UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

ORAL ARGUMENT REQUESTED

ARTHUR NADEL,
SCOOP CAPITAL, LLC,
SCOOP MANAGEMENT, INC.,

Defendants,

CASE NO.: 8:09-0087-T-26TBM

SCOOP REAL ESTATE, L.P.,
VALHALLA INVESTMENT PARTNERS, L.P.,
VALHALLA MANAGEMENT, INC.,
VICTORY IRA FUND, LTD.,
VICTORY FUND, LTD.,
VIKING IRA FUND, LLC.,
VIKING FUND, LLC., and
VIKING MANAGEMENT, LLC.

Relief Defendants.
_____/

WELLS FARGO'S MOTION FOR PAYMENT OF CERTAIN FEES AND COSTS AS ADMINISTRATIVE EXPENSES

Wells Fargo Bank, N.A. ("**Wells Fargo**" or "**Bank**")[1] moves this Court for an Order compelling the Receiver to reimburse the Bank for specific fees and costs incurred in defense of the Bank's property rights and security interests, against the claims made and positions taken by the Receiver, as an administrative expense, and states:

[1] Wells Fargo is successor by merger to Wachovia Bank, N.A. ("**Wachovia**").

SUMMARY OF THE ARGUMENT

A party subjected to loss and expense as a result of the administration of a receivership estate is entitled to be made whole as a matter of fundamental fairness; and allowing the injured party to be paid through an administrative expense claim is an accepted method of implementing this policy. This policy and method have been endorsed by the United States Supreme Court in *Reading Co. v. Brown*, 391 U.S. 471, 478 (1968) and several courts in the Middle District of Florida. Here, Wells Fargo has been unfairly subjected to loss and expense as a result of the Receiver's unsuccessful litigation against it. Separate from and in addition to the unsecured deficiencies on its secured claims, Wells Fargo has suffered losses as the Receiver forced it to spend multiple millions of dollars in attorneys' fees and costs to defend against unfounded attacks. After two trips to the Eleventh Circuit, the Receiver's attacks have been conclusively defeated.[2] Despite their losing efforts, the Receiver and his counsel have been fully compensated from estate assets for their time opposing Wells Fargo's interests in this case and asserting meritless claims and positions (even after the Eleventh Circuit conclusively established their clear lack of any legal foundation). Now, the Receivership Estate should reimburse Wells Fargo for *some*[3] of the damage the Receiver has done to the Bank.

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[2] By separate motion, the Bank recently sought turnover of Rents improperly retained by the Receiver. This issue remains pending, even though the Eleventh Circuit precedent makes it clear that the Receiver must return this property to the Bank.

[3] In this motion, the Bank only seeks to recover a portion of the fees and costs it incurred in this Receivership. Specifically, Wells Fargo seeks to recover the legal fees and costs it incurred in defending its security interests before this Court, plus the appellate costs awarded by the Eleventh Circuit, as discussed below. The Bank is not seeking to recover the legal fees associated with the appeals to the Eleventh Circuit, legal fees or costs associated with the

FACTUAL BACKGROUND

A. THIS RECEIVERSHIP PROCEEDING

The SEC initiated this action against Arthur Nadel and his entities on January 21, 2009. (Dkts. 1-2). The SEC also moved to appoint the Receiver on the same date. (Dkt. 6). The Court immediately entered the Order Appointing Receiver. (Dkt. 8). As a result of the Order Appointing Receiver, and the orders expanding the Receivership, the Receiver took possession of several properties, including four properties subject to Wells Fargo security agreements.

B. WELLS FARGO SECURED CLAIMS

As of January 21, 2009, Wells Fargo held valid secured claims against the following properties: (1) 841 South Main Street, Graham, North Carolina (the "**Rite Aid Property**"); (2) approximately 420 acres near Asheville, North Carolina in Buncombe and McDowell counties (the "**Laurel Mountain Property**"); (3) 30393 Upper Bear Creek Road, Evergreen, Colorado (the "**Evergreen Property**"); and (4) 464 Golden Gate Point, Unit 703, Sarasota, Florida (the "**Sarasota Property**").[4] In addition, Wells Fargo held valid property rights to, and secured claims against, rents generated from, *inter alia*, the Rite Aid Property.

