

**United States Bankruptcy Court
District of Massachusetts (Worcester)
Adversary Proceeding #: 15-04055**

Assigned to: Judge Melvin S. Hoffman

Date Filed: 10/07/15

Lead BK Case: 14-40987

Lead BK Title: Telexfree, LLC

Lead BK Chapter: 11

Demand:

Nature[s] of Suit: 91 Declaratory judgment
72 Injunctive relief –
other

Plaintiff

Stephen Darr
Huron Consulting Services, LLC

represented by **Charles R. Bennett, Jr.**
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V.

Defendant

**Rita Dos Santos, Individually and as
Putative Class Representative**

represented by **William R. Baldiga**
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LEAD ATTORNEY



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Filing Date	#	Docket Text
10/07/2015	<u>1</u>	Adversary case 15-04055. Complaint by Stephen Darr against Rita Dos Santos, Individually and as Putative Class Representative. Fee Amount \$350. Nature of Suit(91 (Declaratory judgment)),(72 (Injunctive relief - other))(Bennett, Charles) (Entered: 10/07/2015)
10/07/2015	<u>2</u>	Brief/Memorandum In Support of <i>Preliminary Injunction</i> (Re: <u>1</u> Complaint) filed by Plaintiff Stephen Darr (Murphy, Harold) (Entered: 10/07/2015)
10/07/2015	<u>3</u>	Affidavit of Stephen B. Darr (Re: <u>1</u> Complaint) filed by Plaintiff Stephen Darr (Murphy, Harold) (Entered: 10/07/2015)
10/07/2015		Receipt of filing fee for Complaint(15-04055) [cmp,cmp] (350.00). Receipt Number 15028530, amount \$ 350.00 (re: Doc# <u>1</u>) (U.S. Treasury) (Entered: 10/07/2015)
10/08/2015	<u>4</u>	Summons Issued on Rita Dos Santos, Individually and as Putative Class Representative Answer Due 11/9/2015. Summons must be served within seven (7) days of issuance. (mhussey, Usbc) (Entered: 10/08/2015)
10/09/2015	<u>5</u>	Motion filed by Plaintiff Stephen Darr For Order (Re: <u>1</u> Complaint) for <i>Scheduling Order Regarding Trustee's Request for Preliminary Injunction</i> with certificate of service. (Bennett, Charles) (Entered: 10/09/2015)
10/19/2015	<u>6</u>	Summons Service Executed on Rita Dos Santos, Individually and as Putative Class Representative 10/14/2015 (Condon, Christopher) (Entered: 10/19/2015)
11/06/2015	<u>7</u>	Stipulation By Defendant Rita Dos Santos, Individually and as Putative Class Representative and between Plaintiffs' Interim Executive Committee, on Behalf of Rita dos Santos, Individually and as Putative Class Representative and Stephen B. Darr as Trustee of the Estates of TelexFree, LLC, TelexFree, Inc. and TelexFree Financial, Inc. <i>Extending Deadline to Answer Adversary Complaint</i> with certificate of service (Re: <u>1</u> Complaint) filed by Defendant Rita Dos Santos, Individually and as Putative Class Representative (Baldiga, William) (Entered: 11/06/2015)
11/12/2015	<u>8</u>	Endorsed Order Dated 11/12/15 Re: <u>7</u> Stipulation filed by Defendant Rita Dos Santos, Individually and as Putative Class Representative. ALLOWED. (mhussey, Usbc) (Entered: 11/12/2015)
11/14/2015	<u>9</u>	BNC Certificate of Mailing - PDF Document. (Re: <u>8</u> Order) Notice Date 11/14/2015. (Admin.) (Entered: 11/15/2015)
12/11/2015	<u>10</u>	Answer to Complaint with certificate of service filed by Rita Dos Santos, Individually and as Putative Class Representative. (Baldiga, William) (Entered: 12/11/2015)
01/19/2016	<u>11</u>	Order of District Court Judge Timothy C. Hillman Dated 1/15/16 Withdrawing the Reference of the Adversary Proceeding to the Bankruptcy Court. See Order For Full Text. (jr) (Entered: 01/19/2016)
01/20/2016	<u>12</u>	Status Conference Scheduled for 1/26/2016 at 10:00 AM at Boston Courtroom 2, 12th Floor, 5 Post Office Square, Boston, MA 02109. (rmb, USBC) (Entered: 01/20/2016)

01/22/2016		<u>13</u>	Order dated 1/22/2016 Re: <u>1</u> Complaint filed by Plaintiff Stephen Darr. See Order for Full Text. (meh, Usbc) (Entered: 01/22/2016)
01/22/2016		<u>14</u>	BNC Certificate of Mailing – Hearing. (Re: <u>12</u> Hearing Scheduled) Notice Date 01/22/2016. (Admin.) (Entered: 01/23/2016)
01/24/2016		<u>15</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>13</u> Order) Notice Date 01/24/2016. (Admin.) (Entered: 01/25/2016)
01/26/2016		<u>16</u>	Order dated 1/26/2016 Re: <u>1</u> Complaint filed by Plaintiff Stephen Darr. STATUS CONFERENCE HELD. WITHIN THIRTY DAYS, THE CHAPTER 11 TRUSTEE MAY AMEND HIS COMPLAINT AND THE PARTIES SHALL FILE THEIR RULE 26(F) CERTIFICATION. (meh, Usbc) (Entered: 01/26/2016)
01/28/2016		<u>17</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>16</u> Order) Notice Date 01/28/2016. (Admin.) (Entered: 01/29/2016)
02/09/2016			Transcript Ordered and Acknowledged. Requested by Kiersten Taylor, Esq. and payment received. The expected completion date is 09/29/2016. (Janice Russell Transcripts) (Entered: 02/09/2016)
02/09/2016		<u>18</u>	An official transcript (RE: <u>12</u> Status Conference Scheduled) heard on 01/26/16 has been filed. Pursuant to Judicial Conference Policy, electronic access to transcripts is restricted for 90 days from the date of filing. The transcript is available for inspection at the Clerk's Office or a copy may be purchased from the transcriber. Contact the ECR Operator for transcriber information. Parties have until 03/1/2016 to file a Request for Redaction with the Court. If no request is filed, the transcript may be made available electronically on 05/10/2016. (Janice Russell Transcripts) (Entered: 02/09/2016)
02/10/2016		<u>19</u>	Notice of Filing of Official Transcript. Notice is hereby given that an official transcript has been filed. Pursuant to the Judicial Conference policy governing public access to transcripts of federal court proceedings, transcripts are not electronically available(online) until 90 days after filing but may be inspected by clerk's office or purchased from the court transcriber during the 90–day period. (ADI) (Entered: 02/10/2016)
02/12/2016		<u>20</u>	BNC Certificate of Mailing. (Re: <u>19</u> Notice of Filing of Official Transcript) Notice Date 02/12/2016. (Admin.) (Entered: 02/13/2016)
02/26/2016		<u>21</u>	Amended Complaint by Charles R. Bennett Jr. on behalf of Stephen Darr against Rita Dos Santos, Individually and as Putative Class Representative. (RE: related document(s) <u>1</u> Adversary case 15–04055. Complaint by Stephen Darr against Rita Dos Santos, Individually and as Putative Class Representative. Fee Amount \$350. Nature of Suit(91 (Declaratory judgment)),(72 (Injunctive relief – other)) filed by Plaintiff Stephen Darr). (Bennett, Charles) (Entered: 02/26/2016)
03/03/2016		<u>22</u>	Order dated 3/3/2016 Re: <u>5</u> Motion filed by Plaintiff Stephen Darr For Order Re: (<u>1</u> Complaint) for Scheduling Order Regarding Trustee's Request for Preliminary Injunction. See Order for Full Text. (meh, Usbc) (Entered: 03/03/2016)
03/05/2016		<u>23</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>22</u> Order on Motion for Order/Authority) Notice Date 03/05/2016. (Admin.) (Entered: 03/06/2016)

03/17/2016	<u>24</u>	Response <i>Plaintiffs' Interim Executive Committee's Response to Order on Trustee's Motion for Order for Scheduling Order Regarding Trustee's Request for Preliminary Injunction</i> with certificate of service filed by Interested Party Plaintiffs' Interim Executive Committee Re: <u>5</u> Motion filed by Plaintiff Stephen Darr For Order (Re: <u>1</u> Complaint) <i>for Scheduling Order Regarding Trustee's Request for Preliminary Injunction</i> with certificate of service., <u>22</u> Order dated 3/3/2016 Re: <u>5</u> Motion filed by Plaintiff Stephen Darr For Order Re: (<u>1</u> Complaint) for Scheduling Order Regarding Trustee's Request for Preliminary Injunction. See Order for Full Text. (Baldiga, William) (Entered: 03/17/2016)
03/22/2016	<u>25</u>	Status Conference Scheduled for 4/13/2016 at 10:00 AM at Boston Courtroom 2, 12th Floor, 5 Post Office Square, Boston, MA 02109. (rmb, USBC) (Entered: 03/22/2016)
03/24/2016	<u>26</u>	BNC Certificate of Mailing – Hearing. (Re: <u>25</u> Hearing Scheduled) Notice Date 03/24/2016. (Admin.) (Entered: 03/25/2016)
04/04/2016	<u>27</u>	DISREGARD– Answer to Complaint with certificate of service filed by Rita Dos Santos, Individually and as Putative Class Representative. (Baldiga, William) CORRECTIVE ENTRY– Document #29 is the corrected version. (Entered: 04/04/2016)
04/05/2016	<u>28</u>	Order Requiring Corrective Action. You are hereby ORDERED to file the required document(s) identified in the attached order within (2) business days of the date of this order Re: <u>27</u> Answer to Complaint filed by Defendant Rita Dos Santos, Individually and as Putative Class Representative. (meh, Usbc) (Entered: 04/05/2016)
04/05/2016	<u>29</u>	Answer to Complaint with certificate of service filed by Rita Dos Santos, Individually and as Putative Class Representative. (Baldiga, William) (Entered: 04/05/2016)
04/13/2016	<u>30</u>	Order dated 4/13/2016 Re: <u>1</u> Complaint filed by Plaintiff Stephen Darr. STATUS CONFERENCE HELD. THE PARTIES SHALL FILE A JOINT PROPOSED FORM OF PRE-TRIAL ORDER IN ECF AS A SUPPLEMENTAL DOCUMENT AND SUBMIT A COPY IN WORD FORMAT TO MSH@MAB.USCOURTS.GOV BY THE CLOSE OF BUSINESS BY MAY 13, 2016. (meh, Usbc) (Entered: 04/13/2016)
04/15/2016	<u>31</u>	BNC Certificate of Mailing – PDF Document. Notice Date 04/15/2016. (Admin.) (Entered: 04/16/2016)
05/10/2016	<u>32</u>	Order dated 5/10/2016 to Show Cause. ANY PARTY IN INTEREST MAY SHOW CAUSE IN WRITING ON OR BEFORE MAY 31, 2016 WHY THE ATTACHED ORDER SHOULD NOT BE ENTERED. THE TRUSTEE SHALL CAUSE A COPY OF THIS ORDER, AND THE ATTACHMENT, TO BE POSTED IN ENGLISH, SPANISH, PORTUGUESE AND CHINESE ON THE WEB SITE MAINTAINED BY KURTZMAN CARSON CONSULTANTS LLC FOR THIS CASE. (meh, Usbc) (Entered: 05/10/2016)
05/12/2016	<u>33</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>32</u> Order to Show Cause) Notice Date 05/12/2016. (Admin.) (Entered: 05/13/2016)
05/13/2016	<u>34</u>	Certificate of Rule 26(f) Conference and Rule 26(f) Discovery Plan (Re: <u>1</u> Complaint) filed by Plaintiff Stephen Darr (Bennett, Charles) (Entered: 05/13/2016)

