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*Thomas W. McNamara*

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8 UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
9 OAKLAND DIVISION

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11 FEDERAL TRADE COMMISSION,

12 Plaintiff,

13 vs.

14 AMERICAN FINANCIAL BENEFITS  
CENTER, a corporation, also d/b/a AFB and  
15 AF STUDENT SERVICES; AMERITECH  
FINANCIAL, a corporation; FINANCIAL  
16 EDUCATION BENEFITS CENTER, a  
corporation; and BRANDON DEMOND  
17 FRÈRE, individually and as an officer of  
AMERICAN FINANCIAL BENEFITS  
18 CENTER, AMERITECH FINANCIAL, and  
FINANCIAL EDUCATION BENEFITS  
19 CENTER,

20 Defendants.  
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Case No. 4:18-cv-00806-SBA

**RECEIVER’S EX PARTE APPLICATION  
SEEKING COMPLIANCE WITH  
PRELIMINARY INJUNCTION AND  
ORDER TO SHOW CAUSE AS TO WHY  
DEFENDANT BRANDON FRERE  
SHOULD NOT BE HELD IN CIVIL  
CONTEMPT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

JUDGE: Hon. Sandra Brown Armstrong

1 Pursuant to L.R. 7-10 and the Modified Preliminary Injunction Order (ECF No. 187, the  
2 “PI Order”), § VII.F, Receiver Thomas W. McNamara hereby applies *ex parte* for an Order to  
3 Show Cause as to Why Defendant Brandon Frere Should Not Be Held in Civil Contempt.  
4 Within three hours of the Court clerk alerting the parties’ counsel that an order on the FTC’s  
5 Motion for Preliminary Injunction was imminent, Defendant Brandon Frere liquidated two of the  
6 Corporate Defendants’ bank accounts. He transferred \$400,000 from Defendant American  
7 Financial Benefits Center (“AFBC”)’s and Defendant Financial Education Benefits Center  
8 (“FEBC”)’s bank accounts to himself, his family, and one of his attorneys. The Receiver has  
9 requested that Defendant return these funds, but he has not done so.<sup>1</sup>

10 The PI Order provides that where “any person fails to deliver or transfer any Asset or  
11 Document, or otherwise fails to comply with any provision of this Section [entitled Transfer of  
12 Receivership Property to Receiver], the Receiver may file an Affidavit of Non-Compliance and  
13 motion seeking compliance or a contempt citation.” PI Order § VII. Pursuant to the PI Order,  
14 the Receiver requests that the Court enter an order requiring Frere to immediately return the  
15 \$400,000 he withdrew from the Corporate Defendants’ bank accounts, and that he be charged a  
16 fine in the amount of \$5,000 per day until the contempt is purged. The Receiver further requests  
17 that the Court hold Frere liable to the Receivership Estate for compensation for any actual  
18 damages suffered, including the Receiver’s attorneys’ fees and expenses in bringing the *ex parte*  
19 application.

20 Relief is sought *ex parte* to shorten the time in which this matter is heard. Such expedited  
21 relief is sought because there is ongoing contempt that threatens to cause continued violation of  
22 the Court’s Orders.

23 Notice of this application has been provided to counsel for Frere who acknowledged  
24 receipt of the notice, but did not state whether or not they would oppose the *ex parte* application.

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27 <sup>1</sup> Notably, at the same time he was transferring hundreds of thousands of dollars for his benefit,  
28 Defendant Frere made no provision to pay his employees their outstanding pre-receivership  
wages, which for two weeks of work totaled roughly \$175,000.

1 Notice of this application has also been provided to counsel for the FTC, who support the  
2 application.

3 Because civil contempt requires that the alleged contemnor receive an opportunity to  
4 respond and to be heard at an in-person hearing prior to any finding of contempt, a briefing and  
5 hearing schedule should be set to allow Frere a full and fair opportunity to be heard.

6 This *ex parte* application is supported by this application, the accompanying  
7 memorandum of points and authorities, the declaration of Thomas W. McNamara, all pleadings  
8 and papers on file in this action, and upon such other matters as may be presented to the Court at  
9 the time of the hearing. A proposed order is attached hereto.

