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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Consumer Financial Protection Bureau, Plaintiff, vs. Chance Edward Gordon, etc., et al., Defendants. _____	Case No.: CV12-6147-RSWL(MRWx) Complaint Filed: 7/18/2012 DEFENDANT CHANCE E. GORDON AND GORDON LAW FIRM, P.C.'S OPPOSITION TO RECEIVER'S REQUEST FOR PAYMENT; REQUEST TO TAKE JUDICIAL NOTICE Date: March 4, 2013 Time: 1:30 p.m. Ct.Room: Hon.Percy Anderson 15

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I. Introduction

Recent decisional authority has raised a substantial question about the validity of the instant prosecution and all related enforcement activities, including without limitation the appointment of the Receiver, and his lawyers, in this action. The recent decision in *Canning v. N.L.R.B.,* 2013 WL 276024 (D.C. Cir. 2013) strikes like a dagger into the heart of the instant action and gives reason to question its validity *ab initio*.

Most of the balance of the Gordon Defendants' opposition is the same as their earlier opposition. The Receiver's pending motion seeks payment of nearly money collected from the Gordon and Pessar business entities, including money extracted from bank accounts of Gordon & Associates Publishing, Inc., an entity that is not even a defendant in this action. The Pessar Defendants have settled with a proposed stipulated judgment that abandons their money collected by the Receiver. The Gordon Defendants take no position regarding that money.

The Gordon Defendants suggest that their money approximately $60,600, plus a an amount reserved as interest, must be held pending the outcome of this action. It would be a travesty to distribute money to the Receiver and then conclude that the entire prosecution was void *ab initio* because of the unconstitutional acts of an overzealous President.

The Receiver's pending motion demonstrates Plaintiff's bad faith in initiating this action because, if the motion is granted, there will be nearly no money to distribute to injured consumers. While the number of pre-litigation injured consumers was minimal, e.g., the Gordon Defendants had a success rate between 85% and 95% based on a fair reading of the Receiver's first report, the Receiver's conduct has virtually guaranteed that there will be many. At the Receiver's fee application demonstrates, the Receiver spent nearly nothing on running the existing businesses preferring, instead, to justify its

reputation as a liquidation only firm. Thus, over 800 active clients in financial distress, many of whom were facing foreclosure, were totally abandoned by the receiver. Despite the absence of proof of a substantial amount of consumers injured before the instant action was filed, there will certainly be a significant number of consumers injured after the Receiver seized and dismantled the defendant businesses.

The Receiver's pending motion seeks nearly all of the collected money. While it would be tedious and pointless to attempt to attack the billing line item by line item, it is clear that most of the billing is unnecessary because the Receiver failed to operate the modification business. Instead, the Receiver acted as an investigative agent of the Plaintiff and should be paid from governmental funds and not the funds of the Gordon Defendants who have not been found liable for any misconduct.

The Gordon Defendants object to the use of their money to make any interim payment to the Receiver, his lawyers, and others employed by the Receiver. There has been no adjudication that the money collected by the Receiver - particularly money belonging to the Gordon Defendants and a third party - is the product of unlawful conduct. There has not even been a preliminary determination - after the Gordon Defendants were given an opportunity to present an opposition - that Plaintiff has a likelihood of success on the merits. Moreover, a fair and objective analysis of the figures presented in the Receiver's first report demonstrates that 85% to 95% of the consumers in question received the services they contracted for. Plaintiff's only success has been by presenting an ex-parte application, with a complaint under seal and no notice to the Gordon Defendants, where Plaintiff puffed the significance of a vocal but statistically insignificant minority of disgruntled former customers. Under these circumstances, there is no justification to grant the instant motion.

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In the event the Court is inclined to make an interim award, the Gordon Defendants object to the majority of the request for fees on the grounds that the work is neither necessary nor appropriate. Much of the charges are for work that can only be described as litigation support for Plaintiff. In essence, Plaintiff has hired an investigative and research team and seeks to pass on the expenses to Defendants. That ploy should be condemned, not rewarded.

II. The Pending Motion Is Procedurally Defective

Local Rule 7-3 contains a meet and confer process required before filing a motion. That rule requires a notice of motion to specify "This motion is made following a conference of counsel pursuant to L.R. 7-3 which too place on (date)." The Receiver has failed to comply with that requirement. In addition, the instant motion, expressly made pursuant to Local Rule 66-7, is premature. The local rule applies to permanent receivers, not temporary receivers. Accordingly, the instant motion should be denied without prejudice based on procedural blunders.

III. There Is Valid Reason To Conclude That The Instant Action Is Constitutionally Invalid, So Approving The Expenditure Of The Gordon Defendants' Money Should Await Resolution Of The Constitutional Issue

Plaintiff was established as the result of the Dodd-Frank Act, which provided plenary powers, many of which were transferred from other agencies. These powers, and direction for the fledgling agency were outlined in a July 15, 2011 report of the Office of Inspector General, which was entitled "Review of CFPB Implementation Planning Activities" (hereinafter "OIG Report"). The Gordon Defendants ask this Court to take Judicial notice of the OIG Report.