06/01/2016		<u>35</u>	Order dated 6/1/2016 Re: <u>32</u> Order to Show Cause. See Order for Full Text. (meh, Usbc) (Entered: 06/02/2016)
06/04/2016		<u>36</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>35</u> Order) Notice Date 06/04/2016. (Admin.) (Entered: 06/05/2016)
06/27/2016		<u>37</u>	Notice of Filing of Amended Complaint in Civil Action No. 16–40018 (D. Mass.) with certificate of service filed by Interested Party Plaintiffs' Interim Executive Committee (Baldiga, William) (Entered: 06/27/2016)
07/11/2016		<u>38</u>	Response filed by Plaintiff Stephen Darr Re: <u>37</u> Notice of Filing of Amended Complaint in Civil Action No. 16–40018 (D. Mass.) with certificate of service filed by Interested Party Plaintiffs' Interim Executive Committee (Bennett, Charles) (Entered: 07/11/2016)
08/05/2016		<u>39</u>	Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment with certificate of service. (Baldiga, William) (Entered: 08/05/2016)
08/05/2016		<u>40</u>	Statement <i>Local Bankruptcy Rule 7056–1 Statement of Undisputed Material Facts in Support of PIEC's Motion for Summary Judgment</i> with certificate of service (Re: <u>39</u> Motion for Summary Judgment) filed by Interested Party Plaintiffs' Interim Executive Committee (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit B # <u>3</u> Exhibit C # <u>4</u> Exhibit D # <u>5</u> Exhibit E # <u>6</u> Exhibit F # <u>7</u> Exhibit G # <u>8</u> Exhibit H # <u>9</u> Exhibit I # <u>10</u> Exhibit J # <u>11</u> Exhibit K # <u>12</u> Exhibit L # <u>13</u> Exhibit M # <u>14</u> Exhibit N # <u>15</u> Exhibit O) (Baldiga, William) (Entered: 08/05/2016)
08/05/2016		<u>41</u>	Brief/Memorandum In Support of <i>PIEC's Motion for Summary Judgment</i> (Re: <u>39</u> Motion for Summary Judgment, <u>40</u> Statement) filed by Interested Party Plaintiffs' Interim Executive Committee (Baldiga, William) (Entered: 08/05/2016)
08/16/2016		<u>42</u>	Assented to Motion filed by Plaintiff Stephen Darr to Establish Response Date for Piec's Motion for Summary Judgment with certificate of service. (Attachments: # <u>1</u> Certificate of Service) (Lizotte, Andrew) (Entered: 08/16/2016)
08/17/2016		<u>43</u>	Endorsed Order dated 8/17/2016 Re: <u>42</u> Assented to Motion filed by Plaintiff Stephen Darr to Establish Response Date for Piec's Motion for Summary Judgment. ALLOWED. RESPONSES TO THE PIEC'S MOTION FOR SUMMARY JUDGMENT, INCLUDING AFFIDAVITS, AND ANY CROSS–MOTION FOR SUMMARY JUDGMENT ARE DUE BY SEPTEMBER 2, 2016. RESPONSES TO ANY CROSS–MOTION FOR SUMMARY JUDGMENT ARE DUE BY SEPTEMBER 23, 2016. THE COURT WILL HOLD A HEARING ON THE MOTION AND ANY CROSS–MOTION FOR SUMMARY JUDGMENT ON SEPTEMBER 28, 2016, AT 10:00 A.M. (meh, Usbc) (Entered: 08/17/2016)
08/17/2016			DISREGARD: Hearing Scheduled to 9/28/2016 at 10:00 AM at Boston Courtroom 2, 12th Floor, 5 Post Office Square, Boston, MA 02109 Re: <u>42</u> Assented to Motion filed by Plaintiff Stephen Darr to Establish Response Date for Piec's Motion for Summary Judgment. (meh, Usbc) Corrective entry: disregard. Docketed in error. Modified on 8/17/2016 (ymw). (Entered: 08/17/2016)
08/17/2016			Hearing Scheduled for 9/28/2016 at 10:00 AM at Boston Courtroom 2, 12th Floor, 5 Post Office Square, Boston, MA 02109 Re: <u>39</u> Motion filed

			by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment (ymw) (Entered: 08/17/2016)
08/19/2016		<u>44</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>43</u> Order on Generic Motion) Notice Date 08/19/2016. (Admin.) (Entered: 08/20/2016)
09/02/2016		<u>45</u>	Opposition <i>By Trustee to PIEC Motion for Summary Judgment</i> filed by Plaintiff Stephen Darr Re: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment with certificate of service. (Lizotte, Andrew) (Entered: 09/02/2016)
09/02/2016		<u>46</u>	Response to Defendants' Local Bankruptcy Rule 7056–1 Statement of Undisputed Material Facts in Support of PIEC's Motion for Summary Judgment filed by Plaintiff Stephen Darr Re: <u>40</u> Statement Local Bankruptcy Rule 7056–1 Statement of Undisputed Material Facts in Support of PIEC's Motion for Summary Judgment with certificate of service (Re: <u>39</u> Motion for Summary Judgment) filed by Interested Party Plaintiffs' Interim Executive Committee. (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit B # <u>3</u> Exhibit C # <u>4</u> Exhibit D # <u>5</u> Exhibit E # <u>6</u> Exhibit F # <u>7</u> Exhibit G # <u>8</u> Exhibit H # <u>9</u> Exhibit I # <u>10</u> Exhibit J # <u>11</u> Exhibit K # <u>12</u> Exhibit L # <u>13</u> Exhibit M # <u>14</u> Exhibit N # <u>15</u> Exhibit O) (Lizotte, Andrew) (Entered: 09/02/2016)
09/02/2016		<u>47</u>	Cross–Motion filed by Plaintiff Stephen Darr For Summary Judgment. (Lizotte, Andrew) (Entered: 09/02/2016)
09/02/2016		<u>48</u>	Statement of Undisputed Material Facts in Support of his Cross–Motion for Summary Judgment (Re: <u>47</u> Motion for Summary Judgment) filed by Plaintiff Stephen Darr. (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit B # <u>3</u> Exhibit C # <u>4</u> Exhibit D # <u>5</u> Exhibit E # <u>6</u> Exhibit F # <u>7</u> Exhibit G # <u>8</u> Exhibit H) (Lizotte, Andrew) (Entered: 09/02/2016)
09/02/2016		<u>49</u>	Affidavit of Stephen B. Darr in Opposition to the PIEC Motion for Summary Judgment and in Support of the Trustee's Cross–Motion for Summary Judgment (Re: <u>45</u> Opposition, <u>47</u> Motion for Summary Judgment) filed by Plaintiff Stephen Darr. (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit B # <u>3</u> Exhibit C # <u>4</u> Exhibit D # <u>5</u> Exhibit E) (Lizotte, Andrew) (Entered: 09/02/2016)
09/02/2016		<u>50</u>	Exhibit <i>I</i> (Re: <u>48</u> Statement) filed by Plaintiff Stephen Darr (Lizotte, Andrew) (Entered: 09/02/2016)
09/02/2016		<u>51</u>	Memorandum of Law In Support of Trustee's Opposition to PIEC Motion for Summary Judgment and Trustee's Cross–Motion for Summary Judgment (Re: <u>45</u> Opposition, <u>47</u> Motion for Summary Judgment) filed by Plaintiff Stephen Darr. (Lizotte, Andrew) (Entered: 09/02/2016)
09/06/2016		<u>52</u>	Hearing Scheduled for 9/28/2016 at 10:00 AM at Boston Courtroom 2, 12th Floor, 5 Post Office Square, Boston, MA 02109 RE: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment. (rmb, USBC) (Entered: 09/06/2016)
09/06/2016		<u>53</u>	Hearing Scheduled for 9/28/2016 at 10:00 AM at Boston Courtroom 2, 12th Floor, 5 Post Office Square, Boston, MA 02109 RE: <u>47</u> Cross–Motion filed by Plaintiff Stephen Darr for Summary Judgment. Objections due by 9/23/2016 at 04:30 PM. (rmb, USBC) (Entered: 09/06/2016)

09/06/2016		<u>54</u>	Certificate of Service (Re: <u>45</u> Opposition, <u>46</u> Response, <u>47</u> Motion for Summary Judgment, <u>48</u> Statement, <u>49</u> Affidavit/Declaration, <u>50</u> Exhibit, <u>51</u> Brief/Memorandum) filed by Plaintiff Stephen Darr (Lizotte, Andrew) (Entered: 09/06/2016)
09/06/2016		<u>55</u>	Certificate of Service of Notice of Hearing (Re: <u>47</u> Motion for Summary Judgment) filed by Plaintiff Stephen Darr (Attachments: # <u>1</u> Notice of Hearing) (Lizotte, Andrew) (Entered: 09/06/2016)
09/08/2016		<u>56</u>	BNC Certificate of Mailing – Hearing. (Re: <u>52</u> Hearing Scheduled) Notice Date 09/08/2016. (Admin.) (Entered: 09/09/2016)
09/08/2016		<u>57</u>	BNC Certificate of Mailing – Hearing. (Re: <u>53</u> Hearing Scheduled) Notice Date 09/08/2016. (Admin.) (Entered: 09/09/2016)
09/12/2016		<u>58</u>	Notice of Hearing (Re: <u>39</u> Motion for Summary Judgment) filed by Interested Party Plaintiffs' Interim Executive Committee (Baldiga, William) (Entered: 09/12/2016)
09/15/2016		<u>59</u>	Stipulation By Plaintiff Stephen Darr <i>and Plaintiffs' Interim Executive Committee Regarding Settlement Conference</i> filed by Plaintiff Stephen Darr (Lizotte, Andrew) (Entered: 09/15/2016)
09/15/2016		<u>60</u>	Certificate of Service (Re: <u>59</u> Stipulation) filed by Plaintiff Stephen Darr (Lizotte, Andrew) (Entered: 09/15/2016)
09/26/2016		<u>61</u>	Joint Motion filed by Plaintiff Stephen Darr to Continue Hearing [Re: <u>39</u> Motion for Summary Judgment, <u>47</u> Motion for Summary Judgment] with certificate of service. (Attachments: # <u>1</u> Certificate of Service) (Lizotte, Andrew) (Entered: 09/26/2016)
09/26/2016		<u>62</u>	Endorsed Order dated 9/26/2016 Re: <u>61</u> Joint Motion filed by Plaintiff Stephen Darr to Continue Hearing Re: <u>39</u> Motion for Summary Judgment, <u>47</u> Motion for Summary Judgment. GRANTED ; THE SEPTEMBER 28, 2016 HEARINGS ARE CANCELED. A SEPARATE NOTICE OF RESCHEDULED HEARINGS WILL ISSUE. (meh, Usbc) (Entered: 09/26/2016)
09/28/2016		<u>63</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>62</u> Order on Motion to Continue/Cancel Hearing) Notice Date 09/28/2016. (Admin.) (Entered: 09/29/2016)
10/05/2016		<u>64</u>	Supplemental Document: (Re: <u>59</u> Stipulation) filed by Plaintiff Stephen Darr (Lizotte, Andrew) (Entered: 10/05/2016)
11/10/2016		<u>65</u>	Report <i>and Request for Status Conference</i> filed by Plaintiff Stephen Darr (Attachments: # <u>1</u> Certificate of Service) (Lizotte, Andrew) (Entered: 11/10/2016)
11/15/2016		<u>66</u>	Status Conference Scheduled for 12/14/2016 at 11:00 AM at Boston Courtroom 2, 12th Floor, 5 Post Office Square, Boston, MA 02109. (rmb, USBC) (Entered: 11/15/2016)
11/15/2016		<u>67</u>	Certificate of Service of Notice of Hearing / <i>Status Conference</i> filed by Plaintiff Stephen Darr (Attachments: # <u>1</u> Notice of Status Conference) (Lizotte, Andrew) (Entered: 11/15/2016)

