UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 0:18-cv-61991-BB

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

1 GLOBAL CAPITAL LLC, and
CARL RUDERMAN,

Defendants, and

1 WEST CAPITAL LLC,
BRIGHT SMILE FINANCING, LLC,
BRR BLOCK INC.,
DIGI SOUTH LLC,
GANADOR ENTERPRISES, LLC,
MEDIA PAY LLC
PAY NOW DIRECT LLC, and
RUDERMAN FAMILY TRUST,

Relief Defendants.
_____/

RECEIVER'S RESPONSE IN OPPOSITION TO BRIDGE BANK'S MOTION FOR COMFORT ORDER AUTHORIZING RETENTION OF PORTION OF CASH COLLATERAL PENDING RULING

Jon A. Sale, not individually, but solely in his capacity as the Court-appointed receiver (the "Receiver") for Bright Smile Financing, LLC ("Bright Smile"), BRR Block Inc., Digi South LLC; Ganador Enterprises, LLC, Media Pay LLC; Pay Now Direct LLC, the Ruderman Family Trust, and the Bright Smile Trust (the "Receivership Entities"), respectfully submits this Response in Opposition to the Motion for Comfort Order Authorizing Retention of Portion of Cash Collateral Pending Ruling (the "Motion") filed by Western Alliance Bank ("Bridge Bank" or the "Bank") [D.E. 192]. In opposition to the Motion, the Receiver states:

INTRODUCTION

The Motion is yet another example of the Bank violating this Court's orders and seeking *ex-post facto* relief in the guise of a "comfort order" blessing its violative conduct.[1] First, the Court's Omnibus Order, dated February 20, 2019 [D.E. 162] (the "Order"), required the Bank to return the ***entire $3 million*** to the Receiver after the 90-day period following termination of ACH processing (the "90-Day Period"), except amounts needed to cover unreimbursed ***consumer chargebacks***. The Order does not grant the Bank the right to hold any portion of the $3 million after the 90 Day-Period for any other purpose. Second, the Motion should be denied because it is an improper and untimely motion for reconsideration of the Court's Order. Third, the Bank fails to cite to any authority supporting its Motion. Fourth, the Bank rejected, for no valid reason, a reasonable, good faith proposal offered by the Receiver to maintain the funds in the trust account of either of the parties' counsel pending the Court's determination of the Bank's claim of entitlement to attorney's fees. For all these reasons, the Motion should be denied, and the Bank should not be permitted to compound its wrongful conduct by seeking attorneys' fees in connection with its Motion.

ARGUMENT

I. The Bank Violated the Court's Order

The Court's Order is controlling as it relates to the Bank's right to hold or access the approximately $3,000,000 belonging to the Receivership Estate. [D.E. 162, at 7-10.] The Order provides:

[1] The Bank has already forced the Receiver to incur tens of thousands of dollars of attorneys' fees in responding to its filings. Even worse, the Bank seeks recovery from the Receiver of the needless attorneys' fees it has expended violating this Court's orders, filing papers that attempt to shift the blame to the Receiver, and creating unnecessary litigation.

- The Bank may hold the cash collateral for 90 days after the transfer of ACH processing is complete (previously defined as the "90-Day Period");
- To the extent the funds in Bright Smile's operating account are insufficient to cover *consumer chargebacks* during the 90-Day Period, the Bank may access $500,000 of the cash collateral "*for the sole purpose of reimbursing [the Bank] for said consumer chargebacks;*" and
- To the extent the $500,000 in unfrozen collateral is also insufficient to cover *consumer chargebacks*, the Bank may seek further relief from the Court to offset against the remaining cash collateral "*for the sole purpose of reimbursing [the Bank] for said consumer chargebacks*."

See [D.E. 162, at 7-10] (emphasis added). Nothing in the Order suggests the Bank has any right to hold any portion of the $3 million outside the 90-Day Period or seek any relief related to the $3 million that is not for purposes of covering consumer chargebacks.

The Order specifically addresses the protocol required for the Bank to seek attorneys' fees—which it has done. [D.E. 162, at 8]. But the Order does not grant the Bank any right to hold any portion of the $3 million pending a Court determination as to the Bank's claim of entitlement to attorney's fees or to offset against the $3 million related to such claim. But that is exactly what the Bank has done, by unilaterally deciding to hold (and refusing to turnover) $500,000 of Receivership's $3 million after the 90 Day-Period ran on May 22, 2019.[2]

[2] The Bank never even come close to needing to dip into the $3 million to cover the minimal amount of chargebacks that were easily covered by the Bright Smile operating account.