10 Dated: December 4, 2018

MCNAMARA SMITH LLP

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12 By: /s/ Sanjay Bhandari  
*Attorneys for Court-appointed Receiver,*  
*Thomas W. McNamara*

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**MEMORANDUM OF POINTS AND AUTHORITIES**

Thomas W. McNamara, in his capacity as the Court-appointed Receiver (the “Receiver”) for Defendants American Financial Benefits Center (“AFBC”), Ameritech Financial (“Ameritech”), and Financial Education Benefits Center (“FEBC” and, collectively with AFBC and Ameritech, the “Corporate Defendants”), respectfully submits his memorandum of points and authorities in support of his motion for issuance of an order to show cause why Defendant Brandon Frere (“Frere,” and collectively with the Corporate Defendants, “Defendants”) should not be held in contempt of court based on his violation of this Court’s orders.

**I.**

**INTRODUCTION**

This action was commenced by the Federal Trade Commission (the “FTC”) on February 7, 2018, against Defendants. After extensive briefing by the parties, this Court granted the FTC’s Motion for Preliminary Injunction and appointed a receiver last Thursday afternoon, November 29, 2018 at roughly 2:30 pm.<sup>2</sup> The Receiver was appointed as receiver for the Corporate Defendants pursuant to the PI Order. The PI Order provides that the Receiver is to take possession and control of the assets of the Corporate Defendants with the full powers of an equity receiver. Since being appointed, the Receiver has taken exclusive custody of each location from which the Corporate Defendants operate their businesses and is in the process of preparing a preliminary report for the Court.

Frere drained FEBC’s and AFBC’s bank accounts, withdrawing \$400,000 of funds belonging to the Receivership Estate, after learning that the Court would be issuing an Order on the FTC’s Motion for Preliminary Injunction. He has since refused to return the funds to the Corporate Defendants. His conduct violates the terms of the PI Order, which requires that “Defendants, and any other person with possession, custody, or control of property of, or records relating to, the Corporate Defendants shall . . . fully cooperate with and assist the Receiver in

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<sup>2</sup> Given the Court’s intimate familiarity with this matter (as demonstrated in the Court’s Order Granting Motion for Preliminary Injunction (ECF No. 186) and the PI Order (ECF No. 187)), the Receiver will not repeat the allegations or procedural history of the case here.

1 taking and maintaining possession, custody, or control of the Assets and Documents of the  
2 Corporate Defendants and immediately transfer or deliver to the Receiver possession, custody,  
3 and control of . . . [a]ll Assets held by or for the benefit of the Corporate Defendants.” PI Order  
4 § VII.

5 By this motion, the Receiver respectfully requests that the Court issue an order to show  
6 cause why Frere should not be held in contempt of Court based on his failure to comply with the  
7 Court’s orders.

## 8 II.

### 9 FACTUAL BACKGROUND

10 After learning he had been appointed in the afternoon of November 29, the Receiver  
11 spoke with the parties via conference call at approximately 6:00 p.m. The following morning, on  
12 November 30, the Receiver met with defense counsel at the Corporate Defendants’ Rohnert Park  
13 offices. Over the course of that day, the Receiver took control of the Corporate Defendants’  
14 assets, including bank accounts; confirmed that electronic data was protected and preserved; and  
15 suspended automatic customer billing. The Receiver has since begun the process of reviewing  
16 the companies’ files and interviewing employees.

17 In the course of reviewing the Corporate Defendants’ financial records on Friday,  
18 November 30, the Receiver discovered that Frere had withdrawn a total of \$400,000 from FEBC  
19 and AFBC bank accounts (\$200,000 from each) in the afternoon of November 29, the very day  
20 the Receiver was appointed.

21 Having investigated those transfers, the Receiver has determined that Frere withdrew  
22 these funds before the PI Order was entered, but after the Court clerk alerted the parties that an  
23 Order on the PI Motion was forthcoming. Having spoken to both FTC and Defense counsel, the  
24 Receiver understands that the Court clerk separately called both counsel at roughly 11:00 a.m. to  
25 inform them that the Initial Case Management Conference (“CMC”) would be moved as an  
26 Order on the FTC’s Motion for Preliminary Injunction would soon issue. The Receiver further  
27 understands that at about 11:40 a.m. the Clerk’s Notice Continuing the CMC (ECF No. 185) was  
28 issued. Approximately two hours later, Frere emptied the bank accounts of two the Corporate

1 Defendants, transferring \$400,000 to his personal bank account, his family members, and one of  
 2 his attorneys. Around 1:45 p.m. PT a series of transfers were made from accounts belonging to  
 3 AFBC and FEBC. The amounts transferred were as follows:

