

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JAN 21 2016

TIM RHODES
COURT CLERK

OKLAHOMA DEPARTMENT OF SECURITIES,)
EX. REL. IRVING L. FAUGHT, ADMINISTRATOR)

Plaintiff,)

v.)

SEABROOKE INVESTMENTS LLC, AND)
OKLAHOMA LIMITED LIABILITY COMPANY,)
ET. AL,)

Defendants.)

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Case No. CJ-2014-4515

**RESPONSE OF FIRST NATIONAL BANK & TRUST COMPANY OF
WEATHERFORD, N.A. TO RECEIVER'S REPORT ON CLAIMS AND
CLASSIFICATION RECOMMENDATION,
WITH BRIEF IN SUPPORT**

First National Bank & Trust Company of Weatherford, N.A. ("FNB-Weatherford"), hereby responds to the Receiver's Report on Claims and Recommendation for Classification of Same ("Receiver's Claim Recommendation"), filed December 22, 2015. In support of this response, FNB-Weatherford would show this court the following:

I. BACKGROUND FACTS

1. FNB-Weatherford holds two timely filed receivership claims related to notes and mortgages granted by Oakbrooke Homes LLC, and guaranteed by Tom and Karen Seabrooke, and more particularly summarized as follows:

Oakbrooke Lawton Property: A claim for \$180,406.66, consisting of an estimated secured claim of \$134,608.09, and an estimated unsecured claim of \$45,798.57, secured by Lot 1, Block Twelve, Turnpike Industrial Park, Part Nine, to the City of Lawton, Comanche County, State of Oklahoma ("Oakbrooke Lawton Property"). As of August 11, 2014 (the date this receivership was filed), the loan principal/interest/late charge balance was \$164,449.53. See Proof of

Claim Attachment attached to Proof of Claim (Oakbrooke Lawton).

Oakbrooke College Park Property: A claim for \$240,581.38, consisting of an estimated secured claim of \$128,396.50, and an estimated unsecured claim of \$111,644.88, originally secured by Lots 31-46, Block One, College Park Addition, to Oklahoma City, Oklahoma County, State of Oklahoma. (“Oakbrooke College Park Property”). As of August 11, 2014 (the date this receivership was filed), the loan principal/interest/late charge balance was \$226,914.41. See Proof of Claim Attachment attached to Proof of Claim (Oakbrooke College Park).

2. Orders were entered by this court (on January 29, 2015 and February 20, 2015) abandoning the foregoing properties from the receivership estate, authorizing their foreclosure, and also authorizing FNB–Weatherford to **seek and obtain** deficiency judgments against Oakbrooke Homes and Tom and Karyn Seabrooke (“Stay/Abandonment Order(s)”). Those orders provided however that any such deficiency judgments obtained could not be collected apart from the claims process of this case.

3. Six of the sixteen lots (lots 31-36) of the Oakbrooke College Park Property were sold pursuant to a short sale transaction, and the bank received \$8,897.35 (on or about July 27, 2015).

4. FNB–Weatherford’s mortgages granted it a power of sale, allowing for the same to be foreclosed by non-judicial foreclosure pursuant to the Oklahoma Power of Sale Mortgage Foreclosure Act (Okl. Stat. tit. 46, § 40, et. seq.)(“Power of Sale Act”). On September 18, 2015, the bank commenced non-judicial foreclosures on Ten Lots and the Oakbrooke Lawton Property. The foreclosure sales of those properties occurred on November 24, 2015 and November 25, 2015, respectively. The Ten Lots Property sold back to FNB–Weatherford for a credit bid of \$72,000.00. The Oakbrooke Lawton Property sold back to FNB–Weatherford for

a credit bid of \$126,700.00.

