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-cv-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.
_____/

THE RECEIVER'S OPPOSITION TO 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., as successor by merger to Wachovia Bank, N.A. (collectively, "Wells Fargo") seeks (i) a determination by this Court that the filing of proofs of claim in this case is not necessary to preserve secured creditors' state law security interests in, and claims 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) ("Motion") (Doc. 740). In relevant part, Wells Fargo identifies itself as follows: (1) a second priority secured lender with respect to the approximately 420 acres in Buncombe and McDowell counties, North Carolina ("Laurel Mountain Property") and (2) a loan servicer on a first priority secured loan held by Bank of America ("BoA") and a second priority secured lender on the property located at 464 Golden Gate Point, Unit 703, Sarasota, Florida (the "Sarasota Property") (collectively, "the Properties").[1] Both of the Properties are assets of this Receivership and the Motion relates to these Properties and loans.

Wells Fargo is not entitled to the relief it seeks and, accordingly, its motion should be denied because: (1) it was required to file claims in the claims process; (2) its unfiled claims are now time-barred; (3) it is not entitled to relief under Federal Rule of Civil Procedure 60(b) as a matter of law because it did not seek relief within the one-year period set forth in

[1] Wells Fargo also identifies itself as a loan servicer on a first priority secured loan held by Freddie Mac on real property located at 30393 Upper Bear Creek Road, Evergreen, Colorado (the "Evergreen Property"). Unlike the Properties, which either (i) are owned by receivership entities or (ii) were funded with proceeds of the scheme underlying this case, the Evergreen Property was not funded with scheme proceeds and is not owned by a Receivership Entity. Instead, the Receiver obtained control of it under a settlement with Sharon Moody of the Receiver's claims against her in *Wiand, as Receiver v. N. Moody et al.*, Case No. 8:10-cv-249-T-17MAP (M.D. Fla.). That property is still titled in Ms. Moody's name. Payments on the Freddie Mac loan secured by that property are current and the Receiver intends to continue to make payments and to satisfy the loan when the house is sold, with the balance of the sale price going to the Receivership Estate. Because this house was not funded with scheme proceeds and was not owned by Nadel, any other insider, or any Receivership Entity, the reasons why the security interests on the Properties and the purported amounts owed on loans related to those Properties are not valid do not apply to those relating to the Evergreen Property.

the rule; and (4) it has not satisfied the substantive requirements for relief under Rule 60(b).

BACKGROUND

On April 21, 2010, the Court entered an Order (Doc. 391) granting the Receiver's motion to, in relevant part, approve a procedure to administer claims and proof of claim forms ("POCs") and to establish a deadline for filing POCs. The Order directed that each "entity that asserts a claim against the Receivership arising out of or related in any way to the acts, conduct, or activities of Receivership Entities must submit an original, written Proof of Claim ... **to be received on or before the later of 120 days from the entry of this Order or 90 days from the mailing of the Proof of Claim Form to known possible Claimants** ..." ("Claim Bar Date"). Order ¶ 2 (emphasis in original). Further, it explained that any "entity that fails to submit a Proof of Claim ... on or before the Claim Bar Date ... shall be forever barred and precluded from asserting any claim against the Receivership or Receivership Entities ...." *Id.*

In accordance with the procedures adopted by the Court, the Receiver provided notice to every potential claimant by mailing a claim packet consisting of a cover letter, a Notice of Deadline Requiring Filing Of Proofs Of Claims On Or Before September 2, 2010 ("Claim Bar Date Notice"), and a Proof of Claim form. (Doc. 713-10.) The cover letter explained that, "[m]ost importantly, to have your claim considered, you **MUST** submit a completed and signed Proof of Claim form ... that provides responses to all of the questions in the Proof of Claim form, so that it is **received on or before September 2, 2010** at the address provided in the Proof of Claim Form and Notice." *Id*. Similarly, the Claim Bar Date Notice explained that "the Court entered an order (the "**Claim Bar Date Order**") establishing September 2,

2010 (the "**Claim Bar Date**") as the last date for each person or entity ... to file a Proof of Claim against the Receivership Entities." Claim Bar Date Notice at 2-3. It also explained that "[i]f you think that you may have a claim, you **MUST** file a Proof of Claim to share in distributions from the Receivership Estate." *Id.* It added that,

> If you were an investor, but believe you are or may be a creditor of one o[r] of the Receivership Entities, you must provide to the Receiver by the Claim Bar Date (1) the amount you contend you are owed from any Receivership Entity; (2) any amounts received from any Receivership Entity; and (3) legible copies of all documents on which you base your claim (i.e., all invoices for services or goods provided, loan documents, etc.) or, if any such documents are not available, a detailed explanation as to why any such documents are not available.

