

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

FEDERAL TRADE COMMISSION, et al,

Plaintiffs,

vs.

ZURIXX, LLC, et als,

Defendants.

CIVIL NO.: 2:19-cv-00713-DAK-DAO

District Judge Dale A. Kimball

Magistrate Judge Daphne A. Oberg

**MOTION FOR STAY PENDING APPEAL AND IN OPPOSITION TO AWARD OF
ATTORNEY’S FEES AND COSTS AND TO HOLD ANY JUDGMENT IN ABEYANCE**

TO THE HONORABLE COURT:

DAVID EFRON and EFRON DORADO SE (hereinafter collectively “Efron”), through their undersigned counsel, respectfully state and pray as follows:

1. On March 11, 2020, David K. Broadbent, the Court-appointed receiver (the “Receiver”) filed *RECEIVER’S MOTION FOR ORDER HOLDING EFRON DORADO, S.E. AND DAVID EFRON IN CONTEMPT OF COURT* (the “First Motion for Contempt”), whereby he requested that this Honorable Court issue an order:

holding Efron Dorado and Mr. Efrón in contempt of Court for violating the Injunction. To remedy the contempt violation, the Court should order Efron Dorado and Mr. Efrón to (1) allow the Receiver and his representatives to access the Puerto Rico Office for the purpose of recovering and removing Zurixx’s assets,(2) compensate the Receiver for the value of those assets owned by Zurixx located at the Puerto Rico Office that Efron Dorado and Mr. Efrón has taken, prevented the Receiver from taking, removed, or otherwise disposed of in violation of the Injunction, and (3) compensate the Receiver reasonable attorney fees and costs incurred in enforcing the Injunction. (Doc. No. 115 at pp. 6-7).

2. The herein appearing party voluntarily filed two replies to the First Motion for Contempt without submitting themselves to the jurisdiction of this Honorable Court, even though they had not been properly served or notified the same. (See Doc. Nos. 156

and 165). Efron argued, amongst other things, that conceding the Receiver's requested relief would constitute an unconstitutional taking of property without due process because the property sought to be taken by the Receiver no longer belonged to Defendant Zurixx.

3. Without holding a hearing on the matter, this Honorable Court sided with the local Receiver and issued its *Memorandum Decision and Order* on July 27, 2020, granting the First Motion for Contempt. (Doc. No. 166).

4. On August 21, 2020, Efron filed a motion for reconsideration (Doc. No. 173), wherein they indicated and highlighted the following facts: (i) that all files, documents and hard drives from every computer and server in Zurixx's office had been facilitated by Efron to the Receiver, removed and taken by the Receiver's local attorneys and technicians, based exclusively on the access that was voluntarily given to them, (ii) that Receiver had sent bills to this Honorable Court for amounts that surpassed the value of the Defendant's property at Efron's premises, (iii) that Receiver had never actually visited the premises or removed said property, and (iv) that the premises previously leased by Zurixx was in exactly the same condition as that tenant left it, other than what the Receiver's agents took from the computers and files.

5. This Honorable Court denied Efron's motion for reconsideration on October 20, 2020 (Doc. No. 193), and the appeal from the granting the First Motion for Contempt is currently pending before The United States Court of Appeals for The Tenth Circuit, Case No. 20-4090. At Docket No. 349, December 15, 2021, all parties (Efron not being one apparently) stipulated a stay of this case. This should be even more so here, with an appeal pending.

6. Unsatisfied and undeterred, with and by, the pending appeal, the Receiver filed *RECEIVER'S SECOND MOTION FOR ORDER HOLDING EFRON DORADO, S.E. AND DAVID EFRON IN CONTEMPT OF COURT AND FOR CIVIL SANCTIONS* (the "Second Motion for Contempt", Doc. No. 213), wherein he made the same false arguments as in his First Motion for Contempt, and requested that this Honorable Court issue a second order of contempt, practically identical to the one already being appealed:

holding Efron Dorado and Mr. Efrón in further contempt of Court for their continued defiance of the Injunction and violation of the Contempt Order and granting additional civil sanctions to remedy the harm caused by their contumacy in the following forms of relief: (1) an award of reasonable attorney's fees and costs incurred by the Receiver to enforce the Injunction and for all litigation related to both contempt motions, including the Receiver's fees; (2) compensation to the Receiver for the value of the Zurixx Property; and (3) coercive sanctions in an amount deemed necessary and sufficient by the Court to deter further violations. (Doc. No. 213 at pp. 10-11).