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motion to disqualify the Receiver, or the legal fees or costs associated with monitoring the Receivership matters that were not directly related to the defense of the Bank's security interests. In this motion, the Bank does not seek recovery of the attorney's fees and costs incurred in defense of the separate litigation the Receiver filed and lost, against Wells Fargo. In that case, the Bank incurred approximately $4 million in attorneys' fees between March 2012 and February 2015. *See* Case No. 8:12-cv-00557, Doc. No. 327.

[4] After losing twice in the Eleventh Circuit to Wells Fargo, the Receiver turned over the net proceeds of the sales of the Rite Aid Property and Sarasota Property to the Bank, and lifted the Court's injunction to allow Wells Fargo to foreclose on the Laurel Mountain Property (Dkt. 1296). The Receiver did not dispute the Bank's lien on the Evergreen Property and the Receiver paid off that loan after a Court-approved sale (Dkt. 1043).

C. THE RECEIVER CHALLENGED WELLS FARGO'S SECURITY INTERESTS AND SOUGHT TO EXTINGUISH VESTED PROPERTY RIGHTS THROUGHOUT

The Receiver's aggressive litigation tactics have needlessly damaged Wells Fargo by forcing the Bank to incur fees and costs associated with protecting its property rights against several attacks. In particular, the Receiver:

- Sought the imposition of an untenable "claims administration" process, which the Eleventh Circuit ultimately determined to be wholly improper as a means to eradicate valid state law property interests. *See* Dkts. 675, 689.

- Objected to the Rite Aid Claim on a number of different theories, including the Bank's alleged complicity in Arthur Nadel's Ponzi scheme. The Receiver lost on every theory, but the Bank incurred significant attorneys' fees and costs;

- Initiated separate litigation against the Bank that lasted over 5 years, which the Receiver lost in District Court and at the Eleventh Circuit. *See Wiand v. Wells Fargo Bank, N.A.*, 86 F. Supp. 3d 1316 (M.D. Fla. 2015) (granting summary judgment for Wells Fargo, on all counts), *aff'd Wiand v. Wells Fargo Bank, N.A.*, No. 15-10968, 677 F. App. 573 (11th Cir. Jan. 26, 2017).

- Moved to sell the Rite Aid Property (Dkts. 706 & 823), despite Wells Fargo's secured claim against the property. *See* Dkts. 719, 840, 842.

- Opposed Wells Fargo's motion to compel abandonment of the Rite Aid Property, despite his agreement that there was no equity in the Property. *See* Dkts. 719, 840, 842.

- Maintained his motion to sell the Rite Aid Property even in the face of a higher and better offer. *See* Dkt. 853.

- Filed an inadequate motion to sell the Rite Aid Property, failing to comply with 28 U.S.C. § 2001 (Dkt. 706). After Wells Fargo was forced to object to the sale, the Court denied the sale and compelled the Receiver to comply with the statute. (Dkt. 726).

- Sought to eradicate Wells Fargo's security interests in the La Bellasara and the Laurel Mountain Properties, based on the failure to file proofs of claim. *See* Dkts. 740, 1222. The Eleventh Circuit restored Wells Fargo's security interests on appeal, determining that the receivership court does not have the authority to extinguish a creditor's state law property rights (*e.g.*, security interests) that vested prior to the commencement of the receivership. *See SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017).

- Sought to distribute Receivership funds without maintaining sufficient reserves to pay the Rite Aid Rents to Wells Fargo, necessitating the Bank's objections. *See* Dkts. 825, 831, 1253, 1254.

- Is seeking to eradicate Wells Fargo's interests in the Rents generated by the Rite Aid Property, despite Wells Fargo's valid Assignment of Rents, which cannot be reasonably challenged in light of the Eleventh Circuit's decision in *SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017). Due to this challenge, Wells Fargo was forced to prepare and file its motion to compel the Receiver to turn over the rents. (Dkt. 1332).