- 4 • \$7,500 was transferred to Justin Frere, Frere’s brother. Declaration of Thomas W. McNamara (“McNamara Decl.”) ¶¶ 7, 13.
- 5 • \$9,000 was transferred to Cameron Henry, a former employee of Defendants and a partial owner of one or more of the Corporate Defendants. *Id.* ¶¶ 8, 14.
- 6 • \$15,000 was transferred to Andre and Gloria Frere, Frere’s parents. *Id.* ¶¶ 9, 15.
- 7 • \$268,500 was transferred to a savings account belonging to Frere. *Id.* ¶¶ 10, 16.
- 8 • \$100,000 was transferred to Frere’s counsel. *Id.* ¶ 11.

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 10 The transferees have one thing in common: their connection to Frere. Frere withdrew  
 11 these assets, which belong to the Receivership Estate, and furtively transferred them to friends,  
 12 family, his counsel, and his own savings account less than one hour before the PI Order was  
 13 entered. Frere violated the PI Order in so doing, and he has since refused to return the funds.  
 14 The Receiver now seeks to have these assets returned to their rightful owner – the Receivership  
 15 Estate.

### 16 III.

#### 17 LEGAL STANDARD RE: CIVIL CONTEMPT

18 Compliance with a preliminary injunction may be enforced through contempt  
 19 proceedings. *Reynolds v. Roberts*, 207 F.3d 1288, 1298 (11th Cir. 2000). A court’s ability to  
 20 punish contempt is thought to be an inherent and integral element of its power and has deep  
 21 historical roots. *Sigety v. Abrams*, 632 F.2d 969, 976 (2nd Cir. 1980). The relief granted in civil  
 22 contempt proceedings is compensatory or conditional. *General Signal Corp. v. Donallco, Inc.*,  
 23 787 F.2d 1376, 1380 (9th Cir. 1986). Such relief often takes the form of a fine in the amount of  
 24 the damage sustained by the moving party. *Yanish v. Barber*, 232 F.2d 939, 944 (9th Cir. 1956).  
 25 Such relief can also include an award of costs and attorney fees. *N.Y. State Nat’l Org. for*  
 26 *Women v. Terry*, 159 F.3d 86, 96 (2nd Cir. 1998). A “purge” provision, like the one the  
 27 Receiver has requested here, is typical of the civil contempt process, as it allows “the contemnor  
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1 . . . to purge the contempt and obtain his release by committing an affirmative act.” *See United*  
2 *States v. United Mine Workers*, 330 US. 258, 305 (1947); *see also Hicks v. Feiock*, 485 US. 624,  
3 632 (1988) (“[A] fine that would be payable to the court is . . . remedial when the defendant can  
4 avoid paying the fine simply by performing the affirmative act required by the court’s order”).  
5 To obtain a citation of contempt, the moving party need not demonstrate that the contemnor  
6 acted with intent to violate an injunction, and good faith is not a defense to failure to comply  
7 with a court’s order. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191-93 (1949); *Peppers*  
8 *v. Barry*, 873 F.2d 967, 968-69 (6th Cir. 1989).

#### 9 IV.

#### 10 ARGUMENT

11 Given the timeline and Frere’s furtive withdrawals after he became aware an Order  
12 would be issued on the FTC’s Motion for Preliminary Injunction, it can be inferred that Frere  
13 intended to avoid being bound by the terms of the Order. Frere knew the forthcoming Order  
14 could require him to turn over the assets of his businesses to a receiver. Moreover, Frere refused  
15 to return the Corporate Defendants’ assets even after he was put on notice by the Receiver on the  
16 following day that those assets belonged to the Receivership Estate, which is contemptuous  
17 conduct in and of itself. *See* PI Order § VII.

