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 RECEIVER'S VERIFIED MOTION FOR ATTORNEY'S FEES AND COSTS INCURRED IN CONNECTION WITH BRIDGE BANK DISPUTES

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 reply memorandum of law ("Reply") in support of its Motion for Verified Motion for Attorney's Fees and Costs Incurred in Connection with Bridge Bank Disputes ("Motion for Fees"), and in support thereof, states as follows:

INTRODUCTION

The Receiver asserted three independent bases for entitlement to attorney's fees: (1) statutory attorney's fees for prevailing parties in litigation arising out of a contract pursuant to Section 12-341.01, Ariz. Stat.; (2) contractual attorney's fees for prevailing parties under the Deposit Account Agreement; and (3) attorney's fees that this Court has the inherent and equitable power to award.

Bridge Bank n/k/a Western Alliance Bank (the "Bank") devoted a significant portion of its opposition explaining that the Bank has not sought attorney's fees as a prevailing party. But the bases upon which the Bank moved for attorney's fees are irrelevant to the Receiver's Motion for Fees. The Receiver may assert independent and separate bases for his attorney's fees.

Additionally, the Bank incorrectly asserts that the nature of the action filed by the SEC governs whether the Receiver is entitled to attorney's fees as a prevailing party under Arizona law. However, the nature of the action is in no way dispositive. In fact, the Bank relies on an opinion by the Ninth Circuit, which expressly held that, "When the contract in question is central to the issues of the case, it will suffice as a basis for a fee award." *Galam v. Carmel (In re Larry's Apartment, L.L.C.)*, 249 F.3d 832, 836 (9th Cir. 2001) (applying Arizona law).

Furthermore, although the Bank asserts that this dispute does not arise out of the contract between the parties, the Bank could not draft its opposition without spending several pages describing the contractual relationship between Bright Smile and the Bank governing the entitlement to attorney's fees. Additionally, The Bank's assertion is belied by its on papers filed with this Court. When the Bank first appeared in this litigation, the Bank admitted that appearing was necessary to "advise the court of its contractual relationship with Bright Smile," and that "[t]he Receiver refuses to recognize the binding agreements by and between [the Bank] and Bright Smile

that govern the subject accounts." [D.E. 37 at ⁋⁋ 1, 3]. The dispute between the Receiver and the Bank undoubtedly arose and continues to be fought as a result of the Bank voluntarily appearing in this litigation to enforce its alleged contractual rights and obligations.

FACTUAL BACKGROUND

The Banking Agreements between Bright Smile and the Bank have permeated every aspect of the Bank's appearance in this matter. The Bank voluntarily interjected itself in this matter specifically to enforce the terms and conditions of the Banking Agreements between Bright Smile and the Bank [D.E. 37], and to respond to the Receiver's Emergency Motion for Entry of Order to Show Cause Why Bridge Bank Should Not be Held in Contempt and for Sanctions for Violation of Court Orders, and Incorporated Memorandum of Law ("Motion to Show Cause").

The Bank's Notice of Special Appearance states as follows:

> The Receiver refuses to *recognize the binding agreements by and between WAB and Bright Smile that govern the subject accounts*…. As will be demonstrated by WAB if given the opportunity to fully brief these issues, *the terms of the parties' contract* and WAB's compliance with banking regulations are particularly significant because of the ACH PPD transactions at issue provide the consumer customer with ninety (90) days to demand return of his/her money. *Contrary to the terms of its agreements with Bright Smile*, the Receiver seeks to impose the risk of returning funds to consumers on the Bank, as well as subject the Bank to sanctions by governmental entities due to violations of applicable banking regulations established by the National Automated Clearing House Association, or "NACHA". In sum, the Receiver's attempt at this risk shifting is entirely improper as the Receiver stands in the shoes of Bright Smile but has no greater rights than Bright Smile did *under the Bank's agreements*.

[D.E. 37 at ⁋3](emphasis added). The Bank interjected itself to enforce the Banking Agreements, and to oppose the Motion to Show Cause. The Receiver prevailed when this Court granted the Receiver's Motion to Show Cause against the Bank, and ordered an executive of the Bank to appear for another hearing on why it should not be held in contempt of Court for failing to comply with the Court's Orders. [D.E. 41].

