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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
JEFFREY BARON,	§	**Bankr. No. 12-37921-SGJ**
	§	
Alleged Debtor.	§	**Hearing: Feb. 13, 2013 @ 1:30 p.m.**

ALLEGED DEBTOR'S RESPONSE TO PETITIONING CREDITORS' MOTION FOR SUMMARY JUDGMENT

Comes now, **JEFFREY BARON**, the Alleged Debtor ("Baron") who files this his Response to the Petitioning Creditors' Motion for Summary Judgment (the "Motion"), and in response shows as follows:

SUMMARY OF THE RESPONSE

The petitioning creditors have the burden not merely to establish the existence of their claims but must also to establish **"a prima facie case <u>that no bona fide dispute exists</u>"** as to the validity or amount of their claims. *Matter of Sims*, 994 F.2d 210, 221 (5th Cir. 1993). The grounds offered by the petitioners to establish a prima facie case that no bona fide dispute exists

as to their claims is the District Court's May 18, 2011 order.

The petitioning creditors assert that the order is unstayed and adjudicates Baron's liability for their claims. The petitioning creditors further claim that a full evidentiary hearing was held on April 28, 2011, which included the live testimony of a number of attorneys. Further, the petitioning creditors assert that the motion granted by the district court was fully litigated, and that the alleged debtor invoked his Fifth Amendment rights against self-incrimination at the hearing.

However, Baron will prove that: (1) the district court order relied upon by the petitioning creditors has been stayed and as a matter of law the petitioning creditors' claims are subject to a bona fide dispute; (2) *res judicata* does not bar Baron's bona fide disputes as to the Petitioning Creditors' claims because no final determination was made of either the liability or amount of the claims against Baron; (3) collateral estoppel does not bar Baron's bona fide disputes as to the Petitioning Creditors' claims because the "facts" determined were not essential to the order, and because the order was not fully and fairly litigated; (4) in addition to the Motion exceeding the scope of this Court's January 17, 2013 orders by attempting to address insolvency, there are fact issues on this question for which Baron is entitled to due process, including discovery. For these reasons, the Motion should be, in all respects, denied.

PROCEDURAL HISTORY

Although the procedural history of the litigation involving Baron is voluminous, the portions relevant to the Petitioning Creditors' summary judgment motion on preclusion, consisting primarily of orders from the District Court in *Netsphere, Inc., et al. v. Jeffrey Baron, et al.*, Civil Action No. 3:09-CV-0988-F ("the District Court Case"), the Fifth Circuit Court of Appeals in Netsphere, Inc., et al. v. Jeffrey Baron, Appeal No. 10-11202 ("the Appeal"), and this

Court in In re Ondova Limited Company, Bankr. No. 09-34784-SGJ-11 ("the Ondova Bankruptcy Case") is somewhat more simple, and will be all that is cited herein. The logical beginning is Petitioning Creditors' Exhibit J-2, Judge Royal Ferguson's findings, conclusions and order dated May 18, 2011 in the District Court Case, Docket No. 575 ("the Claims Resolution Order").

The Claims Resolution Order

In the Claims Resolution Order, coming as it did in regards to the Receiver's Fourth Motion for Order Approving Assessment and Disbursement of Former Attorney Claims [Docket No. 562] ("the Fourth Motion"), Judge Ferguson stated that one of his goals was to "resolve" the claims of Baron's former attorneys. *Id*. at p. 3, ¶3. Judge Ferguson acknowledged that the Fourth Motion he was then considering proposed "a settlement and compromise of the Former Attorney Claims" *id*. at p. 5, ¶7, that his consideration was "summary" in nature, *id*. at pp. 6-7, ¶11, that the Receiver had the right to waive Baron's otherwise extant right to a jury trial, *id*. at pp. 9-11, ¶¶16-20, and that the Receiver was not required to collect or offer evidence or make arguments to controvert the Former Attorney Claims," referred to as "the Defense Obligation." *Id*. at p. 5, ¶8.

Thus, the District Court, through the Claims Resolution Order, established a voluntary procedure in which Baron's Former Attorneys could ***elect*** to voluntarily compromise their claims for a fixed amount, "waive" alleged claims against Baron in excess of amounts suggested by the District Court, and be paid by the Receiver. *Id*. at pp. 20-22, ¶¶35-37. Critically, however, the District Court also acknowledged that it was not making any determination of "the Baron Claims," consisting loosely of "legal malpractice and other civil claims." *Id*. at p. 21, ¶36. Judge Ferguson went on to state, "Through this Order, Baron maintains any and all rights to

bring, after the end of the Receivership, the Baron Claims," *id*. at pp. 22, ¶36, holding that then the restrictions imposed by any waiver of other rights as a result of their compromises to be paid by the Receiver would be lifted. *Id*.

