

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
CASE NO. 3:22-cv-00487-TJC-MCR**

FEDERAL TRADE COMMISSION,

Plaintiffs,

v.

MICHAEL RANDO, et al.,

Defendants.

**DEFENDANTS’ OPPOSITION TO RECEIVER’S FIRST FEE APPLICATION
FOR ORDER AWARDING FEES, COSTS, AND REIMBURSEMENT OF
COSTS TO RECEIVER AND HER PROFESSIONALS**

Defendants Michael Rando, Valerie Rando, Prosperity Training Technology LLC, Digital Business Scaling LLC, First Coast Matchmakers Inc., First Coast Matchmakers LLC, and Financial Consulting Management Group LLC, et al. (“Defendants”) respectfully file this Opposition to the Receiver’s First Fee Application for Order Awarding Fees, Costs, and Reimbursement of Costs to Receiver and Her Professionals (the “Fee Application”) (Doc. 67). The Fee Application seeks \$314,078.35 in fees purportedly incurred between May 4, 2022 and July 1, 2022,¹ *see id.*, nearly \$100,000 more than what Defense counsel expended over a similar period. *See* Defendants’ Motion to Modify Asset Freeze to Permit Payment of Attorneys’ Fees

¹ Approximately \$299,000 of this appears to have been incurred prior to June 17, 2022. *See* Receiver’s Notice of Filing in Response to Court’s Request (Doc. 61.).

(Doc. 51) (requesting that the Court release \$225,000 to pay attorneys' fees from the inception of this matter through June 17, 2022).

The Fee Application (Doc. 67) is unreasonable and excessive for several reasons, including because: *(a)* the Temporary Receiver and her professionals (collectively, the "Receiver's Team") billed extensively for time spent improperly acting as an agent of the FTC; *(b)* the Receiver's Team is attempting to charge the Receivership Estate for their travel, lodging, *and even meals consumed while traveling* from south Florida and Tampa to and from Jacksonville; *(c)* the invoices attached to the Fee Application demonstrate the Receiver's Team duplicated efforts and spent extensive time preparing the Temporary Receiver's Interim Report (Doc. 50) (the "Interim Report"); *(d)* the invoices attached to the Fee Application demonstrate the Temporary Receiver's counsel billed significantly for time spent researching and waging meritless legal disputes with the Defendants' counsel over issues such as the Defendants' invocation of the 5th Amendment; *(e)* the invoices reveal extensive time billed by the Temporary Receiver for correspondence with the FTC in which Defendants' counsel was not involved and to attend depositions conducted and defended by the FTC; and *(f)* the Receiver's Team billed for a variety of vague and undefined tasks. For these and the reasons described below, the Fee Application should be denied as to each of the above categories of fees and costs.

BACKGROUND

1. On May 4, 2022, the Court entered an Ex Parte Temporary Restraining Order with Asset Freeze, Appointment of a Temporary Receiver, and Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue (“TRO”) (Doc. 12).

2. The TRO sets forth in Paragraphs XIV(A)-(W) the scope—and limits—of the Temporary Receiver appointed by the Court. *See id.* at ¶¶ XIV (A)-(W).

3. Since entry of the TRO, the Defendants have expended significant time and effort to cooperate with the Temporary Receiver and comply with the TRO.

4. On June 14, 2022, Defense counsel filed a motion seeking reimbursement of fees accrued, and expected to be accrued, through June 17, 2022 (Doc. 51). This motion was opposed by the FTC and the Temporary Receiver. The Court granted that motion in part on June 29, 2022 (Doc. 62) and authorized the payment of \$164,938.95, the amount of fees billed through June 6, 2022. Gunster did not seek reimbursement of costs, travel, meals or lodging, and discounted its fees by 10%.

5. On June 13, 2022, the Temporary Receiver filed her Interim Report. Defendants’ estimate that seventy-six pages of the Interim Report detail tasks outside the Temporary Receiver’s authority and which exceed her primary obligation to marshal and preserve assets.

6. On June 23, 2022, the Temporary Receiver filed a Notice of Filing in Response to Court’s Request (Doc. 61), in which she reported expenses through June 17, 2022 of \$299,000.00.

7. On July 8, 2022, the Temporary Receiver filed the Fee Application (Doc. 67), requesting payment of \$314,078.35 in fees and costs.