In the Bank's Response to the Receiver's Motion to Show Cause, the Bank argued that, "the [Order to Show Cause] was born from the Receiver's prior demand for the Bank to modify its pre-existing contracts with Bright Smile, to shift the risks associated with those agreements from Bright Smile to the Bank, and to compel the Bank into violations of applicable federal Rules." [D.E. 48 at p. 2]. The Receiver and the Bank were able to reach an agreement on the Order to Show Cause after the Bank relented and complied with this Court's Orders. [D.E. 54].

Thereafter, the Bank moved for a comfort order to terminate the contracts between Bright Smile and the Bank. [D.E. 77]. The Bank argued that it had a contractual right to terminate the Contracts at any time without or without cause, and that the Receiver refused to allow their termination. *Id*. at p. 1-2. Throughout the dispute, the Bank has argued that Banking Agreements between Bright Smile and the Bank were binding on the Receiver. E.g., *Id*. at p. 6. As relief, the Bank asked this Court to enter an Order confirming that the Receiver was bound by the Banking Agreements. *Id*. at p. 7. The Bank also asked the Court to provide in its Order that the Bank could hold Bright Smile's $3 million for a period of up to 90 days after the Banking Agreements were terminated. *Id*. at p. 8. The Receiver moved for an extension of time to respond to the Bank's Comfort Motion, but even this simple request for an extension of time was strenuously litigated by the Bank. [D.E. 83].

The Bank's Response in Opposition to the Receiver's Motion for Extension of Time to Respond to Motion for Comfort Order Confirming Termination of Banking Agreements and Incorporated Memorandum of Law states:

> WAB's Motion for Comfort Order merely asks this Court to direct the Receiver to *comply with the pre-receivership contractual terms of the Bank's Banking Agreements with Bright Smile*. The Receiver's investigation of Bright Smile's Business, whether via the Subpoena or any other method, has no relationship to *the Bank's bargained-for right to immediately terminate its banking relationship with or without cause.*... Further, the Receiver's objection to WAB's calculation of its

> reserve account is equally of no consequence. Even if the Receiver wishes otherwise, the *Bank's contract with Bright Smile* undeniably grants the Bank undisputed sole discretion to calculate the amount of its cash collateral for Bright Smile's ACH PPD transactions. No amount of investigation or stone-turning can *change those contract terms or alter the Bank's contractual right to terminate.*

[D.E. 83 at p. 3](emphasis added). Again, the Bank argued that it was enforcing the terms of the Banking Agreements, yet, the Receiver prevailed when this Court granted his motion for extension of time. [D.E. 84].

Fortunately, the Receiver and the Bank were able to agree on several conditions on terminating the banking relationship between Bright Smile and the Bank. [D.E. 160]. However, when the Receiver moved for Court approval of the sale of Bright Smile's assets, the Bank objected, arguing that the Agreement for the Sale and Purchase of Bright Smile should conform to the terms and conditions of the Banking Agreements between Bright Smile and the Bank. [D.E. 151 at p.2]. Ultimately, this Court ruled on the Bank's Comfort Motion [D.E. 77] and the Receiver's Motion to Approve Bright Smile Asset Sale and Purchase Agreement [D.E. 132] in an omnibus Order. [D.E. 162], approving the sale, and partially denied the Bank's Comfort Motion [D.E. 77]. *Id.*[1] Thus, the Receiver emerged as the net winner or prevailing party.

Following the entry of this Court's Omnibus Order [D.E. 163], the Bank moved for contractual attorney's fees and for a contractual set-off of Bright Smile's cash. [D.E.181]. In that motion, the Bank acknowledged that the contractual relationship between Bright Smile and the Bank has been the subject of multiple filings in this action. *Id*. at p. 3. The Bank moved to enforce

[1] Notably, this Court's Order allowed the Bank to hold Bright Smile's cash for 90 days after Bright Smile transferred its ACH processing out of the Bank, which the Receiver already agreed to prior to the Court's Order. This Court's Order also unfroze $500,000 of Receivership funds for the sole purpose of covering any unreimbursed consumer chargebacks, of which there ended up being a *de minimis* amount that were easily covered by Bright Smile's operating account. The Bank never came close to having to touch the $500,000 of Receivership funds.

the Banking Agreements against the Receiver, stating, "the express language of the Banking Agreements providing for the Bank's recovery of its attorney's fees and costs binds the Receiver and the Receivership estate." *Id*. at p. 4-5.