Id. Finally, the Claim Bar Date Notice warned as follows:

> **4. CONSEQUENCES OF FAILURE TO FILE A PROOF OF CLAIM BY THE BAR DATE**
>
> ANY HOLDER OF A CLAIM OR POTENTIAL CLAIM THAT FAILS TO FILE A PROOF OF CLAIM ... BY THE CLAIM BAR DATE WILL BE FOREVER BARRED, ESTOPPED, AND ENJOINED FROM ASSERTING SUCH CLAIM AGAINST THE RECEIVERSHIP ENTITIES ... THEIR RESPECTIVE PROPERTY, THE RECEIVE, OR THE RECEIVERSHIP ESTATE, AND FROM PARTICIPATING IN ANY DISTRIBUTION FROM THIS RECEIVERSHIP.

Id. (emphasis in original).

Finally, the Proof of Claim form explained that "to be eligible to receive a distribution from the Receivership Entities' assets, you must complete and return this Proof of Claim form and, if applicable, provide the requested documentation, so that it is <u>received</u> on or before **September 2, 2010** ...." *Id*. It adds that, "IF THIS COMPLETED FORM, SIGNED UNDER PENALTY OF PERJURY, IS NOT <u>RECEIVED</u> BY THE RECEIVER ... BY **SEPTEMBER 2, 2010**, YOU WILL FOREVER BARRED FROM ASSERTING ANY

CLAIM AGAINST THE RECEIVERSHIP ENTITIES' ASSETS AND YOU WILL NOT BE ELIGIBLE TO RECEIVER ANY DISTRIBUTIONS FROM THE RECEIVER." *Id.* (emphasis in original).

Wells Fargo received the claim packet and understood its contents as demonstrated by its timely filing of the pre-printed Proof of Claim form mailed by the Receiver. (Doc. 712 at 9; Doc. 713 ¶ 24.) That claim, however, related only to its loan purportedly secured by real property generally referred to in this Receivership as the "Rite Aid Property" (*see, e.g.*, Docs. 713-11, 713-12). Wells Fargo did not file a Proof of Claim relating in any way to the Properties.

I. WELLS FARGO, AND WITH RESPECT TO TO THE SARASOTA PROPERTY ALSO BOA, RECEIVED TIMELY NOTICE OF ITS OBLIGATIONS UNDER THE CLAIMS PROCESS.

A. Wells Fargo Had Proper Notice Of Its Need To File A Claim Relating To Its Purported Interest In Laurel Mountain.

Wells Fargo has been on notice of this Receivership, of the Laurel Mountain Property's association with the Receivership, and of the requirement of filing a claim and of the Claim Bar Date for years. This is detailed in the Receiver's Reply to Trste, Inc.'s and Wells Fargo Bank, N.A.'s Objection and Opposition to Receiver's Motion to Approve Determination and Priority of Claims ("Reply") (Doc. 712 at 5-10) and the Declaration of Gianluca Morello in support of the Reply (Doc. 713). As those filings establish, Wells Fargo was informed of this Receivership shortly after it started (Doc. 690-2) and of Laurel Preserve, LLC's – the record owner of the Laurel Mountain Property – inclusion in the Receivership no later than less than a month after it was included (Doc. 713-5). In March 2009, counsel for Wells Fargo informed the Receiver of its security interest in the Laurel

Mountain Property (Doc. 713-6), and communications between Wells Fargo and the Receivership relating to that property continued (Doc. 713 ¶ 19). Further, on June 4, 2010, the Receiver mailed a claim packet to Wells Fargo that specifically identified Laurel Preserve as a Receivership entity and, as detailed above, clearly explained the claims process and consequences of not filing a timely claim. However, Wells Fargo did not file a claim related to the Laurel Mountain Property, and now it is prohibited from pursuing any interest in that property. *See Callahan v. Moneta Capital Corp.*, 415 F.3d 114, 117-18 (1st Cir. 2005) (potential claimants that did not submit their claims by bar date lacked "standing to object to the adjudication of a pending claim in the Claims Disposition Order"); *SEC v. Princeton Econ. Int'l Ltd.*, 2008 WL 7826694, *4 (S.D.N.Y. 2008) ("All persons or entities with a claim that failed to file a proof of claim prior to the Bar Date and were not excused from filing a proof of claim under the Plan are forever barred, estopped, and permanently enjoined.").