MEMORANDUM OF LAW

In just 60 days, the Temporary Receiver’s expenditures total approximately 20% of the purported cash assets of the Receivership Estate. *See* Interim Report (Doc. 50 at 106) (listing “Cash and Money Market Accounts” with a value of \$1,383,500.26). Most of these fees appear to be devoted to investigating and listing evidence she believes supports the FTC’s underlying allegations, along with researching legal issues to wage unnecessary disputes with Defendants’ counsel—tasks that are contrary to the Temporary Receiver’s duty as a neutral officer of the Court. The Fee Application argues that the Court should pass these fees and costs incurred to help the FTC on to the Receivership Estate and the Defendants. Not so. As illustrated below, the Court should not award any compensation to the Temporary Receiver beyond a reasonable estimation of: (1) the costs directly related to securing and preserving the assets of the estate; and (2) professional fees incurred conducting tasks tailored to fulfilling her obligations plainly defined by the TRO. Any additional fees or costs should be borne by the FTC or the Temporary Receiver herself.

The Receiver Exceeded Her Authority Under the TRO and Now Seeks to Be Paid from the Receivership Estate for Work Conducted to Benefit the FTC.

The TRO authorized the Temporary Receiver to act “solely” as the “agent of this Court” (Doc. 12 at 22), and to conduct, extensive, but limited activities. In conducting those activities, federal law requires the Temporary Receiver to act “for

the benefit of all the parties having an interest in the property [in question], not for the plaintiff or defendant alone.” *N. Am. Broad., LLC v. U.S.*, 306 Fed. Appx. 371, 373 (9th Cir. 2008) (“A court-appointed receiver is an officer of the court, appointed on behalf and for the benefit of all the parties having an interest in the property, not for the plaintiff or defendant alone.”). “The property in [her] hands is in *custodia legis*; it is the court itself that has the care of the property in dispute” and the Temporary Receiver has “no powers except such as are conferred upon [her] by the order of [her] appointment and the course and practice of the court.” *Id.*; see also *Sterling v. Stewart*, 158 F.3d 1199, 1201 (11th Cir. 1998) (A federal “receiver is a neutral court officer appointed by the court usually to ‘take control, custody, or management of property that is involved in or is likely to become involved in litigation for the purpose of . . . undertaking any [] appropriate action.’”).

The Interim Report and the exhibits to the Fee Application demonstrate that the Temporary Receiver spent extensive time as an agent of the FTC, as opposed to serving as a neutral representative of the Court. For example, the Interim Report states that it “addresses all activity that resulted in the fees and costs sought” by the Temporary Receiver in the Fee Application. Yet the first 76 pages of the 110-page report are more appropriate for an investigative report for the FTC and amicus brief in support the FTC’s Motion for Preliminary Injunction, than they are a neutral reporting of steps taken by the Temporary Receiver.

The Temporary Receiver’s instruction was to provide a report addressing (i) the steps taken to implement the TRO; (ii) the value of the assets and liabilities of the

Receivership Entities; (iii) the steps the Receiver intends to take in the future to “protect receivership assets, recover receivership assets from third parties, and adjust receivership liabilities; and (iv) provide her opinion on whether “any portion of the business of any of the Receivership Entities can continue to operate legally and profitably.” *See* Doc. 12, Sec. XIV, W. Yet, the vast majority of the Temporary Receiver’s efforts prior to June 13, 2022 appear to fall outside each of these categories.

As such, the Court should deny the Temporary Receiver’s request to be compensated for fees expended: (a) acting as an agent and investigator for the FTC;² (b) summarizing her biased investigative activities and other unauthorized or unnecessary conduct in the Interim Report; (c) corresponding with the FTC or attending depositions conducted or defended by the FTC; (d) researching inapposite case law and subsequent attempts to undermine the Defendants’ constitutional rights to plead to the 5th Amendment; (d) on vague and undefined tasks.

