

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

FRANZ LESTI and PETRA RICHTER,

Plaintiffs,

vs.

Case No. 2:11-cv-695-FtM-29DNF

WELLS FARGO BANK, N.A., formerly  
known as Wachovia Bank, N.A.,

Defendant.

WELLS FARGO BANK, N.A.'S  
MOTION TO TAX ATTORNEYS' FEES AND COSTS

Defendant, Wells Fargo Bank, N.A. ("Wells Fargo"), by and through its undersigned counsel and pursuant to Fed. R. Civ. P. 54, and M.D. Fla. L. R. 3.01 and 4.18, moves this Court to tax its reasonable attorneys' fees and costs against 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") and its costs against Plaintiff, Petra Richter ("Richter"), and in support thereof, states as follows:

*Introduction*

This Court has determined Wells Fargo to be the prevailing party on all claims raised in this action and that the Plaintiffs are not entitled to any relief from Wells Fargo. On January 28, 2015, this Court entered its Judgment in a Civil Case (the "Judgment") (ECF No. 321). As explained herein, Wells Fargo is entitled to an award of its reasonable attorneys'



fees and *all* costs against the Trustee in accordance with the governing Deposit Agreement and Disclosures for Commercial Accounts (the “Deposit Agreement”) and 28 U.S.C. § 1920. Additionally, Wells Fargo entitled to an award of costs against Richter as enumerated in 28 U.S.C. § 1920.

***Procedural History and the Related Bankruptcy Action***

***A. The Claims in this Action***

On December 15, 2011, Plaintiffs, Franz Lesti (“Lesti”) and Richter, Individually and on Behalf of All Others Similarly Situated, and the Trustee, filed their Class Action Complaint (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. On March 30, 2012, Plaintiffs filed their Amended Class Action Complaint (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).<sup>1</sup>

Wells Fargo filed a Motion to Dismiss the Amended Complaint (ECF No. 43). On March 19, 2013, this Court entered its Opinion and Order (ECF No. 72) on the motions to dismiss the Amended Complaint. In particular, the Court dismissed *without prejudice* Count

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<sup>1</sup> SunTrust Bank was also named as a Defendant in the Amended Complaint. Counts I – V of the Amended Complaint were against SunTrust Bank.

VIII, which was brought by the putative class, and Count X, which was the sole count brought against Wells Fargo by the Trustee. The Plaintiffs elected not to seek to amend the dismissed claims.

On April 25, 2014, Wells Fargo filed its Dispositive Motion for Summary Judgment (ECF No. 230) as to all remaining claims by Richter.<sup>2</sup> On January 13, 2015, this Court entered its Opinion and Order ("Summary Judgment Order") (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 (ECF No. 320) denying Plaintiff's Second Amended Motion for Class Certification (ECF No. 219) as moot in light of the Summary Judgment Order. The Judgment (ECF No. 321) was then entered in favor of Wells Fargo later that day.<sup>3</sup> As such, Wells Fargo has prevailed on all claims by all Plaintiffs in this 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***

Tardif was appointed the Trustee for the Debtors in the related bankruptcy action styled: *In Re: Ulrich Felix Anton Engler, et. al.*, United States Bankruptcy Court, Middle District of Florida, Case No. 9:08-bk-04360-MGW (the "Bankruptcy Action"). The Trustee, the putative class, and their respective counsel filed their Complaint jointly and have been

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<sup>2</sup> 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.

<sup>3</sup> It appears that Judgment (ECF No. 321) has been entered against all Plaintiffs and in favor of Wells Fargo. To the extent necessary, Wells Fargo requests that the Court either clarify that the Judgment is against all Plaintiffs or separately enter judgment against the Trustee as all of his claims have been dismissed and the deadline for the Trustee to amend his pleadings has long expired. The Trustee has always taken the position that since he elected not to replead his attempted claims, that he was "still in the case" and his time to appeal did not begin to run until the Judgment was entered at the conclusion of the entire case.

litigating this action in cooperation and coordination with each other ever since. Specifically, the Trustee, the Trustee's counsel, and counsel for the putative class all signed an Amended Joint Prosecution and Cooperation Agreement, entered into and effective January 1, 2012, "for the purpose of jointly prosecuting their common interests in connection with the Class Action Suit". See Bankruptcy Action, ECF No. 831, p. 9.<sup>4</sup>

This 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 Recoveries<sup>5</sup> 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 Claim<sup>6</sup> 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.

