, the receivership estate was indebted to Freddie Mac in the total approximate amount of $389,407.16 (exclusive of certain interest, costs and fees), all pursuant to that certain Note dated as of November 17, 2006 (as amended, restated, supplemented, or otherwise modified from time to time, the "Evergreen Note"), between River City and the Borrowers.

In order to secure the indebtedness under the Evergreen Note, the Borrowers executed and delivered to River City a Deed of Trust (as amended, restated, supplemented, or otherwise modified from time to time, the "Deed of Trust"), to the Evergreen Property, located in Colorado, dated November 17, 2006.[5] Thereafter, the Evergreen Loan Documents were assigned to Freddie Mac. Among other things, pursuant to the Evergreen Loan Documents, Freddie Mac holds the Deed of Trust as security for the debt owed to it under the Evergreen Note.

Pursuant to the Evergreen Loan Documents and assignment thereof, Freddie Mac now holds the Deed of Trust to the Evergreen Property as security for the debt assigned to it under the Evergreen Note. Under the Deed of Trust, the Public Trustee of Jefferson County, Colorado, holds fee simple title to the Evergreen Property for the benefit of Freddie Mac. The Evergreen Deed of Trust was duly recorded in the public records of Jefferson County, Colorado. As noted, Wells Fargo is the servicer of this loan and has standing to enforce the loan documents and file

[5] The Evergreen Note and Deed of Trust are collectively referred to herein as the "Evergreen Loan Documents", copies of which are annexed hereto as Composite Exhibit A.

proofs of claim on Freddy Mac's behalf. *See, e.g., Greer v. O'Dell*, 305 F.3d 1297, 1303 (11th Cir. 2002) (holding loan servicer has standing to file proof of claim on behalf of lender).

Significantly, the Evergreen Property was not brought into the receivership estate until November 8, 2010 (Doc. No. 517), over two months after the bar date (September 2, 2010) established for filing claims in this case. (*See* Doc. No. 391).

B. The Sarasota Property Loans.

(i) The Senior Loan/Mortgage

On May 23, 2006, MSC Mortgage, LLC ("MSC"), as lender, and Neil V. Moody as Trustee of the Neil V. Moody Revocable Trust Agreement dated February 9, 1995 (the "Neil Moody Trust"), as borrower, entered into a standard loan transaction (described below) pursuant to which Wells Fargo serves as servicer of the loan made in connection with the Neil Moody Trust's purchase of the Sarasota Property. The Senior Loan Documents (defined below) were subsequently assigned to BOFA and Wells Fargo continues to act as servicer of the Sarasota Property loan. As of January 25, 2012, the receivership estate was indebted to BOFA in the total approximate amount of $1,183,530.66 (exclusive of certain interest, costs and fees), all pursuant to that certain Note dated as of May 23, 2006 (as amended, restated, supplemented, or otherwise modified from time to time, the "Senior Note"), between MSC and the Neil Moody Trust.

In order to secure the indebtedness under the Senior Note, the Neil Moody Trust executed and delivered to MSC a Purchase Money Mortgage (as amended, restated, supplemented, or otherwise modified from time to time, the "Senior Mortgage") dated May 23, 2006.[6] Thereafter, the Senior Loan Documents were assigned to BOFA. Among other things, pursuant to the Senior Loan Documents, BOFA holds security interests in and liens upon the Sarasota Property.

[6] The Senior Note and Senior Mortgage are collectively referred to herein as the "Senior Loan Documents", copies of which are annexed hereto as Composite Exhibit B.

Pursuant to the Senior Loan Documents and assignment thereof, BOFA is a first priority, senior secured creditor of the receivership estate. BOFA has valid, perfected, and not otherwise avoidable first-priority security interests in the Sarasota Property. As noted, Wells Fargo is the servicer of this loan and has standing to enforce the loan documents and file proofs of claim on BOFA's behalf. *See, e.g., Greer v. O'Dell*, 305 F.3d at 1303.

