UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

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.
_____/

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

Burton W. Wiand, as Receiver (the "**Receiver**") for the above-captioned case, hereby files this objection to Wells Fargo Bank, N.A.'s ("**Wells Fargo**") motion for payment of $568,622.74 in attorney fees and costs as administrative expenses (the "**Motion**") (Doc. Nos. 1333 and 1334). In support of this objection, the Receiver states as follows:

SUMMARY OF THE ARGUMENT

Wells Fargo not only asks the Court to order the Receivership Estate to pay $568,622.74 in attorney's fees and costs it incurred asserting its own interests in this Receivership Case but also

improperly seeks to prioritize its claim over those of the Class 1 Investor Claims filed by victims of the Nadel Ponzi scheme—and in doing so, ignoring the claims priorities that this Court has approved as "fair and equitable" in its Claim Order (defined below). In making this request, Wells Fargo's request ignores not only equity but also the American Rule, which generally requires that each party to a proceeding bear its own legal fees and costs. In this case, no statute or any other independent basis for attorney fee liability provides an exception to this rule. Moreover, Wells Fargo's failure to file proof of claims for attorney fees (or *any* proof of claim for all but one loan) precludes any claim for attorney fees based on its loan documents. And even if the Court found an award for attorney fees appropriate under Wells Fargo's pre-receivership loan documents, such an award would not be entitled to administrative expense priority over the defrauded investors of Nadel's Ponzi scheme.

FACTUAL BACKGROUND

On January 21, 2009 (the "**Receivership Date**"), the Securities and Exchange Commission filed a Complaint (Doc. No. 1) initiating the above-captioned receivership case (the "**Receivership Case**") to prevent the defendants from further defrauding investors through hedge funds operated by Arthur Nadel and his related entities. That same day, the Court entered an order appointing the Receiver (the "**Order Appointing Receiver**") (Doc. No. 8), which prescribed the scope of the Receiver's duties, authority, and powers, and also vested title to all property of the receivership entities in the Receiver (the "**Receivership Estate**").

The Receiver sought an order establishing a deadline for all claimants to file claims arising in any way out of the activities of the Receivership Entities to facilitate a timely claims resolution and distribution process. On April 21, 2010, the Court entered an order establishing a claims administration process by which potential claimants could file their claims against the

Receivership Estate (the "**Claims Bar Date Order**") (Doc. No. 391). The Claims Bar Date Order set a September 2, 2010 deadline to file claims against the Receivership Entities (the "**Claims Bar Date**"). On March 2, 2012, the Court entered an order (the "**Claim Order**") (Doc. No. 776) approving the Receiver's proposed claim priorities as "fair and equitable," with the highest priority given to all allowed investor claims and tax lien claims—Class 1. Wells Fargo's Motion attempts to create a new class of claims above Class 1.

On September 2, 2010, Wells Fargo filed a proof of claim in the amount of $2,655,000 relating to a loan on one property (the Rite-Aid Property), which was assigned claim number 502 by the Receiver (the "**Rite-Aid Claim POC**").[1] Wells Fargo has not filed an amended Rite-Aid Claim POC or filed any other Proofs of Claim is the Receivership Case.

A. The Wells Fargo Disputes

As described in its Motion, Wells Fargo claimed security interests in four properties which were property of the Receivership Estate—the Rite-Aid Property, the Laurel Mountain Property, the Evergreen Property, and the Sarasota Property. As conceded by Wells Fargo, the Receiver did not dispute or in any way challenge Wells Fargo's lien as to the Evergreen Property.[2] The Receiver did, however, assert claims against Wells Fargo relating to Wells Fargo's security interests in the Rite-Aid Property, the Laurel Mountain Property, and the Sarasota Property (the collectively, the "**Properties**").

The Receiver's disputes with Wells Fargo can be grouped into two categories. First, the Receiver filed a complaint against Wells Fargo asserting several civil claims, including claims to avoid Wells Fargo's liens on the Properties as fraudulent transfers (the "**Fraudulent Transfer**

[1] A copy of the Rite-Aid Claim POC is attached as **Exhibit A** to the Receiver's Objection to Wells Fargo's turnover Motion. Doc. No. 1342.
[2] Motion at p. 3 n.4.

