

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION**

IN RE:

ULRICH FELIX ANTON ENGLER and
PRIVATE COMMERCIAL OFFICE, INC.,

Case No. 9:08-bk-04360-ALP
Case No. 9:08-bk-04365-ALP
Jointly Administered

Debtors.

**WELLS FARGO BANK, N.A.'S APPLICATION FOR
ADMINISTRATIVE EXPENSE CLAIM PURSUANT TO
11 U.S.C. §§ 503(a), 503(b)(3)(B), 503(b)(4) AND APPLICABLE CASE AUTHORITY**

Wells Fargo Bank, N.A. ("Wells Fargo"), by its undersigned counsel, requests that the Court grant it an administrative expense claim pursuant to 11 U.S.C. §§ 503(a), 503(b)(1)(A) and 503(b)(4), for attorney's fees and costs to be awarded to Wells Fargo by the United States District Court for the Middle District of Florida in a suit instituted collectively by the Plaintiff, Robert E. Tardif, Jr. ("Tardif" or "Trustee"), in his capacity as the Chapter 7 Trustee of the substantively consolidated Bankruptcy estates of Debtors, Ulrich Felix Anton Engler ("Engler"), Private Commercial Office, Inc. ("PCO"), and PCO Client Management, Inc. ("PCOM") (collectively, the "Debtors"), Franz Lesti ("Lesti") and Petra Richter ("Richter"), Individually and on Behalf of All Others Similarly Situated, where Wells Fargo is the prevailing party against the Trustee, on behalf of the Debtors' estates. In support, Wells Fargo states as follows:

SUMMARY

The U.S. District Court has determined Wells Fargo to be the prevailing party on all claims raised in the U.S. District Court action filed by the Trustee, Lesti and Richter and, that the Plaintiffs are not entitled to any relief from Wells Fargo. On January 28, 2015, the U.S. District

Court entered its Judgment in a Civil Case (the “Judgment”)(M.D. Fla. Case No; 2:11-CV-00695-JES-DNF; ECF No. 321). As explained herein, Wells Fargo is entitled to an administrative expense claim for any and all reasonable attorneys’ fees and all costs awarded by the U.S. District Court against the Trustee in accordance with the governing Deposit Agreement and Disclosures for Commercial Accounts (the “Deposit Agreement”) and 28 U.S.C. § 1920.

PROCEDURAL BACKGROUND

A. Wells Fargo is Prevailing Party in District Court Claims By Trustee and Purported Class Plaintiffs

1. On December 15, 2011, Plaintiffs, Trustee, in his capacity as the Chapter 7 Trustee of the substantively consolidated Bankruptcy estates of Debtors and Lesti and Richter, Individually and on Behalf of All Others Similarly Situated, filed their Class Action Complaint (M.D. Fla. Case No; 2:11-CV-00695-JES-DNF; ECF No. 1)(the “Complaint”) seeking to hold Wells Fargo responsible for an alleged “Ponzi” scheme that was purportedly operated by the Debtors during the brief period that PCOM maintained two (2) accounts (the “Accounts”) at Wells Fargo (the “District Court Action”).

2. On March 30, 2012, Plaintiffs filed their Amended Class Action Complaint (District Court Action; ECF No. 24)(the “Amended Complaint”). In the Amended Complaint, Lesti and Richter (individually and on behalf of the putative class) asserted causes of action against Wells Fargo for: (i) Aiding and Abetting Conversion (Count VI); (ii) Aiding and Abetting Fraud (Count VII); (iii) Aiding and Abetting Breach of Fiduciary Duties (Count VIII); and (iv) Unjust Enrichment (Count IX). The Trustee asserted a cause of action on behalf of the Debtor, PCOM, against Wells Fargo for Negligence and Wire Transfer Liability (Count X).

3. Wells Fargo filed a Motion to Dismiss the Amended Complaint (District Court

Action; ECF No. 43) and on March 19, 2013, this Court entered its Opinion and Order (District Court Action; ECF No. 72) on the motions to dismiss the Amended Complaint. In particular, the Court dismissed *without prejudice* Count X, which was the sole count brought against Wells Fargo by the Trustee, and Count VIII, which was brought by the putative class. Both the Trustee and the putative class elected not to seek to amend the dismissed claims.

