
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 15-1329-JLS (JCGx)

Date: March 22, 2017

Title: Consumer Financial Protection Bureau et al. v. Pension Funding, LLC et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero
Deputy Clerk

N/A
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR DEFENDANT:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER (1) GRANTING RECEIVER’S
FOURTH INTERIM APPLICATION FOR PAYMENT OF
FEES AND REIMBURSEMENT OF EXPENSES (Doc. 131)
AND (2) GRANTING GENERAL COUNSEL’S FOURTH
INTERIM APPLICATION FOR PAYMENT OF FEES AND
REIMBURSEMENT OF EXPENSES (Doc. 132)**

Before the Court are two Interim Fee Applications filed by Krista Freitag, the court-appointed receiver, and Allen Matkins, her general counsel. (Freitag App., Doc. 131; Allen Matkins App., Doc. 132.) The Court finds these matters appropriate for disposition without oral argument. *See* Fed. R. Civ. P. 78(b); C.D. Cal. R. 7-15. Accordingly, the hearing on these applications scheduled for March 24, 2017 at 2:30 p.m. is VACATED. For the reasons provided below, the Court GRANTS both Applications.

I. BACKGROUND

On August 20, 2015, CFPB brought an enforcement action against Defendants Pension Funding, LLC, Pension Income, LLC, Steven Covey, Edwin Lichtig, and Rex Hofelter. (Compl., Doc. 1.) The Complaint alleged violations of the Consumer Financial Protection Act and various New York regulations stemming from Defendants purported involvement with and sale of so-called “pension advances,” defined as “lump-sum

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payments that consumers could receive in return for agreeing to redirect all or part of their pension payments, over eight years, to repay the funds.” (*Id.* ¶ 1.)

On January 7, 2016, pursuant to a stipulation between CFPB and all of the Defendants except Covey (Stip., Doc. 59), the Court entered a preliminary injunction enjoining certain conduct by Defendants (PI, Doc. 61). In relevant part, the injunction appointed Freitag, of E3 Advisors, as the “receiver of Pension Funding, LLC and Pension Income, LLC[.]” (*Id.* at 3.) In her role as receiver, Freitag was permitted to “employ attorneys, accountants, and others to investigate, advise, and where appropriate, to institute, pursue, and prosecute all claims and causes of action of whatever kind and nature which may now or hereafter exist[.]” (*Id.* at 6.)

Subsequently, on March 1, 2016, Freitag filed a motion in aid of receivership. (Mot., Doc. 71.) In that motion, Freitag sought to retain Allen Matkins as legal counsel. (*Id.* at 1.) Additionally, Freitag requested the Court’s approval, consistent with Local Rule 66-6.1, to file interim fee applications on a quarterly basis. (*Id.* at 14-15.) On April 13, 2016, the Court granted Freitag’s motion subject only to the limitation that the Court would defer, rather than waive, Local Rule 66-5’s requirement that Freitag file a list of Defendants’ creditors. (Order, Doc. 86.)

On July 7, 2016, the Court granted Freitag and Matkins’ First Interim Fee Applications, which covered the period from January 8, 2016 to March 31, 2016. (First Interim Fee Applications Order, Doc. 95.) The Court likewise approved Matkins request for \$36,163.35 in fees and \$2,057.79 in expenses. (*Id.* at 7-8.) On October 19, 2016, the Court granted Freitag and Matkins’ Second Interim Fee Applications. (Second Interim Fee Applications Order, Doc. 115.) Specifically, the Court approved a payment of \$65,706.30 in fees and \$460.33 in expenses to Freitag and \$30,655.35 in fees and \$600.06 in expenses to Matkins. (*Id.* at 4, 6.) And on December 14, 2016, the Court generally approved the Receiver’s report and recommendations on how to unwind the receivership assets. (Report and Recommendations, Doc. 125.)

