

**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.

**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”), moves this Court for a “comfort order” authorizing the Bank to retain the balance of the cash collateral funds remaining in the Bright Smile Financing, LLC (“Bright Smile”) collateral account, or \$500,000, until the Court issues its ruling on the Bank’s pending Verified Motion to Offset Cash Collateral to Recover Its Attorneys’ Fees and Costs (“Motion”) [ECF No. 181]. In support thereof, WAB respectfully represents as follows:

I. INTRODUCTION

By this motion, WAB seeks to preserve the *status quo* in order to protect recovery of its

attorneys' fees and costs in this matter in the event its fee recovery Motion is granted. Pursuant to this Court's Omnibus Order (the "Order") [ECF No. 162], WAB held approximately \$3,000,000 in cash as collateral (the "Cash Collateral") related to the Bank's ACH processing services for Bright Smile. Consistent with that Order, WAB duly continued to provide its ACH processing services to Bright Smile until the date Bright Smile transferred its ACH processing out of WAB, i.e., February 22, 2019 (the "Last ACH Day"). That same Order permitted the Bank to hold the Cash Collateral for 90 days following the Last ACH Day to protect WAB against consumer chargebacks. It also explicitly recognized that WAB could file the Motion to seek recovery of its attorneys' fees and costs. [*Id.*, at 8.] The Bank filed that Motion; it is fully briefed; and the parties are waiting for the Court to address it. What is more, as part of the relief sought in the Motion, the Bank requested that "the Freeze Order remain in full force and effect with respect to the [Cash] Collateral at least in the amount sought herein until the Court rules on this Motion". [ECF No. 181, at 10.] The Bank asked for such relief expressly "to preserve WAB's rights in the [Cash] Collateral." [*Id.*] WAB reiterated this request in its Reply filed in support of the Motion. [ECF No. 188, at 3.]

Now that the 90-day period after the Last ACH Day has elapsed, the Bank has promptly transferred the \$62,076.87 in Bright Smile's operating account and \$2,517,463.12 in Bright Smile's collateral account to the Receiver. WAB now seeks a comfort order allowing it to continue to hold the remaining \$500,000 of the Cash Collateral to preserve its contractual rights in the funds pending the ruling on the Motion.

This motion has become necessary because the Receiver refused WAB's good faith request to stipulate to the retention sought and course of action described herein. Out of equity and fairness, to preserve the *status quo* and protect the Bank's interests in getting paid in the event of a ruling in its favor on the Motion, this motion should be granted. The Bank's prompt and expeditious delivery to the Receiver of the operating account balance and the rest of the Cash Collateral underscores its good faith and the lack of prejudice to the Receiver here.

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II. PRINCIPLES OF EQUITY AND FAIR PLAY SUPPORT
WAB'S REQUESTED RELIEF

WAB files the instant motion to preserve the *status quo* and secure the Receivership Estate's performance in the event the Court grants the Bank's pending fee recovery Motion. By the Motion, filed on April 29, 2019, WAB seeks to offset the Cash Collateral pursuant to its rights under the Banking Agreements to recover its attorneys' fees and costs incurred in this action. (See Declaration of Lori Edwards, [ECF No. 181-1], Exh. B at pp. 4-5 [providing for the Bank's right of setoff against any and all of Bright Smile's accounts for "attorneys' fees and costs and expenses of collection]"). According to the Motion, the amount of those fees and costs is \$303,656.07, subject to final determination once the exact amount of fees for responding to opposition and attending any hearing are known. WAB also recognizes the potential that the Court's ruling on the Motion might be appealed, which in turn might trigger a right to recover additional fees and costs. Accordingly, the Bank seeks to retain \$500,000 in reserve to ensure WAB retains sufficient Cash Collateral to recover its fees and costs incurred through any appeal that might be filed with respect to the Court's Order on the Motion.

To clarify, the Bank 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.

The Bank met and conferred with Receiver's counsel with the hope of stipulating for this reasonable relief. Even though the approach described and relief sought herein results in no prejudice to the Receiver and merely preserves the *status quo* as to a portion of the Cash Collateral while the Motion is pending, and even though the Bank expeditiously delivered to the Receiver the rest of the Cash Collateral and all of the funds in Bright Smile's operating account, the Receiver rejected WAB's proposal.

On May 28, 2019, notwithstanding the Bank's two wire transfers of the remainder of the Cash Collateral and the entire balance of the operating account, the Receiver's counsel proposed

that the Bank transfer the remaining \$500,000 to the trust account of one of the firms representing the parties. There are a myriad of problems with that proposal, all of which are avoided by maintaining the *status quo*. For starters, the Bank's security interest in the remaining Cash Collateral remains perfected due to its possession of those funds; perfection would be lost by the change in possession. Further, requiring the Bank to transfer the funds to even its own counsel's trust account would result in unnecessary attorneys' fees and Bank transaction fees, and give rise to serious and avoidable conflict of interest risks. In addition, while the \$500,000 remains in the Bright Smile Money Market collateral account, it continues to bear interest, which benefits the estate. Thus, preserving the *status quo*—including the applicability of the Freeze Order to the Cash Collateral WAB seeks to hold in reserve—benefits the Receivership Estate. Consequently, WAB proactively and, in good faith, files the instant motion to ensure the collectability of any fee award the Court may grant to WAB pursuant to the Motion.

III. CONCLUSION

WAB promptly released the vast majority of Bright Smile's cash maintained at WAB to the Receiver at his request. Under the Banking Agreements, WAB has the express right to collect its attorneys' fees, costs and expenses of collection from the cash in Bright Smile's accounts maintained at Bank. The Bank's Motion for an Order providing for such relief is fully briefed but remains pending. WAB therefore respectfully requests an Order authorizing the Bank to retain and hold the remaining \$500,000 in Cash Collateral so that the Bank may preserve its right to offset Bright Smile's debts against the reserved amount, subject to the Court's ruling on the Motion. The principles of equity and fair play justify this result to preserve the *status quo*, and the Receivership Estate will suffer no prejudice. WAB respectfully submits that the Court should enter its "comfort order" as described above.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3), I HEREBY CERTIFY that, as discussed above, I conferred with Gary M. Freedman, Esq., counsel for Receiver, on multiple occasions by telephone regarding the relief sought by this motion, including by telephone on May 29, 2019,

but the parties were unable to reach an agreement, as the Receiver was unwilling to stipulate to the Bank's retention of \$500,000 of the Cash Collateral pending a ruling on the Bank's Motion to offset the cash collateral. I further certify that the Receiver proposed that, as an alternative to the Bank's retention of the \$500,000, the reserved funds be deposited into a client trust account maintained by either of the party's firms. For the reasons set forth in this motion, the Bank respectfully declined that counter-proposal.

By: /s/ James N. Robinson
James N. Robinson

Dated: May 29, 2019

Respectfully Submitted,

By: /s/ Monique D. Jewett-Brewster

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SERVICE LIST

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

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