

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.

**LIMITED OBJECTION AND MEMORANDUM OF LAW OF WELLS FARGO
BANK, N.A. IN OPPOSITION TO RECEIVER'S UNOPPOSED MOTION TO
(1) APPROVE FIRST INTERIM DISTRIBUTION, (2) ESTABLISH RESERVES,
AND (3) APPROVE REVISIONS TO CERTAIN CLAIMS DETERMINATIONS**

Wells Fargo Bank, N.A. ("Wells Fargo"),¹ a valid secured creditor and party in interest herein, hereby files this limited objection (the "Objection") and memorandum of law in opposition to *Receiver's Unopposed Motion to (1) Approve First Interim*

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

Distribution, (2) Establish Reserves, and (3) Approve Revisions to Certain Claims Determinations (the "Motion") (Doc. No. 825), and in support thereof, states as follows:

MEMORANDUM OF LAW

A. If the Motion Does Not Waive or Otherwise Affect Wells Fargo's Secured Claims on the Real Estate, Wells Fargo Does Not Object to the Motion, Except Wells Fargo Requests, at Minimum, an Increased Reserve With Respect to the Rite Aid Property.

The Receiver's Motion seeks to make a first interim distribution of approximately \$25 Million representing an approximately 20% distribution to investors on account of their allowed claims. The Motion also seeks to establish a 20% reserve for certain of Wells Fargo's claims secured by real estate held in the receivership estate. Counsel for the Receiver has advised Wells Fargo that the Motion is not intended to and does not waive or otherwise affect Wells Fargo's secured claims. Thus, it is Wells Fargo's understanding that the Motion does **not** seek to transfer Wells Fargo's liens from the real estate that secure its claims to the proposed 20% reserved amounts. In other words, it is Wells Fargo's understanding that the Motion does not seek to replace Wells Fargo's security interests in the real estate with the security in the proposed reserve account.

If Wells Fargo's understanding is correct, Wells Fargo does not object to the Motion except as follows: Wells Fargo opposes the Receiver's motion to sell the Rite Aid property and requests that the property be immediately abandoned to the bank; if the Receiver proceeds with the sale as planned, this Motion will effectively limit Wells Fargo's secured claim against the Rite Aid property to \$2,420,692.30 (\$2,200,000 realized from the sale plus the proposed 20% reserve of \$220,692.32) **prior** to any determination of whether the claim is allowable or not. As noted in Wells Fargo's prior

pleadings with the Court, a pre-determination of Wells Fargo's secured claims at this stage in the proceedings would amount to an unconstitutional taking of Wells Fargo's property rights without due process. *See* Doc. Nos. 689, 719, 740 and 762; *see also In re Real Property Located at Jupiter Drive, Salt Lake City, Utah*, 2007 U.S. Dist. LEXIS 65276, at *10 (D. Utah June 7, 2007) (“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.’”) (quoting *Marshall v. New York*, 254 U.S. 380, 385 (1920)); *SEC v. Haligiannis*, 608 F. Supp. 2d 444, 449 (S.D.N.Y. 2009) (determining a district court’s equitable authority in a receivership proceeding does not extend to abrogating fundamental property rights created by state law and protected by due process) (citing *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893)).

These fundamental state law property rights require federal receivers such as Mr. Wiand to manage real estate according to the law of the state where the property is located. *See* 28 U.S.C. § 959(b) (noting receiver must manage and operate the property "in the same manner that the owner or possessor thereof would be bound to do" under applicable state law). This includes preserving the status quo with the lender – *i.e.*, by bringing current the regular, monthly principal and interest payments, as well as property taxes. *See SEC v. Madison Real Estate Group*, 647 F. Supp. 2d 1271, 1284-85 (D. Utah 2009) (citing *Securities & Exchange Commission v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984)). And if the status quo is not preserved and a secured creditor's collateral has been impaired (such as in this case), additional creditor protections justify lifting the injunction to allow the secured creditor to exercise its state law rights and remedies (*see*

SEC v. Madison Real Estate Group, 647 F. Supp. 2d at 1284-85; *Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources, Inc.)*, 54 F.3d 722, 729 (11th Cir. 1995) (" . . . a creditor may obtain relief from the stay (1) for cause, including the lack of adequate protection of the creditor's interest in the collateral.") (citation omitted)); or requiring a receiver to abandon the property. See *SEC v. Madison Real Estate Group*, 647 F. Supp. 2d at 1278-84 ("If the value of the property is less than the loan amount . . . the disadvantages of keeping the property in the Receivership outweigh the advantages."); *In re Kent*, 411 B.R. 743, 751 (Bankr. M.D. Fla. 2009) (determining that if the sale of an asset will not generate funds for investors or unsecured creditors, abandonment is the proper course) (quoting *In re Rambo*, 297 B.R. 418, 433 (Bankr. E.D. Pa. 2003)).