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Page 2 of the OIG report explains that "As mandated by the Dodd-Frank Act, a presidentially appointed, Senate-confirmed director is to lead the agency. A CFPB Director has not yet been appointed." Page 4 of the OIG Report contains the following significant limitations on the CFPB's authority and powers:

> In addition to the transferred functions, CFPB has newly-established federal consumer financial regulatory authorities. The Treasury Secretary is not permitted to perform certain newly-established CFPB authorities if there is no Director by the designated transfer date. For example, if there is no Director by the designated transfer date, in general, the Treasury Secretary is not permitted to exercise the authority to:
>
> • prohibit unfair, deceptive, or abusive acts or practices under subtitle C in connection with consumer financial products and services;
>
> • prescribe rules and require model disclosure forms under subtitle C to ensure that the features of a consumer financial product or service are fairly, accurately, and effectively disclosed both initially and over the term of the product or service;
>
> • prescribe rules under section 1022 relating to, among other things, the filing of limited reports to CFPB for the purpose of determining whether a nondepository institution should be supervised by CFPB;
>
> • supervise nondepository institutions under section 1024, including the authority to (a) prescribe rules defining the scope of nondepository institutions subject to CFPB's supervision, (b) prescribe rules establishing recordkeeping requirements that CFPB determines are needed to facilitate nondepository supervision, and (c) conduct examinations of nondepository institutions.

In summary, the CFPB did not gain authority to bring enforcement actions against non banking persons (natural or legal) until "a presidentially appointed, Senate-confirmed director is to lead the agency."

It is well known that the CFPB's director, Richard Cordray, was appointed by President Obama on January 4, 2012 and was not confirmed by the United States Senate.

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See New York Times Article, January 4, 2012. The Gordon Defendants ask this Court to take Judicial notice of the New York Times Article.

The significance of this unconfirmed appointment was the subject of review in *Canning v. N.L.R.B.,* 2013 WL 276024 (D.C. Cir. 2013), which tested the constitutional validity of "three members [of the NLRB who] were all appointed by the President on January 4, 2012, purportedly pursuant to the Recess Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 3." According to the *Canning* Court, the presidential appoints on that day were not valid "intrasession recess" appointments for a variety of well explained reasons. As a result, the NLRB's order was vacated, and the Court of Appeals refused to enforce an invalid order.

The CFPB's director, Richard Cordray, was appointed on the same day, using the same invalid usurpation of legislative authority. Thus, according to the reasoning of the D.C. Circuit Court of Appeals, enforcement actions initiated during the Cordray reign, including the instant action, would be constitutionally infirm. The instant situation is even more infirm than the NLRB situation because the OIG Report specifically requires the CFPB to have "a presidentially appointed, Senate-confirmed director is to lead the agency." There has been no Senate confirmation of the CFBP's director.

Distribution of the Gordon Defendants' money should await the determination of the validity of this action. The Gordon Defendants have propounded Requests for Admissions regarding the date and nature of Mr. Cordray's appointment. Responses are likely to be followed by a summary judgment motion based on the *Canning* holding. Should this Court follow the well reasoned opinion of the D.C. Circuit Court of Appeals, then it is likely that the Court would to find that Plaintiff lacked the authority to file the instant action, so it should be dismissed. With that disposition not only possible but

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likely given the current state of the law, then the Gordon Defendants should not be forced to chase after wrongfully seized funds.

IV. The Issue Of Payment For The Receiver Should Be Deferred

As previously argued, the issue is not whether the Receiver should be paid for its work but, rather, who should pay the Receiver. The current motion seeks to use collected funds (namely, the money that would otherwise belong to the Defendants or would be refunded to consumers whose work was not completed because this litigation obstructed Defendants' ability to finish pro bono loan modification work). Once dissipated, those funds would not be available to return to Defendants, should Defendants prevail on the merits, or to compensate consumers who suffered because the Receiver did no loan modification work. Accordingly, the issue of whether the Receiver should be paid from collected funds or from the Plaintiff's budget should wait.

V. The Gordon Defendants Should Not Have To Pay For Investigative Efforts

Plaintiff has cleverly crafted the receivership order to assign to the Receiver the task of investigating issues that Plaintiff would have to prove at trial. The Receiver's clearly biased conduct, from the exclusion of the Gordon Defendants from their office, to the refusal to make payments to preserve frozen assets, to the unquestionably biased reports and statements to this Court, demonstrate Plaintiff is getting what it bargained for.

A review of the moving papers demonstrates that most of the work performed is for the benefit of Plaintiff's litigation efforts and not for the benefit of any consumer, as described below:

- The Receiver seeks recovery for a preliminary analysis of the sales and marketing activities, business operations, and activities of the Receivership Defendants. This

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must be reviewed in light of the Receiver's history as a liquidation firm (*see* Plaintiff's submission of Robb Evans & Associates' firm resume and history attached to their first opposition), the Receiver's failure to do anything to try to operate the processing department, and the Receiver's desire to liquidate Defendants' business. The liquidation option was a foregone conclusion, despite the Receiver's anticipated protests to the contrary, so this work had no value other than to provide Plaintiff with evidence for trial.