5. Based upon the amounts owed on the date of receivership (August 11, 2014), post-receivership payments, and the sale events, FNB-Weatherford remains owed the following unsecured claims:

Ten Lots			Oakbrooke Lawton		
Item:	Amount:	Comment:	Item:	Amount:	Comment:
Principal	\$225,037.58	As of 8/11/2014	Principal	\$163,088.87	As of 8/11/2014
Interest	\$1,377.73	As of 8/11/2014	Interest	\$998.46	As of 8/11/2014
Late Charges	\$499.10	As of 8/11/2014	Late Charges	\$362.20	As of 8/11/2014
Post Receivership Payments (short sale of 6 lots)	(\$48,897.35)	For the sake of argument, the bank has applied this to principal)	Post Receivership Payments	\$0.00	
Sale Price	(\$72,000.00)		Sale Price	(\$126,700.00)	
Deficiency	\$106,017.06		Deficiency	\$37,749.53	

FNB-Weatherford hereby amends down to the above figures its two unsecured claims pending before this court and the receiver.

II. ARGUMENTS AND AUTHORITIES

FNB-WEATHERFORD IS ENTITLED TO DEFICIENCY CLAIMS.

A. Non-Receivership Law Entitles FNB-Weatherford to a Deficiency Claim.

Okla. Stat. tit. 46; § 43(A)(2)(d) provides:

[I]n a mortgage transaction not involving the mortgagor's homestead, unless otherwise agreed, the mortgagor shall be liable for any deficiency between the amount obtained by the mortgagee from the sale and the amount of the indebtedness, interest, and the costs and expenses of sale including the amount of attorney's fees fixed in the mortgage by agreement, unless a part or all of the

fees are waived by the parties or the amount fixed is found by a court to be unconscionable. If such fees are found to be unconscionable or no fees are fixed in the mortgage by agreement a court may allow reasonable attorney's fees. Any action for a deficiency pursuant to the provisions of this subparagraph shall be commenced within ninety (90) days after the date of the sale¹. If, in such action, the mortgagor shall establish that the fair market value of the property as of the date of the sale exceeded the sale price, then the deficiency otherwise obtainable under this subparagraph shall be reduced by the amount of such excess².

Therefore, under non-receivership law, FNB-Weatherford is entitled to collect the remaining unsecured balances owed on its note/mortgage/guarantee claims. Additionally, the Stay/Abandonment Orders, authorized FNB-Weatherford to present a deficiency claim in this receivership.

B. The Aggregate Deficiency Claim Amount Due to FNB-Weatherford is Not Less than \$143,766.59.

In a receivership involving an insolvent corporation, a claimant's claim is fixed as of the date of the receivership. Trustee of Clients' Security Fund of the Bar of New Jersey v. Beckmann, 364 A.2d 15, 19 (N.J. Super. Ct. App. Div. 1976) ("the status of claims should be determined as of the time of the filing of the complaint or the appointment of a receiver,..."); E.C. Horn Sons v. Hoffman, 24 F.2d 162, 163 (3d Cir. 1928) (when debtor shown to be insolvent, "the rights of all creditors are fixed as of that date"); American Trust Co. v. Harris, 88 F.2d 541,

¹ Because of waivers in Tom and Karyn Seabrooke's guaranty agreements, FNB-Weatherford submits it is not required to file within 90 days a deficiency action against the Seabrookes. JP Morgan Chase Bank v. Specialty Restaurants, 243 P3d 8, 2010 OK 65, at ¶18-20. However, out of an abundance of caution, deficiency actions were filed. The action for a deficiency from the Oakbooke Lawton Property foreclosure was filed on January 8, 2016 with the Comanche County Court Clerk, Case No. CJ-2016-8. The action for a deficiency from the Ten Lots foreclosure was filed on January 7, 2016 with the Oklahoma County Court Clerk, Case No. CJ-2016-89. These suits were authorized by the Stay/Abandonment Orders. These petitions have not yet been served as FNB-Weatherford prefers to resolve its deficiency claims before the receivership court, if possible.

