
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

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

Date: July 25, 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 FIFTH INTERIM APPLICATION FOR PAYMENT OF FEES AND REIMBURSEMENT OF EXPENSES (Doc. 142) AND (2) GRANTING GENERAL COUNSEL’S FIFTH INTERIM APPLICATION FOR PAYMENT OF FEES AND REIMBURSEMENT OF EXPENSES (Doc. 143)

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. 142; Allen Matkins App., Doc. 143.) 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 July 28, 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.)

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 entities. (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.) Finally, on March 22, 2017, the Court granted Freitag’s Fourth Interim Fee

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Application for \$30,685.95 in fees and \$1,786.87 in expenses and her General Counsel's request for \$35,832.15 in fees and \$447.84 in expenses. (Order at 8, Doc. 137.)

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

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“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).

III. DISCUSSION

A. Freitag’s Fifth Interim Application

Freitag’s Application, which covers the period from January 1, 2017 through March 31, 2017, seeks interim approval of \$50,256.45 in fees and \$5,504.47 in expenses. (Freitag App. at 1.) Freitag seeks an order from the Court authorizing payment on an interim basis of 80 percent—or \$40,205.16—of her fees, and 100 percent of her expenses. (*Id.*) The twenty percent holdback would be recoverable at the conclusion of the receivership. (*Id.*)

The Receiver’s work during the application period falls into the following six broad categories: (1) general receivership (4.4 percent of requested fees), (2) asset investigation and recovery (3.6 percent of requested fees), (3) reporting (2.7 percent of requested fees), (4) operations & asset sales (17.5 percent of requested fees), (5) claims & distributions (70.4 percent of requested fees), and (6) employment/fees (1.5 percent of requested fees).¹ (*Id.* at 2.) Freitag’s fee request represents a 63.8 percent increase compared to the Fourth Interim Fee Application but a 38.0 decrease compared to the Third Interim Fee Application.²

The first three categories involved comparatively small expenses. First, the Receiver’s general receivership duties related to “income tax matters, agency requests, and website updates.” (*Id.* at 4.) The Receiver asserts that her work in this category is “largely non-recurring” and will likely “reflect minimal time on a go-forward basis.” (*Id.*) The Receiver’s total fees for this category equal \$2,188.35. (*Id.*) Second, the Receiver’s asset investigation and recovery work concerned the proposed sale of the

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

² If one adds the \$10,188.00 omitted from the Third Interim Application, the decrease is 44.9 percent.

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Lynk Loan Participation and Pensioner collection activities. (*Id.* at 4-5.) Total fees for this category equal \$1,824.75. (*Id.* at 5.) Third, the Receiver’s reporting work, totaling \$1,333.35, focused on preparing the Fourth Interim Report. (*Id.*)

The receiver’s operations and asset sales work focused on “monthly Pensioner payment collections, analysis of pensioner accounts, commencement of reconciliations of more than 150 Pensioner power of attorney accounts and other operational matters.” (*Id.*) The Receiver says that the power of attorney account reconciliations are “ongoing[] but nonrecurring” (*Id.*) Overall, the Receiver describes her work in this category as “consistent” and “crucially important.” (*Id.*) Total fees for operations & asset sales amounted to \$8,780.40. (*Id.*)

By far the Receiver’s largest category was claims and distributions, accounting for \$35,359.65 in fees. (*Id.*) This category accounts for the Receiver’s work responding to “voluminous direct inquiries from Pensioners, Investors, agents and others” regarding the status of their investments or debts. (*Id.*) Because the claim letters were sent on December 30, 2016, this fee period included the Receiver’s work responding to Investor inquiries. (*Id.* at 6.) The Receiver notes that the claims process resulted in no disputes with investors. (*Id.*) To reduce costs in this category, the Receiver has created template responses and assigned an associate with a lower hourly rate to handle in the first instance inquiries from Pensioners and Investors. (*Id.* at 5-6.)

