
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

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

Date: July 7, 2016

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 FIRST INTERIM APPLICATION FOR PAYMENT OF FEES AND REIMBURSEMENT OF EXPENSES (Doc. 88), AND (2) GRANTING ALLEN MATKINS’ FIRST INTERIM APPLICATION FOR PAYMENT OF FEES AND REIMBURSEMENT OF EXPENSES (Doc. 89)

Before the Court are two First Interim Applications filed by Krista Freitag, the court-appointed receiver, and Allen Matkins, her general counsel, respectively. (Freitag App., Doc. 88; Allen Matkins App., Doc. 89.) The Court finds this matter 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 8, 2016 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. (Complaint, 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-

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sum 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 (Stipulation, Doc. 57), 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 April 29, 2016, Freitag filed her First Interim Report (“FIR”), which covered activities occurring between January 8, 2016 and March 31, 2016. (FIR, Doc. 87.) According to the FIR, “[o]n or about January 8, 2016 . . . the Receiver took control of the Receivership Entities, their books and records, bank accounts and assets.” (*Id.* at 1.) As of March 31, 2016, according to the FIR, “the Receiver has secured and recovered \$1.17 million in cash and a \$1.1 million participating interest in a commercial real estate loan.” (*Id.*) Additionally, “the Receiver promptly assumed responsibility of all service operations and collections,” and initiated the early stages of a forensic accounting, as directed in the Court’s Preliminary Injunction. (*Id.* at 2.)

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.”

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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 First Interim Application

Freitag's Application, which covers the period from January 8, 2016 through March 31, 2016, seeks interim approval of \$81,889.65 in fees and \$7,926.77 in expenses. (Freitag App. at 1.) Freitag seeks an order from the Court authorizing payment, on an interim basis, of eighty percent – or \$65,511.72 – of her fees, and one hundred percent of her expenses. (*Id.*) The twenty-percent holdback would be recoverable at the conclusion of the receivership. (*Id.*)

According to her Application, the receiver's work thus far falls into the following six categories: (1) general receivership (26 percent of requested fees), (2) asset investigation and recovery (17 percent of requested fees), (3) reporting (less than 1 percent of requested fees), (4) operations and asset sales (14 percent of requested fees), (5) claims and distributions (19 percent of requested fees), and (6) forensic accounting (23 percent of requested fees). (*Id.* at 3.) At a general level, Freitag asserts that “[t]he initial phase of a complex equity receivership always involves substantial work” related to the recovery of assets, notification of affected parties, and transitioning management of the receivership entities. (*Id.*) However, Freitag suggests that “[a]s this type of receivership progresses, fees and costs generally decline as the assets are secured and protected, operations are stabilized, and procedures for the efficient administration of receivership are put in place.” (*Id.*)

Freitag provides a description of each category of work completed to date. With regards to her general receivership duties, Freitag states that the initial work focused on “taking over and securing the Receivership Entities’ assets, books and records” and “coordinating imaging of the receivership estate’s electronic devices and physical books and records.” (*Id.* at 6.) Additionally, this work included “setting up case-specific lines of communication and a designated website to provide salient case documents and contact information for Pensioners and Investors,” and “noticing the Pensioners, Investors and other vendors[.]” (*Id.*) Freitag adds that much of “[t]his work is largely non-recurring,” and, therefore, costs in this area are likely to be reduced as the

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receivership progresses. (*Id.*) Total fees relating to her general receivership duties amount to \$21,209.85. (*Id.*)

The second category of work relates to asset investigation and recovery. (*Id.* at 6.) According to the Application, much of this work, “[i]n addition to securing the Receivership Entity bank accounts,” related to investigating and securing “the Receivership Entities’ \$1.2 million (now \$1.1 million) participating interest in a commercial real estate loan.” (*Id.* at 6.) Additionally, “the Receiver discovered an additional and similar participating interest previously held in the name of a Receivership Entity retirement account[.]” (*Id.* at 6.) An “analysis of these transfers and potential claims arising therefrom is ongoing.” (*Id.* at 7.) Total fees arising from this category of work equal \$13,647.15. (*Id.*)