Clearly, Receiver was just trying to extort fees from Efron.

7. The herein appearing party respectfully submits that this Second Motion for Contempt was a brazen attempt by the Receiver to deprive the Tenth Circuit of its jurisdiction of these matters since he asked for materially the same remedies as he did in the First Motion for Contempt which is currently pending before said Honorable Court of Appeals.

8. The herein appearing party voluntarily filed two replies to the Second Motion for Contempt without submitting themselves to the jurisdiction of this Honorable Court, even though they had not been properly served or notified the same. (See Doc. Nos. 238 and 263). Efron argued, amongst other things, that (i) conceding the Receiver's requested relief was barred under Fed.R.Civ.P. 62.1 because this matter (including the award of attorney fees and costs) had already been appealed to the 10th Circuit, that (ii)

the premises and the property concerning Receiver's motion was no longer owned by Efron because it had been foreclosed in December 2020 and title had been transferred, that (iii) the subject of Receiver's motion had already been ruled on by the Puerto Rico State Court against the Receiver (i.e. the Court ruled for the summary eviction of tenant Zurixx in spite of Receiver's attorneys' objections and request for a stay of the proceedings where they unsuccessfully argued that the leased premises were part of Zurixx's assets), and that (iv) the action being sought by the Receiver was unreasonable, violative of Efron's property rights, and unnecessary, as all of the discovery materials including files, hard drives, and computers had already been taken from Zurixx's former offices early in 2020 by Receiver through his agents being given access by the same party against whom they soon thereafter requested be found in contempt of the November 1, 2019 *STIPULATED PRELIMINARY INJUNCTION ORDER* (Doc. No. 54).

9. As we've pointed out to this Honorable Court, Receiver himself has recognized that Zurixx's assets in Puerto Rico subject to the *PRELIMINARY INJUNCTION* were successfully acquired by him and sold long ago. (See, e.g. Doc. No. 271 at p 2). Although the appearing party understands the amounts obtained by Receiver through the sale of this property to be some \$20,000.00, much less than what he has requested in costs and attorney's fees (used office furniture and equipment that will usually hold little value).

10. On November 8, 2021, this Honorable Court issued a second *Memorandum Decision and Order*, this time granting the Second Motion for Contempt. (Doc. No. 334).

11. On November 17, 2021, Efron filed their second Notice of Appeal (Doc. No. 335) in this case, this time appealing from this Honorable Court's second *Memorandum Decision and Order*. The second appeal is currently pending before The United States Court of Appeals for The Tenth Circuit, Case No. 21-4141.

12. Surprisingly, on December 8, 2021, the Receiver filed a *MOTION FOR ATTORNEY'S FEES* (the "Motion for Attorney Fees", Doc. No. 348), whereby they petition this Honorable Court for attorney's fees totaling hundreds of hours for the work of numerous attorneys at rates well above \$500 an hour, for hundreds of hours, which in the majority were purportedly spent reviewing interoffice messages and holding interoffice conferences and other work generally not recoverable under most attorney fee's awards, duplicating work mostly done well after the Receiver had already seized and auctioned Zurixx's property in Puerto Rico early in 2020, and other matters related to this case but not Efron.

13. Although Receiver may have an argument that, in this forum, he was the prevailing party on the issue of contempt, which is being appealed, he has asked this Honorable Court to award him as attorney fees an overwhelming amount of time litigating an issue in Puerto Rico in which it most definitely did not prevail. As this Honorable Court can easily verify, Efron did not vigorously oppose the Receiver's motions for contempt, instead opting to voluntarily cooperate and facilitate access so that the Receiver could seize the assets it sought. As we've stated, Efron did litigate the issue of Zurixx's rights to the premises and prevailed against Receiver before the Puerto Rico Courts.

14. The Local Rules of this Honorable District Court state that "a motion for attorney's fees authorized by law must be filed and served within 14 days after (i) entry

of a judgment; or (ii) an appeals court remand that modifies or imposes a fee award”, and that such “motion must (i) state the basis for the award; (ii) specify the amount claimed; and, (iii) be accompanied by an affidavit of counsel setting forth the scope of the effort, the number of hours expended, the hourly rates claimed, and any other pertinent supporting information that justifies the award.” DUCivR 54-2(f).

15. It is a long held and widespread legal maxim that only reasonable fees should be awarded and that in order to recover attorney’s fees one must have been the prevailing party – although being a prevailing party seldom guarantees the recovery of attorney fees. Most of the federal fee-shifting statutes condition an award of attorney’s fees on obtaining success in the litigation, the most common interpretation provides that a “prevailing party” may be entitled to collect fees. To qualify as a prevailing party, a litigant must achieve some success on the merits of the case. 10 Moore's Federal Practice - Civil § 54.171 (2021). Establishing the litigant’s prevailing party status is only the first step in the attorney’s fee inquiry, as once across this “statutory threshold,” a prevailing party must also demonstrate that it should recover fees under the particular statute at issue and must prove the amount of the fee. Most fee-shifting statutes are discretionary; a prevailing party need not recover fees in every instance. *Id.*

16. “Any fee imposed incident to a contempt citation is primarily punitive but is also intended to compensate the victim of the contempt for the expenses incurred because of the contempt. The fees awarded should, therefore, be limited to those occasioned by the contempt.” 10 Moore's Federal Practice - Civil § 54.171 (2021), citing: General Signal Corp. v. Donallco, 787 F.2d 1376, 1380 (9th Cir. 1986) (any fees incurred prior to entry of consent judgment could not be recovered when defendant adjudged in

contempt of that consent judgment, because fee may compensate only harm deriving from contempt itself), and Halderman v. Pennhurst State School & Hosp., 49 F.3d 939, 941 (3d Cir. 1995) (fee award in contempt context is designed to make party whole for losses incurred as result of contempt).

17. In his Second Motion for Contempt the Receiver acknowledges that this Honorable Court “may: (1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantive issue.” Doc. No. 213 at p4 n3, citing Fed. R. Civ. P. 62.1(a). However, he cites United States v. Gonzales, 531 F.3d 1198, 1202–03 (10th Cir. 2008), for the contention that “[n]otwithstanding the Notice of Appeal, this Court retains jurisdiction to rule on the aspects of [his] Motion because an adjudication of civil contempt is generally not appealable until sanctions have been imposed, which has yet to occur here, and because this Motion deals with ongoing contempt with respect to the Injunction.” *Id.*

18. Nevertheless, we must point out that the Tenth Circuit has stated: “[o]ur unpublished disposition in United States v. Gonzales, 531 F.3d 1198 (10th Cir. 2008) (unpublished)—another postjudgment civil contempt case—cites to Hickey, as well as cases from the Fifth, Seventh, and Eighth Circuits, for the proposition that postjudgment civil contempt orders remain interlocutory until the district court makes both a finding of contempt and imposes a sanction. However, our ruling in Gonzales does not discuss what implications, if any, this postjudgment rule has on appeals from final judgment of prejudgment civil contempt orders.” Verlo v. City & Cty. of Denver, 741 F. App'x 534, 544 n.4 (10th Cir. 2018)(citations omitted).

19. Both contempt orders issued by this Honorable Court are currently being appealed as prejudgment civil contempt orders. See Tenth Circuit Case Nos. 20-4090 and 21-4141.

20. In devising sanctions for civil contempt, district courts should consider “the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.” United States v. United Mine Workers, 330 U.S. 258, 304, 91 L. Ed. 884, 67 S. Ct. 677 (1947). Appropriate sanctions may include a coercive fine, coercive incarceration, or a combination thereof. International Union, UMW v. Bagwell, 512 U.S. 821, 827-29, 129 L. Ed. 2d 642, 114 S. Ct. 2552 (1994); Dinnan v. Bd. of Regents of the Univ. Sys. of Ga., 625 F.2d 1146, 1150 (5th Cir. 1980). Courts have recognized that incarceration is an suitable sanction for civil contempt, but only as long as its purpose is to compel compliance with a court order and not to punish the contemnor. Bagwell, 512 U.S. at 826-27; Shillitani v. United States, 384 U.S. 364, 370-71, 16 L. Ed. 2d 622, 86 S. Ct. 1531 (1966); Dinnan, 625 F.2d at 1149-50.

