

**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.

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**REPLY IN SUPPORT OF WESTERN ALLIANCE BANK'S MOTION FOR  
COMFORT ORDER AUTHORIZING RETENTION OF PORTION OF CASH  
COLLATERAL PENDING RULING**

Western Alliance Bank, an Arizona banking corporation, successor in interest to Bridge Bank, National Corporation ("WAB" or "Bank"), by and through its undersigned counsel, files this reply memorandum of law ("Reply") to Receiver's Response in Opposition to WAB's Motion for Comfort Order ("Opposition") [ECF No. 201] and in support of its Motion for Comfort Order Authorizing Retention of Portion of Cash Collateral Pending Ruling ("Motion for Comfort Order") [ECF No. 192], and respectfully represents:

**I. INTRODUCTION**

The Opposition reveals there is no dispute that the \$500,000 in Cash Collateral at issue may be held in reserve pending the Court's ruling on the Bank's Verified Motion to Offset Cash

Collateral to Recover Its Attorneys' Fees and Costs ("WAB's Fee Recovery Motion") [ECF No. 181] and the Receiver's subsequent Verified Motion for Attorney's Fees and Costs ("Receiver's Fee Recovery Motion") [ECF No. 198]. Instead, the Opposition shows that the fundamental issue before the Court now is *where* that Cash Collateral should be held.

Where the Bank seeks only to preserve the *status quo*, the Opposition offers no reason at all why the *status quo* should be disrupted and the funds moved from the Bank to an attorney trust account. This is because there is no reason to disrupt the *status quo*. Certainly, the Receiver did not identify any prejudice to the Receivership Estate by the Bank's continued hold on the \$500,000 *subject to the Court's Freeze Order pending further ruling by the Court on the Fee Recovery motions*. The Receiver also did not articulate any benefit to the Estate or any rationale whatsoever to move the funds to an attorney trust account. Conversely, even setting aside the administrative and other hurdles created by the use of an attorney trust account, the Bank stands to suffer great prejudice (*i.e.*, loss of its secured status) if it is forced to surrender possession of the \$500,000 at issue. Moreover, there is no concern that, as needed, the Bank will quickly and effectively release funds to the Receivership Estate as it recently did when delivering Cash Collateral and Operating Account funds the same day the Receiver provided wire transfer instructions. Preserving the *status quo* at this point makes even more sense considering the Court's recent order for the parties to mediate their respective Fee Recovery motions. Finally, the Opposition's arguments that this Motion somehow constitutes a reconsideration of the February 20, 2019 Omnibus Order, or that WAB somehow waived its right to offset the Cash Collateral by not objecting to the Freeze Order fall flat.

Accordingly, this Motion should be granted and WAB should continue to hold \$500,000 of the Cash Collateral pending the Court's ruling on the Fee Recovery motions or further order.

**II.**  
**THE FACTUAL BACKGROUND RELEVANT TO**  
**WAB'S MOTION FOR COMFORT ORDER**

A detailed response to Receiver's revisionist history in this case is unnecessary. The docket, and particularly the Court's Orders in this case, reflect both the history and WAB's good

faith efforts to meet this Court's Orders and the Receiver's instructions while performing under the Banking Agreements.

WAB would only supplement the Relevant Factual Background by noting that on or about May 28, 2019, *on the same day* that it received the Receiver's wire transfer instructions, WAB transferred a total of \$2,517,463.12 from Bright Smile's Money Market Account and \$62,076.87 in Bright Smile's Operating Account to the Receiver's new banking institution. The Opposition fails to make that point clear.

WAB also would clarify that the Court's Omnibus Order dated February 20, 2019 ("Omnibus Order") [ECF No. 162], made \$500,000 of the Cash Collateral available for reimbursement of the Bank's payment of consumer PPD ACH chargebacks in the event WAB had to pay such chargebacks. That "safety net" was created by the Court and, significantly, the Court arrived at the amount of \$500,000 to protect the Bank's rights. The Receiver never challenged, disputed or in any way attacked that reserve or its amount. WAB is grateful that the amount of consumer chargebacks was less than the \$500,000 set aside to protect the Bank. The Bank now simply seeks to continue to hold the same amount—\$500,000—to protect its rights, this time, to recover its attorneys' fees and costs against its original deposit account holder.

### **III.**

#### **THERE IS NO PREJUDICE TO THE RECEIVER IN GRANTING THE MOTION FOR COMFORT ORDER; CONVERSELY, THE BANK FACES SUBSTANTIAL RISK**

While the Opposition advances meritless arguments that ignore (i) the contractual language of the Banking Agreements (there is no "waiver" of any of the Bank's rights under the Agreements and the Freeze Order did not terminate any WAB rights), as well as (ii) the express language of this Court's Omnibus Order (which acknowledges the Bank's right to file its Fee Recovery Motion and seek an offset of its Cash Collateral), it is completely silent as to any prejudice the Receivership Estate might suffer if the Bank's Motion for Comfort Order is granted.