Litigation").[3] Judge Whittemore presided over the Fraudulent Transfer Litigation and ultimately granted summary judgment in favor of Wells Fargo.[4] Second, the Receiver sought a determination from this Court that Wells Fargo's failure to file proof of claims with respect to the Laurel Mountain Property and the Sarasota Property resulted in extinguishment of Wells Fargo's security interests in those properties (the "**Claims Litigation**"). (*See* Doc. No. 1209.) Although this Court agreed with the Receiver's arguments (Doc. No. 1222), the Eleventh Circuit Court of Appeals—noting the dearth of authority on the issue involved—reversed.[5] Both the Fraudulent Transfer Litigation and the Claims Litigation are now concluded.[6]

B. Wells Fargo's Attorney Fee and Cost Request

Wells Fargo now asks the Receivership Estate to reimburse $527,548.10 of its attorney fees and costs incurred in this Receivership Case, ostensibly relating to "defending its security interests" before the Court.[7] Although Wells Fargo couches its request as an administrative expense claim, the Motion seeks distinct forms of relief. Wells Fargo first asks the Court to enter an order awarding attorney fees and costs. Wells Fargo then seeks an additional finding that those awarded attorney fees and costs are entitled to an administrative expense priority. As explained below, this distinction is important.

Wells Fargo also asks the Court to impute administrative expense priority on $41,074.64 in costs already awarded by other courts (the "**Cost Awards**"). The bulk of the Cost Awards arise

[3] Case No. 8:12-cv-00557-JDW-EAJ.
[4] Case No. 8:12-cv-00557-JDW-EAJ, Doc. No. 325.
[5] *See S.E.C. v. Wells Fargo Bank, N.A.*, 848 F.3d 1339 (11th Cir. 2017) ("[T]here is minimal authority with respect to a district court's authority, in the context of a receivership, to extinguish a secured creditor's preexisting state law security interest by operation of its own claims administration process.").
[6] Wells Fargo has also filed, contemporaneous with the present Motion, a *Motion for Order Directing Receiver to Turnover Rents from Rite Aid Property* (Doc. No. 1332). That motion will be addressed by the Receiver by separate response.
[7] Motion p. 2 n.3.

from a motion for attorney fees and costs made before Magistrate Judge Jenkins in the Fraudulent Transfer Litigation. The court denied Wells Fargo's attorney fee request in its entirety, but awarded $40,312.94 in taxable costs.[8]

Wells Fargo first claimed entitlement to post-receivership attorney fees and costs in its limited objection to the Receiver's motion to approve the sixth interim distribution to investors. (*See* Limited Objection, Doc. No. 1254). In that objection, Wells Fargo complained that sufficient reserves were not maintained by the Receiver to pay "approximately $806,121.22.00 [sic] for attorneys' fees and costs incurred by Wells Fargo in enforcing its security interests in this case and on appeal before the Eleventh Circuit." (Limited Objection, Doc. No. 1254 at 3). The Receiver filed a reply (Doc. No. 1258), making many of the same arguments it advances in this response—Wells Fargo conflates priority of a claim with the basis for a claim. The Court, after considering Wells Fargo's objection and the Receiver's reply, entered an Order approving the Receiver's proposed distributions and reserve amounts. (Doc. No. 1259).

ARGUMENT AND MEMORANDUM OF LAW

A. Wells Fargo's Arguments Ignore the American Rule

Wells Fargo's request for attorney fees and costs incurred in this Receivership Case conflates the *priority* of an award for attorney fees with *liability* for attorney fees. As framed by the United States Supreme Court, the "basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise."[9] Wells Fargo's Motion, however, is devoid of any reference to this "bedrock principal."