11/17/2016		<u>68</u>	BNC Certificate of Mailing – Hearing. (Re: <u>66</u> Hearing Scheduled) Notice Date 11/17/2016. (Admin.) (Entered: 11/18/2016)
11/18/2016		<u>69</u>	Motion filed by Plaintiff Stephen Darr to Continue Hearing [Re: <u>66</u> Hearing Scheduled] /Reschedule Status Conference with certificate of service. (Attachments: # <u>1</u> Certificate of Service) (Lizotte, Andrew) (Entered: 11/18/2016)
11/22/2016		<u>70</u>	Endorsed Order dated 11/22/2016 Re: <u>69</u> Motion filed by Plaintiff Stephen Darr to Continue Hearing Re: <u>66</u> Hearing Scheduled/Reschedule Status Conference. GRANTED ; THE STATUS CONFERENCE WILL BE RESCHEDULED BY SEPARATE NOTICE. (meh, Usbc) (Entered: 11/22/2016)
11/22/2016		<u>71</u>	Status Conference Rescheduled for 12/21/2016 at 10:15 AM at Boston Courtroom 2, 12th Floor, 5 Post Office Square, Boston, MA 02109. (rmb, USBC) (Entered: 11/22/2016)
11/22/2016		<u>72</u>	Certificate of Service of Notice of Hearing /Status Conference (Re: <u>1</u> Complaint, <u>71</u> Hearing Scheduled) filed by Plaintiff Stephen Darr (Attachments: # <u>1</u> Notice of Rescheduled Hearing) (Lizotte, Andrew) (Entered: 11/22/2016)
11/24/2016		<u>73</u>	BNC Certificate of Mailing – Hearing. (Re: <u>71</u> Hearing Scheduled) Notice Date 11/24/2016. (Admin.) (Entered: 11/25/2016)
11/24/2016		<u>74</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>70</u> Order on Motion to Continue/Cancel Hearing) Notice Date 11/24/2016. (Admin.) (Entered: 11/25/2016)
12/20/2016		<u>75</u>	Opposition by PIEC to Trustee's Cross–Motion For Summary Judgment (Re: <u>47</u> Motion for Summary Judgment) filed by Interested Party Plaintiffs' Interim Executive Committee (Baldiga, William) (Entered: 12/20/2016)
12/20/2016		<u>76</u>	Response to Memorandum of Law in Support of Trustee's Opposition to PIEC Motion for Summary Judgment and Trustee's Cross Motion for Summary Judgment with certificate of service (Re: <u>47</u> Motion for Summary Judgment) filed by Interested Party Plaintiffs' Interim Executive Committee (Attachments: # <u>1</u> Exhibit A) (Baldiga, William) (Entered: 12/20/2016)
12/20/2016		<u>77</u>	Response to Trustee's Statement of Undisputed Material Facts In Support of his Cross Motion for Summary Judgment with certificate of service (Re: <u>47</u> Motion for Summary Judgment) filed by Interested Party Plaintiffs' Interim Executive Committee (Baldiga, William) (Entered: 12/20/2016)
12/21/2016		<u>78</u>	Order dated 12/21/2016 Re: <u>1</u> Complaint by Stephen Darr against Rita Dos Santos, Individually and as Putative Class Representative. STATUS CONFERENCE HELD AND COMPLETED. (clm, Usbc) (Entered: 12/21/2016)
12/22/2016		<u>79</u>	Hearing Scheduled for 2/22/2017 at 10:00 AM at Boston Courtroom 2, 12th Floor, 5 Post Office Square, Boston, MA 02109 RE: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment. (rmb, USBC) (Entered: 12/22/2016)

12/22/2016		<u>80</u>	Hearing Scheduled for 2/22/2017 at 10:00 AM at Boston Courtroom 2, 12th Floor, 5 Post Office Square, Boston, MA 02109 RE: <u>47</u> Cross-Motion filed by Plaintiff Stephen Darr for Summary Judgment. (rmb, USBC) (Entered: 12/22/2016)
12/22/2016		<u>81</u>	Certificate of Service of Notice of Hearing (Re: <u>47</u> Motion for Summary Judgment) filed by Plaintiff Stephen Darr (Attachments: # <u>1</u> Notice of Hearing) (Lizotte, Andrew) (Entered: 12/22/2016)
12/22/2016			Please see case #14-40987 entry #835 for the audio file of the hearing held on 12/21/2016. (ymw) (Entered: 12/22/2016)
12/22/2016			Transcript Requested by William Baldiga, Esq.. Transcriptionist awaiting payment upon completion of transcript. (Janice Russell Transcripts) (Entered: 12/22/2016)
12/23/2016			Transcript Ordered and Acknowledged. Requested by William Baldiga, Esq. and payment received. The expected completion date is 12/23/16. (Janice Russell Transcripts) (Entered: 12/23/2016)
12/23/2016		<u>82</u>	An official transcript (RE: <u>71</u> Status Conference Rescheduled) heard on 12/21/16 has been filed. Pursuant to Judicial Conference Policy, electronic access to transcripts is restricted for 90 days from the date of filing. The transcript is available for inspection at the Clerk's Office or a copy may be purchased from the transcriber. Contact the ECR Operator for transcriber information. Parties have until 01/13/2017 to file a Request for Redaction with the Court. If no request is filed, the transcript may be made available electronically on 03/24/2017. (Janice Russell Transcripts) (Entered: 12/23/2016)
12/23/2016		<u>83</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>78</u> Order) Notice Date 12/23/2016. (Admin.) (Entered: 12/24/2016)
12/24/2016		<u>84</u>	BNC Certificate of Mailing – Hearing. (Re: <u>79</u> Hearing Scheduled) Notice Date 12/24/2016. (Admin.) (Entered: 12/25/2016)
12/24/2016		<u>85</u>	BNC Certificate of Mailing – Hearing. (Re: <u>80</u> Hearing Scheduled) Notice Date 12/24/2016. (Admin.) (Entered: 12/25/2016)
12/24/2016		<u>86</u>	Notice of Filing of Official Transcript. Notice is hereby given that an official transcript has been filed. Pursuant to the Judicial Conference policy governing public access to transcripts of federal court proceedings, transcripts are not electronically available(online) until 90 days after filing but may be inspected by clerk's office or purchased from the court transcriber during the 90-day period. (ADI) (Entered: 12/26/2016)
12/27/2016		<u>87</u>	Certificate of Service of Notice of Hearing (Re: <u>39</u> Motion for Summary Judgment) filed by Interested Party Plaintiffs' Interim Executive Committee (Baldiga, William) (Entered: 12/27/2016)
12/29/2016		<u>88</u>	BNC Certificate of Mailing. (Re: <u>86</u> Notice of Filing of Official Transcript) Notice Date 12/29/2016. (Admin.) (Entered: 12/30/2016)
02/21/2017		<u>89</u>	<i>Brief of the Class Defendants as Amici Curiae Relative to Cross-Motions for Summary Judgment</i> filed by Interested Party Frantz Balan (Rona, Ilyas) (Entered: 02/21/2017)
02/22/2017		<u>90</u>	

			Order dated 2/22/2017 Re: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment. HEARING HELD. THIS MOTION IS HEREBY TAKEN UNDER ADVISEMENT. (clm, Usbc) (Entered: 02/22/2017)
02/22/2017		<u>91</u>	Order dated 2/22/2017 Re: <u>47</u> Cross-Motion filed by Plaintiff Stephen Darr For Summary Judgment. HEARING HELD. THIS MOTION IS HEREBY TAKEN UNDER ADVISEMENT. (clm, Usbc) (Entered: 02/22/2017)
02/22/2017		<u>92</u>	PDF with attached Audio File. Court Date & Time [2/22/2017 10:08:36 AM]. File Size [32297 KB]. Run Time [02:14:34]. (admin). Re: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment and <u>47</u> Cross-Motion filed by Plaintiff Stephen Darr For Summary Judgment. Modified on 2/23/2017 (ymw). (Entered: 02/23/2017)
02/24/2017		<u>93</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>90</u> Order on Motion For Summary Judgment) Notice Date 02/24/2017. (Admin.) (Entered: 02/25/2017)
02/24/2017		<u>94</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>91</u> Order on Motion For Summary Judgment) Notice Date 02/24/2017. (Admin.) (Entered: 02/25/2017)
08/11/2017			Transcript Requested by Kasey Emmons, Esq.. Transcriptionist awaiting payment upon completion of transcript. (Janice Russell Transcripts) (Entered: 08/11/2017)
08/28/2017			Transcript Ordered and Acknowledged. Requested by Kasey Emmons, Esq. and payment to be received. The expected completion date is 08/28/17. (Janice Russell Transcripts) (Entered: 08/28/2017)
08/28/2017		<u>95</u>	An official transcript (RE: <u>79</u> Hearing Scheduled RE: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment and <u>47</u> Cross-Motion filed by Plaintiff Stephen Darr for Summary Judgment) heard on 02/22/17 has been filed. Pursuant to Judicial Conference Policy, electronic access to transcripts is restricted for 90 days from the date of filing. The transcript is available for inspection at the Clerk's Office or a copy may be purchased from the transcriber. Contact the ECR Operator for transcriber information. Parties have until 09/18/2017 to file a Request for Redaction with the Court. If no request is filed, the transcript may be made available electronically on 11/27/2017. (Janice Russell Transcripts) (Entered: 08/28/2017)
08/29/2017		<u>96</u>	Notice of Filing of Official Transcript. Notice is hereby given that an official transcript has been filed. Pursuant to the Judicial Conference policy governing public access to transcripts of federal court proceedings, transcripts are not electronically available(online) until 90 days after filing but may be inspected by clerk's office or purchased from the court transcriber during the 90-day period. (ADI) (Entered: 08/29/2017)
08/31/2017		<u>97</u>	BNC Certificate of Mailing. (Re: <u>96</u> Notice of Filing of Official Transcript) Notice Date 08/31/2017. (Admin.) (Entered: 09/01/2017)
12/18/2017		<u>98</u>	Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment dated 12/18/2017 Re: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment

			and <u>47</u> Cross-Motion filed by Plaintiff Stephen Darr For Summary Judgment. FOR THE REASONS SET FORTH ABOVE, I RECOMMEND GRANTING MR. DARR'S MOTION FOR SUMMARY JUDGMENT AND DENYING THE PIEC'S. See Order for Full Text. (Telam, Usbc) (Entered: 12/19/2017)
12/21/2017		<u>99</u>	Assented to Motion filed by Interested Party Plaintiffs' Interim Executive Committee to Extend the Deadline to Object to the Court's [Re: <u>98</u> Opinion Issued] with certificate of service. (Baldiga, William) (Entered: 12/21/2017)
12/21/2017		<u>100</u>	BNC Certificate of Mailing – PDF Document. (Re: <u>98</u> Opinion Issued) Notice Date 12/21/2017. (Admin.) (Entered: 12/22/2017)
12/22/2017		<u>101</u>	Endorsed Order dated 12/22/2017 Re: <u>99</u> Assented to Motion filed by Interested Party Plaintiffs' Interim Executive Committee to Extend the Deadline to Object to the Court's Re: <u>98</u> Opinion Issued. ALLOWED. (Telam, Usbc) (Entered: 12/22/2017)
12/27/2017			Transcript Requested by William Baldiga, Esq.. Transcriptionist awaiting payment upon completion of transcript. (Janice Russell Transcripts) (Entered: 12/27/2017)
01/12/2018		<u>102</u>	Objections to the Bankruptcy Court's December 19, 2017 Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment filed by Interested Party Plaintiffs' Interim Executive Committee Re: <u>98</u> Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment dated 12/18/2017 Re: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment and <u>47</u> Cross-Motion filed by Plaintiff Stephen Darr For Summary Judgment with certificate of service. (Attachments: # <u>1</u> Exhibit 1 # <u>2</u> Exhibit 2 (Part 1 of 2) # <u>3</u> Exhibit 2 (Part 2 of 2) # <u>4</u> Exhibit 3 # <u>5</u> Exhibit 4 # <u>6</u> Exhibit 5 # <u>7</u> Exhibit 6 # <u>8</u> Exhibit 7 # <u>9</u> Exhibit 8 # <u>10</u> Exhibit 9 # <u>11</u> Exhibit 10) (Baldiga, William) (Entered: 01/12/2018)
01/16/2018		<u>103</u>	Transmittal Re: <u>98</u> Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment dated 12/18/2017 Re: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment and <u>47</u> Cross-Motion filed by Plaintiff Stephen Darr For Summary Judgment. (Attachments: # <u>1</u> Objection) (sl) (Entered: 01/16/2018)
01/18/2018			Notice of Docketing Record to District Court (Case Number: 18-40007) Re: <u>98</u> Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment dated 12/18/2017 Re: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment and <u>47</u> Cross-Motion filed by Plaintiff Stephen Darr For Summary Judgment. (sl) (Entered: 01/18/2018)
01/19/2018		<u>104</u>	Motion filed by Plaintiff Stephen Darr to Extend Time to File Response to [Re: <u>102</u> Objection] with certificate of service. (Attachments: # <u>1</u> Certificate of Service) (Lizotte, Andrew) (Entered: 01/19/2018)
01/19/2018		<u>105</u>	Endorsed Order dated 1/19/2018 Re: <u>104</u> Motion filed by Plaintiff Stephen Darr to Extend Time to File Response to Re: <u>102</u> Objection. ALLOWED. (Telam, Usbc) (Entered: 01/19/2018)
01/22/2018		<u>106</u>	Transmittal of Addendum Re: <u>103</u> Transmittal Re: <u>98</u> Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary

			Judgment dated 12/18/2017 Re: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment and <u>47</u> Cross-Motion filed by Plaintiff Stephen Darr For Summary Judgment. (sl) (Entered: 01/22/2018)
02/09/2018		<u>107</u>	Response by Trustee to Objections to the Bankruptcy Court's December 19, 2017 Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment with certificate of service filed by Plaintiff Stephen Darr Re: <u>102</u> Objections to the Bankruptcy Court's December 19, 2017 Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment filed by Interested Party Plaintiffs' Interim Executive Committee Re: <u>98</u> Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment dated 12/18/2017 Re: <u>39</u> Motion filed by Interested Party Plaintiffs' Interim Executive Committee For Summary Judgment and <u>47</u> Cross-Motion filed by Plaintiff Stephen Darr For Summary Judgment with certificate of service. (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 (Part 1 of 2) # 3 Exhibit 2 (Part 2 of 2) # 4 Exhibit 3 # 5 Exhibit 4 # 6 Exhibit 5 # 7 Exhibit 6 # 8 Exhibit 7 # 9 Exhibit 8 # 10 Exhibit 9 # 11 Exhibit 10) (Attachments: # <u>1</u> Certificate of Service) (Lizotte, Andrew) (Entered: 02/09/2018)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

<p>In re:</p> <p>TELEXFREE, LLC, TELEXFREE, INC. and TELEXFREE FINANCIAL, INC.,</p> <p style="text-align: center;">TelexFree.</p>	<p>Chapter 11 Cases</p> <p>14-40987-MSH 14-40988-MSH 14-40989-MSH</p> <p>Jointly Administered</p>
<p>STEPHEN B. DARR AS TRUSTEE OF THE ESTATES OF TELEXFREE, LLC, TELEXFREE, INC. and TELEXFREE FINANCIAL, INC.,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>RITA DOS SANTOS, INDIVIDUALLY AND AS PUTATIVE CLASS REPRESENTATIVE, AND MARIA MURDOCH, ANGELA BATISTA JIMENEZ, ELISANGELA OLIVEIRA AND DIOGO DE ARAUGO, AS PUTATIVE CLASS REPRESENTATIVES,</p> <p style="text-align: center;">Defendants.</p>	<p>Adversary Proceeding No. 15-04055</p>

**RESPONSE BY TRUSTEE TO OBJECTIONS TO THE BANKRUPTCY COURT'S
DECEMBER 19, 2017 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF
LAW ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

INTRODUCTION

The Trustee brought this adversary proceeding before the Bankruptcy Court to prevent the defendants (“Defendants”) from interfering with the Trustee’s pursuit of certain fraudulent transfer and preferential transfer claims against Net Winners in the TelexFree Ponzi and pyramid scheme (that is, those participants who received more than they paid into the scheme). The

Defendants opposed the relief sought by the Trustee and challenged the Trustee's right to recover certain of those transfers, asserting that those transfers did not involve property of the bankruptcy estates. The issue of the Trustee's exclusive right to pursue recovery of these transfers was presented to the Bankruptcy Court on cross-motions by the Trustee and the Defendants for summary judgment. After a lengthy hearing and consideration of the record, the Bankruptcy Court entered the *Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment* (the "Proposed Rulings"). The Defendants have objected to the Proposed Rulings (the "Objection") pursuant to Federal Rule of Bankruptcy Procedure 9003. The Proposed Rulings are well supported by the record, and the Trustee requests that the Court accept the Proposed Rulings in their entirety.

BACKGROUND

As set forth in the Proposed Rulings, the material facts necessary to support a decision in these cases are not in dispute. *Proposed Rulings*, at p.3. These undisputed facts establish the following:

TelexFree LLC, TelexFree Inc., and TelexFree Financial, Inc. (collectively, "TelexFree" or the "Debtors") operated a Ponzi and pyramid scheme that appears to have involved the largest number of victims in history, defrauding approximately 1,000,000 participants of upwards of \$1,700,000,000. While structured ostensibly as a multi-level marketing enterprise for the sale of voice over internet protocol ("VoIP") service, in reality TelexFree's business was the recruitment of new members, also referred to as participants or promoters (hereinafter "Participants") into the scheme based upon a promise of exorbitant "profits" that were in fact funded by fees paid by new Participants. *Affidavit of Stephen B. Darr in Opposition to the PIEC Motion for Summary Judgment and in Support of the Trustee's Cross-Motion for Summary Judgment* ("Darr

Affidavit”), at ¶5-6.¹ A person could become a member of TelexFree by purchasing a membership plan for either \$339 (Ad Central Plan) or \$1,425 (Ad Central Family Plan).

Affidavit of John S. Soares in Support of Search Warrants (“Soares Affidavit”), at ¶53.² Upon purchasing a membership plan and opening a User Account,³ a person could immediately begin earning TelexFree “credits” ranging from \$20 to \$100 per week, per membership plan, depending upon the type of membership plan purchased, by doing nothing more than posting meaningless advertisements on the internet. *Soares Affidavit*, at ¶54-58. Participants in the TelexFree scheme could also ‘earn’, or obtain, credits by recruiting other Participants into the scheme. *Darr Affidavit*, at ¶6. In reality, the credits issued to Participants were nothing more than Monopoly money created by the game operator, TelexFree.

In most reported Ponzi schemes, investors transferred money directly to the Ponzi operator, and the Ponzi operator paid fictitious profits directly to the members, referred to hereinafter as “Direct Transactions”. In addition to Direct Transactions, TelexFree developed a variation of this scheme through what has been referred to as a “Triangular Transaction” in which TelexFree, a recruited Participant, and a recruiting Participant were each integrally involved. In a Triangular Transaction, TelexFree issued a membership invoice to a recruited Participant. The recruited Participant paid the membership fee to their recruiting Participant. The recruiting Participant, with the consent of TelexFree, retained the membership fee and TelexFree reduced the recruiting Participant’s accumulated credits, treating the redemption of

¹ Appended as Exhibit 6 to the Objection.

² Appended as part of Exhibit 5 to the Objection.

³ A Participant established a User Account, or login, with TelexFree each time that they purchased a membership plan. The User Account was utilized to track the Participant’s activity in the scheme, including credits earned and redeemed. Many of the Participants maintained multiple User Accounts.

credits as income to the recruiting Participant, and satisfying the recruited Participant's invoice from TelexFree. *Proposed Rulings*, at p. 7-8; *Darr Affidavit*, at ¶9-10.

The Triangular Transaction was the predominant method by which Participants were recruited into the TelexFree scheme. During the course of its short existence, TelexFree sold more than \$3,000,000,000 of membership plans. Of this amount, approximately \$300,000,000 in membership plans were sold to Participants through Direct Transactions and approximately \$2,700,000,000, or nearly ninety percent (90%) were sold to Participants through Triangular Transactions. *Proposed Rulings*, at p. 8; *Darr Affidavit*, at ¶12. The Triangular Transactions were central to TelexFree's perpetuation of its Ponzi scheme enabling it to recruit Participants and to make payments to recruiting Participants, lending credence to the credit currency it created, furthering the illusion that TelexFree was a legitimate enterprise, and thereby incentivizing Participants to expand the pyramid. *Darr Affidavit*, at ¶9-10. Participants could be both a recruiting and a recruited Participant by purchasing one or more membership plans through Triangular Transactions, and arranging for sale of one or more membership plans through Triangular Transactions to recruited Participants.

In substance, the membership fee transferred by a recruited Participant to a recruiting Participant through a Triangular Transaction was a payment by the recruited Participant for the membership plan in TelexFree. The fact that TelexFree permitted the membership fee to go directly from the recruited Participant to the recruiting Participant, as opposed to passing through TelexFree, does not change the substance of the transaction.

TelexFree treated and reported the transactions embodied in a Triangular Transaction based upon the substance of the transaction, not its form. The membership fee that was paid by a recruited Participant was treated as income to TelexFree and the retention of the membership fee

by the recruiting Participant was treated as a corresponding expense of TelexFree. *Darr Affidavit*, at ¶15-17. TelexFree issued 1099 tax forms to Participants reflecting payments made to them through both Direct Transactions and Triangular Transactions. *Darr Affidavit*, at ¶19-21.

