Docket #0247 Date Filed: 8/7/2014

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
Central Division

In re: TELEXFREE, LLC, TELEXFREE, INC., and TELEXFREE FINANCIAL, INC., Debtors.	Chapter 11 Case Nos. 14-40987-MSH, 14-40988-MSH, 14-40989-MSH (Jointly Administered)
ANTHONY CELLUCCI, JAMILLY LAKE, and GERIVALDO PACHECO–PUTATIVE CLASS REPRESENTATIVES AND THOSE SIMILARLY SITUATED, Plaintiffs, v. TELEXFREE, INC, f/k/a COMMON CENTS COMMUNICATIONS, INC. et al., Defendants.	Adversary Proceeding No. 14-04057-MSH

TRUSTEE' MOTION TO STAY THE ACTION

The Plaintiffs, Anthony Cellucci, Jamilly Lake and Gerivaldo Pacheco (the "Plaintiffs") have brought a Complaint against the Debtors and numerous other entities and individuals asserting numerous claims for violation of federal and state securities law and common law claims, including claims for fraud and misrepresentation. The Complaint, which seeks class action certification, consists of 605 paragraphs encompassing 95 pages and many of the factual allegations substantially parallel those in complaints filed by, among others, the Securities and Exchange Commission and the Massachusetts Division of Securities against the Debtors and others. Contemporaneously with filing the Complaint, the Plaintiffs filed a Motion to Withdraw

1440987160516000000000071

the Reference (the "Withdrawal Motion"). In addition to this Complaint, there is a second complaint[1] filed against the Debtors in this Court which is substantially similar to the present Complaint, and there are numerous complaints[2] filed in various jurisdictions asserting substantially the same claims against substantially the same defendants, except the Debtors are not parties to those actions.

The Trustee moves that the Court enter an order Staying the Action on the bases that (a) as to the Debtors, the Complaint in substance asserts no more than a claim to recover the amount allegedly owed to the claimant, which can be most expeditiously and efficiently handled as part of the claims process; (b) the claim against the Debtors should not be joined with the numerous securities and other claims involving the numerous defendants; (c) to allow the litigation to continue against the Debtors will embroil the Trustee in complex securities litigation involving numerous parties and claims involving costly discovery and motion practice, all of which will exponentially increase the cost to the estate with no corresponding benefit; and (d) as to the Debtors, the class certification may not be appropriate, because a central issue to resolving the individual claims will be the netting of the debits and credits as to each claimant. Accordingly the Trustee respectfully prays that the Court enter an Order Staying the Actions.

In further support of his request for a Stay, the Trustee states as follows:

PROCEDURAL STATEMENT

1. On April 13, 2014, TelexFree LLC, TelexFree, Inc. and TelexFree Financial, Inc. each filed petitions for relief under Chapter 11 of the United States Bankruptcy Code. The

[1] *Waldemara Martin and Leandro Valentin v. TelexFree, Inc., et al.*, Adversary Proceeding No. 14-04044-MSH.
[2] *Reverend Jeremiah Githere, et al. v. TelexElectric LLP, et al.* (C.A. 14-12825 (D.Mass.); *Ferguson, et al. v. TelexElectric, LLP*, C.A. 5:14-cv-00316-D (EDNC); *Guevara v. Merrill, et al.*, D.A. 1:14-cv-22405 (S.D. Fla.) and *Cook v. TelexElectric LLLP, et al.*, C.A. 2:14-cv-00134 (N.D. Ga.).

petitions were initially filed with the United States Bankruptcy Court for the District of Nevada. Subsequently, the cases were transferred to this Court.

2. In filing their cases, the Debtors represented that they operated a telecommunication business that used multi-level marketing to assist in the distribution of Voice over Internet Protocol telephone services. However, in fact, the Debtors were operating a pyramid scheme whereby they would solicit members and the payment of membership fees with promises of substantial returns for placing TelexFree advertisements and for recruiting additional individuals.