Throughout the Receivership Proceedings, the Receiver has vigorously challenged Wells Fargo's claims, often without a legitimate legal basis. He objected to the Bank's claims on a number of different theories, including the Bank's alleged (but ultimately discredited) complicity in Arthur Nadel's Ponzi scheme. *See, e.g.*, Dkt. 675. He sought to eradicate the Bank's valid state law property rights through an untenable "claims administration" process. *See, e.g.*, Dkt. 1209. Even after the Eleventh Circuit determined the "claims administration" process to be wholly improper as to state law security agreements, the Receiver has continued to assert that certain security instruments were eradicated – in fact, he is still arguing that Wells Fargo's North Carolina assignment of rents was somehow extinguished by one of this Court's orders, despite the Court's lack of authority to do so. *See* Dkts. 840, 842. In 2012, he moved to sell the Bank's collateral despite the Bank's valid liens, the Bank's opposition to the sale, his own noncompliance with applicable statutes, and a better offer for the same property. *See* Dkt. 706, 718, 719, 823, 840, 842, 853. At several points during these proceedings, the Receiver sought to distribute Receivership funds without maintaining sufficient reserves to turn over the Bank's property, necessitating the Bank's objections. *See* Dkts. 825, 831, 1253, 1254. These are just some of the examples of how the Receiver's litigation tactics have needlessly damaged

Wells Fargo by forcing the Bank to incur attorneys' fees and costs associated with protecting its property rights against myriad attacks.

The Receivership Proceedings could have been inexpensive for the Receivership Estate and Wells Fargo, if the Receiver had been reasonable. In fact, he could have merely abandoned Wells Fargo's collateral pursuant to the unassailable security instruments, but he refused to do that. *See* Dkts. 719, 840, 842. Instead, the Receiver and his attorneys have incurred hundreds of thousands of dollars in fees litigating against Wells Fargo, with nothing to show; and Wells Fargo has incurred hundreds of thousands of dollars defending against the Receiver's baseless challenges. The Receivership Estate has paid all of the Receivers' attorneys' fees and costs. It is now time for Wells Fargo's attorneys' fees and costs to be paid too.

D. THE FEES AND COSTS SOUGHT BY THE BANK FALL WITHIN THE COURT-APPROVED DEFINITION OF ADMINISTRATIVE EXPENSES

On April 20, 2010, the Receiver filed a motion for an order establishing a claims administration process by which potential claimants could file their claims against the Receivership Estate (the "**Claims Procedures Motion**") (Dkt. 390). The order approving the Claims Procedures Motion set September 2, 2010 as the general claims bar date for filing claims against the Receivership Entities (the "**Claims Procedures Order**") (Dkt. 391). The Claims Procedures Order did **not** set a bar date for filing administrative claims, but it did approve the Claims Procedures Motion "in all respects", including the definition of administrative expenses:

> All administrative expenses, **including attorneys' fees and costs, litigation expenses,** experts, and other administrative costs, will be paid from the Receivership Estate. These administrative expenses will be paid or reserved before any Distribution is made. Administrative expenses may also include, but are not limited to (1)

> expenses for publishing notice and (2) the retention of one or more consultants to assist in analyzing the validity of filed claims. No previous request for the relief sought herein has been made to this or any other Court.

(emphasis supplied) (Dkt. 390 at 11).

The Receiver has previously moved this Court to pay himself and his attorneys for the prosecution of these unsuccessful actions against Wells Fargo, with funds from the Receivership Proceeding. *See, e.g.*, Receiver's Twenty-First Interim Motion for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and His Professionals, Dkt. 1245 at 19-21; Twentieth Motion, Dkt. 1211 at 20-22, *etc*.

As of July 31, 2016, the Receiver personally received $815,543.89 from estate assets, and the Receiver's attorneys received at least $11,420,873.19. *See* Dkts 130, 165, 201, 266, 395, 497, 582, 646, 657, 717, 860, 914, 951, 1047, 1091, 1127, 1143, 1156, 1201, 1218. More specifically, the James Hoyer law firm – which was hired for the sole purpose of pursuing claims against Wells Fargo (*see* Dkt. 730) – received $323,316.78 for its services between February 2, 2012 and July 31, 2016.[5] And these figures do not even include fees and costs incurred by conflicts counsel during the past 16 months or the significant fees and costs incurred by the Receiver's own law firm from January 2009 through February 2, 2012, in opposing Well Fargo's interests.

