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7

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10  
11 FEDERAL TRADE COMMISSION,  
12 Plaintiff,  
13 v.  
14 DAMIAN KUTZNER, et al.,  
15 Defendants.

Case No. 8:16-cv-00999-DOC (AFMx)

**RECEIVER’S FINAL REPORT AND  
APPLICATION FOR: (1)  
DISCHARGE OF RECEIVER; AND  
(2) APPROVAL OF FINAL FEE  
APPLICATION**

JUDGE: Hon. David O. Carter  
CTRM: 9D  
DATE: February 22, 2021  
TIME: 8:30 a.m.

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1 Thomas W. McNamara, as Receiver, by and through his undersigned  
2 counsel, hereby submits his Final Report and files this Application for: (1)  
3 Discharge of Receiver and (2) Approval of Final Fee Application, thereby seeking  
4 an Order from the Court discharging the Receiver and approving the invoices for  
5 fees and expenses of the Receiver and his counsel (discounted as reported to the  
6 Court) for the period of November 1, 2016 through January 7, 2021.

7 **INTRODUCTION**

8 On May 31, 2016, the Federal Trade Commission (“FTC”) initiated this  
9 lawsuit against Brookstone Law P.C. (“Brookstone”) and Advantis Law P.C.  
10 (“Advantis”) and certain of their employees/principals, including Damian Kutzner,  
11 Vito Torchia, Jr., Jonathan Tarkowski, R. Geoffrey Broderick, and Charles T.  
12 Marshall.<sup>1</sup> Jeremy Foti, who was an owner, co-founder, and controlling person of  
13 Brookstone and a principal or controlling person of Advantis, was added as a  
14 defendant in the FTC’s First Amended Complaint filed on July 5, 2016. *See* ECF  
15 No. 61.

16 Mr. McNamara was appointed as the temporary receiver over the  
17 Receivership Entities the day after the complaint was filed, on June 1, 2016, with  
18 the Court’s entry of a temporary restraining order. *See* ECF No. 23 (“TRO”).<sup>2</sup> His  
19 appointment as Receiver for the Receivership Entities was confirmed with the

20 \_\_\_\_\_  
21 <sup>1</sup> “Brookstone” includes both Brookstone Law P.C. (California) and Brookstone  
22 Law P.C. (Nevada). “Advantis” includes both Advantis Law P.C. and Advantis  
23 Law Group P.C. Kutzner is a founder and the Chief Operating Officer of  
24 Brookstone and a principal or controlling person of Advantis. Torchia co-founded  
25 both Brookstone and Advantis and was the managing attorney of Brookstone.  
26 Tarkowski was named in the Complaint as the former or current managing attorney  
27 for Brookstone and a current or former attorney with Advantis. Broderick was a  
28 director and Chief Financial Officer of Advantis. Marshall was a director, Chief  
Executive Officer, and Secretary of Advantis.

29 <sup>2</sup> “Receivership Entities” is defined in the TRO to mean the Corporate Defendants  
(Brookstone and Advantis) and any entities that are part of Defendants’ common  
enterprise, including but not limited to Broad Base Inc. and Federal Management  
Systems Inc. “Receivership Entities” includes businesses that lack formal legal  
structure (such as businesses operating under fictitious business names), but that  
otherwise satisfy the definition of “Receivership Entity.”

1 Court’s entry of four Stipulated Preliminary Injunctions: the first as to Torchia  
2 (ECF No. 56); the second as to Advantis, Kutzner, Marshall, and Tarkowski (ECF  
3 No. 57); the third as to Brookstone and Broderick (ECF No. 59, and collectively  
4 with ECF Nos. 56 and 57, the “initial PIs”); and the fourth as to Foti (the “Foti PI,”  
5 ECF No. 153).

6 Some receiverships are simpler than others. The instant receivership was  
7 not such a receivership. It was complicated, costly, and in dire financial straits at  
8 the time of the Receiver’s appointment and throughout the life of the case.

9 **FINAL REPORT**

10 The Receiver faced a number of challenges in implementing both the TRO  
11 and the PI. These challenges, as well as other significant events of this  
12 receivership, are summarized below.

13 **I.**

14 **Background**

15 **A. Appointment of the Receiver**

16 The Receiver was appointed as temporary receiver on June 1, 2016 with the  
17 Court’s entry of the TRO in this action. On June 2, 2016, the Receiver and his  
18 team entered and took control of the business premises identified in the TRO:  
19 6 Hutton Centre Drive, Suite 1000, Santa Ana, California. After taking possession  
20 and control of the site, the Receiver secured the physical documents and electronic  
21 data located on the premises, which appeared to be the entire universe of  
22 materials.<sup>3</sup> Once the site and assets were secure, the Receiver suspended  
23 operations in compliance with the TRO and began the process of assessing  
24 Defendants’ business operations.

