UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

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

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

Defendants.

WELLS FARGO'S REPLY IN SUPPORT OF ITS MOTION FOR PAYMENT OF FEES AND COSTS [DOC. 1334]

Wells Fargo Bank, N.A. ("**Wells Fargo**" or the "**Bank**"),[1] hereby files its reply brief in support of its Motion for Payment of Certain Fees and Costs as Administrative Expenses [Doc. 1334] (the "**Fees Motion**") and states:

SUMMARY OF ARGUMENT

During the receivership, Wells Fargo incurred more than $568,622.74 in attorneys' fees and costs in enforcing its security interests and protecting its rights under the Loan Documents against the Receiver's attacks. The overwhelming majority of these fees and costs would not have been incurred but for the Receiver's unreasonable litigiousness. These are the attorneys' fees and costs that Wells Fargo is seeking in its Fees Motion. In his Response, the Receiver argues that the Bank's request is barred by the "American Rule," but he is wrong because at least three exceptions to the American Rule apply (i.e., equity receivership, contractual and wrongful act exceptions). The Receiver argues that the Bank's

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

loan documents do not contain adequate attorneys' fee provisions, but he is mistaken because the provisions clearly apply to attorneys' fees and costs incurred in enforcing and protecting the Bank's rights under the Loan Documents. The Receiver also attempts to justify his actions by claiming that they were reasonable with respect to the Bank, but the observations by the Eleventh Circuit and others invalidate this assertion. As amply demonstrated in the Fees Motion and this Reply, Wells Fargo's request for attorneys' fees is supported by case law from the United States Supreme Court, and the United States District and Bankruptcy Courts for the Middle District of Florida, and falls within the fee provisions in the Loan Documents. Thus, as a matter of fundamental fairness, the Fees Motion should be granted.

1. A District Court, Sitting in Equity, Clearly Has the Authority To Allow and Pay Attorneys' Fees Incurred by a Secured Creditor Protecting and Enforcing its Security Interests.

Wells Fargo seeks attorneys' fees and costs incurred in enforcing its security interests and protecting its rights under the Loan Documents against the Receiver's attacks. Despite what the Receiver states in his Response, the Bank is entitled to reimbursement of these attorneys' fees and costs under decades' old United States Supreme Court precedent.

In Sprague v. Ticonic Nat. Bank, 307 U.S. 161 (1939), the United States Supreme Court held that a Federal District Court in an equity action – particularly a receivership – has power to allow "counsel fees and other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute." See id. at 170.[2] In other words, the receivership case in and of itself is an exception to the "American Rule." See id. at 164 ("Allowance of [attorneys' fees and costs] in appropriate situations is part of the historic equity jurisdiction of the federal courts.")

[2] The Sprague litigation went to the Supreme Court twice. See Ticonic Nat. Bank v. Sprague, 303 U.S. 406 (1938); Sprague v. Ticonic Nat. Bank, 307 U.S. 161 (1939). Both decisions are on point for the issues in the Bank's Reply briefs, because the under-secured creditor sought fees and interest from the Receivership, and the Supreme Court said both should be awarded, even though the other creditors would receive less.

In Sprague, a secured creditor took action to enforce her liens during a receivership. See id. at 162-3. Critically, she acted individually, asserting her own interests. See id. at 166. She was not a class representative and she did not create a common fund. See id. After she prevailed, the creditor sought reimbursement of her fees and costs from the receivership estate. See id. The district court denied her request and the appellate court affirmed, but the United States Supreme Court reversed and remanded for the district court to consider the fee request. See id. at 170. Despite the fact that she had been protecting her own interests, the creditor was entitled to be paid her attorneys' fees from the receivership because she had successfully established her claim – and, as the Court noted, other secured creditors might indirectly benefit from her efforts, having established a law-of-the-case-type result. See id. at 166 ("In her main suit the petitioner neither avowed herself to be the representative of a class nor did she automatically establish a fund in which others could participate. But in view of the consequences of stare decisis, the petitioner by establishing her claim necessarily established the claims of fourteen [others]."). The same is true in this case. Through Wells Fargo's efforts enforcing its own liens and defending them against the Receiver's myriad attacks, Wells Fargo not only served its own interests, but served the interests of other hypothetical creditors who also might have been harmed by the Receiver's positions. Furthermore, the Receiver states, "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." Sprague is that case, and the result should be the same here.

The Receiver contends that the "American Rule" bars the Bank's request for attorneys' fees attributable to the Receiver's negligence. The so-called "American Rule" generally requires each party to bear its own costs and expenses, absent a finding of bad faith. See Vaughan v. Atkinson, 369 U.S. 527 (1962). But there are exceptions to the "American Rule," and the Bank's request falls into at least three of the recognized exceptions. In Sprague, the

Supreme Court made it clear that an equity receivership itself is one of those exceptions. Other exceptions present here include a wrongful act (i.e., the Receiver's unreasonable litigiousness, discussed in the Motion and below), and the provisions of the parties' contracts (i.e., the Loan Documents, discussed in Section 2 below).

In Reading Co. v. Brown, 391 U.S. 471, 478 (1968), the Supreme Court held that a creditor could recover attorneys' fees as a result of a receiver's negligence. See id. at 485 ("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.'"). For the Court, it was a matter of fairness; in a reorganization case, secured creditors should expect to receive more than they would in a liquidation – such is the bargain for being deprived of their collateral – and when, through the negligence of the receiver, a secured creditor receives less (or is harmed more) than it otherwise would have, the secured creditor should have a means for asserting a claim against the receiver. See id. at 477-9. The Reading decision is an important exception to the American Rule, and it has served as a basis for the Bankruptcy Court for the Middle District of Florida to grant attorneys' fees in cases similar to this one. See In re G.I.C. Gov't. Sec., Inc., 121 B.R. 647, 649 (Bankr. M.D. Fla. 1990); In re Prop. Mgmt. and Invests., Inc., 91 B.R. 170 (Bankr. M.D. Fla. 1988).

Logically, this receivership is quite similar to the Reading receivership, because the Court allowed the Receiver to operate the Bank's collateral and collect rents for many years rather than liquidating it and paying off the loans, and because the Receiver's conduct ultimately caused the Bank to receive significantly less than it otherwise would have received. For example, rather than liquidating the Bank's collateral and paying off the Bank's loans shortly after the Receivership began in 2009, the Receiver operated the Rite Aid Property for over 3 years and collected over $1.3 million in rents (which is Wells Fargo's exclusive property under North Carolina law); and, although the Bank was entitled to receive

the sale proceeds to partially satisfy its mortgage, the Receiver held onto the proceeds until June 2017 – over 8 years after the Receivership began. The Receiver also sued the Bank based on a failed claim that the Bank was complicit in the Ponzi scheme and lost in both District Court and on appeal, causing the Bank to incur approximately $5,000,000 in additional legal fees. In Reading, the creditor could recover its attorneys' fees from the receivership estate because he was harmed by the receiver's conduct. The same should be true here. The Receiver does not address Reading in his Response – other than a cursory attempt to discredit it by stating that Reading does not discuss the American Rule – but Reading is on point and should be followed by this Court.

2. Prior Decisions in Litigation Between the Receiver and Wells Fargo Actually Support Wells Fargo's Request for Attorneys' Fees and Costs.

The Receiver asserts the motion should be denied because the Loan Documents[3] do not contain adequate attorneys' fee provisions. As a threshold matter, he is wrong even if the provisions were inadequate, because other exceptions to the American Rule are present here. But the provisions are adequate, even under the case law that he cites.

In his Response to the Fees Motion, the Receiver incorporates an argument from his response [Doc. 1342] to Wells Fargo's Rents Motion and states, "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." This argument is flawed because the decisions of Magistrate Judge Jenkins and Judge Whittemore actually support Wells Fargo's request for fees and costs.