Further, almost a year ago (on April 5, 2011), the Receiver's counsel informed Wells Fargo's counsel in writing that the Claim Bar Date had expired in September 2010, and added that if "[Wells Fargo] believes there are circumstances that justify its failure to file a Proof of Claim, it remains free to submit one and an explanation for the delay and any other materials or information which it deems appropriate." (Doc. 713-8). That letter also explained that if Wells Fargo did not file a claim, "then its interest will not be considered by the Receiver, and the Court…." *Id.* Despite the Receiver's invitation, Wells Fargo did not respond or file a claim. Instead, two months later it filed a petition in the U.S. District Court for the Southern District of New York, discussed *infra* – Wells Fargo has never given the

Receiver or this Court notice of that petition. As discussed herein, Wells Fargo is now forever barred from pursuing its interest in the Laurel Mountain Property.

B. Wells Fargo And BoA Had Proper Notice Of A Need To File A Claim Relating To The Sarasota Property.

Similarly, both Wells Fargo (the servicer on one relevant loan and holder of a second relevant loan) and BoA (the holder of one relevant loan) received timely notice relating to the Sarasota Property and both had notice of this property's inclusion in this Receivership before the Claim Bar Date. The Court approved this property's inclusion in the Receivership on January 28, 2010 (the "Sarasota Property Order"") (Doc. 327). BoA had initiated a foreclosure proceeding and the case was pending at that time. (*See* Doc. 324 at 2, 10.) On February 1, 2010, the Receiver filed in the foreclosure proceeding a notice of filing accompanied by the Sarasota Property Order, the Order Appointing Receiver, the Order of Preliminary Injunction and Other Relief as to Defendants Scoop Capital, LLC and Scoop Management, Inc. and All Relief Defendants, and an Order Reappointing Receiver. (Cohen Decl., Ex. B.) The Receiver also served a copy of this notice and orders on BoA's and Wells Fargo's attorneys in the foreclosure case. (Cohen Decl., Ex. D.) Further, on February 25, 2010, a copy of 01/28/10 Order was recorded in the Sarasota County public records. (Cohen Decl., Ex. A.)

As previously noted, the Receiver then mailed to Wells Fargo a claims packet on June 4, 2010, which Wells Fargo received and understood. A claim packet was also mailed to BoA on June 4, 2010. (Cohen Decl., Ex. E).

After the Claim Bar Date, the Receiver's representatives continued to communicate with BoA's and Wells Fargo's respective outside counsel that were handling the Sarasota

Property and internal employees about the Receivership and its control over that property. In those communications, either the Receiver's representatives informed counsel and internal employees of this Receivership and the inclusion of the Sarasota Property in the Receivership or it is evident the banks and their representatives were aware of it. *See* (Cohen Decl., Ex. F,G, and K). Nevertheless, neither bank ever filed a claim relating to either of the two loans purportedly secured by the Sarasota Property. Both Wells Fargo and BoA are now forever barred from pursuing their interests in the Sarasota Property.

II. CONTRARY TO ITS ARGUMENT, WELLS FARGO WAS REQUIRED TO FILE A CLAIM TO PRESERVE ITS CLAIMED INTERESTS IN RECEIVERSHIP PROPERTY.

Because it failed to file claims relating to the Properties, Wells Fargo now argues it did not have to file them because it asserts it is a secured creditor. Wells Fargo is wrong: the governing rule is that every creditor claiming an interest in property included in this Receivership Estate, whether the interest is secured or unsecured, was required to file a timely claim with the Receiver to preserve its interests for adjudication by this Court. *Riehle v. Margolies*, 279 U.S. 218, 224 (1929) ("Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him."); *see* Ralph E. Clark, *Clark on Receivers* § 646 at 1132 (3d ed. 1992) ("Every person who has any claim or demand against the estate or property in the custody of the court through the receiver, ... must assert such claim or demand in the court in which such receiver was appointed."). Wells Fargo does not cite a single case holding that a secured creditor does not have to file a claim in a receivership to preserve it. Instead, it essentially relies on two categories of cases: one category finds that in the context

of bankruptcy, sometimes secured creditors do not have to file claims; and the other category finds that a receiver takes property subject to all liens and encumbrances. Neither of those categories of cases supports Wells Fargo's position in this Receivership.