25 It was clear from the beginning that Defendants had drained most of the  
26 funds from the business prior to the Receiver’s appointment. The Receiver moved

27 \_\_\_\_\_  
28 <sup>3</sup> There was no evidence that any documents were stored off-site, there was  
evidence that 141 boxes of documents had been shredded in June 2014.

1 quickly to serve asset freeze notices on banks and other financial institutions at  
2 which Defendants were known to have accounts, but only \$90,000 or so remained  
3 in the accounts to be frozen. As the Receiver discovered, Defendants' business  
4 had scaled down substantially by the time of the Receiver's appointment, and  
5 Defendants had used nearly all of the funds previously paid by consumers. The  
6 Receivership Estate's limited resources would be an ongoing challenge for the  
7 Receiver, as discussed further below.

8 **B. Defendants' Business at the Time of the Receiver's Appointment**

9 The Advantis/Brookstone business over which the Receiver took control in  
10 2016 was the surviving component of a bigger "mass joinder" operation.<sup>4</sup>  
11 Defendants targeted consumers with distressed mortgages whose homes were at  
12 risk of foreclosure, representing that the consumers could protect their property  
13 and forestall foreclosure by signing onto Defendants' mass joinder litigation.  
14 Consumers paid a premium for Defendants' "services" (\$895 or \$1,250 for the  
15 initial legal analysis and \$3,000 or \$4,500 for the litigation and then monthly fees),  
16 but Defendants did little to prosecute the cases they filed on behalf of these  
17 consumers, and at the time the FTC initiated the instant lawsuit, all but one of the  
18 mass joinder actions had been dismissed for lack of prosecution, misjoinder, or  
19 failure to state a claim.

20 In the heyday of the business, which was around 2011-2013, there were as  
21 many as 40 to 50 employees. While the business was still operating at the time of  
22 the Receiver's appointment in 2016, it was on a much-reduced scale.<sup>5</sup> When the

23 \_\_\_\_\_  
24 <sup>4</sup> In a mass joinder action, tens or hundreds of plaintiffs sue a common group of  
25 defendants – here, mortgage lenders. Unlike a class action, in which a group of  
26 plaintiffs have a nucleus of common facts which form the basis for their lawsuit, in  
27 a mass joinder, the facts are different for each plaintiff and must be proved  
28 separately.

<sup>5</sup> As the Receiver stated in his Preliminary Report, Defendants' overall revenue  
between 2010 and 2014 appears to have been roughly \$15 million. Tax returns the  
Receiver obtained soon after his appointment showed revenues and income as  
follows: \$606,694/\$165,374 (2010), \$5.2 million/\$80,295 (2011), \$5.4 million/-  
\$5,393 (2012), and \$2.7 million/- \$5,480 (2013). We were not able to confirm the

1 Receiver took control of Defendants’ operations, he found some evidence of  
2 ongoing direct mail solicitations for mass joinder plaintiffs,<sup>6</sup> but Defendants’  
3 ongoing business appeared to be comprised mostly of the management of  
4 previously-filed mass joinder cases and/or their transformation to trustee cases  
5 (financed primarily by residual payments from clients).

6 When the Receiver was appointed, he identified ten active mass joinder  
7 matters (or spinoff trustee cases) which Defendants were managing.<sup>7</sup> In the  
8 aggregate, these cases include approximately 1,300 plaintiffs purportedly  
9 represented by Advantis/Brookstone.

10 ///

11 ///

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14

15 status of tax returns for 2014-2015, but revenues in 2014 and 2015 were likely  
16 much smaller than prior years.

17 <sup>6</sup> These mailers contained a number of false or misleading representations,  
18 examples of which are discussed in greater detail in the Receiver’s Preliminary  
19 Report (ECF No. 41). The Receiver also located scripts for Brookstone and  
Advantis on site, which guided the business’s intake employees on how to respond  
to consumers calling in response to the mailers.