² The mortgagor has the burden of proof on this issue, not mortgagee FNB-Weatherford. However, this offset defense was waived by the Seabrooke in their guarantees, and is not available to them or the Receiver. Specialty Restaurants, 2010 OK 65 at ¶ 18-20.

544 (9th Cir. 1937)(“Claims speak as of the date of the appointment of a receiver. Their rights are fixed on that date”).

C. The Receiver Should Not Deny FNB–Weatherford a Deficiency Claim in His Liquidation Plan.

A receivership court may look to the federal bankruptcy law “and to decisions by the federal courts for guidance in determining priority of claims including those of secured claimants. Reynolds v. E & C Associates, 693 A.2d 278, 281 (R.I. 1997). “[Q]uestions of priority in distribution, set-off, provability of claims and like matters should follow the equivalent provisions of the federal bankruptcy laws which furnish a vast body of procedural and substantive law in the administration of individual solvents’ estates.” Beckmann, 364 A.2d at 554-55. The Ninth Circuit Court of Appeals noted (in 1999) that “[t]he local rules of the Central District of California direct receivers, unless ordered otherwise by the court to ‘administer the estate as nearly as possible in accordance with the practice in the administration of estates in bankruptcy.’” Commodity Futures Trading Comm’n v. Topworth Int’l, 205 F.3d 1107, 1116 (9th Cir. 1999)(quoting Central Dist. Cal. Local R. 25-8).

Under federal bankruptcy law, a secured creditor’s claim is a secured claim to the extent of the value of its security, and the balance is an unsecured claim. 11 U.S.C. 506(a). In effect a deficiency claim is an allowed claim in a bankruptcy, and is classified the same as other unsecured claims. There is no discrimination or distinction between mortgage deficiency claims and fraud claims. See 11 U.S.C. § 726. Both are unsecured claims.

Claims of a same class are to be paid “ratably and without priority or preference as between creditors of the same class...” Progress Press Brick & Machine Co. v. Sprague, 65

S.W.2d 154, 159 (Mo. Ct. App. 1933).

In an equity receivership a secured claimant is entitled to distribution of dividend from the general fund in the hands of a receiver in the proportion that his entire claim bears to the entire indebtedness until such time as the amount realized from such dividend and from the security cover the entire indebtedness. [Citations omitted].

It is clear then, that in a liquidating receivership the bondholders, after the sale of the property, hypothecated to them, are entitled to be paid dividends at least upon the amount of the deficiency due them, which is the only amount claimed by the appellant.

American Trust, 88 F.2d at 543-544. Therefore, FNB-Weatherford's deficiency claims should be paid pro rata with all unsecured claims against the receivership estate.

Consider also the following proposal regarding allocating losses in securities fraud cases, and stating in effect that a secured creditor should be able to recover a deficiency claim:

When the assets are sold for less than the value of the security interest, the secured party can preferentially take only the amount realized by the sale of the specific and securitized asset, with the difference being rolled over in the secured party's claim from the unsecured pool of funds.

...

Accordingly, equity and law require that courts recognize a secured party in a Ponzi scheme and accord that secured party the benefit of its security. If the recoverable amount from the security is greater than the amount the court determines the secured party is eligible to recover, the residue from the liquidation or sale of the secured interest can then be allocated pro rata among all other parties. If the amount a secured party is eligible to recover is greater than the sum of their secured interest, the secured party can recover the entire value of its security, and have its claim to the unsecured funds reduced dollar for dollar against the security. In this way, the secured creditor is given the benefit of its bargain and all other parties recover a greater share of the unsecured assets, producing the only equitable result.

G. Christensen, Allocating Loss In Securities Fraud: Time to Adopt a Uniform Rule for the Special Case of Ponzi Schemes, 3 Wm & Mary Bus. L. Rev. 309, 322-323 (April 2012) ("Ponzi Schemes"). Additionally,

A partially secured creditor is to be treated as a secured creditor for the portion of their investment so secured, and an unsecured creditor for the remainder.

