

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

MICHAEL RANDO, *et al.*,

Defendants.

Case No. 3:22-cv-487-TJC-MCR

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' SECOND
MOTION TO MODIFY ASSET
FREEZE TO PERMIT
PAYMENT OF ATTORNEYS'
FEES¹**

\$306,883.45 total for less than two months of legal representation in this case. That is what the Rando Defendants ask the Court to release from the frozen assets set aside for consumers they victimized in their latest extraordinary request to pay their attorney fees and expenses.² In addition to this inordinate fee amount, they also seek \$69,572.09 for attorneys' fees incurred for representation in a separate criminal investigation, bringing their total request to over a third of a million dollars, which does not yet account for any fees or expenses incurred during July or August. One would expect such an extraordinary request to be supported by a corresponding level of justification, but the Rando Defendants provide little more than the bare

¹ Nothing contained herein should be construed as an indictment of Defendants' counsel or their performance in this litigation.

² The FTC does not challenge the Rando Defendants' right to submit their present request for a disbursement to pay attorneys' fees. The Court inserted a provision in its May 3, 2022 Temporary Restraining Order which allows the Rando Defendants to seek – and the FTC to oppose – disbursements from the frozen assets to pay attorneys' fees. (Doc. 12 § IV.D). The same provision will be in the proposed stipulated preliminary injunction that the parties are finalizing and that the FTC expects to file shortly.

request itself. They neither explain why they cannot pay these fees without the requested disbursement nor provide any evidence to demonstrate their reasonableness. These failures are fatal to their request because unnecessary and unreasonable disbursements would quickly dissipate the liquid frozen funds, undermining the Court's ability to provide consumer redress should the FTC prevail on the merits of this case. Accordingly, the Rando Defendants' motion must be denied in its entirety.

The Rando Defendants retained counsel on May 6, 2022. (Doc. 81 at 1). The Court granted the Rando Defendants \$164,938.95 for attorneys' fees incurred from that date through June 6, 2022. (Doc. 51 at 2; Doc. 62 ¶ 2). Their current motion seeks an additional \$141,944.50 for work performed in this case through June 30, 2022, and another \$69,572.09 for attorneys' fees incurred during the same period for representation in a criminal investigation, bringing the total to \$376,455.54 for the less than two-month period from May 6 to June 30, 2022. (Doc. 81). Since June 30, the Rando Defendants almost certainly have incurred additional and similarly exorbitant attorneys' fees for which they have yet to seek disbursement. All of these attorneys' fees are on top of \$86,000 in disbursements the Rando Defendants have already obtained for personal living expenses for three months. (Docs. 35, 62, 80). This amount is well over the median *yearly* household income for Jackson, Florida, of \$55,531.³

³ <https://www.census.gov/quickfacts/jacksonvillecityflorida>.

At this staggering burn rate, no frozen liquid assets will remain to redress consumer victims if the Rando Defendants continue raiding the frozen funds with their exorbitant requests. The Court-ordered asset freeze only secured approximately \$1.38 million in liquid assets. (Doc. 50 ¶ 211). The remainder of the known frozen assets primarily consists of illiquid investments purportedly held by protective trusts (Doc. 50 ¶¶ 173-178, 183, 186) and approximately \$650,000 in merchant processing reserve accounts, both of which the FTC will seek to liquidate but neither of which are readily accessible (and may never be). The liquid assets will likely diminish rapidly with Defendants' requested personal living expenses and attorneys' fee requests, leaving little available for redress to consumer victims whose losses currently exceed \$14 million. As previously noted, the final consumer injury figure will likely increase once sales numbers for Defendants' prior iteration of the credit repair scheme, Wholesale Tradelines, become known. (Doc. 50 ¶¶ 164-166).

However, the Court has ample discretion to preserve these assets against Defendants' requests for disbursement. The Court may forbid or severely restrict payment of attorneys' fees out of frozen assets. *See FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989). In particular, when "frozen assets are less than the amount needed to compensate consumers for their losses," as they are here, "a district court can properly refuse to unfreeze assets." *FTC v. IAB Mktg. Assocs., LP*, 972 F. Supp. 2d 1307, 1313 (S.D. Fla. 2013) (citing *FTC v. RCA Credit Servs., LLC*, 2008 WL 5428039, at *4 (M.D. Fla. Dec. 31, 2008)); *cf. SEC v. Quinn*, 997 F.2d 287, 289 (7th Cir. 1993) ("Parties to litigation usually may spend their resources as they