A. Wells Fargo's Reliance On Bankruptcy Does Not Help It Here.

Wells Fargo's reliance on bankruptcy cases as justification for its failure to file claims for the Properties is wholly misplaced. As this is not a bankruptcy, the Bankruptcy Code is inapplicable and the Court is governed by rules of equity. *See, e.g., Quilling v. Trade Partners, Inc.*, 2007 WL 107669, at *1 (W.D. Mich. Jan. 9, 2007) ("This proceeding is a federal equity receivership and the Bankruptcy Code does not apply."); *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."). As such, none of the bankruptcy cases cited by Wells Fargo governs this proceeding.

But even if they did, the bankruptcy cases relied upon by Wells Fargo only paint an incomplete picture: in many instances – including some that share similar characteristics to those surrounding Wells Fargo's purported interests – secured creditors must file claims in a bankruptcy proceeding to preserve their rights. *See, e.g., U.S. Nat. Bank in Johnstown v. Chase Nat. Bank of N.Y.C.*, 331 U.S. 25, 33 (1947) (a secured creditor "must file a secured claim, however, if the security is within the jurisdiction of the bankruptcy court and if he wishes to retain his secured status, inasmuch as that court has exclusive jurisdiction over the liquidation of the security."); *In re Strong*, 203 B.R. 105, 112 (Bankr. N.D. Ill. 1996) ("If a secured creditor seeks distribution from the Chapter 13 Standing Trustee administering a confirmed plan it must file a proof of claim."); *In re Parrish*, 326 B.R. 708 (Bankr. N.D.

Ohio 2005) (secured creditor trying to recover a deficiency balance must file a proof of claim). By not filing a claim, they have no right to receive distributions from the estate.[2]

Additionally, there are significant distinctions between bankruptcies and receiverships. Sometimes, a bankruptcy does not impact a secured creditor's security interest because, at the conclusion of the bankruptcy proceeding, the collateral may remain subject to the secured creditor's interest. Thus, even if the secured creditor does not file a claim in bankruptcy, it retains the ability to foreclose on its collateral property if it is not paid in accordance with the terms of the underlying obligation. This is not the case in a receivership. The receivership court can authorize the sale of encumbered receivership property free and clear of all claims, liens, and encumbrances, including a secured creditor's interest. *See, e.g. Miners' Bank of Wilkes-Barre v. Acker*, 66 F.2d 850, 853 (3d Cir. 1933); *People's-Pittsburgh Trust Co. v. Hirsch*, 65 F.2d 972, 973 (3d Cir. 1933). Once the receivership court approves the sale of the encumbered property free and clear, the security interests are transferred to the

[2] *See In re Macias*, 195 B.R. 659, 663 (Bkrtcy. W.D. Tex. 1996) (citing *Matter of Simmons*, 765 F.2d 547, 551 (5th Cir. 1985) ("[T]he bar date for filing unsecured claims … ought to apply as well to secured claims.")) ("If a secured claim [in a Chapter 13 bankruptcy proceeding] is untimely filed, the trustee is entitled (perhaps even obligated) to object to its filing as untimely. Such disallowed claims will not be entitled to any distribution under the plan, nor will the creditor's failure to timely file permit the debtor to later argue a lack of adequate protection. Which brings us to the motion at hand. The creditor complains that it should not have to go through this indignity. The foregoing holding confirms that the creditor in fact does have to file a claim if it wishes to receive distribution under the plan. Moreover, it must file by a date certain, or face disallowance of its claim. Here, the creditor missed the bar date, and the trustee has indicated her intention to seek disallowance of the claim on grounds of untimeliness."); *In re MarketXT Holdings Corp.*, 336 B.R. 67, 71 -72 (Bkrtcy. S.D.N.Y. 2006) ("[The creditor's] failure to file a proof of claim in MarketXT's Chapter 11 case is thus fatal to its demand to share in the proceeds of the litigation. The 'bar date order' entered in the Chapter 11 case required all creditors with secured or unsecured, contingent or fixed, liquidated or unliquidated claims to file a proof of claim by a date certain. This order was binding on [the creditor] as an alleged lienholder, whose claims do not 'ride through' a Chapter 11 case in the face of a valid bar order. [The creditor's] failure to file a claim is fatal to its pretensions to have a continuing participation in the existing Claims." (Internal citations omitted)); *Liona Corp., Inc. v. PCH Assocs.*, 949 F.2d 585, 605 (2d Cir.1991) (a Chapter 11 secured creditor whose claim is not scheduled or whose claim is characterized as disputed, contingent or unliquidated must file a proof of claim to preserve its rights).

proceeds of the property's sale. *See Passaic Plumbing Supply Co. v. Eastside Holding Corp.*, 105 N.J. Eq. 485, 486, 490 (N.J. Ch. 1930); *Bogosian v. Foederer Tract Comm., Inc.*, 399 A.2d 408, 414 (Pa. Super. Ct. 1979).