20 <sup>7</sup> These matters included: (1) *Montes, et al. v. Wells Fargo Bank, et al.*, California  
21 Superior Court, County of Los Angeles, Case No. BC556821, (2) *Randall, et al. v.*  
22 *Citigroup Inc., et al.*, California Superior Court, County of Los Angeles, Case No.  
23 BC526888, (3) *Lawley, et al. v. Bank of America, et al.*, California Superior Court,  
24 County of San Diego, Case No. 37-2016-00011715-CU-OR-CTL, (4) *Bradford, et*  
25 *al. v. Bank of America, et al.*, U.S. District Court, Central District of California,  
26 Case No. 2:15-cv-05201-GHK-JC, (5) *Wright, et al. v. Bank of America, et al.*,  
27 California Superior Court, County of Orange, Case No. 30-2011-00449059-CU-  
28 MT-CXC, (6) *Aslami, et al. v. National Default Servicing Corp., et al.*, California  
Superior Court, County of Orange, Case No. 30-2016-00844390-CU-OR-CJC, (7)  
*Curtis, et al. v. MTC Financial, Inc., et al.* (extension to Chase), California  
Superior Court, County of Orange, Case No. 30-2016-00841019-CU-OR-CJC, (8)  
*Salgado, et al. v. Western Progressive, LLC, et al.*, California Superior Court,  
County of Orange, Case No. 30-2016-00854281-CU-OR-CJC, (9) *Wasinack, et al.*  
*v. Quality Loan Service Corp., et al.*, California Superior Court, County of  
Riverside, Case No. RIC1601230, and (10) *Lee v. JPMorgan Chase Bank, et al.*,  
U.S. District Court, Northern District of California, Case No. 3:15-cv-05215-  
WHA.

1 II.

2 **Implementation of the Initial TRO and Preliminary Injunctions**<sup>8</sup>

3 At the time of the Receiver’s initial appointment, he was faced with a  
4 number of daunting challenges. Defendants had defrauded thousands of  
5 consumers, approximately 1,300 of which were entangled in ongoing litigation. In  
6 addition to resolving the Receivership Entities’ roles in the consumer cases, the  
7 Receiver had to handle disposition of receivership assets with limited funding due  
8 to the small size of the Estate.

9 **A. Protecting Consumers in the Mass Joinder Litigation**

10 One of the Receiver’s first tasks was to find a soft landing for the consumers  
11 involved in the mass joinder litigation. The Receiver moved quickly to notify  
12 consumer plaintiffs (and the courts in which the mass joinder cases were being  
13 heard) of the receivership, filing notices to the courts in the eight active mass  
14 joinder cases which were being overseen by a lawyer working for  
15 Brookstone/Advantis.<sup>9</sup> That notice informed the courts and the parties that  
16 Brookstone/Advantis had been placed in receivership and would be withdrawing as  
17 counsel from the cases, and asked that the courts stay all proceedings for at least  
18 ninety (90) days to give the consumer plaintiffs time to obtain replacement  
19 counsel. *See* ECF No. 67.

20 At the same time, the Receiver sent notices to all of the consumer plaintiffs  
21 in the eight active mass joinder cases via email (or by U.S. Mail to those without

22 \_\_\_\_\_  
23 <sup>8</sup> As noted, Jeremy Foti was not initially a defendant in this action. The first TRO  
24 and set of PIs (the “initial PIs”) were therefore not as to Foti, but as to the other  
25 defendants. *See* ECF No. 23 (TRO as to all Defendants), ECF No. 56 (Stipulated  
26 PI as to Defendant Vito Torchia, Jr.), ECF No. 57 (Stipulated PI as to Defendants  
Damian Kutzner, Charles Marshall, Jonathan Tarkowski, Advantis Law PC, and  
Advantis Law Group PC), ECF No. 59 (PI as to Defendants Geoffrey Broderick,  
Brookstone Law P.C. (California), and Brookstone Law (Nevada).

27 <sup>9</sup> The eight active cases were *Randall v. Citigroup Inc.*, *Lawley v. Bank of America*,  
28 *Wright v. Bank of America*, *Aslami v. National Default Servicing Corp.*, *Curtis v.*  
*MTC Financial*, *Salgado v. Western Progressive LLC*, *Wasinack v. Quality Loan*  
*Service Corp.*, and *Lee v. JPMorgan Chase Bank*.

1 email addresses) advising them of the receivership, confirming that  
2 Brookstone/Advantis would be withdrawing as counsel, and explaining that the  
3 Receiver had requested 90-day continuances in the cases so that the consumer  
4 plaintiffs could obtain a replacement lawyer or appear on their own behalf. In  
5 these communications, the Receiver emphasized that the consumer plaintiffs would  
6 either need to secure replacement counsel or take steps to represent themselves if  
7 they wanted their cases to proceed. A link to the receiver's website with additional  
8 background information and details was also included.<sup>10</sup> Similar notices were  
9 dispatched to the consumer plaintiffs in the two mass joinder cases which had been  
10 dismissed without prejudice but not refiled.<sup>11</sup> *See id.*

11 **B. Preserving the Value of Receivership Defendants' Assets**

12 Because Defendants had scaled down their operation significantly (and had  
13 long since siphoned off the money they made in the business's heyday), there was  
14 little in the way of assets for the Receiver to preserve. The Receiver determined  
15 that vacation of the Receivership offices was necessary to preserve what little  
16 funds remained available.