On November 25, 2015, the Bankruptcy Court found that TelexFree was a Ponzi and pyramid scheme and that this finding was applicable for all purposes in the bankruptcy cases. *See Order on Motion of Chapter 11 Trustee for Entry of Order Finding that Debtors Engaged in Ponzi and Pyramid Scheme and Related Relief* [docket entry 654, case no. 14-40987]. On January 26, 2016, the Bankruptcy Court, consistent with its charge to fashion a remedy for the fraud that was perpetrated, found and ordered that the “Net Equity” methodology was the appropriate method for calculating Participant’s allowed claims against the TelexFree bankruptcy estates (the “Estate”). *Supplemental Order Respecting Motion by Chapter 11 Trustee for Entry of Order Finding that Debtors Engaged in Ponzi and Pyramid Scheme and Related Relief* [docket entry 687, at ¶5, case no. 14-40987]. Pursuant to the Net Equity methodology, Participant claims in the bankruptcy cases will be calculated based upon “the amount invested by the Participant into the Debtors’ scheme, including amounts paid pursuant to Triangular Transactions, less amounts received by the Participant from the Debtors’ scheme, including amounts received pursuant to Triangular Transactions”. *Id.* In other words, a Participant’s claim would be increased for amounts paid to TelexFree in a Direct Transaction and amounts paid as a recruited Participant in a Triangular Transaction. A Participant’s claim would be decreased for amounts received from TelexFree in a Direct Transaction and amounts received as a recruiting Participant in a Triangular Transaction. In this manner, the transactions are netted out to determine if a Participant is a net winner or net loser. The manner in which the Participant purchased the membership plan is irrelevant.

The Defendants did not object to the allowance of Participant claims based upon the Net Equity formula, recognizing the inherent fairness and necessity of including in the determination of allowed claims payments made by, and to, Participants through the Triangular Transactions. The Defendants reserved the right, however, to challenge the Trustee's right to recover amounts paid to Net Winners pursuant to Triangular Transactions.

PROCEDURAL POSTURE

On January 15, 2016, the Trustee commenced two defendant class actions (Adv. Proc. No. 16-4006 and Adv. Proc. No. 16-4007, the "Trustee Class Actions") in the Bankruptcy Court against those Participants who received more money from the Debtors and others in connection with the sale of membership plans or VoIP packages than they paid to the Debtors and others in connection with the sale of membership plans or VoIP packages (the "Net Winners"). In the Trustee Class Actions, the Trustee seeks to recover the net winnings received by approximately 15,000 domestic Net Winners and approximately 78,000 foreign Net Winners, on the basis of fraudulent transfer and preferential transfer, for amounts paid through Direct Transactions and Triangular transactions (the "Avoidance Actions", or the "Avoidable Transfers").⁴ *Id.* In both Trustee Class Actions, the Bankruptcy Court has certified Defendant classes, and appointed Defendant class representatives and class counsel.⁵ [Adv. Proc. No. 16-4006, docket entry 194; Adv. Proc. No. 16-4007, docket entry 479].

⁴ The Ponzi scheme finding creates a conclusive presumption that all transfers made to net winners in furtherance of the scheme are made with fraudulent intent, regardless of the intent and knowledge of the transferee. *Proposed Rulings*, at p. 10, citing *DeGiacomo v. Sacred Heart Univ. (In re Palladino)*, 556 B.R. 10, 14 (Bankr. D. Mass. 2016); see also *In re AFI Holdings, Inc.*, 525 F.3d 700 (9th Cir. 2008); *Warfield v. Byron*, 436 F.3d 551 (5th Cir. 2006).

⁵ The Court may take judicial notice of matters that are of public record, including pleadings that have been filed in federal or state court. *Fed. Rule Evid. 201*; *In re C.R. Stone Concrete Contractors, Inc.*, 434 B.R. 208, 215 n. 54 (Bankr. D. Mass. 2010).

While the defendants in the Trustee Class Actions have raised a number of defenses in their answers, they have not contested that the membership fees paid pursuant to Triangular Transactions constituted a transfer of property of TelexFree, nor that the Trustee has a right to pursue recovery of the membership fees paid through Triangular Transactions as Avoidable Transfers.

This Court, by order dated October 22, 2014, consolidated various actions against TelexFree by Net Losers under the caption *In re TelexFree Securities Litigation*, MDL No. 4:14-md-02566 (the “MDL Action”). On September 23, 2015, the plaintiffs in the MDL Action (who are proposed plaintiff class representatives in the MDL Action and also Defendants herein) filed a motion to amend their second consolidated complaint (the “Motion to Amend”) seeking to assert an unjust enrichment claim against a proposed class of Participants who were Net Winners and received membership fees through Triangular Transactions [docket entry 252]. On October 7, 2015, the Trustee filed a motion to intervene in the MDL Action and supporting memorandum, objecting to the Motion to Amend on the basis that the unjust enrichment claim was merely a repackaging of the Avoidance Actions, and that the pursuit of such claim interfered with the Trustee’s recovery efforts [docket entries 266-267]. On January 15, 2016, after hearing, the Court denied the Motion to Amend [docket entry 379]. On January 26, 2016, the Court denied the plaintiff’s motion to reconsider [docket entry 391].

Notwithstanding the denial of the Motion to Amend and the motion to reconsider, certain of the above-captioned Defendants commenced a separate action on February 24, 2016, styled as *Elisangela Oliveira putative class representative v. Douglas Machado*, et al, Civil Action No. 16-40018 (the “Oliveira Action” and, together with the MDL Action, the “District Court Actions”), seeking to assert substantially the same unjust enrichment claim that formed the basis

of the Motion to Amend. On March 2, 2016, the Court, *sua sponte*, ordered that: “Because this action appears to be an attempt to obviate my prior order denying the motion to amend the Second Consolidated Amended Complaint in the [MDL Action], I am staying all further action in this case until further notice.” [docket entry 6]. No plaintiff class has yet been certified in either of the District Court Actions.⁶

On October 7, 2015, the Trustee commenced in the Bankruptcy Court the within adversary proceeding to enjoin the Defendants’ prosecution of the unjust enrichment claims and for related relief. The Bankruptcy Court heard cross-motions for summary judgment on the issue of whether the Trustee had the exclusive right to pursue recovery of membership fees paid to Net Winners pursuant to the Triangular Transactions. After hearing, the Court entered the Proposed Rulings.

PROPOSED RULINGS

On December 18, 2017, the Bankruptcy Court entered the Proposed Rulings, finding that the payment of membership fees by recruited Participants to recruiting Participants through Triangular Transactions constituted a transfer of an interest of TelexFree in property, thereby providing the Trustee with the basis to pursue recovery of the membership fees as Avoidable Transfers. In so finding, the Bankruptcy Court held that the term ‘interest in property’ was often equated with the term ‘property of the estate’, which is broadly defined to include property in the debtor’s actual and constructive possession. The term ‘transfer’ was similarly broadly defined to include both direct and indirect transfers, including transfers that are unaccompanied by a change of physical possession.

⁶ Pending resolution of this dispute, the Court granted the Defendants limited relief from the stay in the District Court Actions to assert unjust enrichment claims against certain Participants in order to preserve the claims prior to expiration of the statute of limitations.

The Bankruptcy Court further concluded that the Defendants' claims were not particularized but were derivative of the claims asserted by the Trustee, as the Defendants sought to recover the same money arising out of the same transactions being pursued by the Trustee, only changing the characterization of the claim to one based upon unjust enrichment. The Bankruptcy Court further held that the Defendants were unable to establish a constructive trust interest in the membership fees paid through Triangular Transactions, lending further support to the conclusion that the Defendants' claims were not particularized.⁷

The Proposed Rulings are now before this Court. Pursuant to Federal Rule of Bankruptcy Procedure 9033(d), the district court should:

Make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.

For the reasons set forth herein, the Proposed Rulings should be accepted by the Court in their entirety.

ARGUMENT

I. The Bankruptcy Court's proposed findings of fact and conclusions of law that the payment of the membership fees through Triangular Transactions is a transfer of property of TelexFree are well founded and should be accepted by the Court.

As the Bankruptcy Court found, it is well established that claims for fraudulent and preferential transfer are included within property of the estate, and the estate representative has the exclusive right to bring such claims. *Proposed Rulings*, at p. 17; *In re Ontos, Inc.*, 478 F.3d 427, 431 (1st Cir. 2007); *Regan v. Vinick & Young (In re Rare Coin Galleries of America, Inc.)*, 862 F.2d 892, 901 (1st Cir. 1988); *In re El San Juan Hotel Corp.*, 841 F.2d 6, 9 (1st Cir. 1988);

⁷ The Defendants have conceded in their Objection that they do not seek to impose a constructive trust upon the membership fees paid through Triangular Transactions.

In re Dziurgot Farnsworth, 2008 WL 4833089 at *3 (Bankr. D. Mass. Oct. 28, 2008).

Bankruptcy is a collective proceeding for the benefit of all creditors. After a bankruptcy filing, no creditor has a right to assert individual avoidance actions. Avoidance rights belong to the estate representative, and the property recovered becomes property of the estate for the benefit of all creditors. *Mi-Lor Corp. v. Gottsegen (In re Mi-Lor Corp.)*, 233 B.R. 608, 619 (Bankr. D. Mass. 1999).

Recovery from net winners is essential to a trustee's effort to achieve an equitable outcome in the aftermath of a Ponzi scheme. Toward that end, courts have routinely accorded standing to estate representatives in Ponzi schemes to recover money paid to net winners as fraudulent and/or preferential transfers for equitable distribution to all net losers. *See, e.g., In re Ramirez Rodriguez*, 209 B.R. 424 (Bankr. S.D. Tex. 1997); *In re Universal Clearing House Co.*, 62 B.R. 118 (D. Utah 1986); *In re Hedged-Investments Assoc., Inc.*, 163 B.R. 841, 850-51 (Bankr. D. Colo. 1994), *aff'd* 84 F.3d 1286 (10th Cir. 1996); *In re Int'l Loan Network*, 160 B.R. 1 (Bankr. D. Dist. Col. 1993); *In re Taubman*, 160 B.R. 964, 980 (Bankr. S.D. Ohio 1993); *In re Baker & Getty Financial Services, Inc.*, 98 B.R. 300 (Bankr. N.D. Ohio 1989); *In re Geltzer*, 502 B.R. 760 (Bankr. S.D.N.Y. 2013). The "net winnings" represent fictitious profits that are avoidable as fraudulent transfers because "[a]ny dollar paid to reimburse a fictitious profit is a dollar no longer available to pay claims for money actually invested." *Geltzer*, 502 B.R. at 770.

The Trustee's right to pursue recovery of membership fees paid by recruited Participants to recruiting Participants as Avoidable Transfers begins with determining whether TelexFree had an interest in those membership fees paid pursuant to the Triangular Transactions, i.e., whether there was a transfer of an interest of property of TelexFree. *Proposed Rulings*, at p. 16. If TelexFree had an interest in the membership fee, then the Trustee, and only the Trustee, "would

have standing to seek to recover those funds using his statutory avoidance powers.” *Id.*, with *authorities*.

While the term ‘interest in property’ is not defined in the Bankruptcy Code, the term is often equated with ‘property of the estate’, which is defined in Section 541 of the Bankruptcy Code as follows:

- (a) The commencement of a case under...this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
 - (1) ...all legal or equitable interests of the debtor in property as of the commencement of the case...