[8] *See Wiand v. Wells Fargo Bank, N.A.*, 8:12-cv-00557-JDW-EAJ, 2015 WL 12839237 (M.D. Fla. June 10, 2015).
[9] *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164, 192 L. Ed. 2d 208 (2015) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010)).

Wells Fargo is not asking the Court to simply afford administrative expense priority to an attorney fee award already granted by a different tribunal. Rather, Wells Fargo asks this Court, in the first instance, to award Wells Fargo "prevailing party"[10] attorney fees incurred in this Receivership Case "[a]s a matter of fundamental fairness," and then to find that the award is entitled to payment as an administrative priority. (Motion at 8). The American Rule does not contain a "fairness" exception or allow an award of fees based on vague equitable principals. The equitable exceptions to the American Rule are few and are narrowly defined.[11]

The exceptions to the American Rule fall into three categories: (1) the "common fund exception," derived from a court's historic equity jurisdiction, which "allows a court to award attorney's fees to a party whose litigation efforts directly benefit others"; (2) assessment of attorney fees for willful disobedience of a court order; and (3) assessment of fees where a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[12] This last exception derives from the court's inherent authority to police itself, and allows assessment of fees against the responsible party "if a court finds 'that fraud has been practiced upon it, or that the very temple of justice has been defiled.'"[13]

None of these allow deviation from the American Rule based on "fairness." Wells Fargo cites several cases it claims support its entitlement to an administrative expense claim for its

[10] Any doubt as to whether Wells Fargo's request is a true "prevailing party" attorney fee request is clarified by the title for Section A(1) of the Motion's memorandum of law: "Attorneys' Fees and Costs Should be Paid to the Prevailing Party." (Motion at p. 9).

[11] *Gaskill v. Gordon*, 942 F. Supp. 382, 384–85 (N.D. Ill. 1996), *aff'd*, 160 F.3d 361 (7th Cir. 1998) ("Aside from statutory and contractual circumstances, there are a few narrowly defined exceptions to the American rule under which a federal court may award attorneys fees."); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 241, 95 S. Ct. 1612, 1613, 44 L. Ed. 2d 141 (1975) (limiting equitable exceptions to the American Rule).

[12] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45, 111 S. Ct. 2123, 2133, 115 L. Ed. 2d 27 (1991).

[13] *Id.* at 501 U.S. 32, 46 (quoting *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580, 66 S. Ct. 1176, 1179, 90 L. Ed. 1447 (1946)).

attorney fees. But a closer examination of these cases reveals that in each and every case, an underlying basis for the attorney fee liability already existed before the court determined that the liability was entitled to administrative expense priority.

The main case relied on by Wells Fargo is *S.E.C. v. HKW Trading LLC*.[14] In *HKW*, the receiver pursued an action against the Ponzi scheme perpetrator's wife over life insurance proceeds from the death of her husband. Importantly, during the litigation, the wife served the receiver with an offer of judgment pursuant to Florida Statute § 768.79.[15] The receiver did not accept the offer, the wife received a judgment for the insurance proceeds, and the court presiding over the interpleader action granted the wife's motion for attorney fees pursuant to the fee shifting provision in § 768.79.[16]

In *HKW*, the receiver sought to subordinate the wife's attorney fee claim as a general unsecured creditor claim (below claims of defrauded investors). The court found that the attorney fee award was entitled to payment as an administrative expense because it "resulted from the Receiver's attempt to benefit the estate by asserting a claim for the insurance policy proceeds."[17] The key distinction between *HWK* and Wells Fargo's attorney fee claims is that in *HWK*, the court that presided over the underlying litigation had already granted the creditor's attorney fee motion pursuant to § 768.79. There was an already-established, independent basis for the attorney fee liability that arose from an offer of judgment letter served after the initiation of the receivership case. Here, Wells Fargo has not already obtained court-awarded attorney fees. *HWK* is entirely

[14] *S.E.C. v. HKW Trading LLC*, No. 8:05-CV-1076-T-24-TB, 2009 WL 2499146 (M.D. Fla. Aug. 14, 2009).
[15] *Id.* at *1; *see generally* Fla. Stat. § 768.79; *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995)("The Legislature has modified the American rule, in which each party pays its own attorney's fees, and has created a substantive right to attorney's fees in section 768.79 on the occurrence of certain specified conditions.").
[16] *Id.*
[17] *Id.* at *4.

inapposite.