The only way a secured creditor can seek a determination of its rights with respect to those proceeds is if it has filed a claim. *See Riehle*, 279 U.S. at 224 ("Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. ... [I]n the receivership proof of the claim [must] be made in an orderly way, so that it may be established who the creditors are and the amounts due them."). In the absence of filing a claim, the proceeds of the secured property's sale would be distributed in accordance with distributions of the rest of the receivership estate's assets – here, to defrauded investors with allowed claims. In short, although sometimes after bankruptcy a secured creditor can still vindicate its rights independent of the bankruptcy proceeding, in a receivership it cannot do so because all rights to receivership property must necessarily be adjudicated by the receivership court so all receivership assets can be distributed before the receivership is concluded.

B. Wells Fargo's Reliance On Other Cases Also Does Not Help It.

Significantly, none of the other cases cited by Wells Fargo contradicts *Riehle*, 279 U.S. at 224, either or otherwise holds that a secured creditor is immune from having to participate in a receivership claims process. Rather, they illustrate the point that receiverships take property subject to all liens and other encumbrances existing under applicable state law, and that the mere appointment of a receiver does not extinguish any preexisting property rights. However, the fact that the Receiver may have taken control of

property subject to existing liens and encumbrances is a very different matter from whether this Court has authority to require all creditors, including secured creditors, to file claims. *See SEC v. Elliot*, 953 F.2d 1560, 1566 (11th Cir. 1992) (court has "broad powers and wide discretion" to assure equitable distributions); *SEC v. Hardy*, 803 F.2d 1034 (9th Cir. 1986) ("a district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad."). In other words, Wells Fargo conflates the *survival* of a security interest upon the creation of a receivership with the *validity* and *amount* of the creditor's claim and whether, under governing principles of equity, any such claim should be recognized. Irrespective of bankruptcy law and state property law, Wells Fargo was obligated to file all claims to Receivership property it believed it had with the Receiver on or before the September 2, 2010 Claim Bar Date in accordance with the framework adopted by this Court.

C. Wells Fargo's Argument Does Not Make Practical Sense.

Consistent with the use of receivership claims processes in general, the purpose of the claims process here was to implement a fair, efficient, centralized, and due-process compliant procedure for this Court to consider and adjudicate all claims to Receivership property. The completion and filing of a physical claim form was important for several reasons, including that it solicited information from the claimant that was relevant to the determination of its claim and it subjected the claimant to this Court's jurisdiction for purposes of resolving the claim. As part of the claims process, the Receiver reviewed all submitted claims and, based on the information in his possession, made a determination with respect to each claim, proposed a procedure for claimant objections, and submitted his determinations to the Court

for review. As is clear from the Receiver's filings, to the extent an objection cannot be resolved between the objecting claimant and the Receiver, it will be submitted to the Court for final adjudication following a procedure to be set by the Court based on the specific needs of the dispute. Wells Fargo's argument that it can bypass this procedure simply because it has a security interest does not make sense.

Indeed, this argument ignores that irrespective of whether Wells Fargo believes it has a valid security interest, the Court must still determine (i) whether the security interest is valid and (ii) even if it is found to be valid, whether the actual claim secured by such interest is valid – *i.e.*, is Wells Fargo owed money by the Receivership Estate and is it entitled to receive it as a matter of equity – and, if so, what the appropriate claim amount is. In fact, the need for and importance of filing a claim to bring the matter before the court is well-demonstrated by the circumstances here, where Wells Fargo erroneously presumes that it has a valid claim for the full amount owed under the notes purportedly secured by the Properties and that its alleged security interests in the Properties are valid. As previously argued by the Receiver (Docs. 675, 714, 728), neither Wells Fargo's security interests nor its contentions that it is entitled to money from the Receivership Estate are valid as a result of the fact that, at a minimum, it was on inquiry notice of fraud relating to Arthur Nadel's activities.[3] *See 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)).

