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.
_____/

REPLY OF WELLS FARGO BANK, N.A. TO 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

Wells Fargo Bank, N.A. ("Wells Fargo"),[1] a valid secured creditor and party in interest herein, recently filed a motion seeking a determination by this Court that the filing of proofs of claim in this case is not necessary to preserve certain secured creditors'

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

valid state law security interests in, and claims against, collateral in the Receiver's possession or, in the alternative, (ii) leave to file late claims (Doc. No. 740) (the "Motion").[2] Specifically, the Motion relates to the following properties: (1) approximately 420 acres near Asheville, North Carolina in Buncombe and McDowell counties (the "Laurel Mountain Property"); and (2) 464 Golden Gate Point, Unit 703, Sarasota, Florida (the "Sarasota Property"),[3] and it should be granted for several reasons. *See* Motion at pp. 8-16.

The Receiver filed his opposition to the Motion (Doc. No. 755) (the "Opposition"). He objected to the Motion for several reasons, none of which support his baseless theory that secured creditors are required to file proofs of claim in equitable proceedings such as this. In fact, the Receiver does not cite a single case holding that a secured creditor with state law property rights and security interests in real property is required to file a claim in a receivership proceeding. Instead, the Receiver spends over five pages on the bar date notice – which is markedly similar to those used in chapter 11 bankruptcy cases throughout the country – as a basis to invalidate the Secured Creditors' state law property rights and security interests in their real property collateral. This argument, however, is a red herring and should be disregarded. As noted in the Motion

[2] Capitalized terms used but not specifically defined herein shall have the respective meanings ascribed to them in the Motion.

[3] As noted in the Motion, Well Fargo is (1) a first priority secured lender with respect to the Rite Aid Property, (2) a first 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. In his Opposition, the Receiver confirms that he intends to remain current on the Freddie Mac loan with respect to the Evergreen Property and to satisfy the loan when property is sold. *See* Opposition, n.1. As such, the Court need not address that loan in the context of this Motion; accordingly BOFA and Wells Fargo are collectively referred to in this Reply as the "Secured Creditors".

and discussed below, secured creditors are not required to file proofs of claim when seeking to enforce their claims solely against specific collateral, and the cases cited in the Receiver's Reply confirm this established legal principle. Alternatively, equity strongly favors the allowance of untimely claims by the Secured Creditors because there will be absolutely no prejudice to the receivership as there is no distribution plan in place, and the Court, all interested parties and Receiver have been on notice of these secured claims from the outset.

A. Wells Fargo Was Not Required to File Proofs of Claim to Preserve the Secured Creditors' State Law Security Interests In, and Claims Against, Their Real Property Collateral

The Receiver primarily relies on *Rielse v. Margolies*, 279 U.S. 218, 224 (1929) to support his theory that every creditor, including secured creditors, must file a proof of claim in a receivership case. Unfortunately for the Receiver, *Margolies* does not even address the implication of the filing of proofs of claims by secured creditors (or any creditors for that matter). Instead, the *Morgolies* Court addressed the ability of a plaintiff/unsecured creditor to litigate his claims outside of the receivership, the *res judicata* effect of a ruling procured in state court, and an unsecured creditor's right to share in a general fund of assets to be distributed *pro rata* to unsecured creditors. *Id.* The *Margolies* Court ultimately held that it was proper for a plaintiff/unsecured creditor to litigate his breach of contract claims in state court and that the judgment procured

therein was binding in the federal receivership case. *Id.* at 226-27. Accordingly, *Margolies* has no application here and should be disregarded.[4]

Next, the Receiver relies on a series of bankruptcy cases which he alleges hold that secured creditors must file proofs of claim in bankruptcy. The first set of cases are chapter 13 reorganization cases where individual debtors were seeking to retain their primary residences and cure any default arrearages owed to their secured lenders over the course of a chapter 13 plan. *See In re Strong*, 203 B.R. 105, 112 (Bankr. N.D. Ill. 1996); *In re Parrish*, 326 B.R. 708 (Bankr. N.D. Ohio 2005); *In re Macias*, 195 B.R. 659, 663 (Bankr. W.D. Tex. 1996). While a secured creditor is required to file a proof of claim in a chapter 13 case in order to have its arrearages paid over the life of the chapter 13 plan, the non-filing of the claim does not affect the validity of its claims against, and security interests in, their collateral. In fact, irrespective of whether a secured lender files a proof of claim in a chapter 13 case, a chapter 13 debtor is nonetheless required to make its monthly loan payments (less any arrearages) to their secured lenders outside of the plan. *See, e.g., In re Parrish*, 326 B.R. at 718 ("As a practical matter, secured creditors routinely file proofs of claim in chapter 13 cases so that they can receive payment through the chapter 13 plan on any arrearage due.") (emphasis supplied). Thus, a secured creditor is only required to file a proof in a chapter 13 case if it seeks to have its loan arrearages paid over the course of the plan; otherwise it must wait to recover such amounts after the plan is fully consummated.