Wells Fargo also relies on the Supreme Court's decision in *Reading Co. v. Brown*,[18] although it does not address attorney fees or the American Rule in any way. *Reading* was a case under the old Bankruptcy Act,[19] the predecessor to the present-day Bankruptcy Code. There, the creditor's claim resulted from the bankruptcy receiver's[20] negligence in operating an estate property, which resulted in a fire destroying the debtor's only asset. "*Reading* involved tortious conduct that inflicted damage upon parties who had no previous relationship with the debtor's estate."[21] The court found the claim was allowable as an administrative claim because the tort liability was a liability incidental to the operation of the business.

No liability for negligence or other tort has been imposed against the Receiver in this case. Like the § 768.79 attorney fee liability in *HKW*, in *Reading* the creditor's negligence claim supplied an independent source for the underlying liability. An additional key factor in *Reading* was "the wrongful nature of the receiver's act."[22] This factor is not implicated where a trustee or receiver seeks only to liquidate a claim he believes, in good faith, that the estate is entitled to recover.[23] *Reading* is not applicable.

The other cases cited by Wells Fargo follow the same pattern—an existing underlying liability for attorney fees is subsequently granted administrative expense priority by the court determining claims priority (in most cases, a bankruptcy court). In *In re G.I.C. Gov't Sec., Inc.*,[24]

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[18] *Reading Co. v. Brown*, 391 U.S. 471, 475, 88 S. Ct. 1759, 1762, 20 L. Ed. 2d 751 (1968).
[19] Bankruptcy Act of 1898, as amended February 5, 1903, 32 Stat. 797, c. 487 (Comp.St. § 9587).
[20] Under then-existing procedure under the Bankruptcy Act, the receiver was first appointed then later elected as the bankruptcy trustee. *See Reading*, 391 U.S. at 473.
[21] *In re Concrete Prod., Inc.*, No. 88-20240, 1994 WL 16860114, at *8 (Bankr. S.D. Ga. June 8, 1994).
[22] *In re Jack/Wade Drilling, Inc.*, 258 F.3d 385, 390 (5th Cir. 2001) (discussing *Reading* and finding creditor's post-petition attorney fee award was not entitled to administrative expense priority).
[23] *See id.*; *In re Hemingway Transport, Inc.*, 954 F.2d 1, 6 (1st Cir. 1992) (discussing *Reading*).
[24] *In re G.I.C. Gov't Sec., Inc.*, 121 B.R. 647, 649 (Bankr. M.D. Fla. 1990)

the bankruptcy court allowed as administrative expenses costs awarded by the district court in separate litigation initiated by the trustee. Again, there was an independent source of liability for the amounts sought. The case of *In re Prop. Mgmt. & Investments, Inc.*,[25] also points to an underlying source of liability for the attorney fees allowed as administrative expenses. The debtor pursued a malpractice claim against its counsel, and in the underlying litigation the law firm was awarded attorney fees.

The present case is distinguishable from all cases cited by Wells Fargo to support its request for fees. Here, Wells Fargo does not come to this Court with an approved fee award and ask the Court to confer administrative expense priority on that award. Wells Fargo instead asks the Court to actually enter an award of attorney fees in its favor without a valid basis, and then confer administrative expense priority on that fee award. Wells Fargo cites no cases where a receivership court granted a secured creditor's request for attorney fees incurred asserting its own interests in a receivership case.

In some circumstances, where a creditor's efforts provided a tangible benefit to a receivership estate, an award of attorney fees to a creditor could be warranted.[26] But Wells Fargo does not (and could not) assert that it provided a tangible benefit to the receivership estate; its attorney fee claim does not arise from any efforts expended to benefit the Receivership Estate. Here, Wells Fargo was simply protecting its own rights, and its attorney fees were incurred with that goal in mind. The investors should not be asked to pay for attorney fees for the benefit of a

[25] *In re Prop. Mgmt. & Investments, Inc.*, 91 B.R. 170, 171 (Bankr. M.D. Fla. 1988)

[26] *See, e.g.*, *S.E.C. v. First Securities Co. of Chicago*, 528 F.2d 449 (7th Cir. 1976) ("In ordinary federal receivership cases, creditors or shareholders and their attorneys may receive compensation in the discretion of the trial judge where they benefit the receivership estate."); *Exch. Nat. Bank - Colorado v. Hendrickson*, No. IP 83-1821 C-B, 1996 WL 750201, at *5 (S.D. Ind. Sept. 24, 1996) ("[F]or a court to award compensation to a party other than a court-appointed administrator or receiver or his or her court-approved counsel from a fund or an estate, the party's services must have actually benefitted the estate.").

secured creditor.[27] Under the American Rule, Wells Fargo should bear its own attorney fees and costs incurred asserting its interests in the Receivership Case.

B. Receiver Attorney Fees

Throughout its Motion, Wells Fargo attempts to divert the Court's attention by arguing that because the Receiver's attorneys' fees were paid by the Receivership Estate, Wells Fargo's attorneys' fees should receive similar treatment. Not only does this argument ignore the American Rule, it ignores the obvious dynamic between the Receiver, the Receivership Estate, and attorneys hired by the Receiver. Attorney fees paid to the Receiver's attorneys are not "prevailing party" fees, but instead are treated as costs of the receivership estate through the Court's previous entry of an Order Appointing Receiver, which provides a basis for the payment of fees and costs incurred by the Receiver. The Order Appointing Receiver specifically provides that the Receiver is "authorized, empowered, and directed to":

> 4. Appoint one or more special agents, employ legal counsel, actuaries, accountants, clerks, consultants and assistants as the Receiver deems necessary and to fix and pay their reasonable compensation and reasonable expenses, as well as all reasonable expenses of taking possession of the assets and business of the Defendants and Relief Defendants, and exercising the power granted by this Order, subject to approval by this Court at the time the Receiver accounts to the Court for such expenditures and compensation;
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> . . . .
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> 14. The Receiver, and any counsel whom the Receiver may select, are entitled to reasonable compensation from the assets now held by or in the possession of control of or which may be received by Defendants and Relief Defendants; said amount or amounts of compensation shall be commensurate with their duties and obligations under the circumstances, subject to approval of the Court.

[27] *Cf. Gaskill v. Gordon*, 160 F.3d 361, 363–64 (7th Cir. 1998).

(Order Appointing Receiver, Doc. No. 8.)

"[T]he Receiver is an officer of the court."[28] In receivership proceedings, there is an "implied understanding that the court which appointed him and whose officer he is will protect his right to be paid for his services, to be reimbursed for his proper costs and expenses." [29] Payment of such costs, of course, includes payment of reasonable fees to counsel employed by a receiver.[30]

The Receiver, with assistance from his attorneys, has recovered the net amount of $66,834,605.77 for the benefit of the Receivership Estate. At the time of his initial appointment, only $600,000 remained of investors' estimated $132 million in principal. Investors have since recovered approximately 50% of their losses through the efforts of the Receiver and his attorneys. The Receiver has filed twenty-two separate motions with the Court seeking approval of attorney fees. Not a single objection has been raised—by Wells Fargo or any other party—to any request by the Receiver to pay its attorneys.