(ii) The Junior Loan/Mortgage

On May 23, 2006, Wells Fargo, as lender, and Neil V. Moody, individually and as Trustee of the Neil V. Moody Revocable Trust Agreement dated February 9, 1995, and joined by his spouse Sharon G. Moody (collectively, the "Home Equity Borrowers"), as borrowers, entered into a fixed rate advance and home equity line of credit loan transaction (described below). As of January 25, 2012, the receivership estate was indebted to Wells Fargo in the total approximate amount of $1,060,812.55 (exclusive of certain interest, fees and costs), all pursuant to that certain SmartFit Home Equity Account Agreement and Disclosure Statement dated as of May 23, 2006 (as amended, restated, supplemented, or otherwise modified from time to time, the "Junior Note"), between Wells Fargo and the Home Equity Borrowers.

In order to secure the indebtedness under the Junior Note, the Borrowers executed and delivered to Wells Fargo a Mortgage (as amended, restated, supplemented, or otherwise modified from time to time, the "Junior Mortgage") dated May 23, 2006.[7] Among other things, pursuant to the Junior Loan Documents, the Home Equity Borrowers granted Wells Fargo security interests in and liens upon the Sarasota Property.

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[7] The Junior Note and the Junior Mortgage are collectively referred to herein as the "Junior Loan Documents", copies of which are annexed hereto as Composite Exhibit C.

Pursuant to the Junior Loan Documents, Wells Fargo is a second priority, secured creditor of the receivership estate. Wells Fargo has valid, perfected, and not otherwise avoidable second-priority security interests in the Sarasota Property.

C. The Laurel Mountain Property Loan

On May 2. 2008, Wachovia and Laurel Preserve, LLC ("Laurel Preserve") entered into a loan transaction (described below) pursuant to which Wachovia served as lender in connection with a loan made to Laurel Preserve in the principal amount of $1,900,000. As of March 17, 2011, the receivership estate was indebted to Wachovia in the total approximate amount of $2,046,256.50 (exclusive of certain interest, costs and fees), all pursuant to that certain Promissory Note dated as of May 2, 2008 (as amended, restated, supplemented, or otherwise modified from time to time, the "Laurel Mountain Note"), between Wachovia and Laurel Preserve.

In order to secure the indebtedness under the Laurel Mountain Note, Laurel Preserve executed and delivered to Wachovia a Deed of Trust and Assignment of Rents (as amended, restated, supplemented, or otherwise modified from time to time, the "Laurel Mountain Deed of Trust"), to the Laurel Mountain Property, located in North Carolina, dated May 2, 2008.[8] Among other things, pursuant to the Laurel Mountain Loan Documents, Wachovia holds the Laurel Mountain Deed of Trust as security for the debt owed to it under the Laurel Mountain Note. The Laurel Mountain Deed of Trust conveyed Laurel Preserve's entire fee simple title to the Laurel Mount Property to TRSTE, Inc. as Trustee for the benefit of Wachovia.[9] The Laurel Mountain

[8] The Laurel Mountain Note and Laurel Mountain Deed of Trust are collectively referred to herein as the "Laurel Mountain Loan Documents", copies of which are annexed hereto as Composite Exhibit D.

[9] Under North Carolina law, a debtor who conveys his/her/its fee simple title to a trustee under a deed of trust to secure a debt, retains only an equitable interest in the secured property until the underlying debt is paid. Thus, TRSTE, Inc. holds the fee simple title for the benefit of Wachovia until the underlying debt is paid. (*See* Doc. No.

Deed of Trust was duly recorded in the public records of Buncombe and McDowell counties, North Carolina.

MEMORANDUM OF LAW

A. The Filing of a Proof of Claim is Not Necessary to Preserve the Secured Creditors' State Law Security Interests in, and Claims Against, Collateral in the Possession of the Receiver.