***C. The Trustee Remains Heavily Involved In This Action After the Dismissal of His Claims Without Prejudice***

Even after his claims were dismissed without prejudice (and the Trustee elected not to amend his claims), the Trustee remained heavily involved in all aspects of this litigation. 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:

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<sup>4</sup> To the extent necessary and pursuant to Fed. R. Evid. 201, Wells Fargo requests that this Court take judicial notice of the Court record in the Bankruptcy Action.

<sup>5</sup> The Agreement defines "Joint Recoveries" as "settlement amounts or recovery at trial" in this case. See Bankruptcy Action, ECF No. 831 at 12.

<sup>6</sup> The Agreement defines "Jointly Pursued Claims" as claims against Wells Fargo and SunTrust. See Bankruptcy Action, ECF No. 831 at 10-11.

- 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. However, at his March 19, 2014 deposition, Mr. Kapila stated that he was, in fact, retained by the Trustee. *See* Soneet Kapila Deposition, 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 (Bankruptcy Action, ECF No. 1002-1, pp. 1-2); (ii) transcripts from depositions taken between July 2013 through March 2014 (Bankruptcy Action, 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 (Bankruptcy 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 (Bankruptcy Action, ECF No. 1002-1, p. 9).<sup>7</sup>
- The Trustee's counsel (United States and German) appeared for mediation in this case 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 attached hereto as Exhibit A, reiterating the Plaintiff's demand that "co-counsel", including the Trustee's counsel, be copied on all emails "particularly regarding "meet and confer" communications".

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<sup>7</sup> On May 8, 2014, Wells Fargo filed its Notice of Filing (ECF No. 249) in this 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 (Bankruptcy Action, 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 in the Bankruptcy Action on May 21, 2014. *See* Bankruptcy Action, ECF No. 1009.

***Wells Fargo's Is Entitled to An Award of Reasonable  
Attorneys' Fees and All Costs Against the Trustee***

***A. Entitlement to Fees and Costs Against the Trustee***

Under Federal Rule of Civil Procedure 54(d)(1), “[u]nless a federal statute, these rules, or a court order provides otherwise, costs-other than attorney's fees-should be allowed to the prevailing party.” There is a “strong presumption that the prevailing party will be awarded costs.” *Mathews v. Crosby*, 480 F.3d 1265, 1276, 1277 (11th Cir.2007). Generally, “A defendant is a prevailing party if the plaintiff achieves none of the benefits sought in bringing its lawsuit. If the case is litigated to judgment on the merits in favor of the defendant, the defendant is the prevailing party”. *Pickett v. Iowa Beef Processors*, 149 Fed.Appx. 831, 832 (11th Cir.2005).

“When the parties to a contract determine that the prevailing party in any litigation shall be entitled to attorneys' fees, it is the court's duty to enforce the attorneys' fee provision in the parties' contract.” *See, e.g. Davis v. National Medical Enterprises, Inc.*, 253 F.3d 1314, 1321 (11<sup>th</sup> Cir. 2001); *see also MKT Reps S.A. De C.V. v. Standard Chartered Bank International (Americas), Ltd.*, 2013 WL 1289261, at \*1 (S.D. Fla. 2013)(awarding attorneys' fees and costs to defendant bank based upon terms of account agreement). The law is clear that in bringing his claims against Wells Fargo, the Trustee stood in the shoes of the Debtors, including PCOM, and is bound by the contracts entered into by the Debtors, and specifically the Deposit Agreement governing the relationship between Wells Fargo and PCOM relative to the Accounts. “[T]he Bankruptcy Code authorizes a bankruptcy trustee to stand in the shoes of the debtor...The trustee succeeds only to such rights as the bankrupt possessed; and the trustee is subject to all claims and defenses which might have been

asserted against the bankrupt but for the filing of the petition. As a general rule, bankruptcy estates enjoy the same rights that the debtor held immediately prior to the filing of bankruptcy.” *In Re Halabi*, 184 F.3d 1335, 1337 (11<sup>th</sup> Cir. 1999)(internal quotations and citations omitted); *In re Pearlman*, 493 B.R. 878, 884-885 (M.D. Fla. 2013)(holding that the Trustee, acting on behalf of the Debtor's estate, was bound by the Debtor's contractual waiver).