As set forth in the Proposed Rulings, property of the estate is extremely broad and includes all kinds of property, tangible and intangible. “Its intended breadth enables the bankruptcy court to control a debtor’s property, *wherever found*, for equitable distribution to creditors.” (emphasis added). *Proposed Rulings*, at p. 18, *citing Straton v. New*, 283 U.S. 318, 320-21 (1931). Property of the estate includes any property that the Trustee may recover under the provisions of the Bankruptcy Code. *In re Ontos, Inc., infra*. Physical possession of property is not required in order to fall within the ambit of property of the estate. *See United States v. Whiting Pools*, 462 U.S. 198, 204-05 (1983)(property of the estate is interpreted broadly to include, among many other things, “property made available to the estate by other provisions of the Bankruptcy Code . . . [which may] bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced.”).

The Bankruptcy Code similarly broadly defines a “transfer” to include “each mode, direct or *indirect*, absolute or *conditional*, voluntary or involuntary, of disposing of or parting with property or an interest in property.” 11 U.S.C. §101(54)(D) (emphasis added). Recognition of the avoidability of indirect transfers demonstrates that physical possession is not required to

establish a property interest in an asset nor the avoidability of its transfer. By defining “transfers” so broadly, the Code ensures that a party may not achieve by indirection that which it cannot do directly. See *In re Arbogast*, 466 B.R. 287, 312 (Bankr. W.D. Pa. 2012); *In re Titus*, 467 B.R. 592, 617 (Bankr. W.D. Pa. 2012); *In re 1634 Associates*, 157 B.R. 231, 234 (Bankr. S.D.N.Y. 1993).

When viewed in the entirety, the Triangular Transaction involved a transfer of an interest of TelexFree in property. The recruited Participant was purchasing a membership plan from TelexFree. TelexFree held and issued the membership plans. Once a recruited Participant paid for a membership plan, TelexFree authorized the recruited Participant to open a User Account and issued the membership plan to the Participant. TelexFree authorized the recruited Participant to pay the membership fee otherwise due to TelexFree instead to the recruiting Participant.

Courts employ their equitable powers “to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.” *Pepper v. Litton*, 308 U.S. 295, 304 (1939)). “When fashioning equitable relief...a court acts with broad discretion. *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3rd Cir. 1986), citing *Lacks v. Fahmi*, 623 F.2d 254, 256 (2nd Cir. 1980). Courts should look not to “the structure of the transaction but the knowledge and intent of the parties involved in the transaction.” *In re Hechinger Inv. Co. of Delaware*, 327 B.R. 537, 546 (D. Del. 2005). See also *In re Adelpia Communications Corp.*, 512 B.R. 447 (Bankr. S.D.N.Y. 2014)(series of transactions may be treated as one when it appears that, despite formal structure erected and labels attached, segments comprise a single integrated scheme when considering knowledge and intent of parties involved in transaction); *Orr v. Kinderhill Corp.*, 991 F.2d 31,

35 (2d Cir. 1993) (“[w]here a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications.”).

Particularly in the context of fraudulent transfer law, courts look at the substance, not the form, of a transaction, taking into account all methods of transfer, direct or indirect. *Cont'l Cas. Co. v. Symons*, 817 F.3d 979 (7th Cir. 2016) (rejecting formalistic argument as transaction was structured to keep purchase price proceeds out of the hands of the debtor). These principles have been employed in varying contexts, for example, to avoid transfers made in leveraged buyouts and to avoid direct payments made to a debtor’s vendors by the purchaser of the debtor’s assets.

In a leveraged buyout case, the trustee seeks to avoid as a fraudulent transfer the liens granted and payments made to the lender who financed the transaction. The transfer takes the form of multiple steps which appear to support a finding that the challenged transfer is supported by fair consideration. Looking past the form of the transaction to its substance, however, the leveraged buyout is not a series of separate, independent transactions but a single transaction whereby the loan proceeds are paid to the debtors’ shareholders, leaving the debtor with the secured liability but none of the loan proceeds. As a result, the transfer may be avoided because the debtor did not receive reasonably equivalent value for the pledging of its assets. *See, e.g., In re Chas P. Young Company*, 145 B.R. 131 (Bankr. S.D.N.Y. 1992); *In re OODC, LLC*, 321 B.R. 128 (Bankr. D. Del. 2005); *United States v. Tabor Court, infra*; *Wieboldt Stores v. Schottenstein*, 94 B.R. 488 (N.D. Ill. 1988); *In re O’Day Corporation*, 126 B.R. 370 (Bankr. D. Mass. 1991); *In re Jevic Holding Corp.*, No. 08-11006, 2011 WL 4345204 (Bankr. D. Del. 2011).

The principle of applying the substance of a transaction over its form has also been adopted in considering the avoidability of payments made by a purchaser of the debtor’s assets to certain of the debtor’s creditors. Here, the asset purchaser acquires the assets of the debtor, and a

portion of the purchase price is paid by the asset purchaser directly to the debtor's creditors. In that instance, the transfers were made between two non-debtor parties – the asset purchaser and the debtor's creditor. The defense raised by the creditor is that the transfer is not recoverable because the transfer was indirect, between two third parties, and the debtor never had physical possession of the funds in question. Looking at the substance of the transaction, courts find that the funds paid by the purchaser to select creditors are recoverable as preferential transfers because the payments reduced the purchase price otherwise due to the debtor. *See, e.g., Warsco v. Preferred Technical Group*, 258 F.3d 557, 568-69 (7th Cir. 2001); *In re Food Catering & Housing, Inc.*, 971 F.2d 396 (9th Cir. 1992).

The rationale of focusing on the substance, and not the form, of a transaction applies here. TelexFree had an interest in the membership fee when the recruited Participant purchased the membership plan from TelexFree. TelexFree permitted the membership fee, which was otherwise due to it, to be paid to the recruiting Participant. That the membership fee due to TelexFree was paid to the recruiting Participant does not change the result, or the legal effect - that TelexFree had transferred an interest in property to the recruiting Participant.

TelexFree's interest in the membership fee paid through a Triangular Transaction is also demonstrated by the relationship between the recruiting participant and TelexFree. While the Bankruptcy Court did not expressly rely upon this relationship to support its conclusion that the membership fees constituted property of TelexFree, it referred to factual statements which support a finding of an agency relationship between TelexFree and the recruiting participants as relates to the solicitation of participants and the payment of the membership fee.⁸ The

⁸ *See also Memorandum of Law in Support of Trustee's Opposition to PIEC Motion for Summary Judgment and Trustee's Cross-Motion for Summary Judgment*, at pgs. 15-17 (attached as Exhibit 7 to the Objection).

Bankruptcy Court referenced that TelexFree booked as income “payment through system” (comprised of membership fees paid through Triangular Transactions) and the transfer of the membership fee to the recruiting Participant was considered a corresponding expense, characterized as “agent commission”. *Proposed Rulings*, at p. 9. Later, the Bankruptcy Court states that:

The parties agree that no participant ever took steps to repudiate his or her membership contract with TelexFree. Under the contract TelexFree had the right to collect member fees but allowed a recruiting participant to hold on to those fees in exchange for redemption of credits in his TelexFree user account. That TelexFree treated membership fees as its own is reflected in its financial records and practices. TelexFree recorded participant-to-participant payments as “payments through the system” and booked these payments as a company expense for agents’ commissions. It issued IRS Forms 1099 to recruiting participants who held on to the membership fees.
Proposed Rulings, at p. 19.

The relationship between recruiting participants and TelexFree as described by the Bankruptcy Court is an agency relationship, where the recruiting participant is TelexFree’s agent for the purpose of the selling of the membership and collecting the membership fee. *Id.* As an agent of TelexFree, the recruiting participant received and held the membership fee for TelexFree and at the direction of TelexFree. *Deep Blue Ventures Inc. v. Manfra Tordella & Brookes, Inc.*, 791 NYS 2d 298, 301 (N.Y. Sup. Ct. 2004); *Tidewater Designs Inc. v. Evergreen America Corp. (In re Tidewater Designs, Inc.)*, 276 B.R. 733 (Bankr. E.D.N.C. 2002); and *Gold v. Rowland*, 296 Conn. 186, n. 15 (2010).

Accordingly, principal-agent relationships between TelexFree and the recruiting participants support the finding that TelexFree had an interest in the membership fees paid through Triangular Transactions sufficient to support the conclusion that those membership fees and the transfer of those membership fees to the recruiting participants

constituted a transfer of an interest in property which the Trustee can recover as an Avoidable Transfer.

The results that follow from consideration of the economic substance of the transactions, and/or a finding that an agency relationship existed, are fully compatible with the principles of equity. When a Ponzi scheme fails, as they all eventually do, the estate representative is charged with recovering winnings from those who profited from the scheme and redistributing those fictitious profits to the net losers based upon the principle that all investors in a Ponzi scheme should be treated equally. *See Cunningham v. Brown*, 265 U.S. 1, 13, 44 S. Ct. 424, 427, 68 L. Ed. 873 (1924); *Abrams v. Eby (In re Young)*, 294 F. 1, 4 (4th Cir. 1923).

In order to fashion an equitable result, claims in Ponzi scheme cases are determined upon a net equity basis, that is, an investor's claim amount against the estate is equal to the amount that the investor paid into the scheme, reduced by amounts the investor received from the scheme. *See, e.g., CFTC v. Topworth Int'l Ltd.*, 205 F.3d 1107, 1115-16 (9th Cir. 2000); *In re Bernard L. Madoff Inv. Sec. LLC*, 654 F.3d 229, 242 (2d Cir. 2011); *Donell v. Kowell*, 533 F.3d 762, 772 (9th Cir. 2008). Because the Triangular Transactions were such an integral component of the TelexFree scheme, both the Direct Transactions and Triangular Transactions are included in the Net Equity calculation. As set forth earlier, a Participant's claim is increased for amounts paid to TelexFree in a Direct Transaction as well as payments made to a recruiting Participant in a Triangular Transaction, and the claim is decreased by the amounts a Participant received from TelexFree in a Direct Transaction and from a recruited Participant in a Triangular Transaction.

If the Triangular Transaction payments and receipts were not factored into a Participant's claim, perverse results would arise. A Participant's right to have a claim and share in any Estate distribution would depend upon whether they purchased their membership plan directly or

through a recruiting Participant, even though each Participant was the victim of the same fraud and suffered a similar monetary loss as a result of the fraud. A Participant whose claim is not reduced for the membership fees received by that Participant through a Triangular Transaction would have the opportunity to profit twice – once from the collection of the membership fee through the Triangular Transaction, and again from not having any claim it has reduced by such payment.

Because the recruited Participant is allowed a claim against the Estate for amounts paid to a recruiting Participant through a Triangular Transaction, the Trustee must have the right to pursue recovery of net winnings from a recruiting Participant who profited from a Triangular Transaction. Otherwise, a Participant could become a Net Winner by acting as a recruiting Participant in one or more Triangular Transactions, have no liability to the Estate, and thereby retain fictitious profits from the operation of the Ponzi scheme to the detriment of the Net Losers. Principles of equality of distribution require that the Trustee have the authority to pursue Net Winners and recover such net winnings for the benefit of all Participants who lost money in the scheme, regardless of the manner in which the transaction was effectuated.

II. The Defendants' objections to the Proposed Rulings are without merit.

A. Physical possession of the property by TelexFree is not necessary for the Trustee to recover membership fees paid through Triangular Transactions.