II. The Motion is an Improper Motion for Reconsideration

Under the guise of a "comfort order," the Bank has filed an improper, untimely, and unsupported motion for reconsideration of the Court's Order. In its Reply in Support of the Motion for Comfort Order Confirming Termination of the Banking Agreements, the Bank asked the Court to enter an order setting a procedure by which it could set-off against the $3 million to recover its attorneys' fees. *See* [D.E. 153, at 6] (the "Reply").[3] The Court had the opportunity to institute a procedure for the Bank to maintain a portion of the $3 million for application to a potential award of attorneys' fees, like the procedure it instituted for consumer chargebacks, but did not do so. Instead, as described above, the Order instructed the Bank to "file a motion to the Court, providing the legal basis for its claim to attorneys' fees[.]" [D.E. 162, at 8]. And after the running of the 90 Day-Period, the full $3 million should have been turned over to the Receiver.

The Bank waived its contractual right to set-off, if any existed, by not seeking relief in respect to the Court's Order requiring the full $3 million to be turned over after the 90 Day-Period. It is well-established that any contractual right may be waived. *See e.g. Gutierrez v. Wells Fargo Bank, NA*, 889 F. 3d 1230, 1235 (11th Cir. 2018) (holding that any contractual right can be waived). Notably, the Deposit Account Agreement and Disclosure ("DAA") does not contain an

[3] The Bank's request for affirmative relief raised in the context of its Reply was improper as new matters and claims for relief cannot be first raised for the first time in a reply. As a general proposition, "District Courts, including this one, ordinarily do not consider arguments raised for the first time on reply." *Allah El v. Avesta Homes,* No. 8:11–cv–2192–T–33TGW, 2012 WL 515912, at *3 (M.D. Fla. Feb. 16, 2012), *citing Broughton v. HPA Subway, Inc.*, No. 11–0036–WS–N, 2011 WL 1321728, at *1 (S.D. Ala. Apr.5, 2011). In *Park City Water Auth., Inc. v. N. Fork Apartments, L.P.*, No. 09–0240–WS–M, 2009 WL 4898354, at *1 n. 2 (S.D. Ala. Dec. 14, 2009), the court cited to a collection of over 40 cases wherein courts declined to consider arguments raised for the first time in a reply. *See also Minshall v. McGraw Hill Broad. Co.*, 323 F. 3d 1273, 1288 (10th Cir. 2003) (argument raised for the first time in reply brief is waived). Similarly, a reply is not the vehicle for requesting new relief. *See, e.g., Graham v. Sabol*, 734 F. Supp. 2d 194, 199-200 (D. Mass. 2010) (reply brief not place to request to add a new party).

anti-waiver clause relating to the set-off rights. Moreover, failing to object to or appeal an order will result in a waiver. *See In re Iliceto*, 706 Fed. Appx. 636 (11th Cir. 2017) (holding that an assignee of Chapter 13 debtor's mortgage waived the right to an adversary proceeding by failing to either timely challenge or seek reconsideration of the court's order finding that the assignee did not have a secured claim). The Bank did not object to or seek reconsideration of this Court's Order requiring it to turn over the entire $3 million upon expiration of the 90 Day-Period. Thus, by failing to object to or seek reconsideration of this Court's Order, the Bank agreed to return the balance of the $3 million within the time required by this Court's Order.

Furthermore, through its own delay, the Bank waived the right to seek reconsideration of this Court's Order. Motions for reconsideration may be appropriate under limited circumstances. This is not one of them. "Courts have distilled three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice." *Instituto de Prevision Militar v. Lehman Bros., Inc.*, 485 F. Supp. 2d 1340, 1343 (S.D. Fla. 2007). The Bank did not demonstrate (or even raise) any of the foregoing grounds in its Motion. Moreover, the Motion is untimely because it seeks, in effect, to modify the Order that is now nearly four months old. If the Bank sought further relief with respect to its impending claim for attorney's fees, including the continued sequestration of a portion of the $3 million after the 90 Day-Period, it could have and should have filed this Motion immediately after the Order was entered in February.

III. The Bank Does Not Cite Any Authority to Support Its Position

The Bank does not cite any authority for its position that it is entitled to hold a portion of the $3 million simply because it has a pending motion for attorneys' fees. As the movant, the

burden is on the Bank to demonstrate why it should be entitled to keep possession of funds clearly belonging to the Receivership Estate. It has failed to meet that burden.[4]

In fact, The Treasury Management Services Agreement and Service Descriptions ("TMSA") defines "Agreement" to include the TMSA, the Setup Form, the respective Service Descriptions, and the Supporting Documents. The TMSA grants the Bank a security interest in Accounts to secure the repayment of any obligation that Bright Smile incurs under the "Agreement." Bridge Bank does not argue that Bright Smile incurred an obligation to pay attorney's fees under the "Agreement." Instead, Bridge Bank argues that the Receivership Estate is required to pay attorney's fees pursuant to the DAA. But the DAA is silent as to any security interest in the Accounts for purposes of the payment of attorney's fees.