PCOM formerly maintained the Accounts at Wells Fargo. See Declaration of Lisa Kinney submitted herewith, ¶4, In connection with the opening of each of the Accounts, PCOM signed a Deposit Account Application (collectively, the “Signature Cards”). See Declaration of Lisa Kinney submitted herewith, ¶5, Composite Exhibit A. In each of the Signature Cards, PCOM acknowledges:

“I/We agree to the terms and conditions of the Wachovia Deposit Agreement for this account(s)” and “I/We hereby acknowledge receipt of a Deposit Agreement, Schedule of Fees, and Rate Disclosure (if applicable)” See Declaration of Lisa Kinney, Composite Exhibit A.

On May 30, 2007, PCOM also executed a Depository Authorization and Certificate (the “Corporate Resolution”). See Declaration of Lisa Kinney submitted herewith, ¶6, Exhibit B. In the Corporate Resolution, PCOM acknowledges:

“AGREEMENT: As an authorized Representative, the undersigned agrees, on behalf of the Company, to the terms and conditions of the Wachovia Deposit Agreement and Disclosures for Commercial Accounts (“Deposit Agreement”) in opening any Company account(s), I hereby acknowledge receipt of a Deposit Agreement, Schedule of Fees, and Rate Disclosure, if applicable.” See Declaration of Lisa Kinney submitted herewith, ¶6, Exhibit B.

At all times that the Accounts were maintained at Wells Fargo, the Accounts were

governed by the Deposit Agreement.<sup>8</sup> See Declaration of Lisa Kinney, ¶7, Exhibit C. The Deposit Agreement provides, in pertinent part:

*“You agree to reimburse us for **any loss, costs, or expenses**, including, without limitation, attorneys’ reasonable fees and the costs of litigation (to the extent permitted by law) that we incur **as a result of any dispute involving your account**; and you authorize us to deduct any such loss, costs, and expenses from your account without prior notice to you. **This obligation includes any dispute between you and us involving the account and situations where we become involved in any dispute between you and an authorized signor, another joint owner, or a third party claiming an interest in the account. It also includes any situation where you, an authorized signor, another joint owner, or a third-party takes action with respect to the account that causes us, in good faith, to seek the advice of counsel, whether or not we actually become involved in a dispute.** See Deposit Agreement, p. 10, ¶(I)(40) (emphasis added).*

As such, Wells Fargo has a contractual right to recovery of all of its reasonable attorneys’ fees and costs against the Trustee for two distinct reasons: (i) Wells Fargo incurred attorneys’ fees and costs successfully defending the claims of the putative class which continued through the entry of the January 28, 2015 Judgment, and those claims were based upon a dispute involving the Accounts and the activity conducted by PCOM on the Accounts;<sup>9</sup> (ii) Wells Fargo incurred attorneys’ fees and costs successfully defending the claims of the Trustee involving the Accounts and the activity conducted by PCOM on the Accounts.

It is anticipated that the Trustee will argue that he can only be responsible for attorneys’ fees and costs through the date that the Trustee’s claims were dismissed in this

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<sup>8</sup> The Deposit Agreement was amended effective October 12, 2007 while the Accounts remained open. See Declaration of Lisa Kinney, ¶7, Exhibit C. However, the relevant provision of the Deposit Agreement quoted herein was not changed.