Apart from the clearly non-determinative language of Judge Ferguson's ruling in the Claims Resolution Order, after it was entered, it does not appear that the District Court treated this order as a "final judgment" on the Former Baron Attorney claims for FRCP Rule 54(a) purposes. There was no "judgment" entered; there was no final disposition of ***any*** of the claims -- referring both to those of Baron expressly reserved in the Order ***and*** to those being "compromised" by the Former Baron Attorneys; there was no "severance" of the claims of the Former Baron Attorneys; and the mandatory procedure for certification of fewer that all claims or all parties for finality in FRCP Rule 54(b) was not followed.[1] Perhaps most critically, however, the Claims Resolution Order to pay the claims was stayed by Judge Ferguson.[2]

The District Court's Stay Order

The next order from Judge Ferguson pertinent to this Motion was his order on the Receiver's "Motion to Clarify Instruction to Receiver on Payments to Former Baron Attorneys," Docket No. 980. In response, and seeking "to preserve the status quo for appeal," on June 18, 2012, Judge Ferguson entered his "Order Regarding Motion to Clarify Instruction to Receiver on Payments to Former Baron Attorneys," Docket No. 987 (*see* Baron Exhibit D-1, hereafter referred to as the "Stay Order"). In the Stay Order, at p. 3, Judge Ferguson acknowledged that "one of the appeals of Receivership Orders deals with the Court's decision regarding [the Former

[1] Rule 54(b) states that unless the Court "expressly determines that there is no just reason for delay," any order adjudicating fewer than all claims or all parties "does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."

[2] Although Judge Ferguson did not use the word "stay," under well-established Fifth Circuit authority, Docket No. 987 constitutes a stay and suspended the designated proceedings of the Receiver under prior orders to pay compromised claims. *Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005).

Baron Attorneys' fee] claims, [and] Baron should be able to contest the decision before funds are distributed." *Id*. at p. 3. Thus, Judge Ferguson held:

> "Accordingly, it is ORDERED that no funds be distributed to the former Baron attorneys until the completion of the Appeal. Those funds now available will be segregated and set aside by the Receiver until a decision is made by the Court of Appeals."

Id. As clarified by the Court of Appeals' order dated December 31, 2012, holding that "district court orders that were in place prior to the release of our opinion remain in place" (*see* Petitioning Creditors Exhibit J-6, p. 1), the Stay Order represents the *status quo* as of the filing of the involuntary petition against Baron.

<u>The Court of Appeals Reversal of the Receivership Order</u>

In the Appeal, on December 18, 2012, the Court of Appeals set aside the appointment of the Receiver, and with it, Judge Ferguson's rulings, including the Claims Resolution Order and, with it, the voluntary resolution procedure Judge Ferguson had imposed. *See* Petitioning Creditors' Exhibit J-5 (hereafter, "J-5") As a critical rationale for its ruling that imposition of the Receivership was an abuse of discretion, the Court of Appeals repeatedly and unambiguously went to pains to recognize that what made it so was the seizure of Baron's assets using the Receivership to satisfy unsecured and not-yet-determined claims.

> Baron's former attorneys were free to make claims against the bankruptcy estate, many had done so. Alternatively, to the extent that they represented Baron or his companies in matters unrelated to the Ondova bankruptcy, the attorneys could file suit in a court of appropriate jurisdiction to collect the fees owed, which many had done. Establishing a receivership to secure a pool of assets to pay Baron's former attorneys, who were unsecured contract creditors, was beyond the court's authority. . . . Moreover, for those unpaid attorneys who had filed claims, ***the claims had not been reduced to judgment*** such that a receiver would have been proper to "set aside allegedly fraudulent conveyances by [Baron]." (Citations omitted; emphasis added.)

See J-5 at p. 18.

> Although the attorneys' allegations and claims were delaying the district court and bankruptcy proceedings, they were not the subject matter of the underlying litigation. "The general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a ***potential money judgment***." (Citations omitted; emphasis added.)

Id. at p. 19.

> "[F]ederal courts in this country have traditionally applied the principle that courts of equity will not, as a general matter, interfere with a debtor's disposition of his property ***at the instance of a nonjudgment creditor***. (Citations omitted; emphasis added.)

Id. at p. 20.