In Wiand v. Wells Fargo Bank, N.A., Case No. 8:12-cv-00557-JDW-EAJ, the Receiver's fraudulent transfer allegations were the only claims at issue. After the Bank prevailed on summary judgment (and on the Receiver's appeal), the Bank moved for

[3] Copies of the relevant provisions are attached to the Banks' motion. See Doc. 1334-4.

attorneys' fees and costs under the Loan Documents. In her Report and Recommendation, Magistrate Judge Jenkins determined that the fraudulent transfer claims did not trigger the Bank's rights under the Loan Documents. See Case No. 8:12-cv-00557-JDW-EAJ, Doc. Nos. 336 (M.D. Fla. June 10, 2015). As Judge Whittemore explained when he adopted the Report and Recommendation, the Bank's request for fees was denied because "the fraudulent transfer claims were brought to avoid transfers of security interests and loan payments that were already made, and not to enforce the security interests, protect the security of the mortgage, or as a result of a failure to comply with the conditions of the note and the mortgage." See Case No. 8:12-cv-00557-JDW-EAJ; Doc. No. 340 (M.D. Fla. January 29, 2016), p. 7.

In this case, the Bank has been actually seeking to enforce its security interests, protecting the security under the Loan Documents from the Receiver's attacks, and attempting to ensure that the Receiver complies with the conditions of the Loan Documents. One timely example of this is the Bank's Rents Motion: enforcing the Assignment of Rents,[4] defending it, and ensuring that the Receiver complies with it. Other examples include, but are not limited to: Wells Fargo's objection to the claims procedure motion [Doc. 689] and motion for leave to file late claims [Doc. 740], both of which the Bank was forced to file in order to protect the validity and priority of its liens on four different properties; and Wells Fargo's motion relief from the injunction and/or to compel abandonment of the Rite Aid Property [Doc. 719] and multiple objections to the Receiver's motions to sell the Rite Aid Property [Docs. 718, 831, 832], all of which the Bank was forced to file in order to enforce its liens and require the Receiver to comply with the provisions of the Loan Documents. Thus, under Judge Whittemore's analysis, the fees incurred in those efforts should be awarded under the Loan Documents' fee provisions.

[4] The Assignment of Rents states, "Should Assignee incur any liability, loss or damage under the Leases or under or by reason of this Assignment, or in the defense of any such claims or demands, the amount thereof, including costs, expenses and attorney's fees, shall be secured hereby; and Assignor shall reimburse Assignee therefor immediately upon demand."

3. The Receiver's Actions Have Been Unreasonable.

The Receiver's attacks on Wells Fargo have been, and continue to be, unreasonable. Although several examples of his unreasonableness are chronicled in the Bank's Fees Motion, the Receiver disputes this characterization. In his Response, the Receiver argues that his actions have been reasonable, stating "the Receiver's actions as to Wells Fargo were reasonable at the time and reasonably calculated to lead to recovery of assets" and citing the Court's decisions in his favor during the "Claims Litigation." Since the Receiver apparently agrees that his positions taken during the "Claims Litigation" bear on the issue of his reasonableness, the Eleventh Circuit's assessment of those positions is undeniably relevant.

During oral argument, the Judges of the Eleventh Circuit said of the Receiver's positions: "I'm flabbergasted by this case. I really am. I can't believe that this happened;" and "I am really really troubled by this case;" and "this is the first [case] in the entire history of the Country… I couldn't find a single case that allows a Federal District Court to do this." See Transcript of Oral Argument at 15:7-8, 15:19-20, and 27:7-13, SEC v. Wells Fargo, Case No. 16-10942 ("**Oral Arg. Trans.**") [Doc. 1345-1]. And when the Court got to the crux of the issue – "you knew that [Bank] had an interest, why did you have to file a proof of claim" – the Court deemed the Receiver's answer – "because that is what the Court required" – to be simply "ridiculous." See id. at 23:4-9. These are just the highlights of the Oral Argument. When the entire transcript is digested, it is clear that the Eleventh Circuit thought the Receiver had been unreasonable with respect to the Bank, but the episode does not end there.