- The Receiver seeks recovery for an analysis of case files. Again, this served no consumer benefit, as the Receiver did nothing to attempt to work or process the files. The same blanket suggestion that consumers seek alternative arrangements and liquidation recommendation could have been accomplished without this work. Again, the most of the Receiver's work amounted to thinly veiled litigation support for Plaintiff, which should be paid for by Plaintiff not the Gordon Defendants.
- The Receiver seeks recovery for efforts to evaluate closing numbers. That is pure investigation for Plaintiff and has nothing to do with a legitimate receivership function.
- The Receiver seeks recovery for describes analysis of complaints. Again, that is pure investigation for Plaintiff and has nothing to do with a legitimate receivership function. That is substantiated by the statements in the end of the paragraph, where Mr. Kane tacitly admits that the purpose of that work was to file a second report because the results of the first one were too favorable to the Gordon Defendants. Apparently, Plaintiff was embarrassed about the transparency of the bias in the Receiver's initial report and the ease with which the Receiver's numbers were properly reclassified to show a laudable success rate. Frantic to

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justify its existence and please Plaintiff, the Receiver worked aggressively to create some basis to support it efforts to revise "downward its conclusions regarding the likely success rate."

- The Receiver seeks recovery for a variety of litigation support efforts, not legitimate receivership efforts with one exception. The detailed analysis of customer records, quickbooks records, and other business operations date is totally unnecessary given the fact that the Receiver was never going to operate the processing business. It only provides investigation for Plaintiff for trial.
- The Gordon Defendants conceded that a receptionist - with scripts to respond to questions - was necessary to address consumer calls and concerns. The Gordon Defendants will conceded that developing the scripts would cost approximately $1,000 of associate lawyer time, as well as a $10 per hour receptionist for 40 hours per week for 7 weeks ($2,800).

The Receiver's moving declarations chronicle work that is clearly improper to charge to the receivership estate. This includes reviewing facebook postings, which has no value to any consumer and should be done, if at all, outside of billable time. This also includes opposing Mr. Gordon's request for subsistence money. This is particularly disingenuous. The receiver and its lawyer want a substantial amount of money to object to Mr. Gordon's request for money to maintain and feed himself and pay his counsel, so that it would have been more cost effective to allow Mr. Gordon to have some of his money for his expenses. Mr. Gordon is forced to feed himself by hunting game because his request for substance money was effectively denied, while the Receiver wants to be paid from Mr. Gordon's earnings for participating in the effort to starve him. That is a particularly despicable misallocation of resources.

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VI. Conclusion

The initiation and prosecution of this action, particularly given the high profile and public nature of the CFPB's enforcement actions, has causes irreparable injury to the Gordon Defendants. Their legal publishing business and law practice have been destroyed and liquidated, with no meaningful prospect of resurrection even if they are vindicated on all counts, and even, in the more likely case, this action terminates because Mr. Cordray's appointment was unconstitutional. At very minimum, the money seized from the Gordon Defendants, and some cushion for interest, should be retained to provide some capital for Mr. Gordon to start over.

Respectfully presented,

LAW OFFICE OF GARY KURTZ
A Professional Law Corporation

Dated: February 11, 2013

By: *Gary Kurtz*
Gary Kurtz, Esq. Attorney for
Defendants Chance E. Gordon
and The Gordon Law Firm, P.C.

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REQUEST TO TAKE JUDICIAL NOTICE

Pursuant to Rule 201, Federal Rules of Evidence, Defendants Chance E. Gordon and The Gordon Law Firm, P.C., request that this Court take Judicial Notice of the following two documents:

1. July 15, 2011 report of the Office of Inspector General, which was entitled "Review of CFPB Implementation Planning Activities." A true and correct copy is attached hereto as Exhibit "1;"

2. New York Times Article, January 4, 2012. A true and correct copy is attached hereto as Exhibit "2;" and

3. The CFPB's director is Richard Cordray, who was appointed by President Obama on January 4, 2012.

Respectfully presented,

LAW OFFICE OF GARY KURTZ
A Professional Law Corporation

Dated: February 11, 2013

By: Gary Kurtz
Gary Kurtz, Esq. Attorney for
Defendants Chance E. Gordon
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Certification

I hereby certify that, on February 11, 2013 a copy of the foregoing DEFENDANT CHANCE E. GORDON AND GORDON LAW FIRM, P.C.'S OPPOSITION TO RECEIVER'S REQUEST FOR PAYMENT; REQUEST TO TAKE JUDICIAL NOTICE T was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's EM/ECF System.

Dated: February 11, 2013

Gary Kurtz

Gary Kurtz