[5] The James Hoyer firm received this substantial sum from the Receivership Estate despite being hired on a contingency basis to sue Wells Fargo for the Bank's alleged complicity in Arthur Nadel's Ponzi scheme. After over four years of litigation, including an appeal to the Eleventh Circuit, the Receiver lost on all counts and the James Hoyer firm recovered nothing for the Receivership Estate. Although the Bank prevailed, it was nonetheless forced to incur approximately $4 million in attorneys' fees defending this specious lawsuit just at the trial level. *See* Case No. 8:12-cv-00557, Doc. No. 327.

As a matter of fundamental fairness, Wells Fargo seeks payment of $527,548.10 as an administrative expense for enforcing its status as a secured creditor, which includes $491,036.17 in attorneys' fees (after application of the Courtesy Discount and agreed-upon client adjustments); $16,511.93 in costs incurred from the beginning of the Receivership through October 31, 2017 (after application of agreed-upon client adjustments); and $20,000 in estimated future attorneys' fees, since November 1, 2017.

In addition, having prevailed in the Eleventh Circuit appeal of *SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017), $761.70 (the "**Appellate Costs**") is payable to Wells Fargo pursuant to Federal Rule of Appellate Procedure 39, and should be paid as an administrative expense. A copy of Wells Fargo's Bill of Costs was filed in this case at Docket No. 1282, p. 3. All of the fees and costs sought by the Bank fall within the definition set out in the Court's Claims Procedures Motion. *See* Dkt. 390.[6]

Finally, having prevailed in the related litigation in the United States District Court for the Middle District of Florida and recevied a cost award from Judge Whittemore, $40,312.94 (the "**Related Litigation Cost Award**") is payable to Wells Fargo and should be taxed as an administrative expense. *See* Case No. 8:12-cv-557, Dkt. 340. In total, Wells Fargo seeks allowance and payment of **$568,622.74** as an administrative expense claim.

[6] The specific attorneys' fees and costs sought in this administrative claim are detailed in the Affidavit of Steven R. Wirth, Esq., attached as **Exhibit 1.**

MEMORANDUM OF LAW

A. WELLS FARGO'S ATTORNEYS' FEES AND COSTS SHOULD BE ALLOWED AND PAID AS AN ADMINISTRATIVE EXPENSE.

1. *Attorneys' Fees and Costs Should be Paid to the Prevailing Party.*

The Receiver has vigorously challenged Wells Fargo's status as a secured creditor. Many of his challenges were meritless; and in the end, all were unsuccessful. Despite his losing every challenge against the Bank, the Receiver and his attorneys have been paid handsomely from the Receivership Estate, receiving 100% of their requested fees. On the other hand, despite its prevailing in every challenge, Wells Fargo has been left to bear a substantial expense burden on its own – a burden which was unjustly imposed by the Receiver.

In an SEC receivership, a Court's decision to award attorneys' fees should be guided by a number of factors including the results obtained and "the complexity of problems faced, the benefit to the receivership estate, the quality of work performed, and the time records presented." *SEC v. Fifth Ave. Coach Lines, Inc.*, 364 F. Supp. 1220 (S.D.N.Y. 1973). Importantly, "whether a receiver merits a fee is based on the circumstances surrounding the receivership, and **'results are always relevant**.'" *FTC v. Worldwide Info. Serv. Inc.*, 2015 WL 144389, *4 (M.D. Fla. Jan. 12, 2015) (citing *SEC v. Elliott*, 953 F. 2d 1560, 1577 (11th Cir. 1992) (emphasis added)). Unlike in a bankruptcy proceeding, the preservation of assets for creditors is not a prime concern. *See Fifth Ave. Coach Lines, Inc.*, 364 F. Supp. at 1222. Rather, the emphasis is on the results obtained.