Conversely, the Bank would suffer great prejudice in the form of the loss of its perfected security interest in its only remaining Cash Collateral if forced to release the funds at this

juncture. As set forth in earlier filings, there is no dispute that Arizona law governs the Banking Agreements. Subdivision B. of Arizona Revised Statutes § 42-9314 (entitled “Perfection by Control”) clarifies that a security interest in a deposit account, such as the Money Market Account in which the balance of the Cash Collateral is currently maintained, is perfected “when the secured party obtains control *and remains perfected by control only while the secured party retains control.*” ARS § 42-9314(b) (Emphasis added). Therefore, should the Bank be forced to surrender possession and concomitantly, control, over the \$500,000, the Bank’s security interest perfected through that very control would be extinguished. The Receiver is aware of this fact but nonetheless insists that the Court deprive the Bank of its remaining Cash Collateral, notwithstanding the Bank’s almost immediate transfer of the balance of the Cash Collateral at the Receiver’s direction. The equity Receiver appointed in this case seeks a result that would cause great inequity to the Bank, an innocent third party in this case who continued to provide its extremely valuable consumer PPD ACH transaction services to the Receiver until the end of the 90-Day Period provided for in the Omnibus Order, i.e., May 23, 2019 (the “Last ACH Day”).

**IV.**  
**WAB’S FEE RECOVERY MOTION WAS TIMELY AND FULLY BRIEFED BEFORE**  
**THE 90-DAY PERIOD AFTER THE LAST ACH DAY ELAPSED**

The Opposition also argues that this Motion constitutes a request for reconsideration of the Court’s Omnibus Order. [ECF No. 201, p. 4]. This argument has no merit and should be rejected.

To begin with, there is no request or need to reconsider anything. The Receiver’s argument presumes it was known as of February 20, 2019 that WAB’s Fee Recovery Motion would not be resolved by the Last ACH Day. The Receiver offers nothing to support such a presumption. Indeed, WAB’s Fee Recovery Motion was fully briefed and was expected to be addressed prior to the Last ACH Day (e.g., WAB filed its Reply on May 20, 2019 [ECF No. 188], prior to the Last ACH Day). Furthermore, at every turn, WAB made clear that it intended to use the Cash Collateral to reimburse WAB’s attorneys’ fees and costs (*see, e.g.*, WAB’s moving and reply papers in support of its Fee Recovery Motion [*see* ECF Nos. 181, at pp. 2-4,

and 188, at p. 3]). The Receiver said nothing in opposition to WAB's Fee Recovery Motion that such relief was precluded, either waiving the objection or conceding there is none. Finally, the Omnibus Order contains no prohibition against seeking a further Order to allow the Court-created Cash Collateral hold to be used to protect WAB's interests beyond ACH charge-backs. Insofar as that Order specifically contemplates that WAB would make its Fee Recovery Motion, it is reasonable to presume that the Court contemplated the Cash Collateral might be used to reimburse WAB's fees and costs as permitted by the Banking Agreements, and contemplated the potential that this Motion might be needed. At all times herein, the Bank has timely acted to protect its rights—the Motion for Comfort Order being no exception.

**V.**

**THE FREEZE ORDER MERELY PRESERVES ANY OFFSET RIGHTS WAB MAY HOLD IN THE CASH COLLATERAL**

Likewise, the Receiver's unsubstantiated claim that the Court's entry of the *Sealed* Freeze Order [ECF No. 13] deprived WAB of its offset rights has no merit. [See ECF No. 201, at 7.] The Freeze Order prohibits WAB from taking any action to set off, transfer, or otherwise assert control over the \$500,000 *pending further Order*. The Bank seeks to exercise its contractual right to offset the \$500,000 in Cash Collateral, *subject to relief from the Freeze Order*. The proposition that entry of the Freeze Order, which was originally filed under seal and without the opportunity for any party's response, somehow permanently terminates the Bank's bargained-for offset rights is simply without merit.

**VI.**

**THE BANK SEEKS TO PRESERVE THE STATUS QUO**

As set forth in the Motion for Comfort Order, the Bank merely requests to retain \$500,000 in reserve solely to preserve the *status quo* with respect to the Bank's asserted offset rights asserted in the Motion. Pursuant to the Freeze Order, the Bank will hold and maintain the reserved amount in the Money Market collateral account until further Court Order (e.g., pending the ruling on WAB's Fee Recovery Motion and the Receiver's Fee Recovery Motion). Although ignored by the Opposition, this result will avoid unnecessary conflict of interest issues that could

arise if the funds were moved to an attorney trust account, as the Receiver apparently prefers. Also ignored by the Opposition – keeping the funds where they are avoids delays and administrative challenges which could arise if the funds are moved to an attorney trust account. Finally, the Money Market Account in which the Cash Collateral is maintained is an interest-bearing account. As such, the \$500,000 held in that account will accrue interest to the benefit of all parties involved.

**VII.**  
**CONCLUSION**

For all the reasons set forth above, and for the reasons set forth in the Motion, the Court should grant the Motion for Comfort Order Authorizing Retention of Portion of Cash Collateral Pending Ruling [ECF No. 192].

Dated: June 19, 2019

Respectfully Submitted,

*By: /s/ Monique D. Jewett-Brewster*

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*Counsel for Western Alliance Bank*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 19th day of June, 2019, on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

By: /s/ Mahalia A. Cole  
 Mahalia A. Cole

**SERVICE LIST**

**\*\*ALL RECIPIENTS WERE SERVED VIA CM/ECF \*\***

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