17 Vacating the Receivership site posed a challenge, however, due to the lack  
18 of funds available to the Estate.<sup>12</sup> The Receiver worked with the FTC to reduce the  
19 expense of those tasks while preserving the necessary chain of custody. Following  
20 established protocols (*see* ECF No. 70), the FTC arranged for the transfer of the

21 \_\_\_\_\_  
22 <sup>10</sup> The Receiver's website provided the following: background and reference  
23 information for Brookstone/Advantis clients; updates on the status of the FTC  
24 case; a detailed Frequently Asked Questions section (based on questions coming  
into the Receiver's office and website) which contained links to the underlying  
court websites for each of the eight cases; and links to the operative complaints in  
the eight active cases (so plaintiffs would have a point of reference).

25 <sup>11</sup> These were the *Montes* and *Bradford* cases.

26 <sup>12</sup> The large quantity of paper records (approximately 100 boxes) and computers  
27 with hard drives to be removed (approximately 71) meant that the costs of record  
28 removal and storage would be substantial and economically impossible given the  
minimal Receivership assets. The Receiver determined that working with the FTC  
was the only feasible way to complete the process without incurring undue costs.

1 paper records and boxes of hard drives from the Defendants’ offices in Santa Ana  
2 site to an FTC facility with controlled and limited access.<sup>13</sup> After returning all  
3 leased equipment, selling the limited amount of furniture owned by the  
4 Receivership Entities, and facilitating the return of Defendants’ and employees’  
5 personal property, the Receiver vacated the Receivership site on August 5, 2016.

6 **III.**

7 **Implementation of the Foti TRO and PIs<sup>14</sup>**

8 Foti was not originally named as a defendant in this action. As the Receiver  
9 noted in his preliminary report to the Court (ECF No. 41), however, “Mr. Foti is a  
10 key, but elusive, player in the Advantis/Brookstone universe.” *Id.* at 14. Foti was  
11 not a formal owner of any of the Advantis/Brookstone entities, which allowed him  
12 to operate under the radar. Nonetheless, once onsite it became clear that Foti was  
13 “one of the bosses.” As reflected in the Receiver’s preliminary report, evidence of  
14 Foti’s extensive role included: Foti’s 2011 signing of a one-page “Deal Memo”  
15 with Defendants Kutzner and Torchia,<sup>15</sup> Foti’s classification as “Management” in  
16 early “firm” directories, and notes in financial records that indicated Foti and  
17 Kutzner were splitting the business’s profits. *See id.* at 14-15.

18 The FTC amended its complaint to add Foti as a defendant. *See* ECF No. 61  
19 (First Amended Complaint). A PI/Asset Freeze was issued as to Foti on August  
20 24, 2016. *See* ECF No. 110. Soon thereafter, the Court also granted the FTC’s *ex*  
21 *parte*, under seal application for a TRO against Foti, which included the

22  
23 <sup>13</sup> The computer hard drives were removed by a computer forensics expert working  
24 with the FTC. The two servers housing the Integrated Legal System (“ILS”)  
25 database, however, were relocated to the Receiver’s office in San Diego, as the  
26 database was necessary to communicate with consumers.

27 <sup>14</sup> *See* ECF No. 110 (PI/Asset Freeze as to Foti), ECF No. 130 (TRO as to Foti),  
28 ECF No. 153 (PI as to Foti).

<sup>15</sup> That “Deal Memo” stated that there would be a majority rule in the voting  
decisions amongst the shareholders of the firm and the non-attorneys (Employees)  
Foti and Kutzner.

1 appointment of the Receiver as receiver over Foti personally and named Time Out  
2 Management, Ltd. LLC (“Time Out,” the title owner of Foti’s residence) as a  
3 Receivership Entity. *See* ECF No. 130. The Receiver’s appointment was  
4 confirmed by entry of a second PI on November 15, 2016. *See* ECF No. 153.

5 Although Foti was not named in the original complaint, it was he – and not  
6 Kutzner, Torchia, or any of the other Defendants – who would cost the  
7 Receivership Estate the most. His misconduct generated rounds of motions and  
8 other briefs, which were a significant drain on the already-fragile finances of the  
9 Receivership Estate, and which could very well have left the Estate with nothing  
10 for either the FTC for consumer redress or the Receiver. The Receiver was able to  
11 avoid such a result only by securing concessions from the lienholders in  
12 connection with the sale of the real property owned by Time Out, the Estate’s one  
13 real asset. Without those concessions, not only would the Receiver have been  
14 unable to recoup his own expenses, but no funds would have been left to transfer to  
15 the FTC for consumer redress. It was only by extensive negotiation with the  
16 relevant parties and the substantial discount of his own and counsel’s fees (with  
17 additional work simply unbilled) that the Receiver was able to ensure a return of  
18 funds to the FTC upon the sale of the property.

