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.

REPLY IN SUPPORT OF WESTERN ALLIANCE BANK'S VERIFIED MOTION TO OFFSET CASH COLLATERAL TO RECOVER ITS ATTORNEYS' FEES AND COSTS AND INCORPORATED MEMORANDUM OF LAW

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 ("Response," ECF No. 186) and in support of its Verified Motion to Offset Cash Collateral to Recover Its Attorneys' Fees and Costs ("Motion," ECF No. 181), and respectfully represents:

I. INTRODUCTION

Both the tone and substance of the Response underscore the difficulties the Bank has encountered since the outset of its involvement in this case, and actually helps demonstrate the reasonableness of the fees the Bank has incurred. The tone of and approach in the Response is

what has greeted the Bank at every turn of this case. The Bank will not address this issue further, other than to say that the Receiver's constant attacks are not supported by the record and, quite frankly, make it more difficult for the parties to resolve their disputes. As for the substance of the Response, the Receiver's position is simple – the Bank is not entitled to any fees under any circumstances. As explained below, this position lacks both factual and legal merit.

The Receiver's threshold argument that WAB has not established the existence of a binding pre-receivership contract with Bright Smile misses the mark. In the face of the Receiver's conduct and demands for WAB's performance under the Banking Agreements, this claim is simply wrong. It is also wrong in light of this Court's previous acknowledgement that the Banking Agreements govern the ACH processing provided by the Bank. Further, and ignored by the Response (including in its repeated incorrect references to a "prevailing party" standard), the Banking Agreements expressly permit WAB to recover its attorneys' fees and costs *regardless of the existence of any dispute*.

Next, the Response incorrectly contends that the Bank is not entitled to fees because the Receiver did not "assume" the Banking Agreements. Formal "assumption" of an executory contract is an inapplicable bankruptcy concept. Nonetheless, the Receiver has, time and time again, demonstrated his intention to be bound by WAB's pre-receivership banking relationship with Bright Smile. Indeed, the Receiver repeatedly has represented to this Court that the continuation of the Bank's ACH processing services has allowed the Estate to maximize the value of the Bright Smile loan portfolio – its primary, if not sole, asset. The Receiver cannot escape his admissions or otherwise avoid the attorneys' fees obligation under the Banking Agreements.

The Receiver's strenuous objection to WAB's termination of the Banking Agreements could stand alone to evidence the Receivership Estate's acceptance of those Agreements. But, the benefit the Banking Agreements and WAB conferred to the Receivership Estate is made clear by the supplemental declaration of Lori Edwards, filed herewith, that details the millions of dollars and thousands of consumer PPD ACH transactions the Bank completed from August 2018 through February 2019. Ms. Edwards' supplemental declaration also provides an accurate representation

of the Bank's risk of Bright Smile's consumer PPD chargebacks during the Receivership period, refuting the misleading (and ultimately irrelevant) declaration of Receiver's CPA Soneet R. Kapila. In sum, the parties' contracts, applicable law and equity all hold that where the Receiver enjoyed the benefits of the Banking Agreements, he must also bear the burdens of those Agreements, including the Bank's right to attorneys' fees.

Notably absent from the Response is any expert testimony to rebut the reasonableness of the Bank's fees. Instead, the Receiver offered only a single week of settlement discussion emails purportedly to prove the "unreasonableness" of the Bank's request here. Even though the Receiver is wrong, WAB objects to this violation of the settlement privilege set forth in Rule 408 of the Federal Rules of Evidence. The Bank also respectfully submits that, given the Receiver's omission of any admissible rebuttal evidence, the Court should permit WAB to offset its cash collateral to recover the requested fees and costs without the need or expense of an evidentiary hearing.[1]

Finally, as requested in the Motion and solely in order to preserve WAB's rights in the ACH Collateral, WAB respectfully requests that the Freeze Order remain in full force and effect with respect to the ACH Collateral to protect WAB's recovery rights until the Court rules on this Motion.

II.