[4] In fact, *Margolies* actually contradicts the Receiver's assertions that all rights to receivership property must be adjudicated in the receivership court so that all assets can be distributed before the receivership is concluded. *See* Opposition at p. 10. The Receiver's recent lawsuit against Wells Fargo in Sarasota County Circuit Court also belies these assertions. *Id.*, Exh. A, Parts I and II.

Next the Receiver relies on chapter 11 bankruptcy cases which do not help his cause. In *In re MarketXT Holdings Corp.,* 336 B.R. 67, 71 (Bankr. S.D.N.Y. 2006), the court determined that an assignee of a pre-petition lawsuit that failed to file a proof of claim prior to the bar date was precluded from participating in the distribution of the proceeds of the lawsuit. Three facts in that case were significant. First, the underlying assignment agreement was rejected by the debtor, thus resulting in a breach of the agreement and the assignee having a general unsecured claim for its damages. *See* 11 U.S.C. § 365(g)(1); 11 U.S.C. § 502. *Id.* at 69. Second, the court determined that the assignee's rights were derivative of the debtor and thus at most the assignment granted the assignee a participation interest in the proceeds of the lawsuit. Third, the assignee's lien did not come into existence until a judgment was entered or a settlement was reached (which had not yet occurred), and the lien did not relate back to the date of the pre-bankruptcy assignment. *Id.* at 71-72; *see Law Research Serv. v. Martin Lutz Appellate Printers,* 489 F.2d 836, 838 (2d Cir. 1974) (citing *Okin v. Isaac Goldman Co.,* 79 F.2d 317, 319 (2d. Cir. 1935). As a result of these unusual circumstances, the court determined that the filing of a proof of claim was fatal to the assignee, who was a general unsecured creditor and at best a future lienholder. *Id.* at 73.

The Receiver next relies on *Liona Corp., Inc. v. PCH Assocs.*, 949 F.2d 585, 605 (2d Cir. 1991), which also does not support his position. *Liona Corp.* involved an under-secured creditor that failed to file a proof of claim before the bar date and who sought to receive distributions from the debtor's general fund to pay its unsecured deficiency claim. The *Liona* court also specifically determined that because all parties were on notice of the

claim and because Liona would have to consent to the sale of its collateral, it was not barred from asserting a claim against the debtor's estate. *Id.* at 605. Thus, while the filing of a proof of claim may be advisable under certain circumstances, such when a claim is only partially secured in order to establish a deficiency claim in order to share *pro rata* in the general pool of assets for the unsecured portion of its debt, a proof of claim is not required to enforce a secured creditor's claim 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). The cases cited by the Receiver confirm this bedrock legal principle.[5]

Thus, contrary to the Receiver's assertions, the governing rule is that a secured creditor is not required to file a proof of claim in an equitable proceeding, irrespective of any bar date order entered in the case. *See, e.g., Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991) ("Rather, a bankruptcy discharge extinguishes only one mode of enforcing a claim -- namely, an action against the debtor *in personam* -- while leaving intact another -- namely, an action against the debtor *in rem*"); *In re Schwalb*, 347 B.R. 726, 753 (Bankr. D. Nev. 2006) (irrespective of whether a secured creditor files a proof of claim, it is bedrock legal principal "that a secured claim passes through bankruptcy unaffected absent some affirmative action to set it aside."); *see also Louisville Joint Stock*

[5] The Receiver's citation to *U.S. Nat. Bank of Johnston v. Chase Nat. Bank of N.Y.C.*, 331 U.S. 28, 33 (1947) is equally unavailing. *Johnston* merely stands for the proposition that if possession of collateral is required in order to perfect a creditor's security interest (such as with equity securities), that creditor must file a claim if that property is in the possession in the Receiver. Here, possession was not required to perfect the Secured Creditors' security interests, which were properly recorded under state law.

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.").