19 **A. Immediate Access of the Time Out Property**

20 Following his appointment as the Temporary Receiver over Foti, the  
21 Receiver took steps to secure the Time Out property, which was the residence  
22 located at 300 Morning Star Lane, Newport Beach, CA 92660 (the “Time Out  
23 Property”), pursuant to the Foti TRO.<sup>16</sup> The only assets of value the Receiver was  
24 able to identify and secure were \$78,000 in cash (all \$100 bills) and \$31,062 in  
25 cashier’s checks, two Chanel watches, three Rolex watches, a Boucheron Diamond  
26

27 <sup>16</sup> The Receiver’s immediate access of the Foti home is discussed in detail in the  
28 Report of Temporary Receiver Re: Receivership Estate of Defendant Jeremy Foti  
(ECF No. 137).

1 Necklace, one firearm, and other jewelry.<sup>17</sup> The house itself – which was titled in  
2 the name of Receivership Entity Time Out – was the largest potential asset, though  
3 it was encumbered by nearly \$5 million in debt.

4 The Receiver took pains to undertake immediate access in such a way that  
5 disruption to the Foti household – in particular, the Fotis’ children – was  
6 minimized. *See generally* ECF No. 137. Foti responded with a number of  
7 falsehoods, *see* ECF No. 147 (documenting false statements in Foti’s proposed  
8 findings of fact), which was, unfortunately, a sign of things to come. Foti has  
9 made the Receiver’s job significantly more difficult, including by violating the Foti  
10 PIs, which culminated in the Receiver’s filing of a contempt motion against Foti  
11 (discussed below).

12 **B. Request for Instruction to Sell the Time Out Property**

13 The Court is well familiar with the Receiver’s efforts to sell the Time Out  
14 Property, having dealt with a significant number of status reports, motions, and  
15 other briefing related to the property following the transfer of the case to Your  
16 Honor upon Judge O’Connell’s passing. Well before the case was transferred to  
17 Your Honor, however, it was clear that something needed to be done with the Time  
18 Out Property. As the Receiver flagged for Judge O’Connell when he sought  
19 instruction to sell the property in early 2017:

20 For the most part, any substantial assets held by Mr. Foti are  
21 encumbered by loans at or near the equity value – these include the  
22 Lamborghini, the Maserati, and the 49’ boat. The home in Newport  
23 Beach will have some amount of net equity, but we will need  
24 additional due diligence for a more definitive valuation – for sure,  
25 however, **that equity is declining since Mr. Foti is not paying the  
mortgage. To date, he has also refused to pay the premium on the  
homeowners insurance and apparently does not intend to pay the  
property taxes.** Instead, his counsel has suggested the Receiver pay  
insurance and taxes. The jewelry identified in the Preliminary Report  
will have some liquidation value.

26  
27 <sup>17</sup> Judge O’Connell released the cash to Mrs. Foti based upon a claim that it was  
28 the property of her mother. The Court confirmed the Receiver’s sale of the jewelry  
on March 8, 2018. *See* ECF No. 411.

1 ECF No. 163 at 1 (emphasis added).

2 In order to protect the property, the Receiver had to front expenses, even as  
3 the Fotis continued to live in the house rent-free as squatters. This caused the  
4 Receiver to flag his serious concerns:

5 Given the dreadful financial straits of the Receivership Estate, this  
6 [Estate's payment of expenses] is not a long term solution. The  
7 situation has recently become dire in the Receiver's estimation. An  
8 appraisal obtained last week by the Receiver has fixed the home's  
9 value at \$6 million. Given the outstanding mortgages, interest and  
real estate taxes stand at approximately \$5 million, and continue to  
grow substantially every month, **Time Out's equity in the property  
is dissipating quickly. If something is not done, there will be  
nothing available for consumers should the FTC prevail.**

10 ECF No. 171 at 1-2 (emphasis added).<sup>18</sup> That was in January of 2017, and even at  
11 that point, the property's equity was sufficiently at risk that the holder of the third  
12 mortgage attempted to foreclose (though that attempt was later withdrawn in light  
13 of the Orders entered in this case). Judge O'Connell declined to authorize the sale  
14 of the property in February of 2017, without prejudice, on the basis that there was  
15 no final judgment or permanent injunction to enforce. *See* ECF No. 202. After a  
16 final judgment and permanent injunction were issued against Foti in September  
17 2017, the Receiver filed a renewed motion for authorization to sell in early  
18 November 2017, just before Judge O'Connell's passing. The case and motion  
19 were then reassigned to Your Honor. *See* ECF No. 373.