The Defendants allege, without any legal authority, that physical possession is a predicate to the Trustee's recovery of the membership fees paid through Triangular Transactions. There is nothing in the Bankruptcy Code that requires physical possession of an asset in order for the asset to comprise property of the estate pursuant to 11 U.S.C. §541 (property of the estate includes all legal or equitable interests of the debtor, wherever located and by whomever held). *Proposed Rulings*, at p. 21. Furthermore, the definition of "transfer" in the Bankruptcy Code is

expansive and includes the transfer of a partial interest or a transfer not accompanied by a change in possession. *Proposed Rulings*, at p.20, citing *Lehtonen v. Time Warner, Inc. (In re PurchasePro.com, Inc.)*, 332 B.R. 417, 426-27 (Bankr. D. Nev. 2005).

To the extent that possession is required at all, constructive possession is all that is necessary, and the Bankruptcy Court so found. *See Proposed Rulings*, at p.21. Constructive possession is found in those situations where the owner, in this case TelexFree, has allowed physical possession of the property (the membership fee) to be retained by the recruiting Participant. The ability of TelexFree to control the use of the membership fee is sufficient to create a property interest in the membership fee which is transferred to the recruiting Participant when TelexFree allows the recruiting Participant to retain the membership fee in lieu of paying it to TelexFree. *New England Box Co., v. C&R Construction Company*, 313 Mass. 696, 49 N.E.2d 121 (1943).

The Defendants' assertion that the Triangular Transactions were merely "participant to participant" transactions, and that TelexFree had no interest possessory or otherwise, is wholly misleading and belies the substance of the transaction.⁹ The issuance of the membership plan was the central purpose of the Triangular Transaction. If TelexFree did not register the recruited Participant as a new member and issue the membership plan to that Participant, the recruited

⁹ The Defendants had earlier alleged that they had little or no involvement in the TelexFree scheme, in order to buttress their claims that the Triangular Transactions were in reality "participant to participant". As set forth in the Background section above and in the Proposed Rulings, these allegations have been thoroughly debunked. The Defendants interfaced directly and extensively with TelexFree, opening User Accounts, earning credits, and receiving payments from the scheme both from TelexFree and from other Participants. Triangular Transactions only occurred in the context of the purchase or sale of a TelexFree membership plan, as distinguished from a purely 'participant to participant' transaction in which TelexFree had no involvement.

Participant would never have paid the membership fee and the transaction would have gone no further.¹⁰

B. The doctrine of *in pari delicto* is not relevant to a determination of the Trustee's right to recover membership fees paid through Triangular Transactions.

The Defendants proclaim, without citation to any relevant authority, that while it may generally be true that estate representatives of a Ponzi scheme can pursue net winners for amounts received in the Ponzi scheme, that right does not exist here because TelexFree did not have physical possession of the membership fee and cannot enforce the terms of the Triangular Transactions because of the doctrine of *in pari delicto*.

In pari delicto is wholly inapplicable to this case for two reasons - the doctrine does not apply to a trustee's pursuit of avoidance action powers, and the Trustee does not seek to enforce the membership contracts.

The doctrine, which may be raised as an affirmative defense, is limited to those situations in which "(i) the plaintiff, as compared to the defendant, bears at least substantially equal responsibility for the wrong he seeks to redress and (ii) preclusion of the suit would not interfere with the purposes of the underlying law or otherwise contravene the public interest." *Nisselson v. Lernout*, 469 F.3d 143, 152 (1st Cir. 2006). Courts have universally held that *in pari delicto* may not be asserted as a defense to an avoidance action brought by a bankruptcy trustee.

Terlecky v. Abels, 260 B.R. 446, 453 (S.D. Ohio 2001); *Cohen v. Ernst & Young, LLP (In re Friedman's, Inc.)*, 372 B.R. 530, 545 (Bankr. S.D. Ga. 2007); *Tolz v. Proskauer Rose LLP (In re Fuzion Techs. Grp., Inc.)*, 332 B.R. 225, 232, 236 (Bankr. S.D. Fla. 2005); *PM Denver, Inc. v. Porter (In re Porter McLeod, Inc.)*, 231 B.R. 786, 794 (D. Colo. 1999); *Gallant v. Kanterman (In*

¹⁰ In fact, the sole purpose of the Triangular Transaction was to enlist the recruited Participant as a member of TelexFree. Only TelexFree could deliver a membership plan, and the Defendants have not alleged to the contrary.

re Kanterman), 97 B.R. 768, 776 (Bankr. S.D.N.Y. 1989) (citing *Podell & Podell v. Feldman (In re Leasing Consultants, Inc.)*), 592 F.2d 103, 110 (2d Cir. 1979); *Wagner v. Wilson (In re Vaughan Co.)*, 2013 Bankr. LEXIS 978, at *17-21 (Bankr. D.N.M. Mar. 11, 2013); *In re Bennett Funding Grp.*, 1997 Bankr. LEXIS 2366, at *26 (Bankr. N.D.N.Y. Dec. 19, 1997). When application of the doctrine would not be in the public interest, such as where a trustee is seeking to recover assets fraudulently transferred in furtherance of a Ponzi scheme, courts allow the action to proceed. *Kapila v. Bennett (In re Pearlman)*, 472 B.R. 115, 123 (Bankr. M.D. Fla. 2012). Courts distinguish between actions brought by a trustee as successor to the debtor's interests, as to which the trustee is subject to the same defenses that could be asserted against the debtor including *in pari delicto*, and claims brought by the trustee under one or more of the avoidance powers under the Bankruptcy Code, which are not subject to such defenses. *See Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149 (11th Cir. 2006); *Porter McLeod*, 231 B.R. at 794.

As set forth in the Proposed Rulings, the TelexFree membership contract was voidable but not void. *Proposed Rulings*, at p. 18-19, citing *Bishop v. Stewart*, 13 Nev. 25, 42 (Nev. 1878); *Shaw's Supermarkets, Inc. v. Delgiacco*, 410 Mass. 840, 842 (Mass. 1991). No Participant took steps to repudiate or rescind the membership contract with TelexFree. *Proposed Rulings*, at p. 19. While the Trustee might be unable to collect an unpaid membership fee from a recruited Participant through a Triangular Transaction because of *in pari delicto*, the Trustee is not seeking to do so. The contracts were not rescinded, the membership fees were paid, and TelexFree issued the membership plans. Rather, the Trustee is seeking to require the Net Winners to disgorge membership fees paid to them to remedy the harm caused by the operation of the Ponzi scheme and to ensure equality of treatment amongst all victims of the Ponzi scheme.

Application of the doctrine of *in pari delicto* would materially impair the Trustee's ability to recover fictitious profits from Net Winners, in contravention of the Trustee's obligation to pursue a ratable and equitable distribution. This respectfully is not and should not be the law as it would interfere with the purposes of the Bankruptcy Code and contravene the public interest.

C. The claims against Net Winners are Estate claims and cannot be asserted by the Defendants.

1. The Defendants' claims are not particularized.

The Bankruptcy Court correctly found that the Defendants' claims are derivative of those asserted by the Trustee, since the claims derive from harm to TelexFree such that the Defendants have no independent basis to pursue recovery against the recruiting Participants. *Proposed Rulings*, at p. 25. The Defendants seek to recover the same membership fees, from the same recruiting Participants, based upon the same Triangular Transactions, as that sought by the Trustee, with the only distinction being their use of "unjust enrichment" as an alternative theory for recovery. The Defendants' claims in this regard are classic "derivative" claims as they are based upon a secondary effect from harm done to the Debtor. *Proposed Rulings*, at p. 25.

In fact, the Defendants implicitly acknowledge that the unjust enrichment claims are not particularized because they have asserted them as class based claims, which requires a determination that the claims share common questions of law or fact and that the claims of the representative parties are typical of the claims of the class. F.R.C.P. 23. The losses suffered by the Defendants are generalized claims as they are similar to the harm suffered by other Participants. *See also Ritchie Capital Mgmt., LLC v. Gen. Elec. Capital Corp.*, 121 F. Supp. 3d 321, 336 (S.D.N.Y. 2015), *aff'd* 821 F.3d 349 (2nd Cir. 2016) ("claims that arise in the aftermath of a Ponzi scheme are classic examples of generalized harm"). The Defendants have had an opportunity, along with all other Participants to file a proof of claim on account of their

generalized claims and share proportionately in any distributions by the Estate, including on account of claims for losses sustained in Triangular Transactions.

The Bankruptcy Court went on to correctly find that the Defendants could not establish a basis for the imposition of a constructive trust on membership fees paid through Triangular Transactions. The finding that the Defendants could not establish a constructive trust lent further support for the Bankruptcy Court's conclusion that the Defendants' claims are derivative of the Trustee's claims:

The very reasoning that mandates denying the constructive trust remedy to the TelexFree victims also explains why their claims are not particularized. While each of the victims no doubt views his or her loss as unique, from the vantage of the TelexFree bankruptcy estates, the victims are indistinguishable. Allowing one victim to elevate her claim over the claims of others thwarts the policy of ratable distribution at the heart of our bankruptcy system.

Proposed Rulings, at p. 22-23, citing *XL/Datacomp, Inc. v. Wilson*, 16 F.3d 1443, 1451 (6th Cir. 1994).

The Bankruptcy Court's finding that there was no basis for imposition of a constructive trust was consistent with longstanding case law in the Ponzi scheme context. In the aftermath of a Ponzi scheme, the paramount concern is for ratable distribution of funds to creditors, which takes priority over the rights of individual participants to seek to impose a constructive trust on funds that they paid into the scheme. *See, e.g., United States v. Ramunno*, 599 F.3d 1269, 1275 (11th Cir. 2010); *United States v. Andrews*, 530 F.3d 1232, 1238 (10th Cir. 2008); *SEC v. Infinity Group Co.*, 226 F. Appx. 217, 219 (3rd Cir. 2007); *SEC v. George*, 426 F.3d 786, 799 (6th Cir. 2005); *United States v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996).

2. Because the Defendants' claims are not particularized, the pursuit of such claims is in violation of the automatic stay.

The Avoidance Actions constitute property of the Estate. 11 U.S.C. §541. Actions taken by a third party to interfere with, or exercise control over, estate property is proscribed by the automatic stay provisions of Section 362 of the Bankruptcy Code. 11 U.S.C. §362(a)(3).

Because the unjust enrichment claims are derivative of the Avoidance Actions, the Defendants are prohibited by the automatic stay from pursuing such claims.

Section 362 of the Bankruptcy Code provides fundamental, broad, and necessary protection to a trustee to administer the bankrupt's estate. *See Midatlantic Nat'l Bank v. New Jersey Dept' of Envtl. Prot.*, 474 U.S. 494, 503, 106 S.Ct. 755, 760, 88 L.Ed.2d 859 (1986); *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 975 (1st Cir. 1997). The filing of a petition for relief operates as a stay, applicable to *all entities*, of, among other things: recovery against the debtor for pre-petition claims, and "any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate." 11 U.S.C. §362(a)(3) (emphasis provided). "The automatic stay is 'extremely broad in scope' in that it prohibits almost all formal and informal acts taken against the debtor or the estate." *Knowles v. Bayview Loan Servicing, LLC, (In re Knowles)*, 442 B.R. 150, 160 (1st Cir. B.A.P., 2011). The actions taken by the Defendants in pursuing the Net Winners to recover payments received through Triangular Transactions constitute actions to obtain possession of Estate property and/or to exercise control over Estate property, namely the Avoidance Actions against the Net Winners.