Most recently, the Bank filed its Motion for Comfort Order Authorizing Retention of Portion of Cash Collateral Pending Ruling ("Second Comfort Motion"). [D.E. 192]. In the Bank's first Comfort Motion [D.E. 83], the Bank asked to hold Bright Smile's cash for 90 days after the termination of the banking relationship. In the Bank's Second Comfort Motion [D.E. 192], the Bank seeks permission not to comply with the relief it requested in its first Comfort Motion. Specifically, the Bank seeks to retain $500,000 for a purpose previously disallowed by the Court's Omnibus Order. Again, the Bank asks for this relief so that it may exercise and enforce a contractual right, *i.e.* the right to set-off.

ARGUMENT

I. The Receiver is entitled to recover attorney's fees as a prevailing party under Arizona law.

The Receiver is entitled to attorney's fees as the prevailing party under Section 12-341.01 of the Arizona Statutes, which provides, "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." § 12-341.01(A), Ariz. Rev. Stat. "[A]s used in A.R.S. § 12–341.01, the words 'arising out of a contract' describe an action in which a contract was a factor causing the dispute." *ASH, Inc. v. Mesa Unified Sch. Dist. No. 4*, 673 P.2d 934, 936 (Ariz. Ct. App. 1983).

"Arizona law does not require that the underlying action supporting a request for fees under Ariz. Rev. Stat. 12–341.01 be styled as an action on the contract itself." *Holiday Mobile Home Resorts v. Wood*, 803 F.2d 977, 979 (9th Cir. 1986). The Ninth Circuit has instructed that, "When

the contract in question is central to the issues of the case, it will suffice as a basis for a fee award." *Galam*, 249 F.3d at 836.

In *Wood*, the Ninth Circuit held that the bankruptcy court erred by not awarding attorney's fees to the prevailing pursuant to A.R.S 12-341.01 where the bankruptcy court denied a petition to reopen its bankruptcy proceeding on res judicata grounds. 803 F.2d at 978. Notably, the bankruptcy court determined that Arizona state courts had already ruled on the two issues underlying the application to reopen the bankruptcy proceeding: (1) whether the note and mortgage fell within the scope of the original bankruptcy court order; and (2) whether the note and mortgage were invalid under Arizona law. *Id.* As shown by *Wood*, the nature of the action does not determine whether attorney's fees may be awarded pursuant to A.R.S. 12-341.01. The key is the substance of the dispute.

Wood further held that A.R.S 12-341.01 "has the effect of writing a fee provision into every contract." 803 F.2d at 979. As such, the Bank's claim that the contract does not contain a prevailing party attorney's fee provisions is wrong. Moreover, A.R.S. 12-341.01 even permits attorney's fees when there is no written contract. *See* § 12-341.01(A), Ariz. Rev. Stat. ("In any contested action arising out of a contract, express or ***implied***, the court may award the successful party reasonable attorney fees.") (emphasis added). An express provision providing for prevailing party attorney's fees is not required (however the Deposit Account Agreement at issue here contains such as provision).

Notably, Arizona courts have awarded attorney's fees pursuant to A.R.S. 12-341.01 to the party prevailing on motions to (1) dissolve a receivership, and (2) oppose the sale of property by the receiver. *See Capital Fund II LLC v. Sakthiveil*, 1 CA-CV 17-0228, 2018 WL 1004898 (Ariz. Ct. App. Feb. 22, 2018).

In the present case, the Bank has repeatedly argued that the Banking Agreements governs its dispute with the Receiver. At every turn, the parties have litigated over the Banking Agreements, including: (1) whether the Banking Agreements are binding on the Receiver; (2) contractual duties that the Bank assumed to process ACH claims for Bright Smile; (3) the Bank's right to terminate the relationship predicated on the Banking Agreements; (4) whether the Banking Agreements governs the Bank's right to hold the Receivership's estate's cash and how much cash the Bank could hold; (5) whether the Bank is entitled to a contractual right to set-off; (6) whether the Bank has a security interest in the cash under the Banking Agreements; (7) whether the Bank is entitled to contractual attorney's fees; and (8) whether the Receiver's agreement to sell Bright Smile's assets would violate the Bank's rights under the Banking Agreements. But for the contractual relationship between the parties, there would never had been a dispute between the Receiver and the Bank. As such, the dispute undoubtedly arises from a contract and is subject to A.R.S 12-341.01.