Id. at 323, n.68.

It should be also noted that FNB-Weatherford's note/mortgage claims against Oakbrooke Homes were personally guaranteed by the Seabrookes. FNB-Weatherford held an independent right to collect from them, independent of the mortgage and/or a foreclosure of collateral. Therefore, prior to this receivership, FNB-Weatherford could have proceeded to collect its note/mortgage indebtedness directly from the Seabrookes as a matter of contract law. It did not need to foreclose, or even determine a deficiency.

Additionally, the receiver's liquidation plan entitles other claimants with unsatisfied mortgages the right to recover from the general asset pool, i.e.,

Patricia Aldridge (filed mortgage, subordinated to First Commercial Bank);
Roland Boeni (unrecorded mortgages claims 1 and 2);
Jack Horcher (note that purports to be secured by 425 NW 11th St.);
Peggy Johnston/HPJ Family Limited Partnerships (claims 2(?), 5, and 6);
Craig Matthies (Custer county mortgage)
Bobbie McCants (mortgage released in 2013)
Carolyn Poage (unrecorded mortgage)
Richard Shonts (note that purports to be secured by 425 NW 11th Street)
Susan Soesbe (mysteriously released mortgages).

Claims are to be paid "ratably and without priority or preference as between creditors of the same class..." Progress Press Brick, 65 S.W.2d at 159. FNB-Weatherford's rights and frustrated expectations vis-a-vis the Seabrookes are like other mortgagee investors—it did business with one or more of the defendants in this case, lost money, and has an unsatisfied claim. That FNB-Weatherford is a national bank insured by the FDIC (and ultimately the tax payers) is a further reason to allow it to share in the distribution pool. Additionally, a secured

creditor should arguably not be penalized by prohibition on an unsecured claim. Secured transactions help prevent Ponzi schemes:

The nature of a Ponzi scheme ensures that no Ponzi scheme operator can offer secured positions for every new investor for very long without the scheme being discovered. Therefore, incentivizing secured positions makes it more likely that a fraudulent scheme will be uncovered more quickly.

Ponzi Schemes, at 314.

D. FNB–Weatherford’s Unsecured Claims Should Include Pre-Receivership Interest and Late Charges.

The receiver allows unsecured claims only for the principal amount, less payments (addressed below). He does not allow any claims for pre-receivership interest. As was noted above, a claimant’s rights are fixed as of the date of the receivership. “The general rule under federal law, in bankruptcy and equitable receivership, which serves as a useful guide here, is that interest on a debtor’s obligations ceases to accrue at the beginning of proceedings.” Stephens v. Colaiannia, 942 P.2d 1374, 1376 (Colo. Ct. App. 1997). The negative implication is that a claimant’s receivership claim may include interest to and through the date of the receivership.

On the date of the receivership, FNB–Weatherford was owed \$1,377.73 in interest on the Oakbrooke College Park loan, plus \$499.10, for a total of \$1,876.83. On the date of the receivership, FNB–Weatherford was owed \$998.46 in interest on the Oakbrooke Lawton loan, plus \$362.20 in late charges, for a total of \$1,360.66. By analogy, the claim for late charges should be given the same treatment. Therefore, the starting place for FNB–Weatherford’s claims are what was owed on the date of the receivership (inclusive of principal, interest, and late charges), *i.e.*, \$226,914.41 (Ten Lots/Oakbrooke College Park) and \$164,449.53 (Oakbrooke Lawton). Post receivership payments should be applied to these starting balances, not lower

starting balances. Applying post-receivership payments to these amounts produces the claim amounts set forth above: (1) Ten Lots (remaining on Oakbrooke College Park Property)-\$106,017.06; (2) \$37,749.53 (remaining on Oakbrooke Lawton), for the aggregate amount of \$143,766.59.

