

In re:

TELEXFREE, LLC,

Debtor.

Chapter 11

TELEXFREE, INC., f/k/a COMMON CENTS

Case No. 14-40987

Adv. No. 14-04080

PAULO EDUARDO FERRARI -PUTATIVE
CLAIMS REPRESENTATIVE ON BEHALF OF
HIMSELF AND THOSE SIMILARLY
SITUATED, RAFAELA SERRANO AS
TRUSTEE OF THE TELEXFREE SETTLEMENT
TRUST PURSUANT TO 26 USC SECTION 468B,

Plaintiffs,

v.

TELEXFREE, INC., f/k/a COMMON CENTS
COMMUNICATIONS, INC.; TELEXFREE,
LLC; TELEXFREE FINANCIAL, INC.;
TELEXELECTRIC, LLLP; TELEX MOBILE,
HOLDINGS, INC.; JAMES M. MERRILL;
CARLOS N. WANZELER; ; STEVEN M.
LABRIOLA; JOSEPH H. CRAFT, a/Ida JOE H.
CRAFT; CRAFT FINANCIAL SOLUTIONS, LLC;
CARLOS COSTA; GERALD P. NEHRA,
individually and doing business as LAW OFFICES
OF NERHA AND WAAK; GERALD
P. NEHRA ATTORNEY AT LAW, PLLC;
RICHARD W. WAAK, individually and doing
business as LAW OFFICES OF NERHA AND
WAAK; RICHARD W. WAAK, ATTORNEY
AT LAW, PLLC; TD BANK, NA; CITIZENS
FINANCIAL GROUP, INC.; CITIZENS BANK
OF MASSACHUSETTS; FIDELITY CO
OPERATIVE BANK, doing business as
FIDELITY BANK; MIDDLESEX SAVINGS
BANK; GLOBAL PAYROLL GATEWAY
INC.; INTERNATIONAL PAYOUT SYSTEMS INC.;
PROPAY, INC., doing business as PROPAY.COM.; BANKS
DOE; DOE INSIDE PROMOTERS; CREDIT PROCESSORS
DOE and PARALEGAL DOE,

Defendants.

**MOTION FOR RELIEF FROM A DISTRICT COURT
JUDGE AND MOTION TO WITHDRAW THE REFERENCE
TO ADVERSARY PROCEEDING DOCKET #14-04080 AND
TO TRANSFER THIS ACTION TO THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS**



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MOTION FOR RELIEF FROM A DISTRICT COURT JUDGE

AND

MOTION TO WITHDRAW THE REFERENCE TO ADVERSARY PROCEEDING DOCKET

#14-04080 AND TO TRANSFER THIS ACTION TO THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF MASSACHUSETTS

Putative Class Representative Paulo Eduardo Ferrari on behalf of himself and all others similarly situated, and Rafaela Serrano as Trustee of the TelexFree Settlement Trust, pursuant to 26 USC Section 468B (hereafter 'Plaintiffs') hereby submits this Motion to Withdraw the Reference (the "Motion"). See accompanying Memorandum of Law in Support of Motion to Withdraw the Reference at **EXHIBIT A**.

WHEREFORE, for the reasons set forth herein, Plaintiffs respectfully request that this Court grant the Motion to Withdraw the Reference.

Respectfully submitted,

/s/ Orestes Brown

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In re:

TELEXFREE, INC., f/k/a COMMON CENTS

Case No. **14-40987**

TELEXFREE, LLC,

Chapter 11

Debtor.

PAULO EDUARDO FERRARI -PUTATIVE
CLAIMS REPRESENTATIVE ON BEHALF OF
HIMSELF AND THOSE SIMILARLY
SITUATED, RAFAELA SERRANO AS
TRUSTEE OF THE TELEXFREE SETTLEMENT
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Plaintiffs,

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INC.; INTERNATIONAL PAYOUT SYSTEMS INC.;
PROPAY, INC., doing business as PROPAY.COM.; BANKS
DOE; DOE INSIDE PROMOTERS; CREDIT PROCESSORS
DOE and PARALEGAL DOE,

Defendants.

***PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO WITHDRAW THE REFERENCE***

Putative Class Representative Paulo Eduardo Ferrari on behalf of himself and all others similarly situated, and Rafaela Serrano as Trustee of the TelexFree Settlement Trust, pursuant to 26 USC Section 468B (hereafter 'Plaintiffs') hereby submits this Memorandum of Law in Support of their Motion to Withdraw the Reference (the "Motion"). In support of the Motion, Plaintiffs state as follows:

The instant action is one of seven substantively similar complaints filed by various plaintiffs seeking damages arising out of an alleged Ponzi pyramid scheme perpetrated by TelexFree, LLC, TelexFree, Inc., and TelexFree Financial, Inc. and related entities. Three adversary proceedings have been filed in this Court. Four actions have been filed in various federal district courts as follows:

-Ferguson et al. v. Telexelectric, LLLP et al., Civil Action No. 5:14-cv-00316-D (Eastern District of North Carolina);

-Cook, on behalf of himself and all other similarly situated v. TelexElectric, LLLP, et al., Civil Action No. 2:14-cv-00134 (Northern District of Georgia);

-Reverend Jeremiah Githere, et al. v. TelexElectric,LLP, et al., Civil action No. 14-12825 (D. Mass.);

-Guevara v. Merrill, et al., Civil Action No. 1:14-cv-22405 (Southern District of Florida).

All of these actions assert causes of action for, among others, fraud, intentional misrepresentation, federal and state securities violations, and violations of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et seq.