> The case before us is similar to *Grupo Mexicano* to the extent that the receivership remedy was for the purpose of controlling Baron's transferring of funds that were to be paid to attorneys – ***nonjudgment creditors***. (Citations omitted; emphasis added.)

Id. at pp. 20-21. And finally,

> The receivership ordered in this case encompassed all of Baron's personal property, none of which was sought in the Netsphere lawsuit or the Ondova bankruptcy other than as a possible fund for paying ***the unsecured claims of Baron's current and former attorneys that had not been reduced to judgment***. (Emphasis added.)

Id. at p. 21. If anything, the Court of Appeals has most plainly ruled that there was no binding adjudication of the merits of the claims of the Former Baron Attorneys and, to the extent that they seek preclusive effect from Judge Ferguson's orders, the Petitioning Creditors. The Court of Appeals also frequently made clear the point that the Receivership was used to seize Baron's personal assets, even though they were "unrelated to the underlying litigation," even though they "were not sought in the Netsphere lawsuit or the Ondova bankruptcy," *id*., and even though there was no evidence that assets that were in fact the subject of the litigation before the District Court "were being moved beyond the reach of the court." *Id*. at 16.

The Court of Appeals' Stay of the District Court's Claims Resolution Order

After the Court of Appeals' opinion reversing as improper the appointment of the Receivership under which the still-stayed District Court order to enter into the voluntary compromises of Former Baron Attorneys' claims was handed down, the Court of Appeals handed down a stay of its own. In Petitioning Creditors' Exhibit J-6, the Court of Appeals ordered a stay as follows: "The import of our order of November 9, 2012, has not changed, which said this: 'Disbursement of any other assets of the Receivership should be as limited as possible until this Court resolves the appeals.' We have resolved the appeals, but the only expenditures should be those appropriate for the Receiver to make until relinquishment of control of assets." *Id*. at p. 7.

The Ondova Fee Enhancement Order

Last, counsel for the Petitioning Creditors, Mr. Pronske, cites an order from this Court in the Ondova Bankruptcy Case entered on November 30, 2012, "Granting the Second Amended Application of Pronske & Patel, P. C. for Payment of Fees as an Administrative Expense for a Substantial Contribution to the Estate," Docket No. 978 (Exhibit J-4). While this order is certainly a final and non-appealable order, it is for counsel's contribution ***to the Ondova bankruptcy estate***, and fails to make or include any determination of liability for all - - or any part - - of those fees by Baron. Notably, also, it came just over two years from Mr. Pronske's withdrawal from representation of Baron. *See* Baron Exhibit D-4.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate, when, viewing the evidence in the light most favorable to the nonmoving party, the record reflects that no genuine issue of any material fact

exists.[3] A "dispute about a material fact is 'genuine'...if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[4] The district court must resolve all reasonable doubts about the fact, and indulge all reasonable inferences from the evidence, in favor of the non-movant.[5]

The Petitioning Creditors ask this Court to hold that the Claims Resolution Order and the Ondova Fee Enhancement Order have preclusive effect on Baron's right to assert that the claims of the Petitioning Creditors (against him) remain subject to bona fide dispute. Fundamentally, there are two types of preclusion which could apply: claim preclusion (or *res judicata*) and issue preclusion (or collateral estoppel). The standards for each are well-developed in the Fifth Circuit.

Application of *res judicata* is proper only if the following criteria are met: (1) the parties must be identical in the two suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must be a final judgment on the merits; and (4) the same cause of action must be involved in both cases.[6] In particular, what constitutes a "final judgment" is determined by reference to the Federal Rules of Civil Procedure and precedent. Rule 54(a) defines a judgment as "any decree or order from which an appeal lies." The Supreme Court has held that a final judgment is a ruling or decree which conclusively determines the rights of the

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[3] *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). See also *Bridgmon v. Array Sys. Corp.,* 325 F.3d 572, 576 (5th Cir. 2003).

[4] *Sulzer Carbomedics, Inc. v. Oregon Cardio-Devices, Inc.,* 257 F.3d 449, 456 (5th Cir. 2001) (quoting *Anderson,* 477 U.S. at 248).

[5] *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *St. Paul Guardian Ins. Co. v. Centrum GS, Ltd.*, 283 F.3d 709, 712 (5th Cir. 2002). See also, *Hom v. Squire*, 81 F.3d 969, 973 (10th Cir. 1996); *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 277 (2d Cir. 1996).

