

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS**

In Re:

**TELEXFREE, LLC ,
TELEXFREE, INC.,
TELEXFREE FINANCIAL, INC.,**

Reorganized Debtors.

Chapter 11

Case No. 14-40987-MSH

Case No. 14-40988-MSH

Case No. 14-40989-MSH

Substantively Consolidated

**OBJECTION BY LIQUIDATING TRUSTEE TO MOTION FOR LEAVE TO DEPOSE
TIMOTHY MARTIN (RULE 2004)**

To the Honorable Melvin S. Hoffman, United States Bankruptcy Judge:

Stephen B. Darr, the duly appointed Liquidating Trustee (the "Trustee") of TelexFree, LLC, TelexFree, Inc., and TelexFree Financial, Inc. (collectively, the "Debtors" or "TelexFree") pursuant to the confirmed liquidating plan of reorganization, respectfully submits this objection to the *Motion by Brandon Zagarella, Joseph Zagarella, Sr., and Joseph Zagarella, Jr. to Depose Timothy Martin Pursuant to Rule 2004* (the "Motion").

Summary of Argument

Despite having had multiple opportunities to establish the basis for their claims against TelexFree, the Zagarellas have failed to do so. The request by the Zagarellas to conduct a Rule 2004 examination of Timothy Martin is both procedurally improper and substantively without merit. The Trustee has already provided the Zagarellas with documents detailing the User Accounts identified by them, as well as additional User Accounts the Trustee believes belong to the Zagarellas. An examination of Mr. Martin will not add anything, nor will giving the Zagarellas access to the complete TelexFree SIG system enable them to obtain any additional information. Instead, the Trustee states that if the Zagarellas require further information



regarding their User Accounts, they should be required to provide the Trustee with their personal identifying information associated with their User Accounts, and the Trustee will conduct the requisite search of the TelexFree records and provide them with the results.

Background

1. The Zagarellas, as with other Participants, were provided the opportunity to file their claims using the interactive website portal (the “Portal”) established by the Trustee for the filing of electronic proofs of claim (“ePOC”).

2. The Portal enabled Participants to input personal information that they had used when opening their accounts (“User Accounts”) with TelexFree, such as name, electronic mail address, physical address, home phone number, cell phone number, password, and secondary password. Based upon the personal identifying information submitted, the Portal would then access and present the User Accounts in the TelexFree electronic records that were attributable to such personal information. The Participant then had the opportunity to accept or reject the User Accounts that were presented, to add additional User Accounts, to modify transactions, and to add additional information manually. Participants could also upload any documentation in support of their claims.

3. While the Zagarellas submitted claims through the Portal, they did not comply with the procedure for accessing User Account information. Rather than submitting personal identifying information, the Zagarellas merely inserted manually the amount alleged to be owed by TelexFree, totaling approximately \$800,000 in the aggregate, without supporting documentation and without reference to any User Accounts.

4. Pursuant to an order dated on or about December 26, 2017, after the deadline had passed for the filing of an ePOC, the Court established procedures for the determination of

Participant claims (the “Procedural Order”). The Procedural Order provided initially for an out-of-court process whereby the Trustee would notify Participants of objectionable components of their claim and provide the Participants with thirty (30) days in which to address the deficiency. In the absence of a timely response, the Trustee would file a notice with the Court proposing allowance or disallowance of the contested claim, which would govern the allowed amount of the claim in the absence of a response within fourteen (14) days of receipt of the notice. If a Participant timely responded to the first or second notice sent by the Trustee, the parties would attempt to resolve the dispute informally and, absent such resolution, the Trustee would file an objection to the claim with the Court.

5. On August 24, 2018, the Trustee sent the Zagarellas notices of proposed resolution of claims, stating that the claims should be disallowed as duplicative and for failure to identify User Accounts. The Zagarellas submitted an untimely response on October 29, 2018 providing a handwritten list of various User Accounts. The response was virtually identical for all three Zagarellas and did not contain any evidence of payments made by the Zagarellas either to TelexFree or to other Participants.

6. Based upon the information provided by the Zagarellas, there were no grounds to treat the claims as anything other than a consolidated claim and resulted in the claim being disallowable as a net winner.

7. Because the claims could not be resolved through the informal process, the Trustee filed objections to the claims of Brandon Zagarella, Joseph Zagarella, Sr., and Joseph Zagarella, Jr. pursuant to the Third Omnibus Objections to Claims filed on August 30, 2019 (docket no. 2227) and the Seventh Omnibus Objections to Claims filed on December 30, 2019

(docket no. 2900), seeking disallowance of each claim for failure to provide adequate information or documentation in support of their claims.

8. On October 7, 2019, the Zagarellas filed a response to the objections to claims (docket no. 2522) re-sending copies of emails that had been previously sent to the Trustee through the informal claims process.

9. On March 25, 2020 Zagarellas filed a supplemental response (docket no. 3153) which did not provide any new, substantive information.

10. On May 13, 2020, the Zagarellas filed a further response (docket no. 3256) which was repetitive and nonresponsive to the issues raised by the Trustee's objections to claims.

11. None of the responses by the Zagarellas differentiated User Accounts amongst each claim, nor did the responses set forth the amount of net winnings or net losses for each User Account.

12. On May 29, 2020, Timothy Martin submitted his second affidavit in support of the disallowance of two of the Zagarella claims (claims no. 131729 and 131732), which included the User Account activity supporting the net winner status and a copy of the responses submitted by the claimants. On or about June 11, 2020, Timothy Martin submitted his third affidavit in support of the disallowance of the remaining Zagarella claims (claims no. 131722 and 131730), which included User Account activity supporting the net winner status and a copy of the responses submitted by the claimants.

13. The Court held a nonevidentiary hearing on the Zagarella claims on September 10, 2020. By order dated September 10, 2020, the Court scheduled an evidentiary hearing, directed the Trustee and the Zagarellas to submit affidavits in lieu of direct testimony on or

before October 13, 2020, and ordered that the evidentiary hearing would be for purposes of cross-examination of the affiants.

14. The Trustee submitted the supplemental affidavit of Timothy Martin on October 8, 2020 (the “Martin Affidavit”). The Zagarellas requested and were granted an extension of time to file their affidavits by October 16, 2020. On October 16, 2020, the Zagarellas filed a single affidavit (docket no. 3631).

15. By order dated October 20, 2020, the Court struck the consolidated Zagarella affidavit and ordered each claimant to file a separate affidavit in support of their claims by October 27, 2020.

16. On October 27, 2020, each of the Zagarellas submitted separate affidavits. The affidavits, however, did not identify the User Accounts forming the basis of each claim but simply requested additional access to the TelexFree records.

17. The Zagarellas have had more than sufficient opportunity to document their claims. Notwithstanding multiple opportunities, their affidavits provide little or no information in support of their claims.

18. By order dated October 28, 2020, the Court scheduled an evidentiary hearing for December 2, 2020 to determine the validity and amount of the Zagarella claims.

19. In the Martin Affidavit, the following information is provided in connection with the Trustee’s objections to the Zagarella claims:

- (i) Copies of the responses filed by the Zagarellas with the Court (Exhibits A, B, and C to the Martin Affidavit);
- (ii) A listing of the 589 User Accounts claimed by some or all of the Zagarellas and, as to each User Account:

- a. Whether the User Account could be located in the TelexFree records;
- b. If the User Account could be located, whether the TelexFree records indicated that the invoice for the membership fee had been paid;
- c. The name, electronic mail address, and other personal information attributable to the User Account;
- d. The Net Equity associated with the User Account; and
- e. Which of the Zagarellas claimed ownership of the User Account.

(Exhibit D-1 to Martin Affidavit);

- (iii) A listing of the 1,993 additional User Accounts determined by the Trustee as likely belonging to the Zagarellas based upon the 589 User Accounts claimed by the Zagarellas and, as to each User Account:

- a. The name, electronic mail address, and other personal information attributable to the User Account; and
- b. The Net Equity associated with the User Account.

(Exhibit D-2 to Martin Affidavit);

- (iv) A summary of the components of the Net Equity for each of the foregoing User Accounts, including direct receipts, direct payments, and receipts and disbursements from Triangular Transactions (Exhibit E of Martin Affidavit);
- (v) A listing of counterparties with respect to each of the foregoing User Accounts, including the direct receipts, direct payments, and receipts and disbursements from Triangular Transactions attributable to each counterparty (Exhibit F to Martin Affidavit).

Argument

Initially, the Trustee notes that this contested matter is solely for the purpose of determining whether any of the Zagarellas are entitled to allowance of a claim that would share in a distribution in these cases. This proceeding is not for purposes of determining whether any of the Zagarellas are net winners that are obligated to make payments to the Trustee. Any such determination of net winner status would be addressed in the context of the pending class action litigation, Adv. Proc. Nos. 16-4006 and 16-4007.

The request by the Zagarellas for authority to conduct a Rule 2004 examination of Mr. Martin is procedurally improper. The filing of the Trustee's objections to claims and the response by the Zagarellas renders the dispute a contested matter pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 9014. *In re Motors Liquidation Co.*, 447 B.R. 150 (Bankr. S.D.N.Y. 2011). As such, the rules governing adversary proceedings are applicable, not those governed by FRBP 2004. *See* FRBP 9014(c). Moreover, deposing Mr. Martin would serve no purpose as the Martin Affidavit already contains all of the information that is available to Mr. Martin based upon the information provided by the Zagarellas and a search of the TelexFree records. The Zagarellas have articulated no additional need for an examination of Mr. Martin and have failed to articulate the benefit that will be derived as compared to the burden being placed upon the Trustee. *Gill v. Gulfstream Park Racing Ass'n*, 399 F.3d 391, 400 (1st Cir. 2005).

With respect to the Zagarellas request for access to the TelexFree records, the Zagarellas were already provided an opportunity to access the TelexFree records when utilizing the Portal

and completing their ePOCs but did not avail themselves of the opportunity to do so.¹ The “Back Office” accounting system that was used prepetition by Participants to review the status of their User Accounts is no longer operational. The request by the Zagarellas for “copies of all records and transactions of TelexFree concerning or having anything to do with the so-called Zagarella Group (Joseph Zagarella, Brandon Zagarella, and Joseph Zagarella Jr.)” is not only overly broad and unduly burdensome but would serve no purpose. The TelexFree electronic records housing Participant information contain more than one terabyte of data and would be of no use to the Zagarellas. On the other hand, if the Zagarellas provide the Trustee with the personal identifying information that they should have provided when registering their claims, the Trustee will have a search done of the TelexFree electronic records and provide the Zagarellas with the information that is generated.

The Trustee has not objected to the allowance of the Zagarella claims based upon the additional User Accounts that were identified in the Trustee’s independent search. Rather, the objections to claims are based upon the 589 User Accounts that were identified and relied upon by the Zagarellas with respect to their proofs of claim. Therefore, information respecting those additional User Accounts is not at issue.

Based upon the foregoing, the Motion should be denied or, alternatively, the relief granted should be narrowly prescribed as set forth herein.

¹ Indeed, where a party requesting discovery had an opportunity to obtain the information sought and failed to do so, courts often prevent access to further discovery. *Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 193 (1st Cir. 2001)(granting protective order and quashing subpoenas issued to witnesses).

STEPHEN B. DARR,
LIQUIDATING TRUSTEE,
By his attorneys,

/s/ Andrew G. Lizotte

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Dated: November 9, 2020
787614

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS**

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CERTIFICATE OF SERVICE

I, Andrew G. Lizotte, hereby certify that on November 9, 2020, I caused to be served, by this Court's CM/ECF system, and by electronic mail as indicated on the service list attached as Exhibit A, a copy of the following document:

- Objection by Liquidating Trustee to Motion for Leave to Depose Timothy Martin (Rule 2004)

/s/ Andrew G. Lizotte

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Dated: November 9, 2020
788150

**IN RE: TELEXFREE, LLC, TELEXFREE, INC., AND
TELEXFREE FINANCIAL, INC.
BANKRUPTCY NO. 14-40987**

EXHIBIT A TO

CERTIFICATE OF SERVICE

(Dated November 9, 2020)

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