Applying these factors to the discrete matters presented in this motion, it is abundantly clear that if any party has earned a fee award under this analysis, it is the Bank, not the Receiver. Yet, the Receiver's fees have been paid from receivership property (*see* Dkts 130,

165, 201, 266, 395, 497, 582, 646, 657, 717, 860, 914, 951, 1047, 1091, 1127, 1143, 1156, 1201, 1218), while the Bank's have not. Making matters worse, much of the Bank's substantial attorneys' fee burden was caused by the Receiver, who relentlessly fought the Bank to no avail. Fairness requires allowance of an administrative claim for the Bank; and so does the law of this Court.

When a receiver pursues an action to benefit the estate, but is unsuccessful, fees incurred in defending the claims asserted by the receiver are "properly classified as an administrative claim against the estate." *SEC v. HWK Trading LLC*, 2009 WL 2499146 (M.D. Fla. Aug. 14, 2009) (allowing administrative expense claim and denying receiver's request to subordinate claim filed by wife of Ponzi scheme perpetrator, to claims of the defrauded investors). A similar rule applies in the bankruptcy context, with courts allowing administrative expense claims for attorneys' fees incurred by creditors' defending their valid claims.[7] In fact, the Supreme Court has expanded Section 503(b)(1)(A) of the Bankruptcy Code[8] to require that courts consider the "statutory objective: fairness to all persons having

[7] It is well established that courts in this Circuit can and should look to bankruptcy law when there is minimal authority in the specific context of a receivership. *See SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017) (stating that "bankruptcy law is both analogous and instructive here" when evaluating the effect of a receivership on a secured creditor's preexisting state law security interests); *see also Bendall v.Lancer Management Group, LLC*, 523 Fed. Appx. 554 (11th Cir. 2013) (the Eleventh Circuit "will apply cases from the analogous context of bankruptcy law, where instructive, due to limited case law in the receivership context").

[8] Section 503(b)(1)(A) of the Bankruptcy Code provides that "there shall be allowed administrative expenses… including –" for the "actual, necessary costs and expenses of preserving the estate." By using the term "including" in the introductory provision of section 503(b), "Congress built a mechanism into § 503(b) for bankruptcy courts to reimburse expenses not specifically mentioned in § 503(b)'s subsections" such that "Congress anticipated that bankruptcy courts would encounter a variety of ... circumstances warranting

claims against an insolvent." *See Reading Co. v. Brown*, 391 U.S. at 478 ("We hold that damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to 'actual and necessary costs' of a Chapter XI arrangement.").

In *Reading Co.*, the Court allowed a creditor's administrative expense claim, reasoning that "parties subjected to loss and expense as a result of the administration of a bankruptcy estate are entitled to be made whole as a matter of fundamental fairness and should be allowed an administrative claim to implement that result." *See In re G.I.C. Gov't. Sec., Inc.*, 121 B.R. 647, 649 (Bankr. M.D. Fla. 1990) (discussing *Reading Co.*). Interpreting *Reading Co.*, the Bankruptcy Court for the Middle District of Florida has allowed administrative expense claims to pay the attorneys' fees of creditors successfully defending their claims against court-appointed officials, compensating those who are forced to expend new resources successfully defending against attempts to rehabilitate/improve the estate. *See id.* (allowing administrative claim to pay costs incurred in successful defense of claim filed by trustee, which the trustee pursued in an attempt to benefit the estate); *In re Prop. Mgmt. and Invests., Inc.*, 91 B.R. 170 (Bankr. M.D. Fla. 1988) (allowing administrative claim to pay for law firm's legal fees incurred in defense of malpractice claim pursued by debtor, because if it had been successful, claim would have benefited estate). Here, the Receiver's actions in administering the receivership estate have subjected Wells Fargo to loss and expense, needlessly forcing Wells Fargo to defend its unassailable security interests, so Wells Fargo's attorneys' fee expenses should be paid as an administrative expense.

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reimbursement, which it could then evaluate on a case-by-case basis." *In re Connolly N. Am. LLC*, 802 F.3d 810, 816 (6th Cir. 2015).

