

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 1:23-24903-CIV-JB

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

RISHI KAPOOR, et al.

Defendants.

COURT-ORDERED SUPPLEMENTAL MEMORANDUM FILED BY MARTIN HALPERN, AS TRUSTEE OF THE MARTIN L. HALPERN REVOCABLE TRUST AND TRUSTEE OF THE HALPERN FAMILY TRUST

Pursuant to Court Order [DE 161], Non-Party Movants, Martin I. Halpern, as Trustee of the Martin I. Halpern Revocable Trust and as Trustee of the Halpern Family Trust (“the Trusts” or “Non-Party Movants”), by and through undersigned counsel, respectfully file their Court-Ordered Supplemental Memorandum.

INTRODUCTION

At the outset, the Trusts and undersigned counsel apologize for not citing binding caselaw from the Eleventh Circuit, referenced in the Court’s May 23 Order. [DE 161]. Therein, the Court properly required supplemental briefing:

In the course of conducting its own research, the Court has become aware of the Eleventh Circuit’s decision in *Sec. & Exch. Comm’n v. Wells Fargo Bank, N.A.*, 848 F. 3d 1339 (11th Cir. 2017), which neither the Receiver nor the Halpern Trusts cited in their filings. The Court has determined that it requires supplemental briefing regarding the *Wells Fargo* decision. Accordingly, the Receiver and the Halpern Trusts, are **ORDERED** to each file a supplemental memorandum of law **no later than May 28, 2024** which addresses the impact, if any, of the *Wells Fargo* decision on the relief sought in the Motion, including but not limited to paragraphs 10-13 of the Receiver’s proposed Order, ECF No. [128-14].

[DE 161].

ARGUMENT

As the Trusts argued, the Receiver cited no case law authorizing the Court to extinguish pre-existing state law liens of a secured creditor, which is not permitted, even in bankruptcy court. *SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017) is on all fours. Pursuant to this binding Eleventh Circuit precedent, the Court must reject the Receiver’s request for a sale “free and clear of all liens, claims and encumbrances” that would extinguish the Trusts’ pre-existing state law lien.

In *Wells Fargo*, the trial court, at the receiver’s urging, extinguished certain property liens because the lienholder did not file a timely proof of claim. On appeal, the Eleventh Circuit reversed. The Eleventh Circuit found “while a federal district court has wide-ranging authority to supervise a receivership, *we hold [the trial court] does not have the authority to extinguish a creditor’s pre-existing state law security interest,*” *Wells Fargo*, 848 F.3d at 1344 (italics added), which is what the Receiver asks the Court to do. Moreover, pursuant to *Wells Fargo*, a trial court also lacks authority to “order a secured creditor to either file a proof of claim and submit its claim for determination by the receivership court, or lose its secured state-law property right that existed prior to the receivership”, which the proposed order requests in paragraphs 10-13. *Id.* at 1345.

Relying on “analogous and instructive” bankruptcy law, and “treatises that have addressed the issue in the receivership context”, *id.* at 1344-45, the Eleventh Circuit concluded “a federal district court cannot order a secured creditor to . . . lose its secured state-law property right that existed prior to the receivership.” *Wells Fargo*, 848 F.3d at 1345 (italics added). *Wells Fargo* has

not been overruled. It has been applied in a subsequent Eleventh Circuit case¹ and in district court cases involving the SEC in and out of the Circuit,² and its holding has been recognized in treatises.³

Based on the briefing, there is no dispute that the Trusts' lien was in existence prior to the receivership. [See DE 128 at 4 (the Receivership Order was entered on January 12, 2024) and DE 128 at 9 (stating that the Trusts' lien was recorded on January 31, 2023)]. Therefore, per *Wells Fargo*, this Court does not have authority to extinguish the Trusts' lien, and the Receiver's request for this relief must be denied.⁴

The Court ordered that the supplemental briefing address “the relief requested in the Motion, including but not limited to paragraphs 10-13 of the Receiver's proposed Order.” [DE 161]. Because the requested sale is premised on voiding all pre-existing liens,⁵ no part of the

¹ *In re Bozeman*, 57 F.4th 895, 915 (11th Cir. 2023) (quoting *Wells Fargo*, 848 F.3d at 1344: “In the bankruptcy context, a secured creditor's lien remains intact through the bankruptcy, regardless of whether the creditor files a proof of claim”).