[3] On February 9, 2012, the Receiver sued Wells Fargo and one of its former officers in Sarasota County, Florida for their relationship with Nadel's Ponzi scheme. The complaint, which is attached hereto as **Exhibit A**, thoroughly details numerous indicia of fraud, Wells Fargo's knowledge and assistance in fraud, and several causes of action asserted against Wells Fargo.

As a result of its inquiry notice of fraud, Wells Fargo did not act with requisite "good faith," and thus all of the money and security interests transferred to Wells Fargo from Nadel and his entities in connection with the Properties, and with respect to the Sarasota Property, from Neil Moody, violated FUFTA and thus are void.

Wells Fargo's contention that the statute of limitation for fraudulent transfer claims has expired and thus the Receiver purportedly is barred from asserting fraudulent transfer claims relating to the Properties ignores the present circumstances and governing law. Even if the Receiver is statutorily barred from affirmatively filing a lawsuit against Wells Fargo and seeking avoidance of the transfer of those security interests, the Court can still consider those fraudulent transfers when determining Wells Fargo's purported interests in any of the Properties as part of the claims process. The Court can do this because it has "discretion to summarily reject formalistic arguments that would otherwise be available in a traditional lawsuit." *Broadbent v. Advantage Software, Inc.*, 2011 WL 754838, *5 (10th Cir. 2011) (in administration of Ponzi scheme receivership, "it was proper for the district court to summarily reject appellants' . . . various contract law arguments in favor of treating appellants like all other similarly situated claimants"); *see Holmberg v. Armbrecht,* 327 U.S. 392, 396 (1946) ("[S]tatutes of limitation are not controlling measures of equitable relief" because "[e]quity eschews mechanical rules; it depends on flexibility").

III. WELLS FARGO HAS NOT SHOWN AND CANNOT SHOW THAT ITS FAILURE TO TIMELY FILE PROOFS OF CLAIM QUALIFIES FOR RELIEF UNDER FED. R. CIV. P. 60(b)(1).

Wells Fargo also argues that its failure to file proofs of claim regarding the Properties should be excused under the exceptions carved out in Federal Rule of Civil Procedure

60(b)(1), which allows a court to relieve a party from a final judgment or order for "excusable neglect." However, this argument fails for several independent reasons. First, it fails as a matter of law because Wells Fargo has not complied with the strict one-year deadline for seeking relief under Rule 60(b)(1). Second, it fails because Wells Fargo has offered no proof whatsoever to support its claim of "excusable neglect." Third, it fails because even ignoring the first and second reasons, the facts here do not remotely come close to satisfying the "excusable neglect" standard.

A. Rule 60(b)(1) Does Not Apply Because Wells Fargo Has Waited Over One Year To Seek Relief.

Wells Fargo's request for relief under Rule 60(b)(1) fails as a matter of law because any such motion **must** be made within one year of the entry of the order in question. *See* Fed. R. Civ. P. 60(c)(1) (emphasis added); *see also Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 393 (1993) ("The same is true of Rule 60(b)(1), which permits courts to reopen judgments for reasons of 'mistake, inadvertence, surprise, or excusable neglect,' but only on motion made within one year of the judgment"). The Court's Order establishing a Deadline for Filing Proofs of Claims (Doc. 391) was entered on April 21, 2010, and set a Claim Bar Date of September 2, 2010. Because the Bank did not file its request for relief until February 8, 2012 – almost two years after entry of the Order setting the Claim Bar Date – as a matter of law Wells Fargo's requested relief must be denied.

B. Wells Fargo Submitted No Relevant Proof And Otherwise Failed To Satisfy Its Burden Under Rule 60(b).

Even assuming *arguendo* that this motion was timely filed, it should still be denied because Wells Fargo has not satisfied its burden for establishing excusable neglect. *See*

Pelican Production Corp. v. Marino, 893 F.2d 1143 (10th Cir. 1990) ("The burden is upon the party moving to have the judgment set aside to plead and prove excusable neglect."). Wells Fargo does not "prove" excusable neglect because Wells Fargo offers almost no evidence to support a finding of excusable neglect, such as affidavits or declarations. Rather, Wells Fargo primarily relies on argument, which does nothing to prove excusable neglect.