The last category, “employment /fees,” involved the Receiver’s time spent preparing the Fourth Interim fee request. (*Id.* at 6.) Total fees in this category amounted to \$769.95. (*Id.*)

In support of her fee application, Freitag submits a ten-page chart detailing the hours billed. A review of this chart shows that five practitioners with billing rates ranging from \$112.50 to \$265.00 performed work during this fee period. (Timesheets, Exh. A, Doc. 142.) 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

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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 \$5,504.47 for postage, copies, and other expenses. (Freitag App. at 7.) Nearly all the expenses (\$4,915.57) involve the costs of FedEx postage for Pensioner and Investor communications. In support of her request, Freitag submits an itemized chart detailing each expense. (*See id.*)

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’ Fifth Interim Application

Matkins’ Application, which also covers the period from January 1, 2017 through March 31, 2017, seeks interim approval of \$44,138.25 in fees and \$252.37 in expenses. (Matkins App. at 1.) Like Freitag, Matkins requests an order authorizing interim payment of 80 percent—or \$35,310.60—of the firm’s fees and 100 percent of its expenses. (*Id.*) The firm’s fees fall into the following seven categories of work: (1) general receivership (0.7 percent), (2) asset investigation (34.2 percent), (3) reporting (1.9 percent), (4) operations and asset sales (28.8 percent), (5) claims and distributions (25.4 percent), (6) third party recoveries (4.9 percent), and (7) employment/fees (4.1 percent). (*Id.* at 2.) Matkins’ fee request represent a 23.2 percent increase compared to the Fourth Interim Fee period.

Matkins’ general receivership work, totaling only \$310.50, consisted of responding to requests for information from the Superintendent and Wisconsin Division of Financial Securities. (*Id.* at 3.)

Asset investigation—Matkins’ largest category of work during the Fifth Interim Period—covers its work representing the Receiver’s interests in thirty-five contracts where the Pensioner has entered bankruptcy and eleven contracts where the receivership entities have obtained default judgments or settlements. (*Id.* at 3.) Because the

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receivership entities 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 3-4.) Like in the Fourth Interim Fee request, Matkins has written off 7.0 hours of billed time. (*Id.*) Considering this write-off, the Court finds that the \$15,115.95 billed for asset investigation is fair and reasonable. (*Id.* at 4.)

The work performed under the third category—reporting—consisted of drafting the Fourth Interim Report, which includes a detailed description of the Receiver’s activities during that quarter. (*Id.* at 5.) Total expenses for this category amount to \$828.00. (*Id.*)

Matkins’ operations and asset sales work related to preparing the documents necessary for the Lynk Loan Participation sale to Willow Partners, LLC. (*Id.*) Lynk has agreed to reimburse \$9,278.30 of Matkins’ fees at the close of the transaction. (*Id.*) Total fees for this category equal \$12,717.45. (*Id.*)

Matkins’ work in the fourth category, claims and distributions, focused on responding to inquiries from investors, pensioners, and their counsel; and advising the Receiver on the rising tide methodology and the treatment of certain claims. (*Id.* at 5-6.) Matkins also assisted with various meet-and-confer sessions with the Superintendent and the CFPB. (*Id.* at 6.) Matkins’ fees for this category total \$11,200.05. (*Id.*)

The third party recoveries fee category, totaling \$2,155.05, encompassed Matkins’ work evaluating jurisdictional and forum selection concerns regarding anticipated collection litigation against defaulted Pensioners. (*Id.*)

The General Counsel’s work under the final fee category, “employment/fees,” consisted of preparing the Fourth Interim Fee Applications. (*Id.* at 6.) Total fees for this category amount \$1,811.25. (*Id.* at 7.)

In support of its Application, Matkins has submitted detailed billing records organized by the category of work performed. (Timesheets, Exh. A, Doc. 143.) These billing records indicate that five attorneys performed work on this case during the Fourth Interim period with hourly billing rates between \$283.50 and \$702.00. (*See id.* at 37.)

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The three practitioners who performed the vast majority of the work were partners with billing rates of \$454.50, and \$517.50 and \$549.00. (*Id.* at 12, 24, 25, 34, 36, 38, 40.) Additionally, the billing chart provides an itemized accounting of the expenses for which the firm seeks reimbursement. (Expenses, Exh. A, Doc. 143.) These expenses are for messenger services, legal research, copies, and postage. (*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 \$40,205.16—of Freitag’s fees, and 100 percent of her expenses. Further, the Court ORDERS immediate payment of 80 percent—or \$35,310.60—of Matkins’ fees and 100 percent of the firm’s expenses. The 20 percent holdback of each applicant’s fees will be recoverable, with the Court’s approval, upon the conclusion of the receivership.

Initials of Preparer: tg