FACTUAL BACKGROUND GERMANE TO WAB'S MOTION

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. The Receiver, having stepped into the shoes of Bright Smile, has no standing to challenge the terms and conditions pursuant to which Bright Smile agreed to receive,

[1] The $303,656.07 in attorneys' fees and costs requested in the Motion includes estimated amounts for responding to opposition and appearing at an evidentiary hearing. Considering the extent of the opposition, the amount likely will be higher. The Bank seeks full recovery and will respond accordingly to ensure all of its fees and costs are recovered. In the event the Court grants the Bank's Motion without a further hearing, WAB respectfully reserves the right to seek all attorneys' fees incurred in this case according to proof.

and the Bank agreed to provide, deposit account and ACH processing services. Nor does the Receiver have standing to dispute the calculation of the cash collateral that protects the Bank from chargebacks from Bright Smile customers, where the Banking Agreements permit the Bank to set Bright Smile's daily ACH limits and collateral requirements in WAB's sole and absolute discretion. The Agreements themselves make this clear, and nothing in the Response can change this indisputable reality.[2]

III.
THE BANKING AGREEMENTS CONSTITUTE A BINDING CONTRACT WITH BRIGHT SMILE, AND BY SUCCESSION, THE RECEIVERSHIP ESTATE

The Response argues that the Bank lacks a "signed agreement with Bright Smile" which "entitle[s] it to attorneys' fees." (Resp., at p. 11.) This argument amounts to misdirection and should be disregarded. It ignores the express language in the Deposit Account Agreement discussed in the Motion and attached as Ex. A to the Edwards Decl. (ECF No. 181-1) which confirms that: (i) the Deposit Account Agreement governs all Bright Smile accounts opened at the Bank; (ii) Bright Smile received a copy of the Deposit Account; and (iii) by continuing to use the accounts, Bright Smile agreed to the terms and conditions of the Banking Agreements. Page 1 of the Deposit Account Agreement also confirms that the Banking Agreements expressly include *the signature cards for the accounts*. The signature cards executed on or around January 17, 2018 by the former signatories for the Bright Smile accounts – Richard R. Samuels, Jr., Darice M. Lang, and Sylvain A. Grenier – are attached as composite Exhibit A to the supplemental declaration of Lori Edwards filed herewith and incorporated herein ("Supp. Edwards Decl.," ¶ 2, Ex. A).

Indeed, this Court already has acknowledged the binding nature of the Banking Agreements. In its Omnibus Order on Motion for Comfort Order and Motion to Approve Bright Smile Asset Purchase Agreement (*see* ECF No. 162), the Court determined that Bright Smile's accounts are governed by the terms and conditions of the Banking Agreements. The law-of-the-

[2] WAB is aware that the SEC filed an untimely "opposition" to this Motion. The Bank respectfully requests that the Court disregard this late-filed document that offers unauthorized, incorrect and irrelevant assertions about this Motion.

case doctrine bars re-litigation of issues that were decided either "explicitly or by necessary implication". *See, e.g., Schiavo v. Schiavo*, 403 F.3d 1289, 1291 (11th Cir. 1990).

Where the Banking Agreements plainly govern the Bright Smile/WAB relationship, and where those Agreements on their face permit WAB to recover it attorneys' fees and costs, the Receiver's challenge to the applicability and enforceability of those contracts simply lacks merit.

IV.
BANKRUPTCY LAW DOES NOT APPLY TO THIS ANALYSIS

The Receiver next argues that he did not "assume" the Banking Agreements under Bankruptcy Code section 365, so, therefore, he is not "bound" by them. In support of this novel argument, the Receiver cites to *SEC v. Churchville*, C.A. No. 15-191 S, 2016 WL 3816373 (D.R.I. July 12, 2016), an unreported and non-binding opinion penned by the U.S. District Court for the District of Rhode Island. In addition to being unpublished and non-binding, the *Churchville* case does not even apply because its facts are easily distinguished. The party seeking fees in that case actively took steps to "protect its investment" after the SEC filed its complaint against the defendant by entering into certain contracts with the defendant, but prior to the appointment of a receiver. No such similarity exists with the Banking Agreements that Bright Smile sought from WAB many months before any SEC action and the Receivership here.