Wells Fargo does attach as Exhibit E a Declaration of Elizabeth A. Ryan (the "Ryan Declaration") in support of its motion (Doc. 740-E). However, the Ryan Declaration falls short of providing the requisite supporting evidence of excusable neglect. Instead, Ms. Ryan identifies herself as a "Mortgage Quality Assurance Analyst at Wells Fargo Home Equity Group" (Doc. 740-E, ¶ 1) and offers her unfounded opinion that "in [her] experience a secured lender is not required to file a Proof of Claim and can simply stand upon its state law property interest as evidenced by its mortgage and security interest." (Doc. 740-E, ¶ 5). Finally, Ms. Ryan declares that she did not receive "notice of the above-captioned proceeding until April 2011, one year and five months after the bar date for filing Proofs of Claim in this case (September 2, 2010).

This is not evidence of excusable neglect. That a "mortgage analyst" incorrectly "presumed" (Doc. 740-E, ¶ 5) that secured creditors do not need to file claims in "a bankruptcy proceeding" is not tantamount to evidence, let alone relevant evidence; it is simply an incorrect opinion, which does not even address receiverships. *See McDowell-Bonner v. District of Columbia*, 668 F. Supp.2d 124 (D.C. Cir. 2009) ("inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect") (internal citation omitted). Moreover, although Ms. Ryan states that she did not

receive notice of this proceeding until April 2011, she fails to identify what, if any, involvement or responsibility she had for the Properties or for deciding whether to file a claim. Further, Ms. Ryan makes no mention of whether other Wells Fargo employees or officers received timely notice of the instant proceedings well in advance of the Claim Bar Date. As shown by Wells Fargo's filing of a claim relating to a different property, the clear answer is that Wells Fargo received timely notice. The Receiver was not obligated to provide notice to every employee of Wells Fargo or specifically to Ms. Ryan or any other "mortgage analyst." He was simply required to provide notice reasonably calculated, under the circumstances, to apprise Wells Fargo of this Receivership and its right to file timely claims to preserve its interests. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). The Receiver complied with this obligation, and Wells Fargo received timely notice of the Claims Bar Date and of its obligation to file claims.

C. The Circumstances Of This Matter Fall Far Short Of Constituting "Excusable Neglect."

Finally, the motion should be denied because the facts governing this issue fall far short of constituting "excusable neglect." Relief under Rule 60(b) "is an extraordinary remedy and is granted only in exceptional circumstances." *Harrington v. City of Chicago,* 433 F.3d 542, 546 (7th Cir.2006) (quoting *Karraker v. Rent -A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir.2005)). In *Pioneer,* the Supreme Court articulated a four-pronged test for

examining excusable neglect. *Canfield v. Van Atta Buick/GMC Truck, Inc*., 127 F.3d 248, 249-50 (2d Cir.1997) (finding that while Pioneer involved the Bankruptcy Code, the analysis was equally applicable to Fed. R.Civ.P. 60(b)). Courts must consider "the danger of prejudice to the [non-moving party], the length of the delay and its potential impact upon judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer* at 395.

1. Wells Fargo, Not The Receiver, Controlled The Long Delay

Wells Fargo incorrectly argues that "most delays" are the fault of the Receiver. But rather than pointing to any facts demonstrating that the Receiver caused Wells Fargo's "delay," Wells Fargo superficially mentions that unidentified complexities of its merger with a failed financial institution combined with its purported misunderstanding of this Court's Claim Bar Date caused its delay and also states that it 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…." Mot. at 15. However, with respect to the "merger," Wells Fargo submits no supporting proof to show how any of that impacted its filing of claims. In fact, it did file a claim on the Rite Aid Property but does not explain how it knew to file that claim while not knowing to file claims with respect to the Properties. With respect to its lack of understanding that its rights could be terminated, this is not a valid ground for finding excusable neglect. *See Noah v. Bond Cold Storage*, 408 F.3d 1043 (8th Cir. 2005) ("Neither a mistake of law nor the failure to follow the clear dictates of a court rule constitutes excusable neglect"). It also is inconsistent with Wells Fargo's filing of a claim relating to the Rite Aid Property.

As the record demonstrates, Wells Fargo was on notice as to the scope of the

Receivership and aware of the procedure for filing claims relating to its interests, was aware of the deadline for filing claims, and had many communications with the Receiver's representatives. Its failure to timely file claims was, at best, a complete lack of diligence and thus not excusable neglect. *See Robinson v. Wix Filtration Corp, LLC*., 599 F.3d 403 (4th Cir. 2010) ("A party that fails to act with diligence will be unable to establish that his conduct constituted excusable neglect").