20 The Receiver's motion to sell the Time Out Property was granted on  
21 December 18, 2017 (ECF No. 391), and Foti was given 60 days to vacate the  
22 property. As the date to vacate neared, however, Foti filed a personal bankruptcy  
23 and bankruptcy on behalf of Time Out in violation of the Foti PIs. In so doing, he  
24 forced the Receiver to initiate contempt proceedings.

25  
26 <sup>18</sup> *See also id.* at 2 (“We estimate that Time Out owes roughly \$100,000 in unpaid  
27 interest and that figure continues to grow at roughly \$16,000 per month....  
28 Additionally, the real estate taxes for the Time Out property are delinquent.  
According to the Orange County Treasurer's website, the outstanding balance is  
\$26,019.63. By April 2017, the total outstanding amount will be \$49,673.84.”).

1 **C. Contempt Motion Against Foti**

2 Foti's obstructionist behavior persisted throughout the receivership, but was  
3 especially acute when the time came for him to vacate the Time Out Property.  
4 Desperate to retain control of the home he had been living in rent-free for more  
5 than eighteen months, Foti filed first an individual bankruptcy petition, and then a  
6 petition on behalf of Time Out. This was a blatant violation of the PIs by Foti,  
7 who signed as "Manager" for Time Out (an entity in receivership) in the  
8 bankruptcy filing and declared under penalty of perjury that he was authorized to  
9 file the petition on behalf of the debtor and that the debtor requested bankruptcy  
10 relief. *See generally* ECF No. 401-1.

11 By filing for bankruptcy on behalf of Time Out, Foti managed to hold up the  
12 Receiver's possession of the Time Out Property. His actions violated the Foti PIs.  
13 In addition to delaying the listing of the property, Foti's violations came at a cost  
14 to the Receivership Estate, both because monthly expenses related to the property  
15 continued to accrue (resulting in less equity for distribution to creditors and the  
16 FTC for consumer redress upon the property's sale) and because Foti's actions  
17 compelled the Receiver to once again expend resources to move for contempt in  
18 order to get Foti to dismiss the bankruptcy proceedings. After granting the  
19 Receiver's motion, the Court ordered Foti into custody until he purged the  
20 contempt, which Foti did by dismissing the bankruptcy in March of 2018.

21 **D. Sale of the Time Out Property**

22 As this Court is aware, it took much longer to sell the Time Out Property  
23 than initially anticipated. The Receiver kept the Court apprised of material  
24 developments, sought periodic instruction regarding price reductions, and  
25 ultimately received the Court's approval to proceed with a proposed sale in July of  
26 2020. A summary of the Receiver's efforts, both before and after the sale was  
27 approved, is set out below.

28 ///

1 The Receiver was first able to list the property in March of 2018. In May,  
2 he filed his first motion to approve the sale of the Time Out Property. *See* ECF  
3 No. 420. The Court declined to approve that sale for reasons it stated on the record  
4 at the June 8, 2018 hearing on the Receiver’s motion. In compliance with the  
5 Court’s instructions, the Receiver continued to market the property and search for  
6 another buyer. *See* ECF No. 436 (informing the Court that the proposed buyer  
7 declined to purchase the property at the Court’s proposed price of \$7.8 million, and  
8 that the Receiver would continue marketing the property).

9 In the short term, these efforts yielded little. The Receiver filed a status  
10 report with the Court on August 22, 2018 to inform the Court that despite a strong  
11 marketing campaign, there had been no other offers for the property. The Receiver  
12 also informed the Court that the receivership was “very much in the red,” that the  
13 Receiver was being forced to front expenses for the Time Out Property, and that he  
14 was paying for homeowners’ insurance, earthquake insurance, cleaning and staging  
15 of the property for its sale, property repairs, utilities, and gardening – all of which  
16 were necessary to keep the property in salable condition. *See* ECF No. 440 at 2;  
17 *see also* ECF No. 446 (status report filed February 20, 2019).

18 The property still had not garnered any real offers or additional interest by  
19 April 4, 2019, when the Receiver filed a status report under seal to request  
20 instruction from the Court regarding the sale of the property. The Receiver’s filing  
21 was sealed, but the Court summarized the highlights when providing the Receiver  
22 with the requested instruction to lower the listing price:

23 In the current Status Report and Request for Instructions,[] the  
24 Receiver explains the diligent efforts of the broker and listing agent to  
25 market the Newport Beach Real Property and solicit appropriate  
26 offers. Due to market conditions, and based on the recommendation  
27 of the Receiver’s real estate agent, the Receiver seeks to reduce the  
28 list price to \$7,495,000. Status Report and Request for Instructions  
at 4. The Receiver notes that the best season to sell real property is  
March through June, and notes that, given the previous offers on the  
Newport Beach Real Property, a listing price of \$7,495,000 would  
hopefully lead to a satisfactory offer from a potential buyer. Given  
the previous offers on the property and the encumbered nature of the

1 property, the Court hereby PROVIDES INSTRUCTION that a listing  
2 price of \$7,495,000 for the Newport Beach Real Property is  
reasonable.

