

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

Oklahoma Department of Securities)
ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)
)
v.)
)
Seabrooke Investments LLC, *et al.*,)
)
Defendants.)

FEB 10 2016

TIM RHODES
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Case No. CJ-2014-4515

**OKLAHOMA DEPARTMENT OF SECURITIES' REPLY TO RESPONSE OF
FIRST NATIONAL BANK & TRUST COMPANY OF WEATHERFORD, N.A.
TO RECEIVER'S REPORT ON CLAIMS AND
CLASSIFICATION RECOMMENDATION**

The Oklahoma Department of Securities (Department), *ex rel.* Irving L. Faught, Administrator, respectfully submits this reply to Response of First National Bank & Trust Company of Weatherford, N.A. to Receiver's Report on Claims and Classification Recommendation (FNB Response).

BACKGROUND

On August 11, 2014, the Department filed a verified *Petition for Permanent Injunction and Other Relief* (Petition) against the Defendants Seabrooke Investments LLC, Seabrooke Realty LLC, Oakbrooke Homes LLC, Bricktown Capital LLC, KAT Properties LLC, Cherry Hill LLC, Tom W. Seabrooke, and Judith Karyn Seabrooke (Defendants) pursuant to the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§1-101 through 1-701 (2011). On August 11, 2014, this Court appointed Ryan Leonard as Receiver (Receiver) for Defendants and the assets of the Defendants. Defendants have agreed to pay, and the Court has ordered the payment of restitution, to investors as determined by this

Court. Defendants have waived any rights to the assets, properties, and funds of the receivership estate.

Since his appointment, the Receiver has liquidated the assets of the Defendants pursuant to orders of this Court. On January 22, 2015, this Court ordered a claims process to be established whereby proofs of claim could be filed by potential creditors and/or claimants (Claimants) of the receivership estate.

BANK'S CLAIMS

First National Bank & Trust Company of Weatherford, N.A. (FNB) filed three timely claims with the Receiver as follows:

1. \$180,406.66 for a loan for real estate in Lawton, Oklahoma (Lawton Property);
2. \$240,581.38 for a loan for real estate known as the College Park Property; and
3. \$1,261,256.78 for a loan for real estate known as Briargate Apartments¹.

Prior to the claims process and by order of this Court, the Lawton Property and the College Park Property were released from the receivership estate. The properties were recently sold and FNB retained the proceeds from those sales. Neither the Department nor the Receiver was a party to the sales transactions or the distribution of proceeds from the sales. The amounts recovered by FNB in connection with the loans related to its two outstanding claims are:

1. \$126,700 for the Lawton Property; and
2. \$120,897.35 for the College Park Property².

¹ FNB subsequently withdrew its claim relating to the Briargate Apartments when the bank received \$1,146,279.27 as payment in full of the outstanding principal and interest.

² FNB also received \$244,458.75 for the sale of two Oklahoma City properties that served as collateral for other loans made to one of more of the Defendants.

The total received by FNB on the loans to one or more of the Defendants is \$ 1,618,335.37. FNB now claims there is a deficiency balance owed to it of \$37,749.53 for the Lawton Property and \$106,017.06 for the College Park Property – properties that were released from the receivership estate in early 2015.

On December 22, 2015, the Receiver filed Receiver's Report on Claims and Recommendation for Classification of Same (Report and Recommendation). In the Report and Recommendation, the Receiver made recommendations for the distribution of the assets of the receivership estate. The Receiver recommended that FNB not receive a disbursement from the receivership estate and FNB filed the FNB Response.

AUTHORITIES AND ARGUMENT

I.

FNB Never Secured Deficiency Judgments Against Oakbrooke Homes, Tom Seabrooke or J. Karyn Seabrooke as Required by the Court

On January 30, 2015, an agreed order was issued by this Court releasing the Lawton Property from the “receivership estate, free and clear of any lien (if any), claims, rights, charges, and/or interests (of whatever type or description) of the receiver and/or [the] receivership estate” (Lawton Order). On February 20, 2015, an agreed order was issued by this Court releasing the College Park Property from the “receivership estate, free and clear of any lien (if any), claims, rights, charges, and/or interests (of whatever type or description) of the receiver and/or [the] receivership estate” (College Park Order). The Lawton Order and College Park Order authorized FNB to seek and obtain an *in personam* money or deficiency judgment against Oakbrooke Homes, Tom Seabrooke and Karyn Seabrooke. The Lawton Order and College Park Order allow FNB to collect or attempt to collect a deficiency

judgment through the receivership claims process but FNB never pursued an action to obtain the judgment.

FNB cannot now lay claim to the assets of the receivership for a deficiency claim that was never litigated or reduced to a judgment and that is unrelated to the remaining assets of the receivership estate. FNB is not a creditor of the receivership.

II.