2. *Fairness Requires Allowance and Payment of The Bank's Fees as an Administrative Expense.*

Granting the Bank an administrative expense claim comports with the fundamental fairness principles that permeate bankruptcy and receivership proceedings. *See, e.g.*, *In re Carpet Ctr. Leasing Co., Inc.*, 991 F.2d at 685-86 (recognizing that § 507(b) converts a secured creditor's claim into an allowable administrative expense claim, where there has been a diminution of value in the collateral by reason of the automatic stay). Indeed, the law is clear that a creditor should not be damaged by actions taken to benefit the estate. *See, e..g, In re CM Sys., Inc.*, 86 B.R. 286, 287 (Bankr. M.D. Fla. 1988) (allowing administrative expense for cost of leasing equipment, which equipment was leased to generate funds for operating the debtor's business); *Tribune Media Co.*, 2015 WL 7307305, at *4 (Bankr. D. Del. Nov. 19, 2015) ("Creditors may seek payment of postpetition fees and expenses under § 503(b)(3)(D) and § 503(b)(4), which allow an administrative claim for actual, necessary expenses that confer a 'substantial contribution' on the bankruptcy estate."), *motion to certify appeal granted sub nom. In re Tribune Media Co.*, 2016 WL 1451161 (D. Del. Apr. 12, 2016).

Had the Receiver been successful in objecting to one or more of the Bank's secured claims, it might have freed up additional funds to the benefit of the receivership estate, but the Receiver's motives are irrelevant. *See HWK Trading LLC*, 2009 WL 2499146, at *4 (allowing administrative claim even though the "Court is not unmindful that the actions taken by the Receiver that led to the award of attorneys' fees against the Receivership were done with the proper motive and intentions"). Because the Court should be focused on results, the only relevant factor is that the Receiver's actions damaged Wells Fargo by forcing the Bank to needlessly expend resources in the form of attorneys' fees and costs. Consequently, Wells

Fargo is entitled to an administrative claim to compensate it for those damages. *See HWK Trading LLC*, 2009 WL 2499146, at *4 ("As such, since the litigation that led to the attorneys' fee award was pursued by the Receiver in an attempt to benefit the state, such fees are properly classified as an administrative claim against the estate.").

Without an administrative expense award to Wells Fargo, the burden of the Receivership's fruitless fighting would be unfairly borne by Wells Fargo, particularly since Receiver has already been paid for losing fights that should never have been brought in the first place. The most bewildering example of this unfair result is demonstrated by contrasting the parties' attorneys' time records for January 2012, when the Receiver pursued a sale of the Rite Aid property, over the Bank's objection and despite the Bank's valid state law security instruments.

In his initial motion to sell the property, the Receiver failed to comply with the statutory requirements of 28 U.S.C. § 2001. *See* Dkt. 706. After Wells Fargo pointed out the flaws, the Receiver fought the Bank rather than fixing the problem. *See* Dkt. 718. On January 24, 2012, the Court denied the sale motion and ordered the Receiver to comply with the statute. *See* Dkt. 726 ("Because there is nothing in the record before the Court even remotely suggesting compliance with the statute, the Court has no jurisdiction to approve the contemplated sale."). Ultimately, the Receiver complied with the statute and the property was sold over the Bank's objection. *See* Dkts. 840, 842.

Incredibly, the Receivership Estate has paid all of the Receiver's attorneys' fees for services performed during this period, including the fees incurred to pursue the unlawful sales process in the first place and the fees incurred to vigorously defend that unlawful process rather

than ameliorate after Wells Fargo pointed out the flaws. *See, e.g.,* Dkt. 897-9, p. 4. On the other hand, Wells Fargo had to pay its attorneys to protect its position from unwarranted attack. This is the kind of injustice that the case law is able to remedy. Moreover, Wells Fargo actually conferred a benefit on the Receivership Estate by insisting with statutory compliance, because benefits to a receivership may take "more subtle forms than a bare increase in monetary value." *Gaskill v. Gordon*, 27 F.3d 248, 253 (7th Cir. 1994) (quoting *SEC v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992)). Therefore, Wells Fargo is entitled to reimbursement for its fees and costs from estate assets.

3. *The Appellate Costs and the Related Litigation Cost Award Are Unquestionably Administrative Expenses*.