Apart from the fact that the Bank never had a personal investment in Bright Smile's operations as did the party seeking fees in *Churchville*, the Rhode Island District Court examines the receiver's obligations under the pre-receivership agreements under the standard of a trustee or debtor-in-possession's "assumption" of a contract under Bankruptcy Code section 365(a) – a bankruptcy law concept that is not at issue here. In any event, the *Churchville* court also noted that a receiver is bound by a contract when he "positively indicate[s] his intention to take over the contract." *Churchville,* at *3.

Upon his appointment in our case, the Receiver stepped into Bright Smile's shoes with respect to the Banking Agreements. *Hamilton v. Flowers*, 183 So. 811, 817 (1938) ("[A] receiver takes the rights, causes and remedies which were in the … estate … whose interests he was

appointed to represent."). The Response ignores this settled rule. As a result of it, though, the Receiver's rights and the obligations that go with them under the Banking Agreements are exactly the same as Bright Smile's prior to the appointment of the Receiver. Further, as discussed below, there is no doubt that the Receiver made clear his intention to take over the Banking Agreements.

V.
EQUITY DICTATES THAT THE RECEIVERSHIP ESTATE SHOULD BEAR THE BURDENS AS WELL AS THE BENEFITS OF THE BANKING AGREEMENTS

Time and time again, the Receiver has acknowledged the benefit the Estate derived from WAB's ACH processing and other banking services. Here are just a few examples – in Receiver's emergency motion for clarification of freeze order (ECF No. 27), Receiver indicates that WAB's continued acceptance of credits for Bright Smile allows the Receiver to "maximize the assets and value of the Receivership Estate." Likewise, in Receiver's emergency motion for Order to Show Cause re contempt against WAB (ECF No. 35), the Receiver claimed that the Bank's alleged failure to comply with his instructions "[was] having a potentially devastating effect on the Bright Smile loan portfolio and its inherent going concern value". Yet again in Receiver's motion for extension of time to respond to Bank's motion for comfort order permitting termination of the Banking Agreements by their terms (ECF No. 82), Receiver indicates that termination would "put[] Bright Smile's multi-million dollar portfolio at risk". Even in his Response here, the Receiver concedes that "[t]he availability of ACH processing was critical to facilitate re-payment for, and preservation of, Bright Smile's multi-million dollar loan portfolio, which was one of the most significant Receivership assets[.]" (Resp., at p. 3.) The Receiver's representations of the Bank's benefit to the Estate are supported by incontrovertible data: from the Receiver's appointment on August 1, 2018 through the last of the Bank's ACH processing for Bright Smile on February 22, 2019, the Bank processed *16,956 consumer PPD ACH transactions totaling over $3.3 million dollars*. (Supp. Edwards Decl., ¶ 3.)

A rule of law ignored by the Response states: when a receiver elects to be bound by a contract, the receiver must accept the entire contract, not merely portions of it. *Real Estate Marketers, Inc. v. Wheeler*, 298 So. 2d 481, 484 (Fla. 1st DCA 1974) ("While [receiver] may pick

which contracts he will honor, he may not pick which [p]arts of a contract he will honor."). The Receiver's own representations to this Court belie his new claim that he did not want/insist/demand that the Banking Agreements be honored just as those representations belie any claim that the Bank's services provided no benefit to the Estate. From insisting on the Bank's performance to refusing to agree to their termination, there can be no doubt the Receiver sought all of the benefits and value of the Banking Agreements – he absolutely indicated his intent to accept those contracts. He cannot be heard to argue, now that it apparently suits him, that the Receivership Estate did not "assume" or agree to be "bound" by the Banking Agreements. The Receiver should be equitably estopped from changing his position now for the Receivership Estate's profit. *See, e.g., Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001) (equitable estoppel is based on the principles of fair play and essential justice). Having demanded and received the benefits, the Estate must bear the burden of the attorneys' fees obligations under the Banking Agreements.