<sup>9</sup> The Trustee entered into the Amended Joint Prosecution and Cooperation Agreement with the putative class and has, through the entry of the Judgment, the Trustee and his counsel have remained involved in continuing to litigate this action against Wells Fargo in coordination with the putative class and their counsel.



action. However, the Trustee cannot have it both ways. Specifically, he cannot request that the bankruptcy estate fund the bulk of the costs incurred by the Plaintiffs in this litigation (including those costs incurred long after the Trustee's claims were dismissed), and then take a contrary position and claim that the bankruptcy estate can only be responsible to Wells Fargo through the date of the dismissal of his claims.

Moreover, as explained in detail above, even following the dismissal of his claims and despite having no pending claims, the Trustee has retained a financial interest in this case (in the amount of 50% of any recovery) and with veto power insofar as any settlement or compromise of any claims of the putative class pursuant to the Amended Joint Prosecution and Cooperation Agreement. *See* Bankruptcy Action, ECF No. 831, p. 12. Moreover, equally importantly, as described above, the Trustee and his counsel continued to actively participate in this case.

Furthermore, while the Trustee *voluntarily chose* not to seek to amend his claims, there was nothing preventing him from seeking to amend his claims (other than his belief of an inability to state any viable cause of action against Wells Fargo) as the dismissal of his claims was without prejudice. Judgment was first entered on January 28, 2015. As such, pursuant to the Deposit Agreement and 28 U.S.C. § 1920, Wells Fargo is entitled to an award of all of its reasonable attorneys' fees and costs against the Trustee from the inception of the case through the entry of the Judgment.

***B. The Amounts Awardable to Wells Fargo***

***1. Attorneys' Fees Awardable Against the Trustee***

When calculating the reasonably hourly rate and the number of compensable hours

that are reasonable, courts in the Eleventh Circuit are guided by the factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974); see also *Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1350 (11th Cir.2008) (*per curiam*) (“In determining what is a “reasonable” hourly rate and what number of compensable hours is “reasonable,” the court is to consider the 12 factors enumerated in *Johnson*.”). These factors include: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (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; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717–19.

There can be no doubt that the attorneys’ fees incurred by Wells Fargo were reasonable and necessary in the defense of this action. This action was pending for over three (3) years prior to the entry of the Judgment. Extensive time and labor was required in Wells Fargo’s defense of this matter. The Plaintiffs in this case were seeking to recover in excess of \$44 million in principal damages against Wells Fargo. Wells Fargo prevailed on the merits on all claims brought by both the Plaintiff and Lesti/Richter on behalf of the putative class. In this action, numerous complex/novel legal issues were presented to this Court. Great skill was required to perform the legal services properly. Plaintiffs were represented by three (3) separate law firms, each of which touted themselves as being highly

qualified in their respective areas in which they participated in this case.<sup>10</sup>

Moreover, during this action, Wells Fargo has taken steps, wherever possible, to minimize the use of judicial resources and the attorneys' fees and costs incurred by the parties. However, Wells Fargo was forced to incur substantial attorneys' fees defending extensive and repeated discovery motion practice initiated by Plaintiffs, the vast majority of which the Court held were without merit. For example, Wells Fargo was forced to defend three (3) separate motions relative to the deposition of Rachel Romijn, who was one of four of Wells Fargo's Rule 30(b)(6) corporate representatives deposed in this case. On October 29, 2014, in its Order on the third such motion where the Plaintiff sought a ruling that Ms. Romijn failed to appear for deposition despite answering nine (9) hours of questioning, this Court held:

"Further, Romijn clearly responded in full to many, many questions during this lengthy deposition, and the idea that Romijn failed to appear for her deposition *borders on ludicrous*. Not only did she appear and answer questions, but she also responded in writing to many of the deposition questions that were unanswered at her deposition. Did she know the response to each and every question, of course not, but she did respond to a majority of the questions at the deposition or later in writing." See Order, ECF No. 305, p. 2 (emphasis added).<sup>11</sup>

Taking into consideration the *Johnson* factors, and giving particular consideration to the amount Plaintiffs were seeking to recover and the extensive and lengthy litigation history, there can be simply be no doubt that Wells Fargo's attorneys' fees were reasonable and necessarily incurred in defending this action.

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<sup>10</sup> German counsel for the Trustee additionally participated at various times in this action.