3 ECF No. 456 at 2.

4 This was the first of three times the Court granted the Receiver leave to  
5 lower the listing price of the Time Out Property. Four months after the Court  
6 approved the first price decrease, in August of 2019, the Receiver filed another  
7 status report with the Court, alerting the Court to the rising cost of maintaining the  
8 property and that the broker reported the dated features of the property were  
9 negatively affecting its attractiveness to potential buyers, as was its Back Bay  
10 location. *See* ECF No. 458. In his August 2019 report, the Receiver also noted  
11 that he might ask the Court to approve a further price decrease. *See id.*; *see also*  
12 ECF No. 466 (October 21, 2019 sealed status report providing update on Time Out  
13 Property). He did so on January 9, 2020, filing an *ex parte* application to decrease  
14 the listing price of the property from \$7,495,000 to \$6,995,000, *see* ECF No. 471,  
15 which the Court granted later that same day, *see* ECF No. 472. In his April 30,  
16 2020 motion to extend the deadline for completion of the receivership, the  
17 Receiver requested a third price decrease, *see* ECF No. 476. The Court granted the  
18 motion the following day, *see* ECF No. 477, thereby lowering the price to  
19 \$6,495,000.

20 In July of 2020, the Receiver finally received a bona fide offer for the Time  
21 Out Property at the listing price of \$6,495,000.<sup>19</sup> That offer, however, had an  
22 unusual source: Tim Smith, the real estate agent whom the Receiver had hired to  
23 market and sell the property. The Receiver concluded, however, that accepting the  
24 offer was in the best interests of the Receivership Estate and asked the Court to

25 \_\_\_\_\_  
26 <sup>19</sup> As reported to the Court, ECF No. 476-1, there had been previous all-cash offers  
27 of \$6.7 million and \$6.5 million, but both transactions failed when the potential  
28 buyers could not perform. The possibility of a public auction was explored. The  
Receiver researched and interviewed two potential auction houses, but the upfront  
costs (approximately \$100,000) and the 10% sales premium made this route  
unattractive.

1 approve the sale, making sure to highlight the unusual circumstances so that the  
2 Court could fully assess the offer. *See* ECF No. 478-1 at 10-11; *see also* ECF No.  
3 478-3 (declaration provided by Tim Smith explaining how his interest in the  
4 property developed). The Court approved the sale on July 10, 2020. *See* ECF No.  
5 480.

6 Although the sale had now been approved, it could not close until the 60-day  
7 appeal period lapsed. During this period, the Receiver went back to the  
8 lienholders, broker, and tax assessor for Orange County, and asked all parties to  
9 reduce or eliminate their accrued interest (the lienholders), commission (the  
10 broker), or property tax penalties (the County) before the close of the sale in order  
11 to increase the net proceeds. For their part, and as part of this process, the  
12 Receiver and counsel agreed to concessions, reducing their fees by 20%. While  
13 the parties agreed to some concessions, they were insufficient in the Receiver's  
14 view and he asked the Court for instruction in a status report (ECF No. 495) before  
15 filing an *ex parte* application (ECF No. 497) requesting such relief on October 12,  
16 2020.

17 The Court set a hearing on the Receiver's *ex parte* application, which was  
18 initially set to occur on November 9, 2020. *See* ECF No. 501. The Court reset the  
19 hearing for December 7 (*see* ECF No. 506), however, which gave the Receiver  
20 another opportunity to approach the parties and ask once again for additional  
21 concessions. Each of the parties – with the exception of Orange County – agreed  
22 to further compromises in order to allow the sale (approved by the Court in July) to  
23 close, and still leave funds for distribution to the FTC for consumer redress once  
24 all the receivership bills were paid. *See* ECF No. 512. On December 7, the Court  
25 heard oral argument on the one issue remaining for adjudication, which was  
26 whether or not Orange County was entitled to keep the roughly \$130,000 in tax  
27 penalties (above and beyond the property tax it was owed). *See id.* The Court  
28 ruled in the County's favor. *See* ECF No. 519. As a result, the final net proceeds

1 from the sale of the Time Out Property were \$552,959.51. With the Court's ruling,  
2 all lingering issues related to the Time Out Property were resolved, enabling the  
3 Receiver to file the instant final report and request for discharge.

4 **IV.**

5 **Receivership Accounting**

6 Attached as Exhibit A is a Receipts and Disbursements Summary for the  
7 receivership period through January 7, 2021. It shows aggregate receipts of  
8 \$694,549.86, less disbursements of \$230,281.82,<sup>20</sup> for net cash as of this Final  
9 Report of \$464,268.04.