21. “In general, the imposition of costs, attorney fees, and contempt sanctions involve collateral issues that may be considered after the principal suit has been terminated.” CGC Holding Co., Ltd. Liab. Co. v. Hutchens, 780 F. App'x 604, 606 (10th Cir. 2019), referencing: Cooter & Gell v. Hart-marx Corp., 496 U.S. 384, 396, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990).

22. In CGC Holding Co. the Tenth Circuit held that the contempt order therein involved a collateral matter that was not comprehended within the therein defendants’ appeal and that therefore, the district court was not divested of jurisdiction to consider the

motion seeking sanctions for the therein defendants' failure to comply with its order and to enter its contempt order. CGC Holding Co., Ltd. Liab. Co. v. Hutchens, *supra* at 607. (10th Cir. 2019).

23. As we've reiterated herein, the contempt orders are both being appealed and in no possible way may be considered a "collateral matter" to said appeals.

24. In addition, well before this Honorable Court entered its *Memorandum Decision and Order* on November 8, 2021 regarding the Second Motion for Contempt, on June 28, 2021, the appearing parties filed a motion to stay the proceeding in this District Court before the Tenth Circuit Court of Appeals which is currently pending resolution.

25. Likewise, in the present case, before surprisingly granting the local Receiver's motion for costs and fees (without any scrutiny as to said fees) on January 7, 2022 (Doc. No. 356), this Honorable Court had issued an order staying the case for 60 days on December 16, 2021. See Doc. No. 350. This is why it surprised the appearing parties when this Court granted the Receiver's motion and stated that it issued the same "considering the lack of opposition or objection" thereto. (Doc. No. 356 at p.1). Similarly, as we've reiterated, it was surprising to see that this Honorable Court found it reasonable to award Receiver fees for what it calls "the unnecessary cases in Puerto Rico" in which Receiver was most certainly not a prevailing party. Again, such fees are absolutely unreasonable as Receiver, with Efron's acquiescence and assistance, had long since fulfilled his tasks relative to Zurixx's property located in the appearing parties' former premises, and there unquestionably was no need for a battery of attorneys to conference amongst themselves for hundreds of hours after such tasks were completed – not to

mention charging well over \$500 an hour which is an unconscionable rate for such tasks in most jurisdictions including Puerto Rico.

26. Had Receiver's attorney been working for a private client, it would be immoral for them to justify charging the hours and fees they seek to recover for work that purely involved the seizing of assets that weren't worth a fraction of the amount of said fees – even if we assume *arguendo*, that the property in question was Zurixx's and subject to the *STIPULATED PRELIMINARY INJUNCTION ORDER*.

27. Therefore, for the above stated reasons, the appearing parties respectfully submit that the Receiver's Motion for Attorney Fees is unfounded and premature, and that the fees purported to be charged by his attorneys are wholly unwarranted and unreasonable. There is nothing in the record to show that the appearing parties have acted obstinately or frivolously in this matter to warrant such an unreasonable coercive fine, as even if one assumes that they had not cooperated, which they absolutely did, there was simply nothing to comply with as the Receiver had already finished with its tasks under the *STIPULATED PRELIMINARY INJUNCTION ORDER*, and the property was no longer owned by Efron and Receiver never subpoenaed the owner.

WHEREFORE, the appearing parties respectfully request that this Honorable Court stay Receiver's Motion for Attorney Fees (Docket No. 348) pending appeal, and/or reconsider its Order granting the same as unopposed while the case had been stayed by stipulation of the parties. That the Court hold in abeyance any judgment on attorney fees which would be again appealed, until the Tenth Circuit rules on this matter.

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico for Salt Lake City, Utah, this 26th day of January 2022.

s/David Efron
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