<sup>11</sup> As further evidence of Wells Fargo's efforts to reduce the motion practice in this matter, Wells Fargo and its corporate representative, Rachel Romijn, voluntarily provided extensive additional written responses following Ms. Romijn's deposition which it was under no Court order to do. Unfortunately, Plaintiff still filed repeated motions in this regard which were soundly rejected by the Court.

“A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation.” *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 1299 (1988). However, “[u]nder federal law it is within the Court’s discretion to award the customary rather than the discounted rate if the customary rate is found to be reasonable.” *Maale v. Kirchgeessner*, 2011 WL 1549058 (S.D.Fla. 2011) citing to *RDP Royal Palm Hotel, L.P. v. Clark Constr. Group, Inc.*, 168 Fed. Appx. 346, 355 (11th Cir.2006) (“Although Jenkins & Gilchrist discounted its hourly rates, the district court found that the usual billing rate was reasonable and approved that rate absent any discount. Accordingly, the district court did not abuse its discretion in its award of attorney’s fees, costs, and litigation expenses.”).

As set forth in the Declaration of Amy S. Rubin, Esq. submitted herewith, the amount of reasonable attorneys’ fees actually charged to Wells Fargo in this matter are \$947,600.00. See Declaration of Amy S. Rubin, Esq., ¶ 5, 6. As explained in the Declaration of Amy S. Rubin, Esq., counsel for Wells Fargo provided its legal services in this matter at steeply discounted rates from their regular customary rates. See Declaration of Amy S. Rubin, Esq., ¶ 6. The customary rates charged by counsel for Wells Fargo are identified in the Declaration of Amy S. Rubin, Esq., ¶ 6. The attorneys’ fees incurred by Wells Fargo as calculated at the customary rates charged by counsel for Wells Fargo are \$1,138,860.50. See Declaration of Amy S. Rubin, Esq., ¶ 6.

Numerous Courts within the Middle District have entered attorneys’ fees awards at hourly rates commensurate to those customarily charged by Wells Fargo’s counsel herein.

*See e.g. Limu Co., LLC v. Burling*, 2013 WL 3992380 at \*1, 3 (M.D. Fla. 2013) (awarding \$515 hourly rate for work performed by Robert W. Thielhelm, Jr. and \$310 hourly rate for work performed by Brandon T. Crossland); *In re Dunkin's Diamonds, Inc.*, 420 B.R. 883, 886 (Bankr. M.D. Fla. 2009) (awarding \$500 hourly rate for work performed by Paul Battista and \$310 hourly rate for work performed by associate Heather Harmon); *F.T.C. v. Direct Benefits Group, LLC*, 2013 WL 5437057 at \*4 (M.D. Fla. 2013) (awarding \$480 hourly rate for work performed by for Attorney-Receiver, Brian A. McDowell); *Hopkins Props., LLC v. Geddings*, 2013 WL 4413350 at \*4 (M.D. Fla. 2013) (awarding \$450 hourly rate for work performed by Charles D. Hood, Jr. and \$375 hourly rate for work performed by Tamara R. Gaines); *F.T.C. v. Direct Benefits Group, LLC*, 2013 WL 6408379 at \*4 (M.D. Fla. 2013) (awarding \$400 hourly rate for work performed by Attorney-Receiver, Samuel J. Zusmann, and his counsel, Suzanne E. Gilbert).

In further support of the reasonableness of the customary hourly rates charged by the attorneys who performed services on this matter, Wells Fargo submits herewith the Declaration of David S. Garbett, Esq. Mr. Garbett is familiar with the rates customarily charged by counsel in complex cases analogous to this matter and concludes that the hourly rates customarily charged by the attorneys at Fox Rothschild, LLP who provided services on this matter are at or below the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation. *See* Declaration of David S. Garbett, Esq., ¶ 8. Based upon the foregoing, Wells Fargo requests that this Court enter an award of attorneys' fees against the Trustee in the amount of \$1,138,860.50, based upon counsel's customary rates which are warranted based upon the

claims and complexity of this case.