Wells Fargo attempts to discredit the overall efforts of the Receiver and his attorneys in this Receivership Case by unfairly focusing on his results against Wells Fargo. "While the results obtained by a receiver clearly are important, the benefits to a receivership estate may take 'more subtle forms than a bare increase in monetary value.'"[31] The Receiver is an officer of the Court and "acts under the supervision of the court."[32] The Receiver's actions as to Wells Fargo were reasonable at the time and reasonably calculated to lead to recovery of assets.[33]

The Receiver's attorneys' fees were approved by this Court, without objection, and should

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[28] *S.E.C. v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992).
[29] *Id.* at 1576.
[30] *See S.E.C. v. Byers*, 590 Supp. 2d 637 (S.D.N.Y. 2008); *S.E.C. v. Durmaz*, CV 10–1689–JST, 2012 WL 13001583 (C.D. Cal. Feb. 9, 2012) (awarding reasonable fees to the receiver and his professionals); *SEC v. Mobley*, No. 00-CV-1316, 1317RCC, 2000 WL 1702024 (S.D.N.Y. Nov. 13, 2000) (same).
[31] *S.E.C. v. Byers*, 590 Supp. 2d 637 (S.D.N.Y. 2008) (citing *Gaskill v. Gordon*, 27 F.3d 248, 253 (7th Cir.1994)).
[32] *S.E.C. v. Elliot*, 953 F.2d 1560, 1577 (11th Cir. 1992).
[33] Indeed, this Court agreed with the Receiver's position in the Claims Litigation.

not weigh on this Court's determination of the attorney fee request in Wells Fargo's Motion.

C. Wells Fargo is Not Entitled to Contractual Fees

Wells Fargo cites to provisions in loan documents relating to the Properties as support for its request for attorney fees (the "**Contractual Provisions**") (*see* Motion at 15–16). But Wells Fargo failed to file a proof of claim for prospective attorney fees relating to any of the Properties, and completely failed to file *any* proof of claim for the loans relating to three of the four Properties. The Claims Bar Date Order barred any claims asserted after that date— September 2, 2010. Under Eleventh Circuit case law, Wells Fargo's failure to file proof of claim for its contingent attorney fee claim precludes awarding its requested fees. Even if the Contractual Provisions provide for the requested fees, an attorney fee award based on a pre-receivership contract should not be afforded administrative expense priority. Further, to the extent that the Motion seeks attorney fees in connection with the Rite-Aid Property, those claims/fees attached to the sale proceeds, and thus should not be denied.[34]

i. *Wells Fargo Failed to File a Proof of Claim for Attorney Fees*

In *Bendall v. Lancer Management Group*,[35] The Eleventh Circuit held that in a receivership proceeding, a creditor must file a proof of claim for attorney fees under a pre-receivership contract. In *Bendall*, the court-ordered claims bar date occurred in 2004.[36] The appellants filed a claim after the claims bar date seeking attorney fees incurred between 2003 and 2009 under a contractual provision in a pre-receivership contract.[37] The Eleventh Circuit, taking guidance from bankruptcy law, held that the appellants' claim for future attorney fees was a contingent claim for which it was required to file a proof of claim.

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[34] *See* Doc. No. 842.
[35] *Bendall v. Lancer Mgmt. Grp., LLC*, 523 F. App'x 554 (11th Cir. 2013).
[36] *Id.* at 557.
[37] *See id.* at 556–57.

The *Bendall* court applied bankruptcy law by analogy, reasoning that "[w]hen parties agree in advance that one party will indemnify the other party in the event of a certain occurrence, a contingent right to payment exists upon the signing of the agreement."[38] Further, "[c]ontingent rights to payment need not be currently enforceable in order to constitute a claim," and "[t]he fact that the full amount of Appellants' legal fees was unknown at [the claims bar date] does not justify the failure to have filed at least a contingent claim for attorney's fees."[39] The appellants were bound by the court's order setting the claims bar date and were required to file proof of claims prior to the bar date.

Wells Fargo filed no proof of claim for future attorney fees in this case. In fact, all but one of the loan documents referenced relate to loans Wells Fargo completely failed to file any proof of claim for—the loans on the Laurel Mountain Property, the Evergreen Property, and the Sarasota Property. Because no proof of claim was filed at all in connection with these loans, and certainly no proof of claim for future attorney fees was filed, Wells Fargo is not entitled to attorney fees based on those loan documents.