On January 17, 2017, the Court approved the Receiver’s Third Interim Fee Request for \$81,093.60 in fees and \$135.00 in expenses and General Counsel’s Third Interim Request for \$59,112.45 in fees and \$3,820.26 in expenses. (Order at 8, Doc. 129.)

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II. LEGAL STANDARD

“A receiver appointed by a court who reasonably and diligently discharges his duties is entitled to be fairly compensated for services rendered and expenses incurred.” *SEC v. Byers*, 590 F. Supp. 2d 637, 644 (S.D.N.Y. 2008). This entitlement to reasonable compensation extends to the professionals employed by the receiver. *See Drilling & Expl. Corp. v. Webster*, 69 F.2d 416, 418 (9th Cir. 1934). “The receiver bears the burden to demonstrate to the court [any] entitlement to [the] payment of fees and costs in the amount requested.” *SEC v. Total Wealth Mgmt., Inc.*, No. 15-CV-226-BAS-DHB, 2016 WL 727073, at *1 (S.D. Cal Feb. 24, 2016) (citing 65 Am. Jur. 2d, Receivers § 228 (2d ed. Feb. 2016 update)). “The court appointing the receiver has full power to fix the compensation of [the] receiver and the compensation of [professionals employed by the receiver],” *Drilling & Expl. Corp.*, 69 F.2d at 418, and the court has considerable discretion in fashioning a fee award that is appropriate under the circumstances, *Gaskill v. Gordon*, 27 F.3d 248, 253 (7th Cir. 1994). Generally, receivers and any assisting professionals should charge a reduced rate to reflect the public interest involved in preserving funds held in a receivership estate. *Byers*, 590 F. Supp. 2d at 646-47.

“An award of interim fees is appropriate ‘where both the magnitude and the protracted nature of a case impose economic hardships on professionals rendering services to the estate.’” *SEC v. Small Bus. Capital Corp.*, No. 5:12-CV-03237 EJD, 2013 WL 2146605, at *2 (N.D. Cal. May 15, 2013) (citation omitted). In determining the reasonableness of the fees and costs requested, the court should consider the “economy of administration, the burden that the estate may safely be able to bear, the amount of time required, although not necessarily expended, and the overall value of the services to the estate.” *In re Imperial ‘400’ Nat’l, Inc.*, 432 F.2d 232, 237 (3d Cir. 1970). However, courts will “[f]requently . . . withhold a portion of the requested interim fees because ‘until the case is concluded the court may not be able to accurately determine the “reasonable” value of the services for which the allowance of interim compensation is sought.’” *Small Bus. Capital Corp.*, 2013 WL 2146605, at *2 (citation omitted).

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III. DISCUSSION

A. Freitag's Third Interim Application

Freitag's Application, which covers the period from October 1, 2016 through December 31, 2016, seeks interim approval of \$30,685.95 in fees and \$1,786.87 in expenses. (Freitag App. at 1.) Freitag seeks an order from the Court authorizing payment on an interim basis of 80 percent—or \$24,548.76—of her fees, and 100 percent of her expenses. (*Id.*) The twenty percent holdback would be recoverable at the conclusion of the receivership. (*Id.*) Freitag also seeks \$10,188.00 in fees that were inadvertently omitted from Freitag's Third Interim Fee Application. (*Id.*) Twenty percent of this amount would also be held back until the completion of the receivership. (*Id.*)

The Receiver's work during the application period falls into the following six broad categories: (1) general receivership (14.1 percent of requested fees), (2) reporting (6.5 percent of requested fees), (3) operations and asset sales (16.1 percent of requested fees), (4) claims and distributions (58.0 percent of requested fees), (5) employment/fees (2.2 percent of requested fees), and (6) forensic accounting (3.0 percent of requested fees).¹ (*Id.* at 3.) As predicted in her last interim fee application, Freitag's requested fees for this period are 62.2 percent less than her last request.²

The Receiver's general receivership duties involved "income tax matters, agency requests, hearings, and website updates." (*Id.* at 5.) The Receiver indicates that her work in this category is "largely non-recurring and is expected to reflect minimal time on a go-forward basis." (*Id.*) The Receiver's total fees for this category equal \$4,330.80. (*Id.*)

The Receiver's reporting work focused on finalizing the Forensic Accounting Report and preparing the Third Interim Report. (*Id.*) The Receiver notes that the requested fees for this category have decreased substantially as a result of the Receiver's completion of the Forensic Account Report, but her work in this category will remain a

¹ The sum of these percentages is less than 100 percent due to rounding.