4. On April 25, 2014, Wells Fargo filed its Dispositive Motion for Summary Judgment (District Court Action; ECF No. 230) as to all remaining claims by Richter.¹

5. On January 13, 2015, this Court entered its Opinion and Order (“Summary Judgment Order”)(District Court Action; ECF No. 317) granting summary judgment in favor of Wells Fargo and determined that Richter shall take nothing from Wells Fargo. Thereafter, on January 28, 2015, this Court entered its Order (District Court Action; ECF No. 320) denying Plaintiff’s Second Amended Motion for Class Certification (District Court Action; ECF No. 219) as moot in light of the Summary Judgment Order. Judgment (District Court Action; ECF No. 321) was then entered in favor of Wells Fargo later that day. As such, Wells Fargo has prevailed on all claims by all Plaintiffs in the District Court Action and this Court has determined that no Plaintiff is entitled to any recovery from Wells Fargo.

B. The Joint Prosecution and Cooperation Agreement Between the Trustee and the Putative Class

The Trustee, the Trustee’s counsel, and counsel for the putative class entered into an Amended Joint Prosecution and Cooperation Agreement (“Cooperation Agreement”), “for the purpose of jointly prosecuting their common interests in connection with the Class Action Suit,”

¹ On March 31, 2014, this Court entered its Order (ECF No. 206), dismissing Lesti’s claims with prejudice, based upon his refusal to appear in this District for mediation and deposition as required by this Court’s Orders.

entered into and effective January 1, 2012. *See* ECF No. 831, p. 9. Thereafter, the Trustee, the putative class, and their respective counsel litigated this action in cooperation and coordination with each other. The Cooperation Agreement provides, in relevant part:

2. Upon application and approval by the Bankruptcy Court and the District Court, GJB [counsel for the Trustee] and RGRD [counsel for the putative class] shall be compensated for their services in the Class Action Suit on a contingency fee basis equivalent to forty percent (40%) of the gross Joint Recoveries obtained in the Class Action Suit (the “Contingency Fee”) and shall be entitled to reimbursement of all actual and necessary costs incurred in connection therewith.

3. The net proceeds of any Joint Recoveries² shall be shared equally between the Debtors’ estates and the Class Action Plaintiffs on an equal, fifty-fifty (50/50) basis.

7. The Parties agree that neither the Trustee nor the Class Action Plaintiffs shall settle or otherwise compromise any Jointly Pursued Claim³ unless the other party agrees to the terms and conditions of such settlement, and in connection therewith agrees to compromise and settle its own claims, subject to Bankruptcy Court approval pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

See ECF No. 831, p. 9.

C. The Trustee Remained Heavily Involved In the District Court Action After the Dismissal of His Claims Without Prejudice

6. In accordance with the Cooperation Agreement, the Trustee, the putative class, and their respective counsel litigated the District Court Action in cooperation and coordination with each other even after the Order dismissing, without prejudice, the Trustee’s claim. The Trustee made a strategy decision not to amend, yet stayed actively involved in the litigation, since based on the Cooperation Agreement, he was entitled to 50% of any Joint Recovery irrespective of whether he remained as a Plaintiff in the case.

² The Agreement defines “Joint Recoveries” as “settlement amounts or recovery at trial” in this case. *See* ECF No. 831 at 12.

³ The Agreement defines “Jointly Pursued Claims” as claims against Wells Fargo and SunTrust. *See* ECF No. 831 at 10-11.

7. Despite dismissal of Count X of the Amended Complaint, the sole count brought against Wells Fargo by the Trustee, the Trustee has always taken the position that although he elected not to replead his attempted claims, he was “still in the case” because his time to appeal did not begin to run until the Judgment was entered at the conclusion of the entire case.

8. The following are a few of the many examples of the Trustee’s involvement in this case following the dismissal without prejudice of his claims on March 19, 2013:

