Docket #0008 Date Filed: 10/10/2018

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 DARR, AS HE IS THE TRUSTEE OF THE CHAPTER 11 ESTATES OF EACH OF THE DEBTORS, Plaintiff and, Counterclaim Defendant, v. UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Defendant and Counterclaim Plaintiff.	Adversary Proceeding No. 18-04091

JOINT DISCOVERY PLAN AND RULE 26(f) CERTIFICATION

The Plaintiff Stephen Darr, as he is the Trustee (the "Trustee") of the Chapter 11 Estates of TelexFree, LLC, TelexFree, Inc. and TelexFree Financial, Inc. (collectively "TelexFree"), and the Defendant United States of America (collectively referred to as the "Parties") submit the following Joint Discovery Plan pursuant to Rule 26(f) incorporated by Federal Rule of Bankruptcy Procedure 7026:

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I. IDENTIFICATION OF ISSUES FOR POSSIBLE EARLY RESOLUTION

Broadly speaking, the claims and counterclaim that the Parties have asserted in this adversary proceeding will require the Court to determine whether TelexFree incurred income taxes, penalties, and interest for the 2012, 2013, and 2014 income tax years. If there were no tax liabilities incurred in the 2012 and 2013 income tax years, the Trustee will be entitled to retain the 2013 income tax refund paid to him (the "2013 Refund"), which the United States maintains was erroneously refunded, and the Court will need to decide if the Trustee has the right to receive a refund for income taxes that TelexFree paid in 2012.[1] If there were taxes incurred in the 2013 and 2014 income tax years, the Court will need to determine the priority of any of the IRS's claims arising from the income tax debts and a related counterclaim for the 2013 Refund paid to the Trustee. The IRS has filed various claims in the TelexFree bankruptcy cases, including: (a) a prepetition priority unsecured claim related to TelexFree's alleged income tax liabilities for the 2013 income tax year; (b) a postpetition administrative expense and counterclaim for the 2013 Refund that the Trustee received postpetition related to TelexFree's income taxes for 2013; and (c) a postpetition administrative expense related to TelexFree's alleged income tax liabilities for the 2014 income tax year[2] (collectively the "IRS Claims"). The Parties agree that the issue of the priority of any of the IRS Claims are ripe for determination

[1] The United States has not asserted any claim related to TelexFree's income taxes for the 2012 income tax year.

[2] The United States has agreed to subordinate the bulk of its claim for the 2014 income tax year, in the amount of $52,593,821, to the payment of administrative expenses allowed by the Bankruptcy Court and allowed claims of the defrauded investors (i.e., TelexFree participants) for lost payments that they made to join the Ponzi scheme at issue in this case. The United States has not agreed to subordinate the remaining amount of its claim for the 2014 income tax year: $1,334,143.

upon a motion for summary judgment. The priority of any of the IRS Claims present discrete legal issues, for which there appears to be no genuine issue of material fact and can be determined as a matter of law.

Accordingly, the Parties propose that the issues in dispute be bifurcated. The Parties request that the Court adopt a schedule to determine whether the IRS's claims for the refund related to the 2013 income tax year paid to the Trustee and income tax liabilities for the 2014 income tax year are administrative expenses or priority unsecured claims (or with respect to the 2013 Refund, property held in trust for the benefit of the United States to the extent that TelexFree actually incurred any income taxes for the 2013 income tax year).

The Parties propose the following briefing schedule to the Court:

(a) The Trustee's motion for partial summary judgment on the discrete issues as to the classification of the IRS's claims for the asserted income tax liabilities and alleged erroneous refund related to the 2013 income tax year and asserted income tax liabilities for the 2014 income tax year to be filed by **October 19, 2018**;

(b) The United States has until **November 9, 2018**, to respond and file a cross-motion for partial summary judgment on these issues;

(c) The Trustee's reply to be filed on or before **November 19, 2018** unless the opposition is coupled with a cross-motion for partial summary judgment, in which case the Trustee shall have until **November 29, 2018**, to respond; and

(d) If necessary, the United States has until **December 10, 2018** to file a reply.