B. <u>This Court Should Grant Wells Fargo Leave to File Proofs of Claim Because There is No Prejudice to the Receivership Estate</u>

The Receiver asks this Court to ignore Wells Fargo's valid state law security interests because the Receiver contends he will be prejudiced. This Court should reject the Receiver's false cry of prejudice for several reasons. First, as Wells Fargo noted in its Motion, the Receiver has been fully aware of the claims of the Secured Creditors, and even listed them in each of his interim reports filed with the Court after the Properties were brought into the receivership estate. (*See, e.g.,* Doc. Nos. 324, 327, 362, 516, 517 and 647). In response, the Receiver does not contend that he was surprised or unaware of these claims. He cannot make this argument, because it is clear from the Receiver's own representations to the Court that the Receiver was indeed aware of these claims.

Second, the Receiver has not filed a distribution plan yet, and has not made any distributions to investors or creditors. As Wells Fargo notes in its Motion, the only distributions the Receiver appears to have made at this point are to pay himself and his counsel. Wells Fargo in its Motion cites a number of cases to support the proposition that where a plan is not yet confirmed, and the debtor was on notice of the existence of a late claim, there is no prejudice. (*See*, Doc. No. 740, p. 13-14) (citing *In re Lynch,* 2004 Bankr. LEXIS 2042 at *4 (Bankr. E.D. Pa. 2004); *In re Herman's Sporting Goods, Inc.,* 166 B.R. 581, 584 (Bankr. D. N.J. 1994); *In re Eagle Bus*, 62 F.3d 730, 738 (5th Cir. 1995); *In re Beltrami Enterprises, Inc.,* 178 B.R. 389, 392 (Bankr. M.D. Pa. 1994); *In re*

Tannen Towers Acquisition Corp., 235 B.R. 748, 755 (D. N.J. 1999). The Receiver does not directly respond to these cases or to this argument. Essentially, the Receiver's response as to *why* he will be prejudiced is to repeat over and over again that he *will* be prejudiced. (*See*, Doc. No. 755, p. 20). This circularity does not provide a basis for supporting the Receiver's position. *See, e.g., In re O'Brien Environmental Energy, Inc.*, 188 F. 3d 116, 127 (3d Cir. 1999) (noting that "prejudice is not an imagined or hypothetical harm; a finding of prejudice should be a conclusion based on facts in evidence.")

About the best the Receiver can say to support his claim of prejudice is that if this Court grants Wells Fargo's Motion, the Receiver "will be forced to expend Receivership resources in addressing this dispute to the detriment of the Receivership estate." (*See* Doc. No. 755, p. 20). Essentially, the Receiver's argument as to prejudice is that he will be forced to deal with Wells Fargo's claims, and this will cost the receivership estate money. This argument does not provide a basis for this Court to ignore Wells Fargo's valid secured claims, nor does it amount to a basis for prejudice. "Otherwise, 'virtually all late filings would be condemned by this factor.'" *In re O'Brien Environmental Energy, Inc.*, 188 F.3d at 126 (citing *Manousoff v. Macy's Northeast Inc. (In re R.H. Macy & Co.)*; *see also* 166 B.R. 799, 802 (S.D.N.Y. 1994) (holding that the depletion of resources otherwise available for timely filed claims is <u>not</u> prejudice); *In re Papp International, Inc.,* 189 B.R. 939, 945 (Bankr. D. Neb. 1995).

C. The Court Should Grant Wells Fargo Leave to File Proofs of Claim Under the Excusable Neglect Standard

The Court should grant Wells Fargo leave to file proofs of claim and deem them 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 (1992). In *Pioneer*, the Supreme Court held that when analyzing a claim of excusable neglect, courts should "tak[e] account of all relevant circumstances surrounding the parties omission," including "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on 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." *Id.* at 395. The Court "accorded primary importance to the absence of prejudice to the nonmoving party and to the interest of efficient judicial administration." *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996). The lack of prejudice to the Receiver is critical in the Court's analysis to permit Wells Fargo leave to file the proofs of claim, and the Receiver has asserted no facts or reasoning to support his assertion of prejudice.

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which provided notice to all CM/ECF participants in this case.

I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following:

Arthur G. Nadel
FCI BUTNER LOW
Federal Correctional Institution
P.O. Box 999
Butner, NC 27509

AKERMAN SENTERFITT

/s/ Steven R. Wirth
L. Joseph Shaheen, Jr.
Florida Bar No.: 212385
Email: joseph.shaheen@akerman.com
Steven R. Wirth
Florida Bar No.: 170380
Email: steven.wirth@akerman.com
401 East Jackson Street, Suite 1700
Tampa, Florida 33602
Telephone: (813) 223-7333
Facsimile: (813) 223-2837

Counsel for Wells Fargo, N.A.