² If one adds the \$10,188.00 omitted from the previous application, the decrease is 66.4 percent.

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consistent expense—albeit at a lower amount—in future fee applications. (*Id.*) Total fees for this category amount to \$1,995.30. (*Id.*)

The Receiver’s operations & asset sales work primarily consisted of collecting Pensioner payments and analyzing Pensioner accounts. (*Id.* at 6.) Fees in this “crucially important” category are expected to be consistent in future fee application. (*Id.*) The Receiver’s requested fees for this category total \$4,940.55. (*Id.*)

The Receiver’s largest fee category is claims and distributions, which includes the Receiver’s work informing Pensioners and Investors about how the Forensic Accounting Report and the Court’s orders will affect their interests. (*Id.*) During the Fourth Interim Period, the receiver sent all Investors through certified return receipt mail a letter informing them about the claims process and their accounts. (*Id.*) To reduce costs, the Receiver has delegated primary responsibility to an associate who bills at a lower rate. (*Id.*) The Receiver expects expenses in this category to remain consistent in future fee application and emphasizes that this work “helps prevent misunderstandings, resolve certain Pensioner and Investor concerns, and resolve Pensioner collection issues” (*Id.* at 6-7.) Total fees for this category equal \$17,800.20 (*Id.* at 7.)

The Receiver’s work in last two categories consisted of preparing the Third Interim Fee Application (employment/fees, \$690.30) and finalizing the Receiver’s Forensic Accounting Report (forensic accounting, \$928.80). (*Id.*)

To support her fee request, Freitag provides a seven-page chart detailing each billing entry. A careful review of this chart reveals that four individuals performed work at hourly rates ranging from \$112.50 to \$265.50. (Timesheet, Exh. A, Doc. 131.) These rates are consistent with the rates proposed by Freitag in her application to serve as receiver and reflect a ten percent discount on Freitag’s regular billing rate. (Stip., Exh. A, “E3 Receiver Credentials,” at 2, Doc. 57-2.) Accordingly, this chart appears consistent with Freitag’s representation that she “anticipate[s] a blended hourly billing rate of less than \$225[.]” (*Id.*)

Separately, Freitag seeks to recover expenses totaling \$1,786.87 for postage and copies. (Freitag App. at 8.) The largest expense (\$1, 253.04) is the cost of the certified return receipt postage for the claim letters mailed to investors. (Itemized Expenses, Exh.

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A, Doc. 131.) In support of her request, Freitag submits an itemized chart detailing each expense. (*See id.*)

Finally, Freitag seeks \$10,188 for time inadvertently omitted from the Third Interim Fee Application. (Timesheet, Exh. B, Doc. 131.) All of this omitted work was performed by one associate during the first three weeks of July, and most of the omitted hours fall under the forensic accounting category (\$9,288). (Freitag App. at 4.)

The Court finds that all of the requested fees are reasonable and adequately supported. Based on the Application and the evidence submitted in support thereof, the Court concludes that Freitag's Application is reasonable. Accordingly, the Court ORDERS payment of 80 percent of Freitag's receivership fees and 100 percent of her requested expenses.