- Trustee’s counsel attended the deposition of Joy Robinson on September 11, 2013 in Naples, Florida.
- Plaintiff, Richter, disclosed her proposed forensic accountant expert, Soneet Kapila on January 31, 2014, more than ten (10) months after the Trustee’s claims were dismissed. Mr. Kapila had been retained by the Trustee as early as 2008. Moreover, at his March 19, 2014 expert deposition, after the Trustee no longer had any pending claim in the District Court Action, Mr. Kapila stated that he was, in fact, retained by the Trustee. *See* Soneet Kapila Deposition, District Court Action; ECF No. 234-1, P. 11, L. 8-12. Moreover, the Trustee’s counsel attended Mr. Kapila’s deposition.
- On May 6, 2014, the Trustee filed an Application for Authority to Pay Expenses seeking approval to pay *from the bankruptcy estate* “his proportionate share” which is 62.5% of the litigation costs *in this action*. These expenses, *which were all incurred after the Trustee’s claims were dismissed*, include: (i) the preparation, conducting and review of the deposition of Petra Richter’s proposed expert, Catherine Ghiglieri, from February 2014 through April 2014 (ECF No. 1002-1, pp. 1-2); (ii) transcripts from depositions taken between July 2013 through March 2014 (ECF No. 1002-1, p. 3); (iii) the cost to fly Petra Richter *and her non-party husband, Klaus Richter*, from Germany to Florida for Petra Richter’s March 6, 2014 deposition in this action (ECF No. 1002-1, pp. 5-8); and (iv) the cost of Petra Richter’s *and her non-party husband, Klaus Richter*’s ten (10) day stay in South Beach when she appeared in Florida in March 2014 for her deposition and mediation in this action (ECF No. 1002-1, p. 9).⁴

⁴ On May 8, 2014, Wells Fargo filed its Notice of Filing (District Court Action; ECF No. 249) in the District Court Action noting, among other things, that the requested payment of expenses for Richter’s non-party husband was improper. Thereafter, on May 9, 2014, the Trustee filed a Corrected Application for Authority to Pay Expenses in this case (ECF No. 1003) reducing only the amount of travel and accommodation expenses the Trustee was requesting the bankruptcy estate pay in connection with Richter’s appearance in Florida in March 2014 for her deposition and mediation. The Corrected Application for Authority to Pay Expenses was granted on May 21, 2014. *See* ECF No. 1009.

- The Trustee’s counsel (United States and German) appeared for mediation in the District Court Action on March 7, 2014. The Trustee claimed to be available to participate at the mediation by phone.
- On May 9, 2014, almost fourteen (14) months after the Trustee’s claims were dismissed, Nina Mandel, counsel for the putative class, wrote the undersigned counsel the email, reiterating the Plaintiff’s demand that “co-counsel”, including the Trustee’s counsel, be copied on all emails “particularly regarding “meet and confer” communications”.

D. Wells Fargo’s Motion to Tax Fees and Costs in the District Court Action

9. On or about February 11, 2015, Wells Fargo filed its Motion to Tax Fees and Costs in the District Court Action, pursuant to Fed. R. Civ. P. 54, and M.D. Fla. L. R. 3.01 and 4.18, seeking its reasonable attorneys’ fees and costs against the Trustee and its costs against Plaintiff, Petra Richter (“Richter”) (District Court Action; ECF No. 322).

10. On May 27, 2015, Wells Fargo filed its Notice of Withdrawal of its Motion to Tax Fees and Costs in the District Court Action against Richter Only (District Court Action; ECF No. 338).

11. The District Court has not ruled on the Motion to Tax Fees and Costs against the Trustee as of the filing of this Motion. However, from a review of the Bankruptcy Court docket for this case, it appears that the Trustee is in the claims administration process and may be bringing the instant bankruptcy case to a close soon. Accordingly, Wells Fargo is filing this motion, in the abundance of caution, prior to the District Court’s ruling, so that this Court can make a determination as to Wells Fargo’s entitlement to administrative expense priority for its fees costs related to the District Court Action in advance of any distribution of the funds from the Debtor’s bankruptcy estate to other creditors.

LEGAL STANDARD & REQUEST FOR FEES AND COSTS

12. The Court has jurisdiction over this matter pursuant to 28 U.S.C. Sections 1334(b), 157(b)(1) and (2). This is a core proceeding in accordance with 28 U.S.C. Section 157(b)(2)(A), (B), (N), and (O).

13. Section 503 provides in pertinent part, that “[a]fter notice and a hearing, there shall be allowed administrative expenses” for entities falling into certain categories. 11 U.S.C. § 503(b). One such category is the actual and necessary expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case. 11 U.S.C. § 503(b)(1)(A). Relying on Section 503 and the case of *In re Reading Co. v. Brown*, 391 U.S. 471, 88 S. Ct. 1759, 20 L.Ed.2d 751 (1968), the Court in *In re G.I.C. Government Securities, Inc.*, 121 B.R. 647 (Bankr. M.D. Fla. 1990), authorized the payment as an administrative expense claim, costs incurred by a defendant who prevails in a suit brought by a chapter 7 trustee to benefit and preserve property of the estate.