Pursuant to 28 U.S.C. § 157(d) "[w]ithdrawal of the reference is mandatory for proceedings that require consideration of both bankruptcy law and other, non-bankruptcy federal law that affects interstate commerce." *Lacey v. BAC Home Loans Servicing, LP* (In re Lacey), 2011 Bankr. LEXIS 4179, *24 (Bankr. D. Mass. Oct. 27, 2011). Plaintiffs' claims pursuant to the Securities and Exchange Act of 1934, the Securities Act of 1933, the Securities Act of 1934, the

Securities and Exchange Commission Rules, the Lanham Act, and the Racketeer Influenced and Corrupt Organizations Act all require “consideration of other laws of the United States regulating organizations or activities affecting interstate commerce,” particularly since Plaintiffs have alleged that Defendants have directly or indirectly, made use of the means of instrumentalities of interstate commerce and of the mails in connection with the causes of action asserted. As a result, withdrawal of the reference for those causes of action is required by the statute. See 28 U.S.C. § 157(d).

Even if mandatory withdrawal is not appropriate, which Plaintiffs don’t concede, permissive withdrawal would be appropriate in the instant case. Section 157(d) “provides that the reference may be withdrawn in the exercise of the district court’s discretion “for cause shown. In determining whether cause exists, a district court should consider the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors.” *Lacey v. BAC Home Loans Servicing, LP* (In re Lacey), 2011 Bankr.LEXIS 4179, *23 (Bankr. D. Mass. Oct. 27, 2011). In the instant case, permissive withdrawal is clearly justified – judicial economy is best served by allowing this case to be determined by the District Court.

Pursuant to 28 U.S.C. § 157(b)(1) and § 158, the Bankruptcy Court has jurisdiction to adjudicate all core proceedings, as defined, and “may enter appropriate orders and judgments,” subject only to a deferential review. 28 U.S.C. §§ 157(b)(1), 158. However, with respect to non-core claims the Bankruptcy Court is empowered only to make recommended findings of fact and conclusions of law, which are subject to a de novoreview in the District Court, which then exercises its final adjudicative power. 28 U.S.C. § 157(c)(1) and (2). Thus, whether this matter properly belongs in the Bankruptcy Court or the this Court turns on whether the stated causes of action are properly defined as core proceedings or non-core proceedings.

All of the causes of action asserted here are non-core proceedings as defined by 28 U.S.C. § 157. See also *In re Arnold Print Works, Inc.*, 815 F.2d 165, 166-7 (proceedings are defined as those which are integral to the core bankruptcy function of restructuring debtor-creditor rights.) *In re Arnold Print Works, Inc.*, 815 F.2d at 166-7. In *Ralls v. Docktor Pet Centers, Inc.*, 177 B.R. 420, 424 (D. Mass. 1995), the Court (Tauro, C.J.) held that non-core proceedings are state or federal claims that arise between parties within a bankruptcy proceeding. Citing the First Circuit case of *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991), the Court explained that non-core proceedings “are claims that do not stem from the Code itself, but potentially have some effect on the bankruptcy estate, such as altering debtor’s rights, liabilities, options, or freedom of action, or otherwise have an impact upon the handling and administration of the

bankrupt estate.” *Ralls*, 177 B.R. at 424. The Court goes on to specify that

If an action would survive outside of bankruptcy, and in the absence of bankruptcy would have been initiated in a state or a district court, then it clearly involves a non-core matter.... Generally, if the claims could have been brought before the filing of the bankruptcy petition, the claims are non-core. *Id.* 425. (Emphasis added).

As the Court noted in *Ralls*, and the First Circuit made clear in *In re Arnold Print Works, Inc.*, 815 F.2d at 165, “the bankruptcy courts are without power to adjudicate a suit seeking pre-petition debts.” *Ralls*, 177 B.R. at 425 (citing *In re Arnold*, 815 F.2d at 165). The causes of action asserted by the Plaintiffs in this action accrued before the debtors filed this bankruptcy petition and, as a result, “are wholly unrelated to the bankruptcy.” *Ralls*, 177 B.R. at 426 n. 7. Under the rule set out in 28 U.S.C. §§ 157 and articulated in *Ralls* and *Arnold*, all of the causes of actions asserted by the Plaintiffs in the instant action (and, for that matter, in the substantively identical actions currently pending in the district courts) are properly characterized as non-core proceedings.

As a result, the Bankruptcy Court is not empowered to finally adjudicate this action. Therefore, if this action remains in the Bankruptcy Court, the District Court will be required to review and approve any findings or conclusions from the Bankruptcy Court prior to the entry of final judgment. If the trial is conducted in the Bankruptcy Court, the District Court will be forced to review the Bankruptcy Court’s findings without the benefit of having heard the evidence firsthand. This will essentially require the Parties to litigate common questions of fact and law at least twice. That is not an efficient use of the Court’s nor the parties’ resources. This is particularly true in light of the substantively identical actions already pending in the district courts. There is currently pending in this action a Motion to Transfer (“Transfer Motion”) filed with the United States Judicial Panel on Multidistrict Litigation (“JPMDL”), docketed at MDL No. 2566, which seeks an order this case by the Bankruptcy Court will likely prevent its transfer to the JPMDL and will create the highly inefficient and incongruous prospect of litigation of the same claims in a consolidated District Court action and in the Bankruptcy Court, the latter of which would then be subject to a further de novo review in the District Court. As a result, permissive withdrawal of the reference is appropriate pursuant to 28 U.S.C. § 157(d).

WHEREFORE, for the reasons set forth herein, Plaintiffs respectfully request that this Court grant the Motion to Withdraw the Reference.

Respectfully submitted,

/s/ Orestes Brown

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