As further evidence of the reasonableness of Wells Fargo's attorneys' fees request, counsel for the Trustee has already requested and been paid from the Bankruptcy Action amounts which far exceed the amounts requested herein by Wells Fargo. Specifically, the Trustee's United States counsel, Genovese, Joblove, & Battista, P.A., who are counsel of record for the Trustee in this action, has already requested and been paid the sum of \$1,669,969.10 in attorneys' fees alone from the bankruptcy estate. *See* Bankruptcy Action, ECF Nos. 1039, pp. 2, 3, 1047; *See* Bankruptcy Action, ECF Nos. 147, 149, 447, 469, 605, 629, 845, 858, 944, 956. In addition, German counsel for the Trustee, Dr. AnneRose Tashiro and the Law Firm of Schultze & Braun GMBH Rechtsanwaltsgesellschaft Wirtschaftsprüfungsgesellschaft have requested and been paid the sum of \$1,034,487.83 in attorneys' fees alone from the bankruptcy estate. *See* Bankruptcy Action, ECF No. 582, pp. 1, 2.<sup>12</sup> Thus, the Trustee's counsel have already collectively been paid in excess of \$2.7 million in attorneys' fees from the Bankruptcy Action.

## **2. Costs Awardable Against the Trustee**

The law permits parties to enter into agreements that provide for recovery of costs in addition to those specifically enumerated in 28 U.S.C. § 1920. *See e.g. Standard Chartered Bank*, 2013 WL 1289261, at \*2 - 7. As described above, pursuant to the Deposit Agreement, Wells Fargo is entitled to recover from the Trustee, who stands in the shoes of Debtor, PCOM, "any loss, costs, or expenses" incurred in this action. *See* Deposit Agreement, p. 10,

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<sup>12</sup> Pursuant to the Amended Joint Prosecution and Cooperation Agreement, ¶ 2, the Trustee and his counsel were litigating this action on a contingency fee basis with the hope of recovering an attorneys' fees award which far exceeded the amounts for which they were already paid by the bankruptcy estate. Thus, the fees amounts requested from the bankruptcy estate should not include the additional attorneys' fees the Trustee's counsel has incurred in this case.

¶(I)(40). As such, Wells Fargo is entitled to recover from the Trustee any costs incurred in this action, and not just those costs specifically enumerated in 28 U.S.C. § 1920. Notably, many of the costs which the Trustee has requested be paid by the bankruptcy estate are not costs enumerated in 28 U.S.C. § 1920, including, certain expert witness charges, mediator fees, and “travel and accommodation” expenses, including hotel and airfare (*see* Bankruptcy Action, ECF No. 1002, 1003).

Wells Fargo has incurred costs recoverable from the Trustee in this action in the amount of \$186,540.55. *See* Declaration of Amy S. Rubin, Esq., ¶ 9; *see also* Bill of Costs. Furthermore, each cost incurred by Wells Fargo was reasonable and necessary for the defense of this case. *See* Declaration of Amy S. Rubin, Esq., ¶ 9; *see also* Bill of Costs. Accordingly, Wells Fargo request that this Court enter an award costs against the Trustee in the amount of \$186,540.55.

***Wells Fargo’s Entitlement to An Award of Costs Against Richter***

As the prevailing party, Wells Fargo is entitled to an award of costs against Richter as provided in 28 U.S.C. § 1920, which include:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Based upon those costs expressly enumerated in 28 U.S.C. § 1920, Wells Fargo has incurred costs recoverable from Richter in this action in the amount of \$34,674.52. See Declaration of Amy S. Rubin, Esq., ¶ 9; see also Bill of Costs. Furthermore, each cost incurred by Wells Fargo was reasonable and necessary for the defense of this case. See Declaration of Amy S. Rubin, Esq., ¶ 9; see also Bill of Costs. Accordingly, Wells Fargo request that this Court enter an award costs against Richter in the amount of \$34,764.52.

#### *Conclusion*

As the prevailing party, Wells Fargo is entitled to an award of its reasonable attorneys' fees and *all* costs against the Trustee. Wells Fargo is also entitled to an award of those costs recoverable pursuant to 28 U.S.C. § 1920 against Richter.