3. Within two days of the commencement of the Debtors' cases, on April 15, 2014, the Securities and Exchange Commission ("SEC") commenced an action against the Debtors, and others, in the United States District Court for the District of Massachusetts, alleging, among other things, that the Debtors were engaged in an illegal pyramid scheme and were raising funds through fraudulent and unregistered offerings of securities. Shortly after the commencement of the action by the SEC, various federal agencies effectuated a search of the Debtors' premises in Marlborough, Massachusetts, and seized numerous computers, servers and other assets of the Debtors, including millions of dollars in cashier's checks.

4. On June 6, 2014, the United States Bankruptcy Court authorized the appointment of a trustee, and Stephen B. Darr was duly appointed as the Chapter 11 Trustee for the Debtors' bankruptcy estates.

TRUSTEE'S ACTIONS

5. Since his appointment, the Trustee has been diligently working to develop an understanding of the Debtors' business, assets, potential claims, and to develop a procedure to ascertain the victims of the Debtors' pyramid scheme. One of the major tasks before the Trustee is to develop an appropriate procedure to consider the claims and determine the true value of the claims.

6. The Trustee's efforts to carry out his investigations have been hampered by a lack of information. As noted, prior to his appointment, the United States Government had seized substantially all of the Debtors' financial records, the Debtors' principals have been indicted, and the Trustee is only now beginning to receive information, both from the Government and as a result of various requests served upon third parties.

7. One of the primary issues the Trustee needs to address in connection with the claims is to determine the actual amount of the creditor's loss by ascertaining (a) how much the creditor actually invested in dollars, (b) how much of the creditor's claim is based upon fees and commissions earned through participation in the pyramid scheme, and (c) how much, if any, the creditor was paid by the Debtors. The net would be, in the Trustee's view, the appropriate amount of the creditor's claim.

8. The Trustee has been led to believe that the number of creditors/victims could be in the hundreds of thousands.

9. Currently, the Trustee has minimal funds available, and while the Trustee anticipates recovering additional funds, the resources of the estates are clearly limited and should

be utilized to address compensation to the victims,[3] and should not be expended by becoming embroiled in the purported class action litigation.

ARGUMENT

While, as a general proposition, the automatic stay does not prevent a creditor from commencing an adversary proceeding against the debtor or its trustee in the bankruptcy court where the debtor's case is pending, the rule does not have universal application. *See Cellceutix Corp. v. Nickless (In re Formatech)*, 496 B.R. 26 (Bankr. D. Mass. 2013).

A closer examination of the underlying complaint reveals that the cases establishing that rule all involved forms of equitable relief seeking a determination with respect to the existence of the claim, such as actions for rescission and constructive trust, as opposed to the amount of the claim. For example, *see Kesar, Inc. v. Unimark LLC (In re Unimark LLC)*, 405 B.R. 113 (Bankr. D. Del. 2009) (complaint for rescission); and *Dibbern v. Adelphia Commc'ns Corp.*, 325 B.R. 89 (Bankr. S.D.N.Y 2005) (complaint for constructive trust).

While the Plaintiffs' action contains claims for equitable relief, the principal claim as asserted against the Debtors, as opposed to the other Defendants, seeks to establish damages and is, therefore, duplicative of the claim process itself. Accordingly, the Plaintiffs' action as against the Debtors should not be proceeding as an adversary proceeding, but should be addressed through the claims process. *See*, for example, *Healy/Mellon-Stuart Co. v. Coastal Group, Inc.*, 100 B.R. 177 (Bankr. D. Del. 1989); and *Sears Roebuck & Co. v. Penney*, 76 B.R. 160 (Bankr. N.D. Cal. 1987).

Additionally, as noted above, the determination of individual creditors' claims in the present case does not lend itself well to a class action proceeding. Each claim needs to be

[3] The Trustee is cooperating with the Securities and Exchange Commission and the United States Attorney to coordinate an approach to maximize the recovery to victims of the pyramid scheme. One of the principal goals of the cooperative approach is to maximize the recovery by controlling the cost of administration of the Estates.

reviewed so that the amount that represents the true value of the claim can be ascertained. As noted, it is expected that many of the claims will include not only the amount actually invested, but also will assert commission due and not reflect payments having been received. However, to accurately determine what each victim lost, it is necessary to net out against the actual investment payments received. *See Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC (In re Bernard L. Madoff Investment Securities LLC)*, 424 B.R. 122, 132, 141-42 (Bankr. S.D. NY 2010) (in order to distinguish net winners from net losers it is necessary to net out cash received from cash invested), affirmed *In re Bernard L. Madoff Investment Securities LLC*, 654 F.3d 229 (2d Cir. 2011) (specifically affirming net equity method).