please to retain counsel. ‘Their’ resources is a vital qualifier. Just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims’ assets to hire counsel who will help him retain the gleanings of crime.’’) (internal citations omitted). In exercising that discretion, courts have waited until the case has concluded to determine the disbursement of defendants’ attorneys’ fees. *See, e.g., FTC v. Trudeau*, 845 F.3d 272, 274-75 (7th Cir. 2016) (affirming refusal to award attorneys’ fees ahead of victim compensation); *FTC v. Direct Benefits Grp., LLC*, No. 6:11-cv-1186, 2012 WL 3715204, at *5 (M.D. Fla. Aug. 9, 2012) (denying motion for attorneys’ fees on basis that “it would not be appropriate to unfreeze the Defendants’ assets based upon their speculation and belief about how this litigation will ultimately end. This is particularly the case in light of the Court's finding that there is good cause to believe the FTC will prevail on the merits.”); *FTC v. Next-Gen, Inc.*, No. 4:18-CV-00128, 2018 WL 5310415, at *1 (W.D. Mo. Oct. 16, 2018) (defendants’ attorneys may renew their fee requests at the conclusion of the case).

The Rando Defendants’ claim that some of the fee request is for defending against a criminal investigation does not affect the outcome of this analysis. The Rando Defendants have not indicated that they are subject to “a formal charge, preliminary hearing, indictment, information, or arraignment” necessary to trigger their Sixth Amendment rights. *United States v. Roper*, 842 F. App’x 477, 479 (11th Cir. 2021) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)). More importantly, an asset freeze only raises Sixth Amendment concerns over impairing a

defendant's right to hire counsel when the asset freeze arises out of a criminal case. See, e.g., *Luis v. United States*, 578 U.S. 5, 9 (2016) (criminal pretrial order freezing assets under 18 U.S.C. § 1345); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624, 626 (1989) (forfeiture ordered in criminal case under 21 U.S.C. § 853); *United States v. Monsanto*, 491 U.S. 600, 603 (1989) (pretrial restraining order in criminal case under 21 U.S.C. § 853). As the Supreme Court noted, criminal defendants are not exempt from civil laws that impose restraints on their assets, such as tax laws, "simply because these financial levies may deprive them of resources that could be used to hire an attorney." *Caplin*, 491 U.S. at 631-32. Here, the FTC brings this case under the FTC Act, an independent statute permitting civil action that does not arise from a criminal case. Thus, the criminal investigation into the Rando Defendants does not change the fact they do not have a right to invade frozen funds the Court has determined likely belong to their victims to pay for attorneys they cannot otherwise afford.

Even if the Court were inclined in principle to allow for the payment of the Rando Defendants' attorneys' fees from the frozen funds, they have not provided sufficient justification for the Court to do so. First, Defendants have not demonstrated that any disbursement is necessary to pay their attorneys because they have refused to fully disclose their income and assets. See *SEC v. Cherif*, 933 F.2d 403, 416-17 (7th Cir. 1991) (affirming refusal to modify injunction where defendant refused to provide financial information); *SEC v. Bivona*, No. 16-cv-1386, 2016 WL 2996903, at *3 (N.D. Cal. May 25, 2016) (declining defendants' request to modify an

asset freeze “without a complete picture of their finances”); *FTC v. RCA Credit Servs., LLC*, No. 08-cv-2062, 2008 WL 5428039, *4 (M.D. Fla. Dec. 31, 2008) (refusing to modify injunction without “[c]omplete and proper disclosure and accounting as required by the preliminary injunction order”). Rather than provide the Court and the FTC complete and accurate financial disclosures as required by the TRO, Mr. and Mrs. Rando asserted their Fifth Amendment privilege, claiming that providing such information would criminally incriminate them. (Doc. 49). Defendants’ motion provides no additional evidence of Defendants’ financial condition.⁴

Without a full picture of Defendants’ finances, the Court has no way to determine whether Defendants’ request is truly necessary to mount a defense in this matter or a brazen effort to preserve their own funds while expending Court-protected moneys meant for consumer victims.⁵

⁴ The FTC is working with the Rando Defendants to obtain an inventory of their assets in the course of extensive settlement negotiations. However, even if the Rando Defendants disclose all of their assets, their motion does not detail any efforts to obtain employment or disclosed any income acquired since the Court’s decision on the TRO. See *FTC v. IAB Mktg. Assocs., LP*, 972 F. Supp. 2d 1307, 1314 (S.D. Fla. 2013) (finding defendants’ request for disbursement unreasonable in part because defendants failed to explain their lack of employment). On July 28, 2022, Defendants, through counsel, submitted to the FTC a report of new business activity, stating their intent to help start a training and coaching service for business owners. Neither the report nor their current motion explains why the expected income from their new venture would not cover at least a portion of their attorneys’ fees. In addition, their motion fails to identify “any other potential sources of funds” aside from employment income, such as loans from friends or family, to finance Defendants’ legal defense. *FTC v. Elite IT Partners, Inc.*, No. 2:19-CV-125, 2019 WL 1568400, at *2 (D. Utah Apr. 5, 2019) (denying motion for release of attorney’s fees from asset freeze).