Although Wells Fargo filed a proof of claim for its loan relating to the Rite-Aid Property it did not seek prospective attorney fees. The Rite-Aid Claim asserted that Wells Fargo is owed $2,655,000 "plus ***accrued but unpaid*** interest since 10/27/09 and mortgage late fees, attorneys fees & costs." (Rite-Aid Claim at p. 3). By only seeking payment for accrued but unpaid attorney fees, Wells Fargo failed to put the Receiver and the Receivership Estate on notice that it would be seeking payment for future attorney fees incurred in the Receivership Case with respect to the Rite-Aid Property. Because Wells Fargo failed to file a contingent claim for future attorney fees,

[38] *Id.* at 558.
[39] *Id*.

the Court should deny Wells Fargo's request for payment of attorney fees incurred in this Receivership Case under the Rite-Aid Property loan documents.

Wells Fargo argues, unpersuasively, that *Bendall* does not apply. The fact that Wells Fargo is not seeking attorney fees—in this Motion—for time prior to the claims bar date is immaterial. The Rite-Aid Claim was completed by an attorney (who presumably incurred fees), and surely Wells Fargo was aware that it might incur future attorney fees in the Receivership Case.[40] *Bendall's* reference to fees incurred prior to the claims bar date only served to show that the claimants there were on notice that they could expect to incur attorney fees and, therefore, should have filed a claim. Wells Fargo also again claims it did not receive proper notice, arguing the Receiver was required to send out a claims package for each of its loans. This Court already rejected that argument (Doc. No. 1222), and that portion of the Court's determination was not addressed on appeal.[41] *Bendall* is directly applicable to the present case, and Wells Fargo's failure to file a claim for future attorney fees prior to the claims bar date precludes an award for attorney fees.

ii. *An Attorney Fee Award Based on Pre-Receivership Contract is Not Entitled to Administrative Expense Priority*

Even if the Court determines Wells Fargo is entitled to attorney fees under the Contractual Provisions, an attorney fee award based on a pre-receivership contract is not entitled to administrative expense priority. "A district court has broad powers and wide discretion to

[40] In Wells Fargo's motion for turnover of rents from the Rite Aid property, in reference to its claim amount, it appears to seek payment of attorney fees prior to Akerman's involvement. (Doc. No. 1322 at p. 9 n.12). However, no time records are produced in that motion.

[41] *See S.E.C. v. Wells Fargo Bank, N.A.*, 848 F.3d 1339, 1342 (11th Cir. 2017) (noting that the Receiver's mailing of a single packet to Wells Fargo was consistent with the established claims administration process). Although Wells Fargo characterizes the claims administration process as flawed, the Eleventh Circuit's decision did not in any way disturb the overall validity of the claims administration process. Only the Court's order extinguishing Wells Fargo's security interests was reversed.

determine the appropriate relief in an equity receivership."[42] Courts presiding over federal equity receiverships may take guidance from federal bankruptcy case law given the common purpose in both proceedings.[43]

Several federal appellate courts—the First, Fifth, and Ninth Circuit Courts of Appeals—have held that attorney fees awarded after the filing of a bankruptcy petition are not entitled to administrative expense priority where the fee award is based on a pre-petition contract.[44] All of these cases discuss *Reading*,[45] a case relied on by Wells Fargo. In distinguishing *Reading*, the Fifth Circuit stated as follows:

> The Court recognizes that the trustee in the instant case, made a decision to act in manner that would cause a third party to incur expense. Unlike the actions of the Reading receiver, however, the actions of the trustee were taken in the course of responsibly carrying out the duties of his position. In a chapter 7 bankruptcy, the trustee is expected to identify and liquidate all existing claims on which the trustee has a good faith belief the estate is entitled to recover. . . . To penalize the estate when the trustee faithfully carries out these duties seriously undermines the incentive structure established by the bankruptcy code.[46]

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[42] *S.E.C. v. Elliott*, 953 F.2d 1560, 1569–70 (11th Cir. 1992)

[43] *See, e.g.*, *Bendall*, 523 Fed. App'x at 557 ("Given that a primary purpose of both receivership and bankruptcy proceedings is to promote the efficient and orderly administration of estates for the benefit of creditors, we will apply cases from the analogous context of bankruptcy law, where instructive, due to limited case law in the receivership context."); *S.E.C. v. Elliott*, 953 F.2d 1560, 1572 (11th Cir. 1992)(looking to bankruptcy law for guidance on setoff argument).