14. In *GIC*, the Trustee filed a complaint against the defendant seeking to recover, for the benefit of the debtor’s estate, damages allegedly incurred by customers of the debtors caused by negligence and conversion on the part of the defendant in handling its margin account maintained by the debtor with the defendant. *Id.* at 648. The defendant prevailed and the District Court entered a final judgment in defendant’s favor on remand based on the determination by the Eleventh Circuit Court of Appeals that the Trustee did not have standing to sue defendant on behalf of individual creditors of the estate. *Id.* The defendant sought court costs as an administrative expense under 11 U.S.C. 503(b)(1)(A). The *GIC* Court held that the costs were properly chargeable against the estate as costs of administration. *Id.* at 649.

15. The *GIC* Court based its ruling on the Supreme Court case of *Ready To. V. Brown*, 391 U.S. 471, 88 S. Ct. 1759, 20 L. Ed. 2d 751 (1968) 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.” *Id.* at 648-649. The court determined that there was no question that the suit instituted by the trustee against the defendant was an attempt to benefit and preserve a property of the state and but for the suit commenced by the trustee, the defendant would not have incurred the costs. *Id.* at 649.

16. Similarly, outside of the Middle District of Florida, in the case of *In re Met-L-Wood Corporation*, 103 B.R. 972, 976-977 (Bankr. N.D. Ill. 1989), the court held that the defendants were entitled to reimbursement from the chapter 7 estate, as a matter of fairness (under *Reading*), for legal expenses (fees and costs) in hiring a law firm to represent them with regard to accusations by the Chapter 7 trustee that the attorneys engaged in “fraud on the Court”. The defendant attorneys argued that *but for* the actions of the trustee, their retention of attorneys to represent them would have been unnecessary and the court agreed. *Id.* at 976. The court found that the facts of the case fell squarely within the rationale of the *Reading* case and accordingly fairness dictated that the unsecured creditors bear the cost of the expense incurred by the defendants. *Id.* at 976-977.

17. By further example, in the case of *In re Good Taste, Inc.*, 317 B.R. 112 (Bankr. D. Alaska 2004), the court held that, as a matter of fundamental fairness, the trustee who unsuccessfully pursued a prepetition strong-arm avoidance claim to set aside a transfer for the benefit of the estate subjected the estate to an administrative expense for attorneys’ fees of the successful defendant.

18. Accordingly, Wells Fargo is entitled to full compensation, as an administrative claim, for any and all the attorney's fees and costs incurred by it as a result of the Trustee's litigation. Wells Fargo would not have incurred these attorney's fees and costs but for the Trustee's suit which the Trustee brought against it in an attempt to benefit, preserve and recover property of the estate. Wells Fargo is entitled to be made whole as a matter of fundamental fairness by an allowed administrative claim against the Debtors' Bankruptcy Estate.

19. Wells Fargo seeks an administrative claim for the full amount awarded by the District Court pursuant to Wells Fargo's Motion to Tax Fees and Costs in the District Court Action. A copy of Wells Fargo's Motion to Tax Fees and Costs and Fox Rothschild LLP's redacted invoices are attached as **Composite Exhibit 1**.

WHEREFORE, Wells Fargo Bank, N.A. respectfully requests the entry of an Order: (i) granting the instant motion; (ii) approving and allowing Wells Fargo Bank, N.A. an administrative claim for the full amount awarded by the District Court pursuant to Wells Fargo's Motion to Tax Fees and Costs in the District Court Action; (iii) entitling Wells Fargo Bank, N.A. to distribution on account of their administrative claim; and (iv) granting Wells Fargo Bank, N.A. such other and further relief as the court deems appropriate.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPLICATION FOR ADMINISTRATIVE EXPENSE CLAIM PURSUANT TO 11 U.S.C. §§ 503(a), 503(b)(3)(B), 503(b)(4) BY WELLS FARGO BANK, N.A.** (and all exhibits to same) was served via CM/ECF and/or U.S. mail to: **Debtors**, Ulrich Felix Anton Engler, Private Commercial Office, Inc. and PCO Client Management, Inc, 1217 Cape Coral Parkway, Apt. 121, Cape Coral, FL 33904; **Trustee**, Robert E Tardif, Jr., Post Office Box 2140, Fort Myers, FL 33902; **United States Trustee - FTM7, 7**, Timberlake Annex, Suite 1200, 501 E. Polk Street, Tampa, FL 33602; and all registered **CM/ECF recipients** on July 8, 2015.

By: s/Heather L. Ries
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