

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

**FEDERAL TRADE COMMISSION,** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** )  
 )  
 **BF LABS INC., et al.,** )  
 )  
 **Defendants.** )

**Case No. 14-CV-0815-W-BCW**

**REPLY SUGGESTIONS IN SUPPORT OF APPLICATION OF KENNYHERTZ PERRY,  
LLC FOR THE ALLOWANCE OF COMPENSATION FOR PROFESSIONAL  
SERVICES RENDERED PRIOR TO RECEIVERSHIP**

Plaintiff Federal Trade Commission takes no issue with the reasonableness of Kennyhertz Perry’s requested fees and expenses. The FTC also does not object to Kennyhertz Perry “ultimately being compensated for the legal services it has provided Defendants.” (Doc. # 111). The FTC’s only basis for objection is that compensating Kennyhertz Perry now would utilize frozen assets. But allowing the FTC’s position to prevail would give it the unbridled authority to secure, *ex parte* no less, an asset freeze that would deprive the defendants of their ability to secure legal representation.

Remarkably even today, the FTC boldly informs this Court that Butterfly Labs has “deceived[,] “defrauded[,]” and “victimized” consumers. (Doc. # 111, at pp. 1, 3). Denying Kennyhertz Perry’s fee application just because the FTC tells the Court this is so would set a dangerous precedent. *See, e.g., Federal Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 565 (5th Cir. 1987) (Court finding that it “cannot assume the wrongdoing before judgment.”); *Smith v. Copeland*, 87 F.3d 265, 268 (8th Cir. 1996) (“under the Due Process Clause, a [defendant] may not be punished prior to an adjudication of guilt”). Arguments made by the FTC, even when

camouflaged with words like “equitable,” fly in the face of due process. *See Smith v. Copeland*, 87 F.3d 265, 268 (8th Cir. 1996) (“under the Due Process Clause, a [defendant] may not be punished prior to an adjudication of guilt”).

It would contravene the Court-approved Temporary Receiver’s interim budget, which involves further operations and manufacturing efforts. Rather than support the FTC’s allegations, the budget required the Temporary Receiver to determine in good faith that Butterfly Labs could be “lawfully operated.” (*See* Doc. # 54 at p. 15, Section X.N.). Regardless, Defendants should be provided an opportunity to be heard on the merits before being deprived of access to legal counsel. *See Dixon*, 835 F.2d at 865.

In presently seeking only fees and expenses incurred before this action was instituted, Kennyhertz Perry is attempting to take a reasonable approach to compensation and continued legal representation. Kennyhertz Perry could have sought the entire fees and expenses due and owing, and under legal precedent would have been warranted in doing so. *See, e.g., FTC v. QT, Inc.*, 467 F. Supp. 2d 863, 866 (N.D. Ill. 2006) (Courts have consistently recognized that the decision to permit attorneys’ fees to be paid from receivership assets in an asset-freeze is well within the court’s discretion); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1022 (7th Cir.1988) (the Court modified the temporary restraining order before the preliminary injunction hearing to allow \$125,000 of frozen assets to pay for attorneys’ fees and \$50,000 for litigation expenses). It has not done so.

As stated in *Dixon*, “[t]he basis of our adversary system is threatened when one party gains control of the other party’s defense as appears to have happened here.” 835 F.2d at 865.

Respectfully submitted,

/s/ Braden M. Perry

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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