² *SEC v. Nadel, et al.*, 2018 WL 965834, Case No. 8:09-cv-87-T-26CPT, at *2 (M.D. Fla. Feb. 20, 2018) (“With recent guidance from the Eleventh Circuit in this case, it is clear that Wells Fargo as a secured creditor did not have to file a notice of claim in the receivership,” citing *Wells Fargo*, 848 F. 4d at 1345); *SEC v. Equitybuild*, 2019 WL 587414, Case No. 18-cv-5587, at 2-4 (N.D. Ill. Feb. 13, 2019) (agreeing to segregate rents in each property in view of liens held by secured lenders, citing *Wells Fargo*).

³ See, e.g., Wright & Miller, Federal Practice and Procedure § 2985, n.12 (3d ed.) (“[A] district court cannot order a secured creditor to either file a proof of claim and submit its claim to the receivership court or lose its secured state-law property right that existed prior to the receivership,” citing *Wells Fargo*).

⁴ The Court's concern about waiver respecting 28 U.S.C. § 2001 is inapplicable here. The Trusts timely objected to the Motion correctly arguing the Court was not authorized to extinguish the Trusts' lien, and the Receiver provided no authority permitting the Court to do so.

⁵ See, e.g., [DE 128 at 1 (requesting approval of sale “free and clear off all liens, claims and encumbrances”); DE 128-10 at 16 (“In order to effectuate the sale of the Property under the Contract, the Receiver will file and prosecute . . . a motion that includes . . . the sale of the Property free and clear”); at 21 (“[T]he Motion for Sale and proposed Order Approving Sale to be submitted to the Court will seek the sale of the Property free and clear of items (xxii) - (xxiv) listed above . .

Motion and proposed Order survives *Wells Fargo*. Indeed, *Wells Fargo* held that a secured creditor need not even file a proof of claim or proof of lien, as mandated in paragraphs 10-13 of the proposed order, to preserve its lien rights because a federal court in a receivership context simply lacks the power to order a secured creditors' lien property rights extinguished. *See Wells Fargo*, 848 F. 3d at 1345 (“a federal district court cannot order a secured creditor to either file a proof of claim and submit its claim for determination by the receivership court, or lose its secured state-law property right that existed prior to the receivership”).

Thus, only a proposed sale subject to pre-existing liens is permissible. Any such potential sale would have to be negotiated and the subject of a new approval motion. Like other property holders, the Receiver may negotiate with the buyer for a sale subject to preexisting liens, satisfy those liens prior to the sale or, more likely, negotiate with lienholders to resolve liens in advance of a free and clear sale. Because the Trusts' secured state law property right existed prior to the Receivership, there is no authority that allows this Court to approve a sale “free and clear of all liens, claims and encumbrances” or to mandate a secured creditor to participate in the claims process as requested by the Receiver here.

. If the Court denies the Motion for Sale or the Order Approving Sale does not approve the sale of the Property free and clear of items (xxii) - (xxiv) listed above, and the Buyer is not otherwise in default or breach of the Contract, then . . . the Deposit shall be returned to Buyer and the parties shall have no further obligations hereunder . . .”].

CONCLUSION

In light of *Wells Fargo*, the Court must deny the Motion.

Dated: May 28, 2024

Respectfully submitted,

NELSON MULLINS

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*Attorneys for Martin I. Halpern, as Trustee
of the Martin I. Halpern Revocable Trust and
the Halpern Family Trust*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via CM/ECF on May 28, 2024 on the Parties listed within CM/ECF.

/s/ Mark F. Raymond
Mark F. Raymond, Esq.