10 **APPLICATION FOR DISCHARGE AND**  
11 **APPROVAL OF FINAL FEE APPLICATION**

12 The Application for Discharge is made on the grounds that the underlying  
13 case has now been resolved as to all Defendants, and the Receiver has completed  
14 his duties as defined in the TRO and the PIs.

15 The Final Fee Application is made pursuant to Sections XX (ECF Nos. 57,  
16 59) and X (ECF No. 153) of the Preliminary Injunctions, which provide that the  
17 Receiver and all personnel hired by the Receiver are entitled to reasonable  
18 compensation and for the cost of actual out-of-pocket expenses to be paid from the  
19 assets of the Receivership Defendants. The instant fee application is the first  
20 presented since November 14, 2016, more than four years ago. It covers the period  
21 November 1, 2016 through January 7, 2021.

22 **Expenses Advanced by the Receiver**

23 As discussed above, the dire straits of the Receivership Estate's finances  
24 forced the Receiver to front the Estate's expenses beginning in March of 2017.  
25 Primarily, these expenses have related to the Time Out Property and include

26 \_\_\_\_\_  
27 <sup>20</sup> In 2016, Judge O'Connell entered Orders granting fee applications which the  
28 estate did not have sufficient funds to pay. The Receiver used a portion of the  
proceeds from the sale of the Time Out Property funds (\$88,842.04 in total) to pay  
these previously-awarded expenses and fees. See ECF Nos. 93 and 165.

1 expenses for insurance, maintenance, utilities, and marketing costs. In total, the  
2 Receiver has paid \$120,885.80 of the Estate's expenses from his own accounts and  
3 he seeks approval to reimburse this amount.

#### 4 **Fees of the Receiver and Professional Staff**

5 In addition to fronting the costs, the Receiver made significant sacrifices  
6 with respect to his fees in order to increase the funds available for the FTC. The  
7 Final Fee Application seeks approval to pay the Receiver's and staff's fees for  
8 services during the period November 1, 2016 through January 7, 2021 as follows:  
9 \$52,247.60 in fees to the Receiver and his staff, reflecting a 20% reduction,<sup>21</sup>  
10 payable to TWM Receiverships, Inc. dba Regulatory Resolutions.

#### 11 **Fees and Expenses of the Receiver's Counsel**

12 The Final Fee Application also seeks \$135,901.20 in fees (reflecting a 20%  
13 reduction), and \$3,742.70 in expenses to Receiver's counsel McNamara Smith  
14 LLP<sup>22</sup> for the period November 1, 2016 through January 7, 2021. The 20% fee  
15 reduction of the Receiver and counsel resulted in a savings of roughly \$47,037 for  
16 the estate (and substantially more when the Receiver's practice to frequently not  
17 bill for his time and the write-offs are considered). If the invoices in this Final Fee  
18 Application are approved, the Receiver will upon discharge disburse \$151,490.74  
19 to the FTC.

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21 <sup>21</sup> Given that the receivership has constantly been in the financial distress, the  
22 Receiver frequently did not bill his time. Moreover, prior to presenting the fee  
23 application to the Court for review, the Receiver examined the bills very carefully  
24 and cut \$9,664.00 in charges. While the time and fees were properly incurred and  
25 recorded, the Receiver decided to excise the costs of work that was not as efficient  
as it should have been, did not translate into a tangible benefit to the estate and, in  
some instances, simply to reduce the size of the bill in light of the financial  
condition of the estate.

26 <sup>22</sup> Again, prior to presenting the fee application to the Court, the Receiver  
27 examined the bills very carefully and cut \$25,565.50 in charges. While the time  
28 and fees were properly incurred and recorded, the Receiver decided to excise  
where the work was not as efficient as it should have been, or did not translate into  
a tangible benefit to the estate and, in some instances, simply to reduce the size of  
the bill in light of the financial condition of the estate.

1           The Application for Discharge and Final Fee Application is based upon the  
2 Final Report included herein, this Application, the Declaration of Thomas W.  
3 McNamara and the proposed Order filed concurrently with this Application, and  
4 upon such other pleadings and oral and documentary evidence as may be presented  
5 at or before the time of the hearing on the Application.

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Dated: January 15, 2021

MCNAMARA SMITH LLP

By:           /s/ Cornelia J. B. Gordon            
Cornelia J. B. Gordon  
*Attorneys for Receiver,  
Thomas W. McNamara*

**CERTIFICATE OF SERVICE**

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I hereby certify that on the 15th day of January, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to all participants in the case who are registered CM/ECF users.

/s/ Cornelia J. B. Gordon  
Cornelia J. B. Gordon  
*Attorney for Receiver,*  
*Thomas W. McNamara*