WHEREFORE, Wells Fargo Bank, N.A. respectfully requests this Court: (i) award Wells Fargo its reasonable attorneys' fees in the amount of \$1,138,860.50, plus recoverable costs in the amount of \$186,540.55, for a total of \$1,325,401.05 and enter judgment against Robert E. Tardif, Jr., in his capacity as the Chapter 7 Trustee of the substantively consolidated Bankruptcy estates of Debtors, Ulrich Felix Anton Engler, Private Commercial Office, Inc., and PCO Client Management, Inc., in the amount of \$1,325,401.05; (ii) award Wells Fargo its recoverable costs in the amount of \$34,674.52 and enter judgment against Petra Richter, in the amount of \$34,674.52, and grant such other and further relief as the Court deems proper.



**CERTIFICATE OF COMPLIANCE WITH M.D. FLA. L.R. 3.01**

WE HEREBY CERTIFY that, in accordance with M.D. Fla. L.R. 3.01, the undersigned has communicated with counsel for Plaintiffs regarding the relief requested herein. As of the filing of this Motion, counsel for Plaintiffs have not provided definitive responses as to their respective positions regarding the relief requested by Wells Fargo herein. In accordance with M.D. Fla. L.R. 3.01(g), Wells Fargo will supplement this filing as necessary with a statement certifying whether or to what extent the parties have resolved any issues presented in this motion.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 11<sup>th</sup> day of February, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Dated: February 11, 2015  
West Palm Beach, Florida

**FOX ROTHSCHILD LLP**

/s/ Amy S. Rubin

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**SERVICE LIST**

*Franz Lesti, et al. v. Wells Fargo Bank, N.A.*

Case No: 2:11-CV-695-FtM-29DNF

United States District Court, Middle District of Florida

**Electronically by CM/ECF System**

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**Hallak, Elliot A.**

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**From:** Nina Stillman Mandel <nsmandel@mandel-law.com>  
**Sent:** Friday, May 09, 2014 8:13 PM  
**To:** Rubin, Amy S.  
**Cc:** Hallak, Elliot A.; Allison, Thomas C.; Stuart Davidson (sdavidson@rgrdlaw.com); David S. Mandel; 'Elgidely, Robert' (relgidely@gjb-law.com)  
**Subject:** RE: Repsonse to Motion to Exclude/Strike Kapila's Expert testimony

Counsel,

It's not clear to me from your response whether this is a quid pro quo. We do not agree to your request. I will note our lack of agreement in the motion.

In addition, in the future, please do not exclude co-counsel who are cc'd on emails when you reply, particularly regarding "meet and confer" communications. Your motives notwithstanding, we prefer to keep everyone informed.

Nina Stillman Mandel

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**From:** Rubin, Amy S. [<mailto:ARubin@foxrothschild.com>]  
**Sent:** Friday, May 09, 2014 5:51 PM  
**To:** Nina Stillman Mandel  
**Cc:** Hallak, Elliot A.; Allison, Thomas C.  
**Subject:** RE: Repsonse to Motion to Exclude/Strike Kapila's Expert testimony

No problem, perhaps you might be as kind to consider withdrawing your Motion to Show Cause especially since I see no court ordered dates on any of the Rachel Romijn deposition answers. Kindly advise your position in this regard.

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**From:** Nina Stillman Mandel [<mailto:nsmandel@mandel-law.com>]  
**Sent:** Friday, May 09, 2014 4:47 PM  
**To:** Rubin, Amy S.; Allison, Thomas C.  
**Cc:** David S. Mandel; Stuart Davidson ([sdavidson@rgrdlaw.com](mailto:sdavidson@rgrdlaw.com))  
**Subject:** Repsonse to Motion to Exclude/Strike Kapila's Expert testimony

Counsel,

Due to a mis-calendaring on my part and other matters, I will be filing a motion for a brief extension of time – until Wed. May 14 - to complete Plaintiff's response to Defendant's motion to exclude Kapila's expert testimony. I hope to file it sooner. Please let me know if you have any objection.

Thank you.

**Nina Stillman Mandel**

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