After all, the “Receiver and all professionals must exercise proper billing judgment in seeking fees from the receivership estate, and should limit their work to that which is reasonable and necessary.” *See, e.g., Fed. Trade Comm'n v. Worldwide Info Servs., Inc. Elite Info. Sols. Inc.*, No. 6:14-CV-8-ORL-28DAB, 2014 WL 12611353, at *2

² Further demonstrating the *ultra vires* nature of the Receiver’s actions, the FTC’s lead investigator on this case testified that he failed to conduct a variety of investigative steps that the Temporary Receiver undertook outside the scope of her authorization under the TRO. For example, the Investigator took no steps to verify the alleged BBB or FTC complaints against the Defendants; never spoke with any customers or former employees of the Credit Game; and did not conduct any financial analysis.

(M.D. Fla. Apr. 24, 2014). Because that judgment is lacking from the Fee Application, it should be denied to the extent it seeks payment for the fees and costs disputed here.

The Fee Application Requests Payment for Travel, Food, Lodging and Duplicative Billings that Should not be Borne by the Receivership Estate.

The Court should also deny the Temporary Receiver's application for reimbursement for costs incurred traveling, eating, or staying in hotels.

This matter is centered entirely in Jacksonville. The action was filed in Jacksonville. The Defendants live in Jacksonville. The Receivership Entities are all based in Jacksonville. And the business premises raided during the immediate access are in Jacksonville. The FTC's choice of a Temporary Receiver who is not based in or near Jacksonville—and the Temporary Receiver's choice of professionals who are not resident in Jacksonville—should not result in the taxing of travel (even if discounted), food, or hotel costs to the Receivership Estate or the Defendants. The Temporary Receiver was appointed *ex parte* and the Defendants had no opportunity to object or propose a local receiver. In short, equity requires all of these ancillary expenses to be borne by the FTC or Temporary Receiver herself.

Requests for fees billed for duplicative efforts by multiple timekeepers should also be denied, as should, as mentioned above, any fees incurred by the Temporary Receiver to collaborate or correspond with the government. "This is particularly true when[,] [according to the FTC,] the receivership estate will not recover sufficient assets to pay full restitution to the victims of the fraud or misconduct alleged in the complaint"; where the Temporary Receiver is not even attempting to operate the

Receivership Entities; and where the Temporary Receiver has not responded to the Defendants' proposal for reopening under her supervision because, the extent of the fees merited by the Temporary Receiver should be weighed in connection not only with the judiciousness of her exercise of her authority, but also in connection with her results. *Fed. Trade Comm'n v. Worldwide Info Servs., Inc. Elite Info. Sols. Inc.*, No. 6:14-CV-8-ORL-28DAB, 2014 WL 12611353, at *2 (M.D. Fla. Apr. 24, 2014) (“Whether a receiver merits a fee is based on the circumstances surrounding the receivership, and ‘results are always relevant.’”) (quoting *S.E.C. v. Elliot*, 953 F.2d 1560, 1577 (11th Cir. 1992)); *see also Am. Civ. Liberty Union of Ga. v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999) (“Courts are not authorized to be generous with the money of others, and it is as much the duty of courts to see that excessive fees and expenses are not awarded as it is to see that an adequate amount is awarded.”). Because both judiciousness and results are lacking here,³ the Court should deny, as set forth above, the Fee Application.

CONCLUSION

As the Fee Application demonstrates, if the Temporary Receiver remains in place and continues expending Estate resources at this rate, there may be no viable assets remaining for the prevailing interests in this litigation. As such, and given the

³ As highlighted at the initial hearing on the FTC's Motion for Preliminary Injunction, the primary results achieved have been limited to shutting down business operations, leaving legitimate customers without the value of services purchased, failing to timely pay vendors, positing later-debunked allegations of post-TRO violations by the Defendants, and maintaining a website which, at this time, appears to serve merely as a conduit for the FTC's press releases and court filings. None of these functions assist the Court or benefit the Receivership Estate.

Temporary Receiver's failures to abide by the TRO and her duty of neutrality, the Court should deny the Fee Application's request for fees and costs disputed above, together with any other relief the Court deems proper under the circumstances.

Dated: July 22, 2022

**GUNSTER, YOAKLEY &
STEWART, P.A.**

By: /s/ Jonathan K. Osborne

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of July, 2022 a true and correct copy of the foregoing document was electronically filed with the United States District Court for the Middle District of Florida using the CM/ECF system which will send notification of such filing to all counsel of record.

By: /s/ Jonathan K. Osborne

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