Although, the TMSA states that all that all transfers to and from an Account will be subject to the terms and conditions applicable to the Account as set forth in the governing DAA, the DAA is not applicable for the purposes of establishing a security interest. If the parties intended to create a security interest for obligations arising under the DAA, including the entitlement to attorney's fees, then the clause granting a security interest would have expressly stated as much. Nowhere

[4] Even if the Bank is entitled to attorney's fees, it possesses a claim without priority. *See Bendall v. Lancer Management Group, LLC*, 523 Fed. Appx. 556 (11th Cir. 2013). In *Bendall*, the receivership entity contractually agreed to indemnify its officers and directors for attorneys' fees and costs prior to the receiver's appointment. This created a contingent claim for attorneys' fees and costs. The contingency ripened after the receiver's appointment. Two of the officers incurred legal fees defending themselves in litigation related to the receivership and sought contractual indemnification. However, these officers failed to file a claim in accordance with the district court's case management order. The Eleventh Circuit held that their claim for attorneys' fees was barred because they failed to comply with the district court's order. Similarly, Bridge Bank seeks attorneys' fees arising under pre-receivership agreements in connection with litigation relating to its attempts to affect the receivership's operations of the Bright Smile business operations. Significantly, the appointment of the Receiver did not trigger the contractual contingency entitling the Bank to attorneys' fees. As such, in the context of an equity receivership, Bridge Bank merely has a claim for attorney's fees that does not receive priority over other Bright Smile claimants.

does the Banking Agreements state that any security interest is granted to satisfy the attorney's fee obligations arising under the DAA. Accordingly, any argument by the Bank that it needs to hold Receivership funds to perfect a security interest is without merit.

In addition, the DAA's right of setoff was cut off by virtue of the Order Granting Plaintiff's Emergency *Ex Parte* Motion and Memorandum for Asset Freeze and Other Relief entered by this Court on August 23, 2018 (the "Freeze Order" at 3-4) and served on the Bank by the Receiver shortly thereafter. And although the Bank began its efforts to escape its relationship with Bright Smile upon receipt of the Freeze Order by refusing to process incoming ACH transfers until the Receiver was forced to obtain two Court orders compelling the Bank to do so, it never challenged the Freeze Order's prohibition against setoff.

IV. The Bank Rejected the Receiver's Good Faith Compromise

Prior to the Bank filing the Motion, and notwithstanding the Bank's failure to comply with the Order, the Receiver proposed that the $500,000 at issue be held in the trust account of either the Receiver's counsel or the Bank's counsel. The Receiver made this offer in a good faith effort to avoid the use of judicial resources and incurring unnecessary attorneys' fees. The Bank rejected that offer.

In the Motion, the Bank lists several reasons why it rejected the Receiver's proposal, none of which are persuasive. For example, the Bank claims that it has a perfected security interest in the $500,000, which interest would be lost if possession were to change. [D.E. 192, at 4]. As described above, the Bank does not have a security interest in the $500,000. At best, it has a possible claim for attorneys' fees, which should be treated the same as the claims of other unsecured creditors. Moreover, the Order was clear that any of the $3 million remaining after the 90 Day-Period was to be turned over to the Receiver. The Bank could have raised this "perfection"

issue months ago, prior to or immediately after entry of the Order, but failed to do so. It is far too late to raise it now.

The Bank also claims that transferring the cash collateral to its counsel's trust account "would result in unnecessary attorneys' fees and Bank transaction fees[.]" *Id.* It is unclear how the Bank would have incurred attorneys' fees by transferring funds to its counsel's trust account, but even if that is true, it is has hard to imagine the Bank did not incur more in attorneys' fees by filing the Motion (and inevitably, a reply brief in support of the Motion).

Finally, the Bank should not be permitted to seeks attorneys' fees in connection with this Motion when (a) it has failed to comply with a this Court's prior Order and its Motion, in essence, seeks to excuse such noncompliance, (b) it is in reality a disguised, unfounded, and untimely motion for reconsideration, and (c) the Bank rejected the Receiver's good faith proposal that would have resolved the issue without the necessity of Court intervention.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court enter an order denying the Motion.

Dated: June 12, 2019

NELSON MULLINS BROAD AND CASSEL
Attorneys for Receiver
One Biscayne Tower, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Telephone: 305.373.9400
Facsimile: 305.995.6449

By: s/Gary M. Freedman
Gary M. Freedman
Florida Bar No. 727260
Daniel S. Newman
Florida Bar No. 0962767
Jonathan Etra

Florida Bar No. 0686905
Christopher Cavallo
Florida Bar No. 0092305

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel who are not authorized to receive electronically Notices of Electronic Filing.

s/Gary M. Freedman
Gary M. Freedman