18 The PI Order bars any interference with assets of the Corporate Defendants or the  
19 Receiver’s efforts to obtain such assets. *See* PI Order § X. The term “assets” is broadly defined  
20 in the PI Order as “any legal or equitable interest in, right to, or claim to, any property, wherever  
21 located and by whomever held.” *Id.* at 2. The PI Order instructs:

22 Defendants, and their officers, agents, employees, and those persons or  
23 entities in active concert or participation with any of them who receive actual  
24 notice of this Order, and any other person served with a copy of this Order, are  
hereby restrained and enjoined from directly or indirectly:

- 25 A. Interfering with the Receiver’s efforts to manage, or take custody,  
control, or possession of, the Assets or Documents subject to the receivership;
- 26 B. Transacting any of the business of the Corporate Defendants;
- 27 C. Transferring, receiving, altering, selling, encumbering, pledging,  
28 assigning, liquidating, or otherwise disposing of any Assets owned, controlled, or

1 in the possession or custody of, or in which an interest is held or claimed by, the  
2 Corporate Defendants; or

3 D. Refusing to cooperate with the Receiver or the Receiver’s duly  
4 authorized agents in the exercise of their duties or authority under any order of  
5 this Court.

6 *Id.* § X.

7 The PI Order directs the Receiver to “[t]ake exclusive custody, control, and possession of  
8 all Assets and Documents of the Corporate Defendants, or in the possession, custody, or under  
9 the control of, any Corporate Defendant, wherever situated,” and empowers the Receiver “to sue  
10 for, collect, and receive all Assets of the Corporate Defendants and of other persons or entities  
11 whose interests are now under the direction, possession, custody, or control of the Corporate  
12 Defendants.” *Id.* § VI.B-C.

13 Frere violated these provisions of the PI Order. As is described above, the bank accounts  
14 belonging to AFBC and FEBC holds, or held, money that belongs to the Receivership Estate.  
15 Once appointed, the Receiver gained (and continues to have) access to and control over those  
16 accounts. Scant minutes before the Receiver’s appointment, however, Frere transferred a total of  
17 \$400,000 out of these accounts. Beyond the violation of the PI Order in taking the \$400,000 in  
18 Corporate funds in the first instance, Frere violated the PI Order when he refused to return the  
19 funds the following day, after the Receiver informed Frere’s counsel that the withdrawn funds  
20 were assets belonging to the Receivership Estate. Frere used his access to AFBC and FEBC to  
21 interfere with the Receiver’s attempts to administer the estate, and has refused to return assets  
22 that rightfully belong to the Receivership Estate.<sup>3</sup>

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25 <sup>3</sup> In the Order Granting Motion for Preliminary Injunction, the Court expressed concern about  
26 the substantial compensation received by Frere and the distributions he directed to others,  
27 including family members, given that such “expenditures deplete the assets that may be available  
28 for consumer redress.” ECF No. 186 at 26. It appears that compensation taken by Frere and the  
distributions to his family members are *vastly larger* than the Court knew of at the time of the  
Order. *See id.* at 24 n.11 (noting that Frere had transferred over \$3.164 million to himself and  
\$864,000 to family and family-owned businesses). Our initial review of the records reveals that  
Frere has received more than \$7.1 million since February of 2017. In other words, Defendant  
Frere has received more than \$10.2 million from the Corporate Defendants since 2015.



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**V.**

**RELIEF SOUGHT BY RECEIVER ON  
BEHALF OF RECEIVERSHIP ESTATE**

Defendant Frere should be ordered to show cause why he should not be held in contempt of court based on his interference with this Court’s exclusive possession and control of the Corporate Defendants’ assets. Frere should be ordered to pay the Receivership Estate the \$400,000 that was held by AFBC and FEBC, plus attorneys’ fees and costs that have been incurred by the Receiver. Frere should be allowed to purge himself of his contempt of court if he or other persons or companies that Frere controls transfer such sums to the Receiver’s account within ten (10) days after entry of the order of contempt.

**VI.**

**CONCLUSION**

For the reasons described above, the Receiver respectfully submits that his motion should be granted.

Dated: December 4, 2018

MCNAMARA SMITH LLP

By: /s/ Sanjay Bhandari  
Attorneys Court-appointed Receiver,  
Thomas W. McNamara

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of December, 2018, the foregoing document  
**(RECEIVER'S EX PARTE APPLICATION SEEKING COMPLIANCE WITH  
PRELIMINARY INJUNCTION AND ORDER TO SHOW CAUSE AS TO WHY  
DEFENDANT BRANDON FRERE SHOULD NOT BE HELD IN CIVIL CONTEMPT;  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF)** was  
electronically transmitted to the Clerk's Office using the CM/ECF System for filing, and for  
transmittal of a Notice of Electronic Filing to all counsel of record who are deemed to have  
consented to electronic service via the Court's CM/ECF system.

/s/ Sanjay Bhandari  
Sanjay Bhandari

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