Security interests have long been recognized as property rights protected by the Constitution's prohibition against takings without just compensation. *See* U.S. Const. amend. V; *United States v. Security Indus. Bank*, 459 U.S. 70, 75, (1982); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. at 589 ("[T]he position of a secured creditor, who has rights in the specific property, differs fundamentally from that of an unsecured creditor, who has none."); *Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 411-12 (1938) ("to the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principal of equality of distribution."); *In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11th Cir. 1984). Moreover, it is without dispute that property interests are determined by state law (*see Butner v. U.S.*, 440 U.S. 48, 55 (1979)), and 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." *Marshall v. New York*, 254 U.S. 380, 385 (1920). Here, the Receiver cannot allege in good faith that the Secured Creditors do not have valid security interests in the Properties. *See* note 2 *supra* (noting the Receiver's fraudulent transfer claims are barred by the applicable statutes of limitation). Instead, in his claims determination motion (Doc. No. 675), the Receiver ignores these loan transactions, presumably because no proofs of claim were filed in this case with respect to those claims. In

690, Ex. F). On December 31, 2008 when Wells Fargo Bank, N.A. became Wachovia Bank's successor by merger it became the secured creditor under the Laurel Mountain Deed of Trust.

subsequent pleadings, the Receiver has clearly taken the position that proofs of claim are required to be filed to preserve a secured creditor's state law property rights in, and claims against, collateral in his possession. (*See* Doc. Nos. 712, 714, 728).[10]

Contrary to the Receiver's assertions, however, it is clear that valid state law security interests pass through a receivership unaffected. *See Marshall v. New York*, 254 U.S. at 385; *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). In fact, more than a century ago, the Supreme Court held that a bankruptcy discharge of a secured creditor's claim does not affect the status of the creditor's underlying lien on the debtor's property, irrespective of any bar date order entered in the case. *See Long v. Bullard,* 117 U.S. 617, 620-21 (1886) ("Here the creditor neither proved his debt in bankruptcy nor released his lien. Consequently his security was preserved notwithstanding the bankruptcy of his debtor."). Over the years, the Court has reiterated this holding. *See, e.g., United States Nat'l Bank v. Chase Nat'l Bank,* 331 U.S. 28, 33 (1947) (stating that a secured creditor "may disregard bankruptcy proceedings, decline to file a claim, and rely solely upon his security . . ."); *Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive

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[10] The Receiver's most recent assertion, that although a secured creditor's lien may not be impacted by its failure to file a claim, without timely filing a claim the creditor simply has no claim amount which is secured by that interest, is illogical and just plain wrong. (*See* Doc. No. 728, n.8). As all of the cited cases demonstrate, a secured creditor's liens are not affected by a receivership, and it may elect to disregard the proceeding and rely solely on its collateral to enforce its claim. While the filing of a proof of claim may be advisable under certain circumstances, such as when the claim is only partially secured in order to establish a claim against the receivership estate for the unsecured portion of its debt, a proof of claim is not required to establish a secured creditor's claim amount which it is entitled to enforce against its collateral outside of the proceeding. *See, e.g., In the Matter of Richard Louis Alexander*, 2011 U.S. App. LEXIS 17110 (7th Cir. Aug. 16, 2011) (holding that a secured creditor who is only looking to proceed with a foreclosure action against the mortgaged property need not file a proof of claim to protect its rights to the collateral). Again, a proof of claim is only required if the secured creditor seeks to assert its claim against the receivership estate, not against its collateral, and the Receiver's contentions to the contrary have no merit and should be disregarded.

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*").

Based on the foregoing authorities, it is clear that a secured creditor may disregard a receivership proceeding, decline to file a claim, and rely solely upon its security in order to enforce its claim. *See United States Nat'l Bank v. Chase Nat'l Bank*, 331 U.S. at 33; *In re: Bateman*, 331 F.3d 821, 826 (11th Cir. 2003) (citing *Nobleman v. Am. Savs. Bank*, 508 U.S. 324, 329 (1993)); *SEC v. Madison Real Estate Group, LLC*, 647 F. Supp. 2d at 1277; *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."); *see also SEC v. Homeland Comm. Corp.*, 2010 WL 2035326, at *7-8 (S.D. Fla. 2010) (determining that secured creditors' claims must be paid out of foreclosure proceeds of collateral and prior to claims of defrauded investors). The Receiver's contention that this rule is only grounded in bankruptcy has no merit. *See Dewsnup v. Timm*, 502 U.S. 410, 417 (1992) (concluding that "the creditor's lien stays with the real property until the foreclosure" despite the absence of any language preserving such interest in the Bankruptcy Code). Moreover, the Receiver cites no cases – because Wells Fargo believes none exist – in support of his baseless and unsupportable position regarding the alleged requirement for secured creditors to file proofs of claim in this case. *See* note 10 *supra*. In fact, the cases cited in the Receiver's recent reply brief (Doc. No. 714, p. 2, n.10), are wholly inapposite as they all address the non-filing of proofs of claim by investors or unsecured creditors, <u>not</u> secured

creditors.[11] Based on the foregoing, this Court should grant the Motion and determine that the filing of proofs of claim by Wells Fargo is not necessary to preserve the Secured Creditors' state law security interests in, and claims against, the Properties.

