

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MASSACHUSETTS

IN RE:	)	
	)	
TELEXFREE, LLC	)	Chapter 11
TELEXFREE, INC	)	Case No 14-40987 MSH
TELEXFREE FINANCIAL INC.	)	14-40988 MSH
	)	14-40989 MSH

(Jointly Administered)

MOTION FOR LEAVE TO DEPOSE TIMOTHY MARTIN  
(RULE 2004)

Now comes the Claimants, Brandon Zagarella, Joseph Zagarella and Joseph Zagarella, JR. (collectively "Zagarella group") and move for leave to depose Timothy Martin (hereafter "Martin"), the expert witness for the Trustee, for the following reasons:

1. This matter involves the issue as to whether or not the Zagarella Group are "net winners" or "net losers" on the within matter.

2. By a "Supplemental Affidavit of Timothy Martin" [docket 3621, filed 10/8/20], Martin, for the first time since claims were filed by the Zagarella Group, disclosed by affidavit, "based upon my personal knowledge, the books and records of Telexfree and the various analyses and reconstructions of the Telexfree books and records, done by Huron Consulting Group on behalf of the Trustee," as follows:

(A) "...[M]embers of the Zagarella Group filed multiple pages of handwritten notes with the Court that claimed ownership of 589 User Accounts in the aggregate." [Par. 3];



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B. “Huron conducted a secondary investigation of potentially related User Accounts based upon the User Account information provided by the Zagarella Group. Through this process, Huron identified 1,992 additional User Accounts determined to belong to the Zagarella Group using the Trustee’s aggregation methodology.” [Par. 7]

C. In addition to these accounts, Huron identified 1610 accounts that were not claimed by the Zagarella Group but were part of additional account aggregations linked through contact information...associated with the claimed accounts.” [Par. 7]

D. “In the alternative, The Court should treat the claims of the Zagarella Group as one consolidated claim given the hopelessly entangled nature of the claims and complete disregard of separate identities.” {Par 11]

3. The Zagarella Group say that they are able to separate their accounts if given an opportunity to see the records Martin has used to arrive at his conclusions. And, because of the newly discovered evidence, the deposition of Martin is essential prior to trial.

4. Pursuant to Fed. R. Civ. P. Rule 45 and in any event, prior to any trial, the Zagarella Group should be permitted to inspect and examine the records Martin intends to rely upon, in order to provide evidence to the Court at the hearing now scheduled December 2.

5. At his deposition, pursuant to the attached Deposition Notice at **EXHIBIT 1**, Martin should be required to produce all documents concerning these Claimants, if the same are not already attached to his aforesaid Affidavit.

WHEREFORE, the Debtor moves for leave to depose Timothy Martin, pursuant to Rule 2004 and in accordance with the attached Deposition Notice.

Respectfully submitted,

Zagarella Group

By their attorney,

/s/ Jordan L. Shapiro

JORDAN L. SHAPIRO  
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DATED: October 28, 2020

CERTIFICATE OF SERVICE

I, Jordan L. Shapiro, counsel for the Zagarella Group, certify that I notified counsel for the U.S. Trustee that I filed the within Motion for leave to depose the debtor (Rule 2004) by forwarding the same electronically to:

[alizotte@murphyking.com](mailto:alizotte@murphyking.com)

SIGNED UNDER THE PENALTIES OF PERJURY October 28, 2020

/s/ Jordan L. Shapiro

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JORDAN L. SHAPIRO

## EXHIBIT 1

UNITED STATES BANKRUPTCY COURT

District of Massachusetts

In re Telexfree, LLC

Debtor

(Complete if issued in an adversary proceeding)

Case No. 14-40987 MSH

Chapter 11

Plaintiff

v.

Adv. Proc. No.

Defendant

SUBPOENA TO TESTIFY AT A DEPOSITION  
IN A BANKRUPTCY CASE (OR ADVERSARY PROCEEDING)

To: Timothy Martin, as Keeper of the Records for the Huron Consulting Group,  
c/o Murphy & King, P.C. (Name of person to whom the subpoena is directed)

☐ Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this bankruptcy case (or adversary proceeding). If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

PLACE Shapiro & Hender  
105 Salem Street  
Malden, MA 02148

DATE AND TIME  
November 17, 2020 at 10 AM

The deposition will be recorded by this method: before an officer authorized by law to administer oaths in the Commonwealth of Massachusetts (Zoom)

☐ Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

See Exhibit A attached to this notice

The following provisions of Fed. R. Civ. P. 45, made applicable in bankruptcy cases by Fed. R. Bankr. P. 9016, are attached - Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and 45(g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date:

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, email address, and telephone number of the attorney representing (name of party)  
the Zagarella Group, who issues or requests this subpoena, are:

Jordan L. Shapiro, 105 Salem Street, Malden, MA 02148 JSLAWMA@aol.com 781-324-520

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, or the inspection of premises before trial, a notice and a copy of this subpoena must be served on each party before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

EXHIBIT A  
DOCUMENTS TO BE PRODUCED

Copies of all records and transactions of Telexfree concerning or having anything to do with the so-called Zagarella Group (Joseph Zagarella; Brandon Zagarella; Joseph Zagarella Jr)

**Federal Rule of Civil Procedure 45(c), (d), (e), and (g) (Effective 12/1/13)**  
**(made applicable in bankruptcy cases by Rule 9016, Federal Rules of Bankruptcy Procedure)**

**(c) Place of compliance.**

*(1) For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

*(2) For Other Discovery.* A subpoena may command:

- (A) production of documents, or electronically stored information, or things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises, at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

*(1) Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

*(2) Command to Produce Materials or Permit Inspection.*

*(A) Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

*(B) Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

*(3) Quashing or Modifying a Subpoena.*

*(A) When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

*(B) When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

*(C) Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

*(1) Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

*(A) Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

*(B) Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

*(C) Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

*(D) Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

*(2) Claiming Privilege or Protection.*

*(A) Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

*(B) Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

...

*(g) Contempt.* The court for the district where compliance is required — and also, after a motion is transferred, the issuing court — may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.



**PROOF OF SERVICE**

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)*: \_\_\_\_\_  
on *(date)* \_\_\_\_\_.

☐ I served the subpoena by delivering a copy to the named person as follows: \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

☐ I returned the subpoena unexecuted because: \_\_\_\_\_  
\_\_\_\_\_

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$ \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true and correct.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information concerning attempted service, etc.: