

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

**FIRST INTERIM APPLICATION FOR COMPENSATION AND
REIMBURSEMENT OF EXPENSES OF MILLIGAN RONA DURAN & KING
LLC AS CLASS COUNSEL TO THE DEFENDANT CLASS**

Pursuant to “Class Certification Order and Approval of Class Counsel”

(Doc. No. 194, attached hereto as Exhibit A) and Massachusetts Bankruptcy Local Rule 2016-1, the law firm of Milligan Rona Duran & King LLC (“MRDK”) respectfully requests that this Court authorize and order Stephen B. Darr, as Chapter 11 Trustee, (“Trustee”) to release funds requisite to compensate MRDK for its reasonable attorney’s fees incurred and for reimbursement of the reasonable and necessary expenses incurred by MRDK from April 26, 2016 to July 31, 2017 in connection with defending *Darr v. Argueta*, Adv. Pro. 16-4006.

INTRODUCTION

1. In this Interim Application – the law firm’s first, MRDK requests attorney’s fees in the amount of **\$97,912.50** plus reimbursement of expenses in the amount of **\$1,349.62**, for a total of **\$99,262.12**. (See Exhibit E, Grand Totals.)

2. The attorney’s fees have been divided into three temporal categories:
(1) \$30,102.50 in fees related to research, preparation, and negotiation of the motion for

class certification, appointment of MRDK as class counsel, and creation of a defense fund, all of which were necessarily incurred prior to MRDK's approval as class counsel (see Exhibit B); (2) \$25,310.00 in fees related to class litigation incurred during the balance of 2016 after this Court's approval of MRDK as class counsel (see Exhibit C); and (3) \$42,500.00 in fees incurred in 2017, when MRDK's rate increase went into effect, related to the class litigation, the challenge to the Trustee's standing, the filing of class proofs of claim, and working with experts. (See Exhibit D.)

3. This application presents a novel issue not explicitly contemplated by the bankruptcy rules relating to employment of professionals. MRDK was appointed class counsel on October 6, 2016. But from April 26, 2016 to October 6, 2016, MRDK incurred \$32,102.50 in fees (of which only \$30,102.50 are sought herein¹) exploring ways to best protect class interests. (See Exhibit B.) This effort began with research into the defense of class actions and common funding dilemmas, including the problem of free riders. MRDK then began research into the possibility that the Estate could provide funding and identified specific examples, including *In re Dehon*. MRDK negotiated with the Trustee's counsel on the potential terms of class certification and Estate funding. MRDK worked to find a suitable class representative who would consent to be a class representative. MRDK prepared and filed a motion for class certification, appointment of MRKD as class counsel, and to create a defense fund.

¹ After review of its time records, MRDK has identified 7.3 hours of time entries, totaling \$2,000 fees, relating to establishing relationships with defendants who were not class representatives. This work was excluded from this application because it did not appear to directly benefit the class. The excluded entries are still displayed in Exhibit F, but the dollar amounts sought in connection with those entries have been set to \$0.

4. The question is whether MRDK can receive compensation for work that *benefited the class* but was performed *before* the Court's order certifying a class and appointing class counsel. MRDK believes the answer is affirmative, insofar as MRDK was not retained by the Estate under 11 U.S.C. § 327, and there was a significant amount of work necessary to request the appointment of class counsel and creation of a limited defense fund. Furthermore, even in more traditional circumstances, professional compensation for work performed before retention is permitted in "extraordinary circumstances sufficient to excuse the failure to file a timely petition." *In re Jarvis*, 53 F.3d 416, 419-20 (1st Cir. 1995). At a minimum, this application presents "extraordinary circumstances" warranting compensation for MRDK's work performed prior to class certification, as it simply would not have been possible to perform the work after class certification. Accordingly, as *In re Jarvis* suggests, this Court "is empowered with discretion to grant *nunc pro tunc* retention orders and allow compensation." *Id.* (quoting 2 Lawrence P. King, *Collier on Bankruptcy* § 327.02, at 327-20 (15th ed. 1995)).

5. Due to the extraordinarily rare confluence of a massive defense class action (in and of itself rare) and bankruptcy rules, it is appropriate for MRDK to receive compensation for work prior to class certification. Without the firm's advocacy for creation of a defense fund, it is unlikely that class certification would have been achieved.²

² Additionally, Fed. R. Civ. P. 23(h) does not appear to apply to defense class actions. While the rule references attorney's fees, it presupposes only the disbursement of attorney's fees when a plaintiff class successfully obtains judgment. Rule 23(h) explicitly references Rule 54(d)(2) – a

6. From October 7, 2016 to July 31, 2017, MRDK has been class counsel for the defendant class of domestic promoters. During this post-certification period, the fees total \$67,810.00. (See Exhibits C - D.) Due to a rate change at the end of 2016, those rates can be divided into two periods.

7. For the remainder of 2016 following class certification, MRDK incurred the following fees for class defense work: \$25,310.00.

8. In 2017, MRDK's rates were subject to a modest across-the-board increase. This rate increase, which was the first across-the-board rate increase for MRDK since it was founded in 2015, was on average \$33.33 per hour per attorney. Applying this rate increase, MRDK's fees defending the class in 2017 (through July 31st) were: \$42,500.00. (See Exhibit D.)

BACKGROUND

9. The Trustee alleges that the Debtors operated a massive Ponzi scheme, defrauding hundreds of thousands of people of billions of dollars. Germane to this Application, the Trustee alleged that roughly 15,000 individuals or entities were "Net Winners" who illegally profited from the fraud. These 15,000 Net Winners comprise the class of defendants ("Net Winner Class").

10. As set forth below, MRDK has expended considerable time and resources—both prior to class certification and thereafter—pursuing defense strategies to protect the Net Winner Class, and to ensure a resolution that is just, fair, and efficient to class members. MRDK has performed this work in connection with two adversary

rule appropriately titled "Judgment; costs." It is doubtful that Rule 23(h) was intended to apply to the present situation where counsel for a defendant class seeks interim fees.

proceeding: the domestic Net Winner Class case (*Darr v. Argueta*, Adv. Pro. 16-4006), and a related proceeding concerning whether the Net Winner Class should be subjected to identical litigation in district court by alleged victims of TelexFree (*Darr v. Dos Santos*, Adv. Pro. 15- 04055).

11. MRDK's work in these adversary proceedings included drafting the motion for class certification and to create a defense fund, drafting a class answer, drafting an amicus brief on the issue of the whether these claims belong in bankruptcy court or district court, obtaining and reviewing TelexFree's SIG data, communicating with experts at StoneTurn Group, and filing proofs of claim on behalf of the class.

WORK PRIOR TO CLASS CERTIFICATION

12. On or around April 26, 2016, MRDK was first contacted by and began interviewing members of the Net Winner Class.

13. On or around July 2016, MRDK began discussing with the Trustee and his counsel about the possibility of Mr. Balan acting as class representative, MRDK acting as class counsel, and the need for a common defense fund to best serve the Net Winner Class's rights while balancing the Trustee's need for an efficient resolution of the claims.

14. From April 26, 2016 to October 6, 2016, MRDK held numerous conference calls and in person meetings with the Trustee, the Trustee's counsel, and others.

15. For example, on August 29, 2016, MRDK and its attorneys held a conference call with the Trustee and the Trustee's information technology specialist about the type and extent of the data that would be produced by the Trustee and later reviewed by the Net Winner Class's expert.

16. During this period, MRDK and its attorneys filed two motions to extend time in which to respond to the Amended Complaint in order to pursue the class certification, employment, and defense fund. (See Doc. Nos. 134 and 167.)

17. During this period, MRDK and its attorneys attended multiple hearings necessary to protect the then-potential class's interests from a possible default.

18. On October 6, 2016, this Court certified the defendant Net Winner Class. (Doc. No. 194.)

19. On October 6, 2016, MRDK was appointed class counsel for the Net Winner Class. (Doc. No. 194.)

20. For the period April 26, 2016 to October 6, 2016, MRDK seeks fees in the amount of \$30,102.50.

WORK AFTER CLASS CERTIFICATION

21. Immediately after class certification, MRDK began working on preparing an answer on behalf of the Net Winner Class. (Doc. No. 215, Dec. 21, 2016.)

22. Additionally, MRDK filed an Amicus Brief regarding a motion for summary judgment on behalf of the Net Winner Class in the related matter *Darr v. Dos Santos*, Adv. Pro. 15- 04055.

23. MRDK also expended significant effort and incurred most of its expenses setting up the infrastructure to be able to email all 15,000 members of the Net Winner Class. While the purpose of the system is to have a direct means of communication with class members, the first use of the system was to notify class members of MRDK's appointment and to instruct members to preserve relevant documents.

24. MRDK, as class counsel, retained StoneTurn Group as the Net Winner Class's expert and worked closely to obtain the necessary data and prepare the scope of StoneTurn's opinions. StoneTurn Group is in the process of analyzing the data and preparing its opinions concerning the "Sistemas de Informações Gerenciais" ("SIG") data and the Trustee's assumptions and analysis of the SIG data.

25. Effective January 1, 2017, MRDK implemented an across-the-board rate increase for the firm. This rate increase, which was the first such rate increase for MRDK since it was founded in 2015, was on average \$33.33 per hour per attorney. Applying this rate increase, MRDK's fees defending the class in 2017 (through July 31st) are \$42,500.00. (See Exhibit D.)

BRIEF SUMMARY OF SERVICES

26. In connection with the domestic Net Winner Class litigation, MRDK performed the following activities:

- a. With regards to the pre-certification time-period:
 - i. Interviewed several defendants and communicated with the Net Winner Class;
 - ii. Attended hearings on behalf of then-potential class members to address the issue of staying defaults until a class representative was appointed;
 - iii. Filed motions for extensions of time to answer the Amended Complaint in order to allow time to negotiate what form a

defense class representation might take (Doc. Nos. 134 and 167);

- iv. Negotiated with the Trustee's counsel regarding class certification, appointment of class counsel, and creation of a defense fund; and
- v. Filed the "Motion to Designate Class Representative, Appoint Milligan Rona Duran & King LLC as Class Counsel, and Create Defense Fund, Assented-to By Trustee in all Respects Except as to Amount of Proposed Fund." (Doc. No. 188.)

b. With regards to the post-certification time-period:

- i. Filed the Answer on behalf of the Net Winner Class (Doc. No. 215, Dec. 21, 2016);
- ii. Filed a proof of claim on behalf of the Net Winner Class;
- iii. Filed an Amicus Brief regarding a motion for summary judgment on behalf of the Net Winner Class in the related matter Adversary Proceeding No. 15-04055;
- iv. Collected and reviewed voluminous records, including documents from the Trustee; and
- v. Worked closely with the Net Winner Class's expert to provide and review the SIG data from the Trustee.

27. MRDK has also incurred reasonable and necessary litigation expenses totaling \$1,349.62. These expenses, which are itemized in and attached as Exhibit G,

include translation services, domain registration fees for telexfreelawsuit.com for class notice, legal research fees, and local travel costs.

28. Accordingly, the total amount of compensation and reimbursement sought in this Application is \$99,262.12. (See Exhibit E, Grand Totals.)

29. MRDK states that the compensation and expenses herein sought belong solely to the firm and its attorneys, and such fees will not be divided, shared or pooled, directly or indirectly, with any other person or firm.

30. MRDK and its attorneys have not received or been promised any other payments for the services covered in this Application. MRDK and its attorneys have not received any prior interim payments from the Defense Fund establish in this matter.

31. Pursuant to Bankruptcy Rule 2016 and MLBR 2016-1, MRDK submits the following information in support of the request for compensation and reimbursement of expenses:

- a. A copy of the Court's order reciting the terms and conditions of employment and compensation (Exhibit A);
- b. A copy of the Court's order authorizing MRDK as class counsel and approving a defense fund of \$225,000.00 from the Estate (Exhibit A);
- c. A brief narrative summary of the services rendered by MRDK in connection with its work as Special Litigation Counsel for the Trustee (¶¶ 12-27, *supra*);

- d. A chart breaking down MRDK's 336.5³ total hours expended (i) showing the full name and initials of each attorney who worked on the case; and (ii) detailing the number of hours expended by each attorney for each of three time periods:
- i. April 26, 2016 to October 6, 2016 (¶¶ 12-20, 26(a), *supra*);
(Exhibit B);
 - ii. October 7, 2016 to December 31, 2016 (¶¶ 21-24, 26(b), *supra*);
(Exhibit C); and
 - iii. January 1, 2017 to July 31, 2017 (¶¶ 21-25, 26(b), *supra*)
(Exhibit D);
- e. Pursuant to MLBR 2016-1, a table showing the grand totals per time keeper and for the firm (Exhibit E);
- f. Contemporaneous attorney time records describing the specific services performed each day by each person with the time broken down into units of tenths of one hour devoted to such services (Exhibit F);
- g. Expense sheets, breaking down the \$1,349.62 in expenses into each individual expense (Exhibit G); and
- h. A brief biography of each person included in the fee application, stating his or her background and experience (Exhibit H).

32. No retainer, partial payment, or interim allowances have yet been requested by or paid to MRDK in this Adversary Proceeding.

³ Through July 31, 2017, MRDK expended 343.8 total hours working on the domestic Net Winner Class action. This request for compensation, however, excludes 7.3 of those hours. See note 1, *supra*.

33. This is MRDK's first interim application for compensation and reimbursement of its disbursements and expenses as Class Counsel to the class of defendants in this Adversary Proceeding as related to the Chapter 11 case.

WHEREFORE, MRDK respectfully requests that this Court enter an order regarding compensation and reimbursement of expenses, as follows:

- i. MRDK requests \$97,912.50 in reasonable and necessary attorney's fees;
- ii. MRDK requests reimbursement of reasonable and necessary expenses in the amount of \$1,349.62; and
- iii. Based on the foregoing, MRDK requests total compensation and reimbursement of \$99,262.12.

Respectfully Submitted,

MILLIGAN RONA DURAN & KING LLC

Dated: August 17, 2017

/s/ Ilyas J. Rona
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