B. The Failure to Timely File Wells Fargo's Proofs of Claim Regarding the Properties Was the Result of Excusable Neglect and, Accordingly, Those Claims Should Not be Barred as Late-Filed.

This Court should grant Wells Fargo leave to file the proofs of claim regarding the Properties and deem such proofs of claim as timely filed under the excusable neglect standard. Federal Rule of Civil Procedure 60(b)(1) permits the court "[o]n motion and just terms" to relieve a party from an order as a result of "excusable neglect." *See* Fed. R. Civ. P. 60(b)(1). Thus, as provided by Federal Rule 60(b), courts will permit a late filing if the movant demonstrates that the failure to act was the result of excusable neglect. *See* Fed. R. Civ. P. 60(b); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996) (applying *Pioneer* standard for excusable neglect to Federal Rule of Civil Procedure 60(b)(1)). The determination of excusable neglect is at the sound discretion of the court. *See Jones v. Chemetron Corp.*, 212 F.3d 199, 205 (3d Cir. 2000) ("We review the bankruptcy court's ultimate determination regarding the existence of excusable neglect for abuse of discretion.").

The Supreme Court clarified the standards that a party seeking relief to file a late claim must meet. *See Pioneer*, 507 U.S. 330, 113 S. Ct. 1489 (1993). In the *Pioneer* case, a creditor filed a proof of claim 20 days late. *See id*. at 1492-93. Among the grounds for the untimely filing, was the inadequacy of the notice and the acts and omissions of creditor's attorney. *See id.*

[11] Instead, the Receiver contends that he only needs to demonstrate that the denial of Wells Fargo's secured interests is "fair and equitable." (*See* Doc. No. 714, p. 2). However, a district court's equitable authority in a receivership proceeding does not extend to abrogating property rights created by state law and protected by due process. *See, e.g., SEC v. Haligiannis*, 608 F. Supp. 2d 444, 449 (S.D.N.Y. 2009) (citing *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893)). Thus, the Receiver not only attempts to unfairly abrogate Wells Fargo's state law property rights, but he also improperly applies general principles of law to facts without any precedent.

at 1492-93. The Court affirmed the Circuit Court's reversal of the bankruptcy court's inflexible interpretation of the showing necessary to allow an untimely filed claim. The Court found the that the decision to permit a late filing was essentially an equitable one and adopted a four-factor test to determine the propriety of allowing a late proof of claim:

> [1] The danger of prejudice to the debtor, [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the control of the movant, and [4] whether the movant acted in good faith.

Id. at 1497. The Court let stand the lower court's findings that the creditor acted in good faith, that there was no prejudice to the debtor and that there was no disruption of efficient judicial administration. *See id*. at 1499. The Court reviewed the conduct of the attorney, allegedly giving "little weight" to his business disruption, and indicating that it was satisfied with the lower court's finding that the unusual form of bar-date notice was sufficient cause to excuse the neglect of counsel. *See id*. at 1499-1500.

Pioneer clearly eliminates the requirement that to be allowed, a late proof of claim must have arisen from uncontrollable events. *See id*. at 1496 ("the 'excusable neglect' standard of Rule 9006(b)(1) is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer."). Rather, the determination is an equitable one and the majority of courts interpreting the *Pioneer* case have concluded that the most important factor is whether the late claim will prejudice the Debtor and its estate. *See In re Sacred Heart Hospital of Norristown*, 186 B.R. 891, 895-96 (Bankr. E.D. Pa. 1995) and cases cited therein. *See also In re Eagle Bus Mfg. Co., Inc.*, 62 F.3d 730, 737 (5th Cir. 1995) ("Under *Pioneer*, the central inquiry is whether the debtor will be prejudiced."). Thus, when considering excusable neglect in the context of claims issues, several factors have been considered including: (1) whether the debtor was aware of the claim; (2) whether payment of the claim would force the

return of payments previously made or affect distributions under the plan; (3) whether payment of the claim would adversely affect the debtor or the success of the reorganization; and (4) whether allowance of the claim would "open the floodgates to future claims." *Manus Corp. v. NRG Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 188 F.3d 116, 127-28 (3d Cir. 1999); *Pro-Tec Servs., LLC v. Inacom Corp. (In re Inacom Corp.)*, 2004 U.S. Dist. LEXIS 20822, at *4 (D. Del. Oct. 4, 2004); *In re Cable & Wireless USA, Inc.*, 338 B.R. 609, 613 (Bankr. D. Del. 2006). Because there is no prejudice to the receivership or the estate and because the remaining factors favor granting leave, this Court should permit the filing of the Secured Creditors' proofs of claim under Federal Rule 60(b)(1).

(i) <u>There Is No Prejudice to the Receivership Estate.</u>

The Receiver has been fully aware of the claims of the Secured Creditors, listing them in each of his interim reports filed with this Court after the Properties were brought into the receivership estate. (*See, e.g.*, Doc. Nos. 324, 327, 362, 516, 517 and 647). The late filing of the Secured Creditors' proofs of claim will not prejudice the receivership because the Receiver has not yet filed a distribution plan in this case. Therefore, because no pay-out to creditors or investors has been determined, the receivership estate will not be injured by the filing of the Secured Creditors' proofs of claim. Moreover, because no distribution plan has been filed, the Receiver cannot contend that he would be required to seek the return of prior distributions if Secured Creditors' claims were allowed, or that allowance will impair the receivership's successful reorganization -- as this is a liquidation. *See In re Lynch*, 2004 Bankr. LEXIS 2042, at *4 (Bankr. E.D. Pa. 2004). In fact, a number of courts have previously held that the lack of a confirmed plan indicates a lack of prejudice to the debtor from the late claim. *See In re Herman's Sporting Goods, Inc.*, 166 B.R. 581, 584 (Bankr. D. N.J. 1994); *In re Eagle Bus*, 62

F.3d at 738 (where a plan is not yet confirmed and the debtor was on notice of the existence of the late claim, there is no prejudice); *In re Beltrami Enterprises, Inc.*, 178 BR. 389, 392 (Bankr. M.D. Pa. 1994) (finding no prejudice where leave sought to file a claim two years after the bar date, even though a proposed disclosure statement had been filed by a creditor); *see also In re Tannen Towers Acquisition Corp.*, 235 B.R. 748, 755 (D. N.J. 1999) ("There is no prejudice when all the parties can be placed in the same situation that they would have been in if the error had not occurred.").

(ii) <u>There Is No Impact to the Administration of the Case.</u>

There is no threat to the administration of this case from the delay. As noted, the Receiver has not attempted to file a distribution plan in this case. Although this case is approximately three years old, it has not advanced very far with respect to making distributions to investors or creditors. *See, e.g., In re Beltrami*, 178 B.R. at 392 (a two-year delay did not negatively impact court administration of the case as no confirmed plan existed). In fact, the only distributions which appear to have been made are to the Receiver and his counsel. Accordingly, this factor is simply not implicated in this case.

(iii) <u>Any Delay Was Caused by the Wells Fargo's Rational Belief That the Secured Creditors' Valid State Law Property Interests Would Not Denied By Failing to File Proofs of Claim Herein.</u>

Most delays were caused by the actions of the Receiver and others and by the excusable neglect of Wells Fargo as it attempted to merge with a failed institution during a national financial crisis.[12] Moreover, it has only recently came to the attention of Wells Fargo that the Receiver was seeking to have the Secured Creditors' valid secured claims disallowed in this case, despite the overwhelming legal authority to the contrary. However, after learning of this fact,

[12] Although the merger with Wachovia officially took place December 31, 2008, it was not until recently that the transition to a single institution under a single brand was completed.

Wells Fargo immediately directed its counsel to investigate this matter thoroughly and, if necessary, to file this Motion seeking leave to file late proofs of claim to protect the Secured Creditors' security interests and claims pursuant to their respective loan documents.