Court Has Broad Equitable Discretion to Determine Appropriate Relief in Equity Receivership

Section 1-603 of the Act authorizes a district court, in a case involving a violation of the Act, to issue a permanent or temporary injunction, restraining order, or declaratory judgment, and to order appropriate or ancillary relief including, but not limited to, an asset freeze, appointment of a receiver, and order of restitution or disgorgement. In *State ex rel. Day v. Sw. Mineral Energy, Inc.*, 1980 OK 188, 617 P.2d 1334, 1338, the Oklahoma Supreme Court reviewed a case brought by the Department wherein the defendants, both individual and corporate, were alleged to have engaged in violations of the registration and anti-fraud provisions of the Act. The Court stated that Oklahoma districts courts have equitable powers in actions brought under the Act and, “[o]nce the equity jurisdiction of the District Court has properly been invoked, the Court possesses the necessary power to fashion appropriate remedies.” *Id.* at 1338. Section 1-608(A) of the Act promotes the goal of state and federal uniformity, and the Oklahoma Supreme Court has acknowledged that the judicial interpretation of the federal securities acts, upon which Oklahoma’s securities laws are modeled, is properly considered in the interpretation of similar state securities provisions. *Id.* at 1339-40.

One principle that has been consistently recognized in state and federal securities cases is that districts courts have “broad powers and wide discretion to determine the appropriate relief in an equity receivership,” *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992), and to craft remedies for securities violations. *Official Comm. of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006), *SEC v. Wang*, 944 F.2d 80, 85 (2d Cir. 1991). According to the United States Supreme Court, in shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973). Within that broad authority is the power to approve a plan of distribution proposed by a receiver. *See SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 82–83 (2d Cir. 2002) (affirming approval of distribution plan as “within the equitable discretion of the District Court”).

FNB argues that its claim is entitled to a priority under non-receivership law. FNB also argues that its claim is entitled to a priority by relying on the authority of bankruptcy laws. The authority cited by FNB, *Commodity Futures Trading Commission v. Topworth Int'l.*, 205 F.3d 1107, 1116 (9th Cir. 1999), for the proposition that the local rules of California direct receivers, unless ordered otherwise by the court, to administer an estate in accordance with the administration of a bankruptcy estate, is not applicable here. In an equity receivership, the Bankruptcy Code does not apply. *Quilling v. TradePartners, Inc.*, No. 1:03–CV–0236, 2006 WL 3694629 (W.D.Mich. Dec. 14, 2006). FNB fails to recognize that it has been clearly established that this Court has the authority to allocate assets in an equity receivership and to approve any distribution plan provided it is fair and reasonable. *Wang* 944 F.2d. at 85, *Worldcom* 467 F.3d at 84. “[I]n fashioning relief in an equity receivership, a district court has discretion to summarily reject formalistic arguments that would otherwise

be available in a traditional lawsuit.” *Broadbent v. Advantage Software, Inc.*, 415 Fed.App’x. 73, 78 (10th Cir. 2011). In equity, remedies to which claimants may be entitled to under other law may be suspended if such a measure is consistent with treating all claimants fairly. *SEC v. Credit Bancorp, Ltd.*, 2000 WL 1752979 at *28 (S.D.N.Y November 29, 2000).

The Receiver, in his Recommendation and Report, has evaluated each claim submitted by FNB and, after careful consideration, made the recommendation to exclude FNB’s unsecured deficiency claim from the apportionment of the limited funds remaining. With regard to the secured claims of FNB, the Receiver and the Department have recognized and facilitated the resolution of those claims through the payment in full of the principal and interest on the Briargate Apartments mortgage and the release of the College Park and Lawton Properties so that FNB could pursue its secured interest. It is the deficiency claims where the fair and reasonable line must be drawn. As the *Worldcom* Court observed, “when funds are limited, hard choices must be made.” 467 F.3d at 84.

A district court that is charged with distributing a limited fund in equity may properly refuse to give priority to one class of claimant over another, even if the law elsewhere recognizes such a priority. *See SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001). FNB suggests that it belongs to a group or class of similarly situated claimants that requires a preference or priority for FNB. There has been no finding that FNB is similarly situated to any other Claimant and there is no basis for designating a class to which the bank would belong. FNB certainly does not belong in the Claimant class of Seabrooke investors.

The court in *SEC v. Byers*, 637 F. Supp. 2d 166, 180 (S.D.N.Y. 2009), in making a determination whether parties are similarly situated, stated, “their circumstances need not be identical, but there should be a reasonably close resemblance of facts and circumstances.”

(citing *Lizardo v. Denny's Inc.*, 270 F.3d 94, 101 (2d Cir. 2001)). The court in *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001), held that “similarly situated” does not mean “identical”, but rather similar “in all material respects.” It is simple in this set of facts to distinguish FNB from other Claimants. FNB is the only bank or financial institution Claimant. FNB had multiple loans with Defendants for the purchase of multiple parcels of real estate for which mortgages were filed and ultimately paid or foreclosed. FNB has received over \$1.6 million from the sale of its collateral since August 11, 2014. No similarity exists between FNB and individual Claimants who were solicited to invest money with the Defendants with no protection as to a return on their investments. A preference or priority does not apply to the FNB claim. The Receiver’s Recommendation and Report should be adopted and FNB’s claim denied.

III.