Further, to the extent that the Court believes oral argument would assist the Court in its determination of this issue, the Parties ask the Court to schedule a hearing as soon as the Court's calendar would permit on or after December 11, 2018; however, the parties request that the

Court not schedule a hearing between December 24, 2018, and January 2, 2019, to accommodate leave scheduled over the holidays.

II. DISCOVERY SCHEDULE RELATING TO THE REMAINING CLAIMS CONCERNING TELEXFREE TAX LIABILITY, IF ANY.

The Parties agree that issues relating to whether TelexFree actually incurred income taxes for 2012, 2013, and 2014, and if no tax is due, the Trustee's entitlement to the 2013 Refund and to a refund for the taxes paid in 2012, involve mixed issues of fact and law. However, the Parties expect that they may be able to stipulate to many of the facts necessary to resolve this dispute. Thus, the Parties will attempt to stipulate to the necessary facts, but should they be unable to stipulate to all of the necessary facts, the Parties propose the following discovery schedule:

A. Initial Disclosures

The Parties shall exchange initial disclosures by **October 17, 2018**.

B. Amendment Deadline for Pleadings

The Parties shall file a motion for leave to amend the pleadings and/or join other parties by **January 15, 2019**.

C. Fact Discovery Deadline

The Parties shall complete fact discovery by **February 15, 2019**.

D. Expert Disclosures

(1) The Trustee shall file expert disclosures by **March 1, 2019**;

(2) The United States shall file its expert disclosures by **April 1, 2019**; and

(3) The Trustee shall file any reply expert rebuttal statement by **May 1, 2019**.

E. Expert Discovery

Expert discovery shall be completed no later than **June 15, 2019**.

F. Dispositive Motions

Dispositive motions may be brought at any time on or before **July 15, 2019**.

G. Joint Pretrial Memorandum

If no dispositive motions are filed, then the Parties shall file a Joint Pretrial Memorandum by **August 15, 2019**.

I. Trial

The Parties anticipate that the length of trial should be two (2) days.

J. Electronically Stored Information

The Parties suggest that the production of electronically-stored information be handled as follows: electronic discovery requests and responses will be limited to reasonably accessible data retained in a machine-readable format, and that it will be produced either in hard copy, bates-stamped, or in PDF format on a compact disc (or some other medium agreed upon by the parties), in either case with any required privilege log. If, at any point during this litigation, any Party seeks production of electronically-stored information in electronic format other than PDF, the parties will meet and confer in good faith regarding the scope of the requests and the costs and burden associated with producing that information.

K. Claims of Privilege/Protection of Trial Preparation Materials

There are not presently any issues about claims of privilege or of protection as trial preparation materials and the parties have not decided upon a method for addressing such issues. However, if such an issue arises, then the parties will follow Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502.

III. SETTLEMENT/MEDIATION

The parties have had discussions regarding possible global resolution of issues between them. As of the date of this Joint Discovery Plan, the Parties have not resolved the issues in

dispute. The parties intend to continue to discuss an amenable resolution to this matter and are optimistic a resolution can be reached.

The Parties may consider mediation once their initial discovery has been completed.

IV. TRIAL BY BANKRUPTCY JUDGE

The Parties consent to trial before a United States Bankruptcy Judge to the extent they involve core matters.

V. RULE 26(f) CERTIFICATION

Counsel to the Parties certify that telephone conversations were held prior to the filing of this joint pleading respecting the nature of the action, the defenses asserted, and the discovery to be required.

FOR UNITED STATES OF AMERICA,
Defendant and Counterclaim Plaintiff

By:

*/s/ Carl L. Moore**
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* Signed with permission in accordance with M.L.B.R. Appendix 8, Rule 8.

/s/ Charles R. Bennett, Jr.

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

By his attorneys,

/s/ Charles R. Bennett, Jr.
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Dated: October 10, 2018

CERTIFICATE OF SERVICE

I, Charles R. Bennett, Jr., hereby certify that on this date, I caused a copy of the foregoing Discovery Plan to be served by the Court's CM/ECF System upon all parties entitled to notice thereunder and by electronic mail to the below listed counsel to the Defendant United States of America.

Carl L. Moore
Carl.L.Moore@usdoj.gov

Dated: October 10, 2018

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