15. Wells Fargo's failure to file timely proofs of claim was not willful. Rather, Wells Fargo did not understand that its failure to file claims before the bar date could result in a loss of its valid state law property rights, and that the Receiver would seek to effectuate a taking of the Secured Creditors' property rights contrary to the Constitution's prohibition against takings without just compensation. *See, e.g.*, Declaration of Elizabeth A. Ryan, ¶5, a copy of which is annexed hereto as Exhibit E ("Ryan Decl."). The foregoing facts do not constitute grounds for denying Wells Fargo leave to file late proofs of claim in this case.

(iv) Wells Fargo Has Always Acted in Good Faith.

At all times, Wells Fargo has acted in good faith. Every party in interest is well aware of the Secured Creditors' claims in this case. In addition, immediately after the Receiver filed his claims determination motion, Wells Fargo actively participated in this case in an effort to protects the Secured Creditors' valid secured claims and security interests in their collateral. As a result of the baseless legal positions the Receiver has taken against Wells Fargo herein, Wells Fargo may suffer significant financial injury. Significantly, it should also be noted that the Evergreen Property was not brought into the receivership estate until November 8, 2010 (Doc. No. 517), over two months after the bar date of September 2, 2010. (*See* Doc. No. 391). Moreover, Wells Fargo did not receive any notice from the Receiver regarding the Junior Loan Documents secured by the Sarasota Property until April 2011, one year and five months after the bar date. *See* Ryan Decl., ¶6. Accordingly, the bar date cannot apply to the Evergreen Property

loan or the junior loan secured by the Sarasota Property under any circumstances. Based on all of the foregoing, Wells Fargo should be granted leave to file late claims in this case.

(v) <u>There Is No Prejudice to Other Creditors and Investors.</u>

It should not be overlooked that the Receiver has not yet filed a distribution plan in this case, thus allowing the Secured Creditors' late claims will not prejudice other creditors or investors. Therefore, because no pay-out to creditors or investors has been determined and no distributions will be sought to be returned, no creditors or investors will be injured by allowing the filing of the Secured Creditors' late proofs of claim. Moreover, as noted above, the Secured Creditors' claims are secured by the Properties, and therefore, unsecured creditors and investors are not entitled to a distribution of funds from that collateral until the claims of the Secured Creditors are paid in full. *See, e.g., SEC v. Homeland Comm. Corp.*, 2010 WL 2035326, at *7-8 (determining that secured creditors' claims must be paid out of foreclosure proceeds of collateral and prior to claims of defrauded investors). Thus, notwithstanding the fact that unsecured creditors and investors are likely to receive a distribution of less than 100% of their allowed claims, because the Secured Creditors' claims are secured by specific collateral and are still higher in priority than that of unsecured creditors and investors, there is no prejudice to those parties in interest.

CONCLUSION

For the foregoing reasons, the Court (a) should (i) determine that it was unnecessary for Wells Fargo to file proofs of claim in this case in order to preserve the Secured Creditors' state law security interests in, and claims against, collateral in the Receiver's possession or, in the alternative, (ii) find excusable neglect on the part of the Wells Fargo, permit Wells Fargo to file proof of claims regarding the Properties within the next 20 days, and deem such proofs of claim as timely filed, and (b) grant such other and further relief as the Court deems necessary and just.

RESERVATION OF RIGHTS

Nothing set forth in this Motion is intended, nor shall be deemed, to modify, limit, release, reduce, or waive any of the Secured Creditors' rights, claims, remedies, causes of action, or privileges at law or in equity, all of which are specifically preserved.

The filing of this Motion is also not intended, nor shall be deemed, to modify, limit, release, reduce, or waive any of the Secured Creditors' rights, claims, remedies, causes of action, or privileges at law or in equity, with respect to any of the secured properties, or any additional claims of Secured Creditors against the Receivership Entities or assets subject to the Forfeiture Proceeding pending in the United States District Court for the Southern District of New York, or in any other location presently unknown, all of which are specifically preserved.

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 did not take a position with respect to the relief requested in the Motion.

DATED this 8th day of February, 2012 in Tampa, Florida.

AKERMAN SENTERFITT

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2012, 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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