B. Matkins' Third Interim Application

Matkins' Application, which also covers the period from October 1, 2016 through December 31, 2016, seeks interim approval of \$35,832.15 in fees and \$447.84 in expenses. (Matkins App. at 1.) Like Freitag, Matkins requests an order authorizing interim payment of 80 percent—or \$28,658.52³—of the firm's fees and 100 percent of its expenses. (*Id.*) The firm's fees fall into the following five categories of work: (1) general receivership (0.4 percent), (2) asset investigation (43.4 percent), (3) reporting (26.0 percent), (4) claims and distributions (22.8 percent), and (5) employment/fees (7.4 percent). (*Id.* at 2.)

Matkins' general receivership work, totaling only \$155.25, consisted of advising the Receiver about certain media coverage about the case. (*Id.* at 3.)

Matkins' largest category of work during the Fourth Interim Period—asset investigation—related to 35 contracts where the Pensioner has entered bankruptcy and 11 contracts where the receivership entities had previously obtained a default judgment or entered a settlement agreement with the Pensioner. (*Id.*) Because the receivership entities

³ Eighty percent of \$35,823.15 is \$28,658.52, not \$28,665.72, as Matkins' Application states. (Matkins Ap. At 2.)

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had not maintained files that tracked these matters, Matkins had to create these records on its own. (*Id.*) The firm’s work involved reviewing case dockets and key filings, gathering information about pre-receivership collection activities, preparing necessary proofs of claim, representing the receivership’s interests in bankruptcy proceedings, and creating a log of bankruptcy cases. (*Id.* at 4-5.) In its Third Interim Fee Order, the Court noted that Matkins should delegate this or other time-intensive work to an associate with a lower billable rate in future applications. (Order at 7, Doc. 129.) In this Application, Matkins instead wrote off 8.5 hours of billed time. (Matkins App. at 4.) Considering this write-off, the Court finds that the \$15,563.70 billed for asset investigation is fair and reasonable.

The work performed under the third category—reporting—focused on drafting the Third Interim Report, which includes a detailed description of the Receiver’s activities during that quarter, and advising the Receiver about her Report and Recommendations. Total expenses for this category amount to \$9,288.45. (*Id.* at 5.)

Matkins’ work in the fourth category—claims and distributions—involved responding to inquiries from investors, pensioners, and their counsel; preparing the Receiver’s *ex parte* application regarding the resolution of claims disputes; and advising the Receiver in preparation for distributing the claim letters to Investors. (*Id.*) Total fees for the claims and distributions category equal \$8,176.50. (*Id.*)

The General Counsel’s work under the final fee category, “employment/fees,” consisted of preparing the Third Interim Fee Applications. (*Id.* at 6.) Total fees for this category amount \$2,639.25. (*Id.*)

In support of its Application, Matkins has submitted detailed billing records organized by the category of work performed. (Timesheets, Exh. A, Doc. 132.) These billing records indicate that four attorneys performed work on this case during the Fourth Interim period with hourly billing rates between \$409.50 and \$702.00. (*See id.* at 37.) The two practitioners who performed the vast majority of the work were partners with billing rates of \$517.50 and \$549.00. (*Id.* at 23, 25, 28, 30.) Additionally, the billing chart provides an itemized accounting of the expenses for which the firm seeks reimbursement.

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(Expenses, Exh. A, Doc. 132.) These expenses are for messenger services, parking, service of process, and document retrieval. (*See id.*)

The Court finds Matkins' fees and expenses fair and reasonable and ORDERS immediate payment of 80 percent of Matkins' requested fees and 100 percent of the firm's expenses.

IV. CONCLUSION

For the reasons stated above, the Court GRANTS both Freitag and Matkins' Applications. The Court ORDERS immediate payment of 80 percent—or \$24,548.76—of Freitag's fees, and 100 percent of her expenses. The Court further ORDERS payment of 80 percent of her fees omitted from the Third Interim Application (or \$8,150.40). Finally, the Court ORDERS immediate payment of 80 percent—or \$28,658.52—of Matkins' fees and 100 percent of the firm's expenses. The 20 percent holdback of each parties' fees will be recoverable, with the Court's approval, upon the conclusion of the receivership.

Initials of Preparer: tg