Having prevailed in the Eleventh Circuit appeal of *SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017), the Appellate Costs detailed and allowed in the amount of $761.70 (*see* Dkt. 1282, p. 3) should be paid as an administrative expense. *See* FRAP 39; *see also HKW Trading LLC*, 2009 WL 2499146, at *3-4; *see also In re G.I.C. Gov't. Secur., Inc.*, 121 B.R. at 648 (defendant's taxable costs were an administrative expense of estate because trustee sued defendant in an attempt to benefit estate); *Resolution Trust Corp. v. Heinhold Commodities, Inc.*, 803 F. Supp. 1342, 1344, 1349 (N.D. Ill. 1992) (concluding an award of attorney's fees and costs constituted a first priority administrative expense of receivership). Similarly, having prevailed in related litigation before Judge Whittemore – in case no. 8:12-cv-557 – the Related Litigation Cost Award of $40,312.94 is payable to Wells Fargo and should be taxed as an administrative expense. *See id.*

4. *The Loan Documents Require the Borrowers to Pay the Bank's Attorneys' Fees and Costs*

Although not a prerequisite to recover attorneys' fees and costs as an administrative expense claim, it should be noted that each of the loan documents at issue here contain provisions requiring the borrowers to pay the Bank's attorneys' fees and costs. Because the Receiver stands in the shoes of the borrowers, he is bound by the fee provisions in each of the loan documents. *Wiand v. Schneiderman*, 778 F.3d 917, 925 (11th Cir. 2015) (affirming enforcement against Receiver of contractual arbitration provision between fund and investor); *Resolution Trust Corp. v. United Trust Fund, Inc.*, 57 F.3d 1025 (11th Cir. 1995) (recognizing that receiver stands in the shoes of the insolvent entity).

In this case, the applicable loan documents state, in relevant part:[9]

- "In the event that Lender is called upon to pay any sums of money to protect this Deed of Trust and the Note… All such monies so advanced by Lender shall be deemed to be secured by this Deed of Trust." Rite Aid Property *Deed of Trust and Security Agreement*, ¶ 1.11. And, "in the event this Deed of Trust is placed in the hands of an attorney… Grantor agrees to pay all costs of collection, including reasonable attorneys' fees (including those in all appellate and bankruptcy proceedings) incurred by Lender..." Rite Aid Property *Deed of Trust and Security Agreement*, ¶ 1.12.

- "Grantor shall protect, indemnify and save harmless Bank from and against all losses… costs and expenses (including, without limitation, reasonable attorneys' fees and expenses)… incurred by or asserted or assessed against Bank on account of or in connection with (i) the Loan Documents or any failure or alleged failure of Grantor to comply with any of the terms of… the Loan Documents." Laurel Mountain Property *Deed of Trust and Assignment of Rents*, pp. 9-10.

[9] All of the applicable provisions appear in the Record, in their entirety. *See, e.g.*, Doc. No. 719-1, pp. 21-22 (the Rite Aid Property *Deed of Trust and Security Agreement*, ¶¶ 1.11 and 1.12); Doc. No. 740-1, p. 16 (the Evergreen Property *Deed of Trust*, ¶ 9); Doc. No. 740-2, pp. 14-15 (the Sarasota Property First *Mortgage*, ¶ 9); Doc. No. 740-3, p. 26 (the Sarasota Property Second *Mortgage*, ¶ 16); and Doc. No. 740-4, pp. 20-21 (the Laurel Mountain Property *Deed of Trust and Assignment of Rents*, pp. 9-10). They are also attached to this motion as ***Exhibit 4***, and incorporated herein by reference. Copies are also in the Receiver's possession and are available upon request. Due to their length, only key portions are set forth in this motion.

- "If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lenders Interest in the Property and/or rights under this Security Instrument… then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including… paying reasonable attorneys' fees to protect its interest in the property and/or rights under this Security instrument… Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security instrument." Evergreen Property *Deed of Trust*, ¶ 9.

- "If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lenders Interest in the Property and/or rights under this Security Instrument… then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including… paying reasonable attorneys' fees to protect its interest in the property and/or rights under this Security instrument… Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security instrument." Sarasota Property First *Mortgage*, ¶ 9.

- "Mortgagor agrees to pay all of Lender's expenses if Mortgagor breaches any covenant in this Security Instrument. Mortgagor will also pay on demand any amount incurred by Lender for insuring, inspecting, preserving or otherwise protecting the Property and Lender's security interest." Sarasota Property Second *Mortgage*, ¶ 16.