2. Wells Fargo Has Not Shown That It Acted In Good Faith

Not only did Wells Fargo fail to establish that it ever acted in good faith in connection with Nadel's scheme, but it also does not and cannot show that it acted in good faith in this proceeding. For example, as outlined above in Section I(A), Wells Fargo was on notice of this Court's and the Receiver's jurisdiction and control over the Laurel Mountain Property as far back as no later than March 2009. Communications between Wells Fargo and the Receivership continued through February of 2010. Wells Fargo's counsel sent a pair of letters to the Receiver in March 2011 which again identified Wells Fargo's interest in that property and demanded payment on the underlying loan. On April 5, 2011, the Receiver responded by letter to Wells Fargo's counsel informing them the deadline for filing a claim had passed in September 2010, but that if "the Bank believes there are circumstances that justify its failure to file a Proof of Claim, it remains free to submit one and an explanation for the delay and any other materials or information which it deems appropriate." Well Fargo ignored the Receiver's counsel.

Instead, without ever notifying the Court or the Receiver, in June (and again in July) 2011, Wells Fargo filed a petition in *United States v. A. Nadel* in the U.S. District Court for

the Southern District of New York seeking adjudication of its alleged rights to the Laurel Mountain Property. Not only did Wells Fargo's inexplicable failure to serve or otherwise notify the Receiver or this Court of its petition demonstrate a lack of good faith, but it violated this Court's injunction. It violated the injunctive language of the Order Appointing Receiver (Doc. 8) enjoining all parties with notice of that Order – such as Wells Fargo – "from in any way disturbing the assets or proceeds of the receivership or from prosecuting any actions or proceedings which involve the Receiver or which affect the property of the Defendants or Relief Defendants…." *See also* Order Granting Second Unopposed Motion to Expand Scope of Receivership (Doc. 44) (including Laurel Mountain Preserve within the ambit of the Court's Order Appointing Receiver). Rather than filing a late claim, Wells Fargo sought to circumvent this Court and the Receiver in violation of an injunction by seeking relief in New York without giving notice to either this Court or the Receiver. Without question, this fell short of "good faith."

3. Allowing Wells Fargo To File A Claim 1 ½ Years After The Deadline Will Prejudice The Receiver And Impact The Proceedings

Wells Fargo became aware of this Receivership no later than in a matter of weeks after the inception of this Receivership and, as a sophisticated party with sophisticated counsel, has very likely known about its need to file claims to preserve its interests in Receivership property for equally as long. But in any event, it received the claims packet that was mailed on June 4, 2010, and thus cannot dispute that it received all the notice it was entitled to about what it had to do to preserve its interests and have them adjudicated. Yet, for reasons that still remain untold, Wells Fargo chose not to file claims on the Laurel

Mountain Property or the Sarasota Property. To allow Wells Fargo to file claims now will cause prejudice to the Receiver and impact these proceedings. It will prejudice the Receiver because he will be forced to expend Receivership resources in addressing this dispute to the detriment of the Receivership Estate. The main purpose of the claims process is to adjudicate all claims to receivership property in an efficient and timely manner, and to bring finality to those claims so that receivership assets can be distributed to victims. Wells Fargo has already delayed that process, and allowing it to file claims now will prejudice the Receiver.

Further, allowing Wells Fargo to file late claims will also cause additional delay to these proceedings. Wells Fargo has made numerous filings related to the Properties and another Receivership property in this Court and even one in the Southern District of New York in violation of an injunction, causing delays in this proceeding that would have been avoided had Wells Fargo followed its obligation to timely participate in the claims process. To allow Wells Fargo to now submit additional claims will delay the proceedings even further because of the time and resources needed to address the validity of those claims and, ultimately, delay distributions to defrauded investors. But more importantly, it would also "open the door" for other would-be claimants who previously ignored the Claim Bar Date from seeking similar relief. The entire purpose of the Claim Bar Date is to avoid requiring receivers to waste scarce receivership resources on circumstances that are like those presented by Wells Fargo here. And for that reason, the hurdle to overcome for receiving permission to file a late claim is very high. Wells Fargo showing falls far short of satisfying that hurdle, especially in light of its lack of good faith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 23, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

I FURTHER CERTIFY that on February 24, 2012, I will mail the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

Arthur Nadel, Register No. 50690-018
FCI BUTNER LOW
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P.O. Box 999
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Respectfully submitted,

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