[44] *See In re Jack/Wade Drilling, Inc.*, 258 F.3d 385 (5th Cir. 2001) (denying administrative expense claim of non-debtor litigant incurred in litigation initiated by bankruptcy trustee post-petition where fees awarded pursuant to pre-petition contract); *In re Kadjevich*, 220 F.3d 1016 (9th Cir. 2000) (denying administrative expense claim for post-petition attorney fee award where source of attorney fee liability was pre-petition tort claim); *In re Abercrombie*, 139 F.3d 755, 759 (9th Cir. 1998) (denying administrative expense claim for attorney fees awarded post-petition where "the source of the estate's obligation remains the prepetition fee provision"); *In re Hemingway Transp.*, Inc., 954 F.2d 1, 4–8 (1st Cir. 1992) (denying administrative expense claim for post-petition award of attorney fees "originating in a prepetition contract with the debtor").

[45] *Reading Co. v. Brown*, 391 U.S. 471, 88 S. Ct. 1759, 20 L. Ed. 2d 751 (1968),

[46] *Jack/Wade Drilling*, 258 F.3d at 391 (internal citations omitted); *see also In re Hemingway Transp., Inc.*, 954 F.2d 1, 6 (1st Cir. 1992) ("Unlike losses sustained by creditors who enter into voluntary prepetition transactions with the debtor, the fire losses in *Reading* resulted from unilateral postpetition conduct on the part of the operating receiver.").

Since the source of the obligation is pre-petition, and the attorney fees incurred by Wells Fargo provided no benefit to the Receivership Estate, their claim to attorney fees is not entitled to administrative expense priority in this Receivership Case.

The reasoning in the cases discussed above, decided in the bankruptcy context, applies with equal force in a federal equity receivership. The Receiver has acted in good faith throughout the Receivership Case, and any action directed at Wells Fargo was initiated solely on the belief that value would inure to the Receivership Estate. Any claim for contractual attorney fees is based on a pre-receivership contract and, if Wells Fargo had properly filed proof of its claims, its attorney fee claims should be treated as a general unsecured claim against the Receivership. As explained at length by several circuit courts of appeals, such a claim is not entitled to administrative expense treatment.

iii. ***For the Reasons Discussed in the Receiver's Response to Wells Fargo's Motion to Turn Over Rents, Wells Fargo is Not Entitled to Contractual Attorney Fees***

To avoid duplication, the Receiver will not address at length his arguments already raised in the Receiver's objection to Wells Fargo's *Motion for Order Directing Receiver to Turnover Rents from Rite Aid Property* (Doc. No. 1332) (the "**Turnover Motion**"). But as stated in his objection to the Turnover Motion, any claim for attorney fees by Wells Fargo related to the Rite-Aid Property attached to the proceeds of the sale of that property by virtue of the Court's order approving that sale. Further, as explained by Magistrate Judge Jenkins in the Fraudulent Transfer Litigation, the contractual language in the Rite-Aid Property deed of trust and security agreement is narrow. The contractual provision does not provide for the attorney fees requested.

REQUEST FOR EVIDENTIARY HEARING

To the extent that the Court is inclined to consider any award for attorneys' fees, the Receiver respectfully requests an evidentiary hearing on same.

CONCLUSION

WHEREFORE, the Receiver respectfully requests that the Court (i) sustain the Receiver's Objection to Wells Fargo Motion, (ii) deny Wells Fargo's claim for attorney's fees of $568,622.74; (iii) deny any award of attorneys' fees and costs as an Administrative Expense Claim; and (iv) grant such other and further relief as this Court deems just and proper.

/s/ Susan Heath Sharp
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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Susan Heath Sharp
Attorney