In this case, the Requested Fees and Requested Costs clearly fall within the purview of these provisions because the Bank was necessarily protecting its security instruments against the Receiver's challenges and enforcing the Bank's secured claims. Because these contractual fee provisions unambiguously state that the Bank's attorneys' fees are recoverable and clearly identify the matters which are recoverable, the fee provisions are enforceable pursuant to the standard set forth in *Succar Succar v. Safra Nat'l Bank of New York*, 237 Fed. Appx. 526, 528 (11th Cir. 2007) (per curiam) (unpublished).

The Receiver's prior citation to *Bendall v. Lancer Management Group*, LLC, 523 Fed. Appx. 554 (11th Cir. 2013) for the proposition that a creditor must file a proof of claim in order to recover attorneys' fees pursuant to contract is inapposite for a number of reasons. First,

unlike the creditors in *Bendall*, the fees sought to be recovered by the Bank here did not begin to accrue until *after* the bar date was entered. Second, the Bank timely filed a proof of claim with respect to the Rite Aid Property and the vast majority of the fees sought to be recovered herein relate to that loan. Third, unlike the creditors in *Bendall*, the Bank did not receive proper notice of the bar date for the loans which it did not file a proof of claim. *See* Doc. Nos. 689, 690.[10] Fourth, and most importantly, the Bank is seeking payment of its fees and costs as an administrative expense claim based on the principles of fundamental fairness and benefit to the estate, not as an unsecured deficiency claim, and there is no bar date for the filing of administrative claims in this case. Thus, *Bendall* has no bearing on the outcome of this motion.

B. THE FEES AND COSTS SOUGHT ARE REASONABLE.

The Bank recognizes that any request for attorney's fees must be reviewed for reasonableness. The standard for reviewing the reasonableness of fees is set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 488 at 717-19 (5th Cir. 1974).[11] The twelve *Johnson* factors are (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or other circumstances;

[10] Indeed, as confirmed by the Eleventh Circuit, the Receiver only mailed a single claims packet to Wells Fargo at its Atlanta, Georgia address. After receiving this packet, Wells Fargo submitted a Proof of Claim as to its loan that secured the Rite Aid Property within the set claim bar date, but did not submit a Proof of Claim detailing its secured interest in the other receivership properties. *See SEC v. Wells Fargo Bank, N.A.*, 848 F.3d at 1342

[11] In *Bonner v. City of Prichar*d, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

(8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client (12) awards in similar case.[12]

The specific attorneys' fees and costs sought in this administrative claim are detailed in the Affidavit of Steven R. Wirth, Esq., attached as **Exhibit 1**. This affidavit attached redacted billing invoices reflecting each cost item and the substance of each time entry for which a fee sought in this motion. The affidavit includes the Appellate Costs. The reasonableness of these amounts is established the Affidavit of Jeffrey Warren, Esq., attached as **Exhibit 2**.

WHEREFORE, Wells Fargo respectfully requests that the Court enter an order in the form attached as **Exhibit 3** (i) granting this motion; (ii) directing the Receiver to disburse **$568,622.74** as an Administrative Expense Claim to Wells Fargo, within three days of the Court's Order; and (iii) granting such other and further relief as this Court deems just and proper.

[12] Even if the Court were to apply a Florida standard of reasonableness, the criteria is virtually identical. *See Bell v. U.S.B. Acquisition Co., Inc.,* 734 So. 2d 403 (Fla. 1999).

LOCAL RULE 3.01(g) CERTIFICATION

Counsel for Well Fargo has conferred with counsel for the Receiver and counsel for the Securities and Exchange Commission. The Receiver has indicated that he objected to and would oppose the relief requested in this motion. The SEC has indicated that it takes no position regarding the relief requested in the motion.

LOCAL RULE 3.1(j) REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.1(j), Wells Fargo requests oral argument on this motion and estimates the time required for both sides to make their presentation to be one hour.

Respectfully submitted,

/s/ Steven R. Wirth
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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Steven R. Wirth
Attorney