Thus, if the Receiver intends to proceed with the sale over Wells Fargo's objection, Wells Fargo requests that, at minimum, the reserve for its secured claim against the Rite Aid property be increased to \$1,246,601.20, which is the difference between the \$2,200,000 the Receiver has indicated would be realized from the sale and the amount of Wells Fargo's claim (\$3,303,461.60) as of April 25, 2012, plus twelve months of interest at a per diem rate of \$397.61. Notwithstanding, if the Court determines that the sale may proceed despite there being no equity in the property for distribution to investors, the Court should allow Wells Fargo to credit bid its entire secured claim in connection with any sale of the Rite Aid property. See, e.g., *River Road Partners, LLC v. Amalgamated Bank (In re River Road Partners, LLC)*, 651 F.3d 642, 652-53 (7th Cir. 2011) (noting secured creditor has absolute right to credit bid its claim in

connection with sale of its collateral; finding it dubious that a plan based on a “free and clear” asset sale that did not provide lenders the right to credit bid could ever be considered by any court “fair and equitable.”); *In re SunCruz Casinos, LLC*, 298 B.R. 833, 839 (Bankr. S.D. Fla. 2003) (same); *In re Midway Investments, Ltd.*, 187 B.R. 382, 390-91 (Bankr. S.D. Fla. 1995) (same).

B. To the Extent the Motion Seeks to Affect or Replace Wells Fargo's Secured Claims on the Real Estate by Establishing a Reserve Account, the Motion is Inappropriate and Should be Denied.

In the unlikely event the Motion seeks to transfer Wells Fargo's liens to the proposed 20% reserved amounts and extinguish Wells Fargo' secured liens on the properties, the Receiver's Motion then ignores fundamental creditor protections and improperly limits Wells Fargo's recovery as a secured creditor. Through the guise of establishing a capped claims reserve of 20% of Wells Fargo's current claim amounts, the Receiver would be unjustifiably seeking to reclassify Wells Fargo's secured claims to, at best, Class 1 Claims on par with the claims of investors. The Receiver would also be seeking to inappropriately cap Wells Fargo's secured claims at 20% of their current claim amounts (regardless of the ultimate outcome of any pending motion or litigation regarding Wells Fargo's secured claims).

The Receiver does not offer an explanation for this action or state this purpose directly in the Motion. Instead, the Receiver simply lists Wells Fargo's secured claims as four of twenty-seven claims he intends to include as part of his capped claims reserve.²

² Wells Fargo also has a fifth secured claim against real property located in Evergreen, Colorado. However, because the property is under contract for sale for \$735,000, significantly higher than the amount owed to Wells Fargo (\$402,786.02), no reserves have been sought by the Receiver and he has previously

Wells Fargo has security interests in various parcels of property in Florida and North Carolina. The Receiver has asserted that these liens should be invalidated based upon alleged misconduct by Wells Fargo. Until those issues are resolved, Wells Fargo retains valid secured liens on those properties. As noted throughout Wells Fargo's prior pleadings with the Court, state law property rights are such fundamental rights that the reclassification or impairment of secured claims require, at minimum, proper notice and the filing of a lawsuit. *See, e.g., SLW Capital LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin)*, 530 F.3d 230, 232 (3d Cir. 2008) (determining lawsuit required to invalidate lien; lien remains intact despite creditor's failure to file claim or object to confirmation of plan which provided claim was unsecured). The Receiver cannot simply reclassify Wells Fargo's secured claims (and deny it the full cash recovery to which these claims, once allowed, are entitled) through a motion requesting the establishment of a capped claims reserve. Should that be the true motive behind the Receiver's Motion, the Court should not countenance the Receiver's attempt to "end run" these creditor protections. Accordingly, unless these infringements of Wells Fargo's rights are remedied (or clarified), the Motion should be denied.

indicated that claim would be paid in full upon the sale of the property. *See* Doc. Nos. 775, n.1 and 825-2, p. 5.

CONCLUSION

WHEREFORE, for the foregoing reasons, Wells Fargo respectfully requests that the Court deny the Motion to the extent it seeks to impair Wells Fargo's rights to receive the full recovery on its secured claims to which it is entitled and to grant such other and further relief as it deems just and proper.

DATED this 2nd day of May, 2012 in Tampa, Florida.

Respectfully submitted,

AKERMAN SENTERFITT

/s/Steven R. Wirth

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Counsel for Wells Fargo, N.A.

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/Steven R. Wirth
Attorney