VI.
THE DECLARATION OF SONEET R. KAPILA IS A RED HERRING[3]

In what should amount to a concession, the Receiver offered no expert declaration to rebut the Bank's evidence of the reasonableness of its fees. Instead, the Receiver filed the declaration of CPA Soneet R. Kapila (the "Kapila Decl."). According to the Kapila Decl., the total amount of "chargebacks" for the 90-day period beginning February 22, 2019 and ending on April 30, 2019 is $7,219.12. (*See* ECF No. 186-2). The Receiver submits this opinion as purported evidence for his argument that the Bank unreasonably insisted on retaining $3 million in cash collateral. To begin with, attempting to assess risk *after the lending has concluded* is meaningless (e.g., a recorded mortgage is not made unnecessary from the outset because the secured loan is repaid without foreclosure). Moreover, the Kapila analysis is misleading because, as discussed in the Supp. Edwards Decl., it makes no distinction between consumer vs. commercial ACH chargebacks. (Supp. Edwards Decl., ¶ 4.) In fact, Mr. Kapila's calculation of chargebacks (be

[3] Also a red herring is the Receiver's reference to his own request for attorneys' fees. Setting aside the lack of any basis whatsoever for such recovery, the matter is not before the Court and seems to be nothing more than another example of overreaching by the Receiver.

they consumer or commercial or a combination of both) during the 90-day period starting when the Bank ceased its ACH processing services is a misleading characterization of the risk the Bank has faced throughout its consumer PPD ACH transaction banking relationship with Bright Smile. For example, during the 90-day period from November 8, 2018 through January 8, 2019, Bright Smile's ACH chargebacks totaled $214,899.89 – 23% (as compared to the 15% NACHA threshold) of the ACH PPDs processed for the same period in the amount of $933,340.18. *Id.* Thus, the Kapila Decl., like trying to use a risk assessment to challenge WAB's attorneys' fees, adds nothing to the analysis of the merits of WAB's Motion.

VII.
THE BANK'S FEES ARE REASONABLE AND WERE UNAVOIDABLE DUE TO THE ACTIONS OF THE RECEIVER; THERE IS NO EVIDENCE TO THE CONTRARY

As noted above, the Receiver failed to submit any expert testimony to rebut the reasonableness of the Bank's attorneys' fees here. The Receiver's failure constitutes a tacit concession as to the reasonableness of *all* of the fees. And to be clear – if the Court determines that the Bank is entitled to recovers fees under the Agreements, Receiver nevertheless objects to ***all*** of the Bank's fees.[4]

Indeed, the Receiver complains that the Bank's fees are unreasonable. The history and record here demonstrate otherwise. The Bank has been forced to incur fees to prevent the Receiver's efforts to overreach the boundary of the Banking Agreements and – when the Receiver refused to transfer the banking relationship even months after Bright Smile's CEO was directed to and said he would do so – to obtain the Court's authority to terminate the agreements. A review of the invoices submitted by the Bank demonstrates that Bank incurred attorneys' fees due to:

- Multiple meet and confer calls with Receiver's counsel and Receiver regarding Bank's reasonable request for clarification of the Freeze Order;

[4] The Receiver even challenges this Motion's compliance with Local Rule 7.3, when WAB merely redacted its confidential and privileged items in its attorneys' invoices. Notwithstanding the Receiver's objections to this appropriate redaction, the content provided apparently was adequate for the Receiver to object to *every single time entry* in those invoices.

- Multiple meet and confer calls with Receiver's counsel and Receiver regarding their delay in completing Bank's federally regulated on-boarding requirements in order to assume control over the Bright Smile accounts;

- Multiple meet and confer calls and emails with Receiver's counsel and Receiver regarding their failure to expressly identify who had authority to provide instructions to the Bank regarding ACH transactions;

- Multiple meet and confer calls and emails with Receiver's counsel and Receiver regarding their repeated demands that WAB increase the daily ACH limits on the Bright Smile accounts notwithstanding the increased risk to the Bank in doing so and the limits set by the parties' pre-receivership agreements;