The imposition of the automatic stay against the Defendants is necessary to provide for equality of treatment among creditors and to avoid piecemeal litigation by individual creditors. *See e.g. Torres v. Santander Financial Services, Inc. d/b/a Island Finance, et al.*, 532 B.R. 195, 200-201 (Bankr. D.P.R., 2015). *See also Matter of Holkamp*, 669 F.2d 505, 508 (7th Cir. 1982)

(“The purpose of the automatic stay is to...provide an equitable liquidation procedure for all creditors....”)

3. Even if the Defendants have particularized claims, the pursuit of such claims should be enjoined pursuant to Section 105 of the Bankruptcy Code.

In any case, the Defendants should be enjoined from pursuing their claims against Net Winners pursuant to the powers set forth in Section 105 of the Bankruptcy Code, because failure to do so will undermine the application of the Net Equity formula and interfere with the Trustee’s administration of the Estate for the benefit of all Participants.

Section 105(a) of the Bankruptcy Code provides that “[T]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” Actions that adversely affect the bankruptcy estate may be enjoined under Section 105. *See e.g. In re G.S.F. Corp.*, 938 F.2d 1467, 1474 (1st Cir. 1991)(under Section 105 there must be “some effect on the debtor’s estate stemming from the action”) *citing Matter of Energy Co-op., Inc.*, 886 F.2d 921, 929 (7th Cir. 1989) (“authority to enjoin actions which threaten the integrity of the bankrupt’s estate”); *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989) (may enjoin third party actions which “would affect the bankruptcy reorganization in one way or another”); *Menard-Sandofrd v. A.H. Robins Co.*, 493 U.S. 959, 110 S.Ct. 376, 107 FL.Ed.2d 362 (1989); *In re Bretanos’s, Inc.*, 36 B.R. 90, 92 (S.D.N.Y. 1984)(stay “necessary to an orderly disposition of the debtor’s estate”). *See also In re Crocker*, 362 B.R. 49, 57 (1st Cir. B.A.P. 2007).

The unjust enrichment claim asserted by the Defendants is not the type of “particularized” claim held by individual creditors that courts have allowed to proceed in derogation of the rights of a trustee to pursue causes of action for the benefit of all creditors who suffered substantially the same injury, especially in the Ponzi scheme context. *See, e.g. In re Barkany*, 542 B.R. 662 (E.D.N.Y. 2015) (creditors barred from prosecuting unjust enrichment

claims, among others, where bankruptcy trustee's fraudulent transfer claims against the same third parties arose from common facts—namely, “the third party defendants’ involvement in a fraudulent investment scheme perpetrated by the debtor with multiple victims”); *Meoli v. The Huntington Nat’l Bank (In re Teleservices Group, Inc.)*, 463 B.R. 28 (W.D. Mich. 2012) (despite the fact that creditors’ unjust enrichment claims against third parties did not belong to the bankruptcy estate, creditors barred from pursuing action where “the third party has been targeted only because his own dealings with the debtor have placed him in [that] unfortunate position”).

The prosecution of the unjust enrichment claims by the Defendants would have a substantial adverse impact upon the Estate in several respects. First, the Trustee would be engaged in a “race to the courthouse” with the Defendants, who would be pursuing the same Net Winners. The Trustee’s ability to resolve claims against these Net Winners would be limited, since the Net Winners would be unlikely to resolve the asserted claims without the participation of the Defendants in the settlement or the execution of a release by the Defendants. The result would be duplicative litigation, unnecessary expense, and significant confusion amongst Net Winners, all to the detriment of the recoveries from the Net Winners. Many Participants engaged in numerous TelexFree transactions, both through Direct Transactions and Triangular Transactions. An individual Participant could be both a Net Loser and a Net Winner on any number of transactions viewed in isolation. If Participants were then to sue, and/or be sued by, other Participants as to each individual Triangular Transaction, the results would be chaotic.

Because the pursuit of the unjust enrichment claims by the Defendants would interfere with the Trustee’s ability to recover on account of the Avoidance Actions, the prosecution of such claims should be enjoined. See *Queenie, Ltd. v. Nygard Int’l*, 321 F.3d 282, 287 (2nd Cir.

2003); *Nevada Power Co. v. Calpine Corp.*, (*In re Calpine Corp.*), 365 B.R. 401, 409 n. 20 (S.D.N.Y. 2007); *Fisher v. Apostolou*, 155 F.3d 876, 882 (7th Cir. 1998).

The Defendants' claim arises out of the same set of facts and seeks to recover the same membership fees being pursued by the Trustee. The Second Circuit Court of Appeals, in two recent instances, entered permanent injunctions in favor of the Trustee under similar circumstances. See *In re Bernie L. Madoff Inv. Securities, LLC*, 740 F.3d 81, 89 (2nd Cir. 2014)(“BLMIS I”); *In re Bernard L. Madoff Investment Securities, LLC*, 512 Fed. Appx. 18 (2nd Cir. 2013)(“BLMIS II”).

In *BLMIS I*, the *Madoff* trustee brought claims against certain net winners for recovery of fraudulent and preferential transfers. While these claims were pending, certain investors filed claims against the same net winners for conspiracy and conversion. The Second Circuit found that the harms suffered by the plaintiff investors were no different than the harm suffered by other investors who lost money. Similarly, the Defendants' claims are really no different than the Avoidance Actions against the Net Winners. Each set of claims is premised upon the payment of the membership fees to recruiting Participants through Triangular Transactions.

As stated by the lower court whose decision was affirmed by the Second Circuit in *BLMIS I*:

In order to assert such a claim independently of the administration of the bankruptcy case, a creditor must have suffered an injury significantly different from the injuries to creditors in general...Where the creditors' injury, while having some personal elements, overlaps with injury suffered by other creditors...the question to be answered is whether the injury to the creditor is “significantly different” from the injuries to other creditors in general.”

Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities, LLC, 429 B.R. 423, 431 (Bankr. S.D.N.Y. 2010). The harm suffered by Net Losers in the Triangular Transactions is indistinguishable from the harm suffered by all other Participants who purchased

TelexFree membership plans through either Direct Transactions or Triangular Transactions. Each Participant invested funds to purchase a membership plan in a Ponzi scheme and ultimately was unable to recover their investment. Payment of the membership fee through a Triangular Transaction does not provide a basis for a Participant to “jump the line” and recover funds to the detriment of other Net Losers.¹¹

A similar injunction issued in favor of the Trustee in *BLMIS II*. In that action, as in *BLMIS I*, the trustee was pursuing recovery of avoidance actions while a third party asserted tort claims against the same defendant. In affirming the lower courts, the Second Circuit took a very expansive view of Section 105:

Section 105(a) is to be “construed liberally to enjoin suits that might impede the reorganization process or, as here, the process of liquidation...Liberal construction reflects ‘the underlying principle of preserving the debtor’s estate for the creditors and funneling claims to one proceeding in the bankruptcy court...105(a) is properly used to enjoin creditors’ lawsuits against third parties where ‘the injunction plays an important part in the reorganization plan’...or where the action to be enjoined will have an immediate adverse economic consequence for the debtor’s estate.

512 Fed. Appx. at 20.

The District Court, whose decision was affirmed by the Second Circuit, noted that the court was dealing with “misrepresentations and lies that every creditor of the estate suffered” much like this case where the Defendants seek, on a class action basis, to recover from certain Net Winners for the harm that every Net Loser suffered. *In re Bernard L. Madoff Investment Securities, LLC*, 2011 WL 7975167 at *13 (S.D.N.Y. 2011).

The third *Madoff* action, cited with approval and relied upon heavily by the Defendants, actually supports the issuance of the Section 105 injunction. *Picard v. Fairfield Greenwich Limited*

¹¹ As discussed above, the Defendants have couched their claim as an “unjust enrichment claim”, which is really just an equitable remedy and a repackaging of the fraudulent transfer claims asserted by the Trustee.

et al., 762 F.3d 199 (2nd Cir. 2014) (“BLMIS III”). In that case, the Second Circuit denied the trustee’s request for an injunction of a suit brought by investors in so-called “feeder funds” against the funds themselves, which the trustee was simultaneously pursuing. This case is readily distinguishable from the present case. The investors in *BLMIS III* contributed money directly to the feeder funds, had claims only against the feeder funds, and had no relationship with the *Madoff* estate. In the instant case, the recruited Participant had a direct and substantial relationship with the Debtors in each Triangular Transaction. TelexFree issued the invoices and membership plans to the recruited Participant, the recruited Participant became a member of TelexFree, and the recruited Participant began immediately accumulating credits, which the recruited Participant was then able to use to recruit others into the TelexFree network. The differences could not be more evident.

Regardless of whether the Defendants have established particularized claims for membership fees paid through Triangular Transaction, prosecution of such claims should be enjoined pursuant to the provisions of Section 105 of the Bankruptcy Code because the prosecution of such claims will interfere with the Trustee’s administration of the Avoidance Actions for the benefit of all Net Losers.

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CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court accept all of the Proposed Rulings entered by the Bankruptcy Court and overrule the Objection.

Respectfully submitted,

STEPHEN B. DARR, CHAPTER 11
TRUSTEE,
By his counsel:

Dated: February 9, 2018

/s/ Andrew G. Lizotte
Harold B. Murphy (BBO #362610)
Charles R. Bennett, Jr. (BBO #037380)
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738851

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re:

TELEXFREE, LLC,
TELEXFREE, INC. and
TELEXFREE FINANCIAL, INC.,

Debtors.

Chapter 11 Cases

14-40987-MSH
14-40988-MSH
14-40989-MSH

Jointly Administered

STEPHEN B. DARR AS TRUSTEE
OF THE ESTATES OF TELEXFREE, LLC,
TELEXFREE, INC. and TELEXFREE
FINANCIAL, INC.,

Adversary Proceeding
No. 15-04055

Plaintiffs,

v.

RITA DOS SANTOS, INDIVIDUALLY AND
AS PUTATIVE CLASS REPRESENTATIVE,
AND MARIA MURDOCH, ANGELA
BATISTA JIMENEZ, ELISANGELA
OLIVEIRA AND DIOGO DE ARAUGO, AS
PUTATIVE CLASS REPRESENTATIVES,

Defendants.

CERTIFICATE OF SERVICE

I, Andrew G. Lizotte, hereby certify that on February 9, 2018, I caused to be served a copy of the *Response by Trustee to Objections to the Bankruptcy Court’s December 19, 2017 Proposed Findings of Fact and Conclusions of Law on Cross-Motions for Summary Judgment* by this Court’s CM/ECF System to the following:

- William R. Baldiga wbaldiga@brownrudnick.com
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DATED: February 9, 2018
739221

In re Telexfree, LLC

Debtor

Stephen Darr
Plaintiff

vs.

Rita Dos Santos, Individually and as Putative Class Representative
Defendant

Related Bankruptcy Case: 14-40987
Chapter 11
Judge Melvin S. Hoffman

Adversary Proceeding: 15-04055

Initial Transmittal

The following is being transmitted to your court:

- Notice of Appeal with Order
- Bankruptcy Docket
- Election to have appeal heard in District Court
- Direct Appeal to Court of Appeals
- Motion for Leave to Appeal With/Without Objections
- Other Response by Trustee

Date:2/9/18

By the Court,

Stefanie Landry
Deputy Clerk
617-748-5319

Receipt is acknowledged of the enclosures referred to above.

District/Appellate Court Docket Number: _____

Date: _____

By: _____
Deputy Clerk