The Court has the inherent power to stay proceedings. *Landis v. North American Co.*, 299 U.S. 248, 255 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants."). In considering the Trustee's request for a stay of the action, the Court should also consider the impact allowing the litigation to proceed will have upon the assets of the estate. Should this and the companion case of *Waldemara Martin* be permitted to proceed, the Trustee will be required to expend substantial amounts of money defending the estate, which will deplete the limited funds available to the Trustee and ultimately diminish any recovery by the victims.

WHEREFORE, the Trustee respectfully prays that the Court stay further proceedings in this matter, and for such other and further relief as the Court deems just and proper.

STEPHEN DARR AS HE IS THE DULY APPOINTED TRUSTEE OF THE CHAPTER 11 ESTATES OF TELEXFREE LLC, TELEXFREE, INC. AND TELEXFREE FINANCIAL, INC.

By his attorneys,
MURPHY & KING, P.C.

/s/ Charles R. Bennett, Jr.

Charles R. Bennett, Jr. (BBO #037380)
Murphy & King, P.C.
One Beacon Street
Boston, MA 02108
Telephone: (617) 423-0400
Email: CBennett@murphyking.com

Dated: August 7, 2014

CERTIFICATE OF SERVICE

I, Charles R. Bennett, Jr., hereby certify that on August 7, 2014, I caused a copy of the foregoing document to be served by operation of the Court's CM/ECF system upon the following parties:

- Roger Bertling rogerbertling@yahoo.com, rbertlin@law.harvard.edu
- Robert J. Bonsignore rbonsignore@class-actions.us, jlent@class-actions.us
- C. Elizabeth Brady Murillo emurillo@burnslev.com
- Alan L. Braunstein abraunstein@riemerlaw.com, ahall@riemerlaw.com
- Douglas Brooks dbrooks@libbyhoopes.com
- John Commisso john.commisso@jacksonlewis.com
- Ronald A. Dardeno rdardeno@dardeno.com
- Martin B. Dropkin nmatza@hotmail.com, nastor@dropkinmatza.com;mdropkin@dropkinmatza.com
- Stuart M. Glass sglass@choate.com
- William J. Hanlon whanlon@seyfarth.com, bosdocket@seyfarth.com
- Carol E Head carol.head@bingham.com
- Lawrence P. Heffernan lheffernan@rc.com, kberardi@rc.com
- Nellie E Hestin nhestin@reedsmith.com, lsizemore@reedsmith.com;jdoolittle@reedsmith.com;mkrizan@reedsmith.com
- Paul V. Kelly paul.kelly@jacksonlewis.com
- Danielle Andrews Long dlong@rc.com, jsantiago@rc.com
- S. Elaine McChesney Elaine.mcchesney@bingham.com
- Michael K. O'Neil moneil@murphyking.com, imccormack@murphyking.com
- Lee M. Pollack lmpollack@jonesday.com
- Ian D. Roffman iroffman@nutter.com, epleadings@nutter.com;cfeldman@nutter.com;kcannizzaro@nutter.com
- Mark C. Rossi Esher.RossiECF@gmail.com, Esher.RossiECF2@gmail.com
- Paul S. Samson psamson@riemerlaw.com
- Kenneth I. Schacter kenneth.schacter@bingham.com
- Ari M. Selman ari.selman@bingham.com
- Jordan L. Shapiro JSLAWMA@aol.com
- Monica Snyder msnyder@murthalaw.com, kbratko@murthalaw.com
- Joseph Toomey jtoomey@nutter.com
- Thomas S. Vangel tvangel@murthalaw.com
- Sarah W. Walsh sarah.walsh@jacksonlewis.com
- Jason C. Weida jweida@jonesday.com

/s/ Charles R. Bennett, Jr.
Charles R. Bennett, Jr.

673862