- Multiple meet and confer calls and emails with Receiver's counsel and Receiver to narrow the scope of the extremely overbroad Subpoena served by Receiver on the Bank in mid-September, 2018;

- Time spent to compile, review and produce over **11,000** pages of WAB documents in response to the Receiver's Subpoena in a rolling production 5+ installments;

- When discussing the notice of compliance with Subpoena, Receiver demanded that the Bank incur the expense of filing an amended notice of compliance, notwithstanding that the date of delivery was delayed one day at the discretion of FedEx because Receiver's counsel's firm was closed on a federal holiday;

- Preparing the Bank's motion for comfort order and all related pleadings after Receiver refused to abide by Bank's notice of termination of the Banking Agreements;

- When discussing the motion for comfort order, the Receiver multiplied those proceedings further by filing a "sur-response" that required the Bank to file and prepare a motion for leave to file a sur-reply, with the proposed sur-reply attached;

- Reviewing and preparing opposition to Receiver's motion for an Order to Show Cause for Contempt ("OSC") against the Bank, and traveling to Miami, Florida for the hearing on OSC; and,

- Reviewing and preparing the Bank's opposition to the Asset Purchase Agreement for sale of Bright Smile assets when the sale motion did not clarify that cash collateral would remain with the Bank sufficient to protect against its exposure for its ACH processing through May 22, 2019, 90 days after the date the Bank ceased providing its ACH processing services to Bright Smile.

Finally, the Receiver unfortunately has disclosed several settlement discussion emails as part of the Response. Of course, one week's email exchanges in late January 2019 pertaining to settlement are no reflection on the attorneys' fees incurred during the seven (7) months WAB has been involved in this matter. Moreover, the Receiver's characterization of WAB's counsel is offensive and wrong, and WAB is confident that the Court will agree should it choose to review

those emails. Regardless, Counsel's choice to share settlement communications violated the spirit if not the letter of Federal Rule of Evidence ("FRE") 408. The Advisory Committee's Notes to FRE 408 explain that the primary purpose of the rule is the promotion of the public policy favoring the compromise and settlement of disputes. The Eleventh Circuit provides that "the test for whether statements fall under this rule is 'whether the statements or conduct were intended to be a part of the negotiations toward compromise.' " *Blu-J, Inc. v. Kemper C.P .A. Group*, 916 F.2d 637, 642 (11th Cir. 1990). Courts tend to exclude evidence which clearly communicates an offer to settle a claim. *See, e.g., Specialized Transp. of Tampa Bay, Inc. v. Nestle Waters North Am., Inc.*, 8:06-cv-421-T-33EAJ, 2008 WL 4080205, at *2 (M.D. Fla. Aug. 28, 2008) (excluding communications where the series of letters exchanged between [the parties] were intended to be part of the negotiations toward compromise" as evinced by the attorneys' labeling of such documents as "for settlement purposes only"). Furthermore, the Southern District of Florida has held that settlement proceeding discussions are inadmissible under FRE 408 for the purpose of disputing a fee award as a result of the settlement. *Perez v. Carey Intern., Inc.*, No. 06-22225-CIV, 2008 WL 4490750, at *6 (S.D. Fla. Sept. 26, 2008).

IV. CONCLUSION

It is inequitable for the Receiver to demand and enjoy the benefits of WAB's Banking Agreements with Bright Smile from the inception of the Receivership in August 2018 through sale of the Receivership assets in February 2019 – to the tune of 16,956 transactions and more than $3.3 million received by the Receivership Estate – yet now argue that he was not bound by those very same agreements and that the Bank should not receive its attorneys' fees as authorized by them. Receiver's attempt to argue against the reasonableness of the fees fares no better. Instead of rebutting the Bank's expert testimony, the Receiver turns to irrelevant CPA testimony and inadmissible settlement communications. Accordingly, the Court should grant the Motion and award the Bank its reasonable attorneys' fees and costs in the approximate amount of $303,657.03 (as adjusted to reflect the actual and full amount incurred).

Dated: May 20, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 20th day of May, 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/ *James N. Robinson*
James N. Robinson

SERVICE LIST

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

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