The Eleventh Circuit rendered its reversal of the order invalidating the Bank's security interests in two properties on February 22, 2017. With its decision, the Eleventh Circuit made it abundantly clear that a District Court could not use an administrative order in a receivership case to impair a creditor's state law property rights. See SEC v. Wells Fargo Bank, N.A., 848 F.3d 1339, 1344 (11th Cir. 2017). During the eleven months since the

decision, however, the Receiver has argued that the decision says something else and that he can continue to do what the Eleventh Circuit said he could not. In fact, in his Response [Doc. No. 1342] to the Bank's Rents Motion, the Receiver actually said:

> Wells Fargo relies in (sic) the Eleventh Circuit opinion that arose from Receivership Case, S.E.C. v. Wells Fargo Bank, N.A., for the proposition that "a receivership court does not have the authority to extinguish a secured creditor's state law rights or security interests that were vested prior to the Receivership Proceeding." But such reliance is misplaced.

Doc. 1342, p. 11. This statement is incredible because the Eleventh Circuit actually held, "while a federal district court has wide-ranging authority to supervise a receivership, we hold it does not have the authority to extinguish a creditor's pre-existing state law security interest." SEC v. Wells Fargo Bank, N.A., 848 F.3d at 1344. It appears that the Receiver continues (apparently intentionally) to misapprehend the issue.[5]

As if his prior conduct and his continued defiance of the Eleventh Circuit were not unreasonable enough, the Receiver's recent Responses [Docs. 1342 and 1343] confirm that he has taken unreasonable positions. In these recent pleadings, the Receiver (i) argued that the District Court's Order no. 776 pertains to Wells Fargo even though the Order itself states that it does not, (ii) ignored the very loan document that governs the Bank's Rents Motion (i.e. the Assignment of Rents); and (iii) ignored the Court's Order regarding the sale of the Rite Aid Property, Doc. 840. These are just a few examples of the Receiver's unreasonable conduct that has harmed Wells Fargo during these proceedings; conduct which puts this case into the wrongful act/negligence exception employed by the Reading Court and others.

[5] See Oral Arg. Trans. at 15:22-24 ("Judge Jordan: If you have a case to that extent, that is against all authority in the United States. I think you misapprehended the issue.").

4. The Receiver Had Notice of Wells Fargo's Attorneys' Fee Claim

As explained more thoroughly in the Bank's Reply in support of the Rents Motion, the Bank was not required to file a proof of claim, much less several. SEC v. Wells Fargo, 848 F. at 1345; see also Oral Arg. Trans. at 26:24 – 27:20. And yet, the Receiver not only argues that a proof of claim was required for post-Receivership attorneys' fees, he argues that 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." This statement is legally irrelevant, and factually inaccurate. In reality, the Receiver has been on notice of the Bank's attorneys' fees since as early as May 27, 2011.[6] In every statement of indebtedness the Bank has provided to him – including the statement that the Receiver used to pay the Bank's claims – Wells Fargo has included specific requests for attorneys' fees and costs.

5. The Related Litigation Cost Award Must Be Paid as an Administrative Claim.

In a related case between the Bank and the Receiver, the United States District Court for the Middle District of Florida entered an award of $40,312.94 in costs against the Receiver, in favor of the Bank (the "**Related Litigation Cost Award**"). Under the authority of SEC v. HKW Trading LLC, 2009 WL 2499146 (M.D. Fla. Aug. 14, 2009) and as set forth more fully in the Fee Motion, there can be no dispute that this award should be paid as an administrative expense claim. Indeed, the Receiver (who was also the receiver in the HKW case) apparently concedes this in his Response, which is silent as to the award and attempts to distinguish HKW Trading by arguing that administrative priority should only apply if there is another court's award to enforce against the estate, as is the case here. See Response, p. 7.

[6] Almost seven years ago, shortly after Akerman LLP was retained to represent Wells Fargo in this action, Wells Fargo's undersigned counsel sent a letter to the Receiver's counsel. In that letter, Wells Fargo specifically described the itemized components of its Rite Aid claim, including attorneys' fees payable to Trenam Kempker, K&L Gates, and Akerman.

CONCLUSION

At every turn, the Receiver has done his best to make things difficult for the Bank, the Court, and other creditors. The only party benefiting from the Receiver's scorched earth campaign against Wells Fargo has been the Receiver himself. The United States Supreme Court has a remedy for situations like this: allowing and paying a secured creditor's attorneys' fees as administrative expenses, which is all Wells Fargo is requesting here.

WHEREFORE, Wells Fargo respectfully requests that the Court enter an order (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.

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

Respectfully submitted,

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