The third category of work relates to reporting. (*Id.*) For the current reporting period, this category accounts for less than one percent of the total fees requested and much of the work involved preparation of the motion in aid of receivership. (*Id.*) Total fees arising from this category of work amount to \$371.70. (*Id.*)

The next category of work relates to operations and asset sales. (*Id.*) According to the Application, “the Receiver’s time in this category primarily reflects the initial transition and assumption of Pensioner payment collections.” (*Id.*) Freitag adds that she anticipates this fee category to “be a consistent fee category[.]” (*Id.*) Total fees relating to this category currently amount to \$11,169.45. (*Id.*)

The fifth category of work relates to claims and distributions. Freitag asserts that she “worked to respond to voluminous direct inquiries” from affected parties. (*Id.*) Here, too, Freitag anticipates that work in this category will “continue to be steady” as the receivership progresses. (*Id.* at 8.) The total fees relating to this category amount to \$15,357.15. (*Id.*)

The final category of work for which fees are sought relates to forensic accounting. (*Id.*) Because “the Receivership Entities’ books and records do not reflect each individual Pensioner and Investor[’s] [sic] account activity,” Freitag asserts that “the Court-ordered forensic accounting is necessary to enable the Receiver to propose a methodology . . . for determining how to unwind or otherwise resolve the Pensioner and Investor transactions [that are the] [sic] subject of this case.” (*Id.*) Freitag further

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provides that “[d]ue to the high volume of transactions and the lack of a thorough and centralized accounting system, the forensic accounting project will take time to complete.” (*Id.*) Nevertheless, Freitag anticipates completing the project during the next quarterly reporting period. (*Id.*) Much of the work thus far completed relates to “the preparation of the global forensic analysis template, and the accounting for the majority of the 2015 transactional activity in all Receiver Entity bank accounts.” (*Id.*) The total fees arising from this category of work are \$20,134.35. (*Id.*)

In support of these various fee categories, Freitag submits a thirteen-page chart detailing each time entry for which she seeks to recover fees. (App., Ex. A, Doc. 88.) A careful review of this chart reveals that five different individuals performed work in aid of the receivership at hourly rates ranging from \$112.50 to \$265.50. (*Id.*) These rates are consistent with rates proposed by Freitag in her application to serve as receiver, and reflect a ten percent discount on Freitag’s and E3’s regular billing rates. (Stipulation, Ex. A, “E3 Receiver Credentials,” at 2, Doc. 57-2.) Moreover, the chart appears consistent with Freitag’s prior assertion that she “anticipate[s] a blended hourly billing rate of less than \$225[.]” (*Id.*)

Separately, Freitag seeks to recover expenses totaling \$7,926.77. (Freitag App. at 9.) The bulk of these fees relate to “the forensic computer imaging and the imaging of all the Receivership Entities’ physical records,” which, according to the Application, “proved more cost-effective than independently shipping such records to southern California from the Bay Area.” (*Id.*) In support of the expense request, Freitag submits an itemized chart detailing each expense. (App., Ex. A at 27, Doc. 88.)

Although the Court finds that all of the requested fees are reasonable and adequately supported, the Court cautions Freitag to be vigilant in managing costs, especially in relation to the claims and distributions category. In the instant application, these fees totaled \$15,357.15. Much of this work relates to reviewing and responding to inquiries from affected parties. The Court recognizes the importance and significance, especially at these early stages, of carefully reviewing this correspondence, and, at this stage, approves Freitag’s direct engagement in this work at a rate of \$265.60 per hour. However, should the volume of such correspondence increase overtime, the Court instructs Freitag to identify ways to manage these inquiries efficiently and in a cost-

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effective manner, which may involve standardization of responses via electronic means and/or increased use of individuals with lower hourly rates.

Based on the Application and the evidence submitted in support thereof, the Court concludes that Freitag’s initial Application is reasonable. Accordingly, the Court ORDERS immediate payment of eighty percent of Freitag’s receivership fees and one hundred percent of her requested expenses.