⁵ Although Defendants’ refusal to disclose their finances place their counsel at risk of not being paid for their services, counsel assumed that risk when they entered their appearance after the Court entered the asset freeze. See, e.g., *FTC v. Trudeau*, 845 F.3d 272, 274 (7th Cir. 2016) (“[L]awyers, particularly, had to understand that their claims to compensation would be junior to those asserted by the FTC on the victims’ behalf.”); *Commodity Futures Trading Comm’n v. Am. Metals Exch. Corp.*, 991 F.2d 71, 79-80 (3d Cir. 1993); *FTC v. Sharp*, No. CV-S89-870 RDF (RJJ), 1991 WL 214076, at *4 (D. Nev. July 23, 1991) (where an attorney knows about an asset freeze prior to

Second, even if Defendants had provided the financial information to show disbursement is necessary, they failed to provide sufficient details about the legal services rendered by their counsel to determine whether the requested amount is reasonable. As a threshold matter, the Rando Defendants do not have an absolute right to choose a Tier-1 law firm like Gunster⁶ when there are a plethora of other good – and likely less expensive – attorneys to represent them. *See Caplin*, 491 U.S. at 624 (“[T]hose who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts.”). Moreover, their motion does not demonstrate “the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation,” a necessary prerequisite to determining the reasonableness of the fees sought. *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994) (quoted source omitted).

The Rando Defendants’ motion attaches fee summaries that tabulate the hours worked, billing rate, and billed amount for each attorney and other professional who rendered service. (Docs. 81-1 & 81-2). Unfortunately, the summaries do not provide any details on what services each professional provided or how much time each

representing a client, the victims “have a stronger claim to the frozen assets” than the attorney); *cf. IAB Mktg.*, 972 F. Supp.2d at 1315 (“[I]t is axiomatic that an asset freeze, set forth in the interest of preserving illegal proceeds from dissipating before there has been a final disposition on the merits, may have unpleasant consequences for the defendant.”).

⁶ <https://gunster.com/press-releases/gunster-ranks-top-us-news-best-lawyers-best-law-firms-2021>.

professional spent providing each service.⁷ See *Am. C.L. Union of Georgia v. Barnes*, 168 F.3d 423, 429 (11th Cir. 1999) (“[O]ur decisions contemplate a task-by-task examination of the hours billed.”).

Although the FTC had previously asked for task-specific information during the last round of Defendants’ request for attorneys’ fees, Defendants declined to provide such information on the grounds of attorney-client privilege. While asserting the privilege is certainly understandable, by doing so, Defendants have deprived the Court of information necessary to determine the reasonableness of the amount requested. See, e.g., *Everhart v. Bd. of Educ. of Prince George’s Cty.*, 2016 WL 7131469, at *4 (D. Md. Dec. 5, 2016) (finding it “virtually impossible . . . to determine reasonableness of time spent” where attorney “frequently lumps several different types of tasks together in one billing entry”); *SEC v. Private Equity Mgmt. Grp.*, No. 09-cv-2901, 2009 WL 2058247, *3 (C.D. Cal. July 9, 2009) (denying request to unfreeze assets when defendant provided only “generalized statements about the complexity of the case”); *SEC v. Dobbins*, No. CIV.3:04-CV-0605-H, 2004 WL 957715, at *2 (N.D. Tex. Apr. 14, 2004) (denying request to unfreeze assets in part because movant “ha[d] not shown any basis for the reasonableness of the amount”).

⁷ This breakdown is particularly important here because any disbursement will likely have to come from *Receivership* assets because the Rando Defendants have already expended the majority of the frozen funds that were in their individual names. The Rando Defendants seek attorneys’ fees incurred in part for representing the *individual* defendants, Michael and Valerie Rando, not the *corporate* defendants. The frozen liquid Receivership assets belong to the corporate defendants under the Court-appointed Receivership, not the individual defendants, and therefore, should not be expended on the individuals’ defense.

In short, the Rando Defendants' motion seeks disbursements that will rapidly deplete the funds preserved for consumer redress without providing *any* justification as to the necessity or reasonableness of the requested disbursements – let alone a sufficient justification. Accordingly, for the foregoing reasons, the FTC requests the Court deny Defendants motion.

Dated: August 30, 2022

Respectfully submitted,

/s/ Hong Park
Hong Park, hpark@ftc.gov (202-326-2158)
Brian M. Welke, bwelke@ftc.gov (-2897)
Sana Chaudhry, schaudhry@ftc.gov (-2679)
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue NW, CC-9528
Washington, DC 20580
Attorneys for Plaintiff

FEDERAL TRADE COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, I served a true and correct copy of the foregoing via CM/ECF to those listed on the CM/ECF system.

/s/ Hong Park
Hong Park