Furthermore, the Bank's argument that the SEC did not file this action as a breach of contract is a red herring. The SEC did not file this action against the Bank. Instead, the Bank voluntarily asserted itself in this proceeding seeking to enforce the Banking Agreements between Bright Smile and the Bank and against the Receiver. [D.E. 37 at ¶3].

Finally, it is telling that the Bank's opposition spends almost no effort refuting the Receiver's claim that he is the prevailing party, and rather focuses on trying to defeat the Receiver's claim on misguided efforts at rewriting the history of the dispute between the parties. Indeed, there is no question the Receiver is the net winner or prevailing party in this dispute.

II. The Receiver is entitled to prevailing party attorney's fees under the Depository Account Agreement.

The Depository Account Agreement, which the Bank claims is part of the Banking Agreements at issue, provides, "In the event either party brings a legal action to enforce this Agreement or collect amounts owing as a result of any Account transaction, the prevailing party shall be entitled to reasonable attorney's fees and costs, including fees on any appeal subject to any limits under applicable law." [D.E. 181 ex. 2 at p. 25].

Although the Bank claims in its opposition that it has not moved to enforce a contract, the record shows that the Bank previously characterized its actions as moving to compel the Receiver's compliance with the Banking Agreements:

> WAB's Motion for Comfort Order merely asks this Court to direct the Receiver to comply with the pre-receivership contractual terms of the Bank's Banking Agreements with Bright Smile.

[D.E. 83 at p. 3]. And again, the Bank moved to (1) enforce its right to set-off, to protect what it claims is a security interest in the cash, and (2) to enforce its right to terminate the Banking Agreements.

Moreover, the Bank's opposition to the Receiver's Motion for Fees all but expressly admits that this a dispute arising from the parties attempting to enforce the Banking Agreements or collect amounts under the Banking Agreements:

> By his own representations to the Court, the Receiver insisted on the Bank's performance under the Banking Agreements. In fact, the Receiver not only insisted on the Bank's performance, but also strenuously opposed the Bank's attempt to exercise its contractual right to terminate the Banking Agreements without notice. (See ECF No. 141.) Now, having so performed under the Banking Agreements, the Bank merely seeks to offset its cash collateral to pay for Bright Smile's debt to the Bank pursuant to its rights under those agreements.

[D.E. 199 at p. 6]. Furthermore, the Bank argues that it is not required to establish that it is the prevailing party to collect attorney's fees, because it did not move for attorney's fees pursuant to

a prevailing party attorney's fee clause. Implicitly, this argument is a tacit acknowledgement that it has been the Receiver who has been the prevailing party in the ongoing disputes with Bank.

III. The Bank failed to address the Receiver's request for attorney's fees pursuant to this Court's inherent power to sanction bad faith conduct.

During this litigation the Bank has: (1) been subject to a Show Cause Order for violating this Court's Freeze Order; (2) needlessly opposed a motion for extension of time; (3) took months to produce the very documents relating to the relatively short banking relationship between the parties; and (4) failed to comply with the Court's Omnibus Order requiring the entire $3 million be turned over 90 days after the termination of the Banking Agreements. The Bank seeks attorney's fees to cover its costs in connection with these actions. If the Bank is awarded attorney's fees and costs, or the Receiver is *not* awarded attorney's fees and costs, this will have a direct adverse impact on the innocent victims of underlying fraud. Under these circumstances, it is equitable to award the Receiver attorney's fees so as to avoid sanctioning those innocent victims by reducing their recovery as a result of the Bank's heavy-handed tactic employed during this case.

IV. The Bank objects to certain time entries that are no longer in dispute.

The Receiver provided the Bank with a copy of its Motion for Fees before filing same pursuant to Local Rule 7.3. The Receiver agreed to withdraw certain time entries when the parties met and conferred on the Bank's objections to the Motion for Fees, and the Receiver filed a corrected Motion for Fees that withdrew certain time entries. The Bank based its objections on the time entries provided in the Motion for Fees served pursuant to Local Rule 7.3, and not the Motion for Fees that is filed on record. As such, certain fees argued by the Bank are no longer in dispute.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court enter an Order awarding him his reasonable attorney's fees and costs.

Dated: June 14, 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 14, 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