E. Pre-Rreceivership Loan Payments Should Not Be Deducted from Principal.

The receiver proposes to determine allowed unsecured claims by applying all payments, whether interest or principal, to the principal balance. In effect, pre-receivership interest is denied. This violates the rules stated above that creditor claims are fixed as of the date of the receivership.

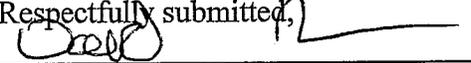
F. The Court Has Broad Powers to Determine Relief.

“The district court has broad powers and wide discretion to determine relief in an equity receivership.” SEC v. Elliott, 953 F.2d 1560, 1566 (11th Cir. 1992). Based upon the arguments set forth herein, and with the court’s consideration of any other favorable arguments and authorities advanced by similarly situated claimants (which FNB-Weatherford reserves the right to argue and advance as its own at hearing), respondent asks that this court fashion relief that would allow it to recover on its remaining unsecured claims. FNB-Weatherford also ask that this court of equity consider that, as an accommodation to the receiver, it waived waived hundreds of dollars in late charges during this receivership.

III. PRAYER FOR RELIEF

Wherefore, FNB-Weatherford asks that the court enter an order: (1) Allowing it an unsecured claim on the Oakbrooke College Park/Ten Lots loan in the amount of \$106,017.06; (2) Allowing it an unsecured claim on the Oakbrooke Lawton loan in the amount of \$37,749.53; and (3) Grant FNB-Weatherford such other relief as the court deems just.

Respectfully submitted,


DAVID L. NUNN, OBA #14512

-Of the Firm-

DAVID L. NUNN, P.C.

PO Box 230

Edmond, Oklahoma 73083-0230

(405) 330-4053

(405) 330-8470 (fax)

dnunn@davidlnunnpc.com

ATTORNEY FOR FIRST NATIONAL BANK
AND TRUST COMPANY OF WEATHERFORD,
N.A.

CERTIFICATE OF SERVICE

This is to certify that a copy of the above and foregoing was mailed, postage prepaid, on the 21 day of January, 2016, to:

Jennifer Shaw
Oklahoma Department of Securities
Oklahoma Department of Securities
204 N Robinson Ste 400
Oklahoma City OK 73102-7001

Robert D. Edinger
Robert D. Edinger PLLC
100 Park Ave. Bldg., Ste. 500
Oklahoma City, OK 73102

Mark A. Robertson
Michael Paul Kirschner
Robertson & Williams
9658 N. May Ave., Suite 200
Oklahoma City, OK 73120

Jim W. Lee
Lee & Kiser
One Broadway Executive Park, Ste. 230
201 NW 63rd Street
Oklahoma City, OK 73116

Ryan Leonard
Meyer & Leonard, PLLC
100 Park Ave. Bldg., Ste. 500
Oklahoma City, OK 73102

R. Stephen Haynes
Law Office of R. Stephen Haynes, P.C.
First Commercial Bank Building
3805 West Memorial Road
Oklahoma City, OK 73134

John M. Thompson
Crowe & Dunlevy
Braniff Building
324 N. Robinson Ave., Suite 100
Oklahoma City, OK 73102

Billy Lewis
Lee, Goodwin, Lee, Lewis & Dobson
1300 E. 9th, Ste. 1
Edmond, OK 73034

Kevin Blaney
Blaney Tweedy & Tipton, PLLC
PO Box 657
Oklahoma City, OK 73101-0657

Rollin Nash Jr.
Nash, Cohenour, Kelley, Giessman & Knight,
P.C.
4101 Perimeter Center Drive, Suite 200
Oklahoma City, OK 73112

James A. Slayton
James A. Slayton, P.C.
4808 N. Classen Blvd.
Oklahoma City, OK 73118

Kelsey Dulin
Dulin Law Firm
153130 N. May Ave., Ste. 102
Edmond, OK 73013



David L. Nunn, Esq.