B. Allen Matkins’ First Interim Application

Allen Matkins’ Application, which covers the period from January 8, 2016 through March 31, 2016, seeks interim approval of \$36,163.35 in fees and \$2,057.79 in expenses. (Allen Matkins App. at 1.) Like Freitag, Allen Matkins requests an order authorizing interim payment of eighty percent – or \$28,930.68 – of its fees and one hundred percent of the firm’s expenses. (*Id.*) The firm’s fees relate to the following four categories of work: (1) general receivership (31 total hours), (2) asset investigation (46.40 total hours), (3) operations and asset sales (.80 total hours), and (4) claims and distribution (4.60 total hours). (*Id.* at 2.)

For Allen Matkins, the work relating to general receivership duties focused on “review and analysis of key orders and pleadings” and on assisting the receiver “in promptly filing the Complaint and Appointment Order in other judicial districts in which the Receivership Entities’ own assets or have property interests,” which included Northern California, Florida, and Maryland. (*Id.* at 3.) Finally, the firm’s work in this category “included reviewing and analyzing pleadings and documents filed in the Chapter 13 bankruptcy case of Defendant Edwin Lichtig,” work that was necessary to “advise the Receiver regarding the impact of the bankruptcy on the receivership.” (*Id.* at 4.) The total fees arising from this category of work amount to \$15,676.20. (*Id.*)

The second category of work relates to asset investigation. (*Id.*) Work in this category amounts to more than half of the firm’s requested fees. (*Id.* at 2.) According to the Application, much of the time in this category related to “reviewing and advising the Receiver regarding the Receivership Entities’ rights and interests under the \$1.1 million loan participation interest[.]” (*Id.* at 4.) Also included in this category, however, were

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“eight subpoenas to banks, financial institutions, and other third parties to obtain documents necessary to the Receiver’s investigation and accounting.” (*Id.* at 5.) Fees in this category total \$17,862.75. (*Id.* at 2.)

The remaining two categories of work, which relate to operations and assets sales and claims and distributions, respectively, account for just over five hours of billed time. (*Id.* at 2.) Much of this time was spent “reviewing and preparing letters giving notice of the receivership” to affected parties and in “responding to . . . specific inquiries and communications.” (*Id.* at 5.) The aggregate fees from these two categories amount to \$2,624.40. (*Id.*) Additionally, Allen Matkins seeks to recover \$2,057.79 in expenses. (*Id.* at 5.) The bulk of these costs relate to properly serving each of the eight subpoenas issued to third parties. (*Id.*)

In support of its Application, Allen Matkins submits detailed billing records, organized by the category of work performed, that document the time spent on this matter and for which the firm seeks to recover fees. (Allen Matkins App., Ex. A, “Allen Matkins Billing Records,” Doc. 89.) These billing records reflect that five attorneys have performed work on this case, with hourly billing rates between \$229.50 and \$670.50. (*Id.* at 29.) The bulk of the work on this matter has thus far been performed by Edward Fates, a partner whose hourly rate is \$486. (*Id.* at 18, 29.) These rates are consistent with the rates proposed in Freitag’s motion in aid of receivership, which were previously represented to be “comparable or less than those charged by attorneys in Southern California with similar levels of skill and experience[.]” (Mot. at 13, Doc. 71.) Freitag previously submitted to the Court detailed biographies of each attorneys’ relevant experience in similar manners. (*Id.*, Ex. A, “Attorney Biographies,” Doc. 71.) Additionally, the billing chart also provides an itemized accounting of each expense for which the firm seeks to recover. (Allen Matkins Billing Records at 15-16, 30.)

Based on Allen Matkins’ Application and the evidence in support thereof, the Court concludes that the requested fees and expenses are reasonable. Accordingly, the Court ORDERS immediate payment of 80 percent of Allen Matkins’ requested fees and 100 percent of the firm’s expenses.

IV. CONCLUSION

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For the reasons stated above, the Court GRANTS both Freitag's and Allen Matkins' Applications. The Court ORDERS immediate payment of eighty percent – or \$65,511.72 – of Freitag's fees, and one hundred percent of her expenses. Additionally, the Court ORDERS immediate payment of eighty percent – or \$28,930.68 – of Allen Matkins' fees and one hundred percent of the firm's expenses. The twenty-percent holdback of each parties' fees will be recoverable, with the Court's approval, upon conclusion of the receivership.

Initials of Preparer: tg