Equity Supports the Exclusion of FNB’s Claim Seeking Additional Funds

The Department takes no issue with the previous disposition of the secured claims of FNB in this case and agrees with the Receiver that the deficiencies sought are unsecured claims. FNB claims that it is owed \$106,017.06 and \$37,749.53 on the College Park and Lawton Properties respectively. Here, where the Receiver has inadequate funds to pay all claims, the Court must make an equitable determination to allow or disallow any part of a claim no matter how deserving a Claimant may be. If there are limited funds to distribute, the Court must apply the fair and reasonable test to each dollar sought.

Considering that FNB has already received back principal and interest loaned to Defendants on multiple properties, the grant of a further distribution would be at the expense of Claimants who have recovered little or nothing at all. Because FNB has already received

proportionately much more from Defendants than other Claimants, it would be inequitable for them to receive additional monies. *Worldcom* 467 F.3d at 84, *Byers* 637 F. Supp. 2d at 183 (S.D.N.Y. 2009). The most grievously injured Claimants should receive the greatest share of the remaining funds in the receivership estate. *Worldcom at 84*, citing *SEC v. Certain Unknown Purchasers of the Common Stock of & Call Options for the Common Stock of Santa Fe International Corp.*, 817 F.2d 1018, 1020-1021 (2d Cir.1987).

IV.

Equity Limits FNB's Recovery to Payment From Collateral

In *SEC v. HKW Trading LLC*, No. 8:05-CV-1076-T-24-TB, 2009 WL 2499146, at *3 (M.D. Fla. Aug. 14, 2009), the court cited Ralph Ewing Clark's *Treatise on the Law and Practice of Receivers*, 3d ed. (1959), for the proposition that "[p]ayment to claimants whose property was unlawfully taken from them is given a higher priority than payment to general creditors." Likewise, in *U.S. Commodity Futures Trading Comm'n v. PrivateFX Glob. One*, 778 F. Supp. 2d 775 (S.D. TX 2011), the court considered the case of a consolidated action brought by the SEC and the CFTC against corporate and individual defendants for violations of the securities and commodity laws. Consent injunctions were issued by the court against the defendants. The appointed receiver proposed a distribution of funds to investors who he described as direct victims of the fraud that was at issue in the case, thereby excluding any payment to creditors such as banks. Wells Fargo Bank, N.A. had extended a \$500,000 line of credit to one of the defendants who defaulted on the loan agreement. Wells Fargo filed a claim with the receiver for over \$500,000 and argued it was entitled to an equitable distribution just like the investors. The receiver argued that courts regularly grant defrauded investors a higher priority than defrauded creditors, citing *Quilling* 2006 WL 3694629. The

court described the receiver's legal argument as "persuasive." The court rejected the Wells Fargo claim, recognizing that it has the power to subordinate the claims of general creditors to the claims of defrauded investors under its broad equitable powers even if the result would be to deny general creditors any compensation at all. *PrivateFX* at 786. In a footnote, the court noted that it is Wells Fargo's "business to review applications for credit and determine whether they are valid. Wells Fargo is a sophisticated financial institution. Thus, it is difficult to place Wells Fargo's claim of victimization on the same plane as that of the duped investors." *Id.* at 787, n 5.

FNB is also a sophisticated financial institution with the power and ability to thoroughly investigate the credit potential of its borrowers and the value of collateral. As any borrower knows, a credit transaction with a financial institution sparks a comprehensive review of the borrower's history, credit, and financial condition. This is a critically important factor with regard to the deficiency claims on the Lawton and College Park Properties. FNB surely exercised its obligation to conduct a comprehensive review of Defendants' credit worthiness and the property values before making the business decision to accept the risk of entering into these commercial relationships. It would be inequitable to allow FNB to receive a further benefit that would cause great financial harm to investors who did not have the same opportunity to conduct an in depth financial probe.

FNB has already recovered \$1,618,335.37 in connection with its loans to Defendants. Neither the Receiver nor the Department objected to the recovery pursuant to the bank's secured interests. However, it would be inequitable to allow FNB to recover more. In *Byers* 637 F. Supp 2d at 183, the receiver proposed a plan permitting secured creditors to rely solely on their collateral for recovery and prohibiting them from recovering on their

deficiency claims. The receiver argued that this would be equitable due to the fact that secured creditors would be paid ahead of investors and receive a greater percentage of their claims than the defrauded investors. The receiver argued that it would be inequitable to permit them to recover more. *Id.* The *Byers* court agreed citing its equitable powers. The court also adopted the *Worldcom* conclusion that it was fair and reasonable that limited funds available for distribution not be directed to those claimants who have already recovered more money than those who have recovered much less, if anything. The same equitable treatment is applicable here. To allow recovery to FNB beyond its collateral would unjustly diminish the recovery of the innocent investors.

CONCLUSION

In light of the facts presented and authorities cited herein, and the absence of authority to support the FNB Response, the Department respectfully requests that the two FNB deficiency claims be rejected.

Respectfully submitted,

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Irving L. Faught, Administrator

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CERTIFICATE OF SERVICE

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