[6] *Matter of ARK-LA-TEX TIMBER CO., INC.*, No. 06-30105 (5th Cir. filed January 29, 2007) *(citing Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559 (5th Cir. 2004)).

parties, leaving nothing for the court to do but execute and enforce the judgment.[7] Rule 54(b) makes plain that, unless the court express determines that there is no just reason for delay of an appeal of an order adjudicating less than all claims of all parties, any such order does not end the action.[8]

Collateral estoppel will apply to bar relitigation of facts determined by a court when, in the initial litigation: (1) the facts sought to be litigated were fully and fairly litigated; (2) those facts determined were essential to the judgment; and (3) the parties were cast as adversaries.[9] This Court has also held that three "sub-factors" must also be considered: "'(1) whether the parties were fully heard; (2) whether the court supported its decision with a reasoned opinion; and (3) whether the decision was subject to appeal or was in fact reviewed on appeal."[10]

ARGUMENTS AND AUTHORITIES

The factual grounds asserted by the petitioning creditors are not supported by the record and are controverted by the summary judgment evidence.

A. The Stay of the Claims Resolution Order Gives Rise to a Bona Fide Dispute

The Claims Resolution Order relied upon by the petitioners was stayed by order of the District Court, and later, upon reversal receivership, in the Court of Appeals. *See* Exhibits D-1 and Petitioning Creditors' J-6 respectively.

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[7] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Mowhawk Indus. v.Carpenter*, 558 U.S. 100 (2009). *See also Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 528 (5th Cir. 1996).
[8] *See, e.g., iLOR, LLC v. Google, Inc.*, 550 F.3d 1067 (Fed. Cir. 2008) (holding that where the district court's ruling disposed of the plaintiff's claims, but failed to address the defendant's counterclaims, the judgment was not final).
[9] *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005); *Gupta v. Eastern Idaho Tumor Inst., Inc. (In re Gupta)*, 394 F.3d 347, 351 (5th Cir. 2004). *See also Copeland v. Merrill Lynch & Co.*, 47 F.3d 1415, 1423 (5th Cir. 1995) (holding that where the issue presented was not a "'critical and necessary part'" of the prior judgment, collateral estopped would not apply).
[10] *In re Henry S. Miller Commercial, LLC*, 418 B.R. 912, 917 (Bankr. N. D. Tex. 2009), *quoting State Farm Fire & Cas. Co. v. Fullerton*, 118 F.3d 374, 382 (5th Cir. 1997).

The Fifth Circuit has defined a "stay" as "[a] stopping; the act of arresting a judicial proceeding by the order of a court. Also, that which holds, restrains, or supports. A stay is a suspension of the case or some designated proceedings within it. It is a kind of injunction with which a court freezes its proceedings at a particular point."[12]

On June 18, 2012, the district court entered an order staying the order to pay the 'former attorneys' as a compromise of their claims, pending appeal. Exhibit D-1. The district court ordered that "no funds be distributed to the former Baron attorneys until the completion of the appeal." Exhibit D-1 at p. 3. Moreover, the district court expressly recognized that the claims were subject to a dispute, and ordered that "***Baron should be able to contest the decision before funds are distributed***." *Id*. (emphasis added). Following the Court of Appeals ruling, the Court of Appeals imposed a stay of its own, even while acknowledging that the status quo, and all prior orders of the District Court (including its stay order above) remained in force.

It is well-established that where creditors possess a stayed order their claims are subject to a bona fide dispute**.** The Fifth Circuit has affirmed the bankruptcy court holding that "creditors possessed a stayed judgment. Accordingly, such claims were subject to a bona fide dispute and lacked standing to institute an involuntary petition." *In re Norris*, 183 B.R. 437, 453 (Bankr. W.D. La. 1995), *aff'd*, 114 F.3d 1182, 1997 WL 256808 (5th Cir. 1977). In affirming the bankruptcy court's opinion, the Fifth Circuit cited with approval the holding in *In re Raymark Industries, Inc.*, 99 B.R. 298 (Bankr. E.D. Pa. 1989). The court in *Raymark Industries* held that **"*a creditor who holds a stayed judgment holds a claim which is subject to a bona fide dispute, and hence, lacks standing to institute an involuntary bankruptcy case.*"** *Id*. at 299.

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[12] *Tesfamichael v. Gonzales*, *supra* at Footnote 2.

In *In re Henry S. Miller Commercial, LLC*,[13] a recently-decided case with surprising resonances cited by the Petitioning Creditors, this Court held that even an unstayed judgment does not preclude inquiry into whether or not there is a bona fide dispute as to the validity or amount of a claim, and that "objective circumstances that might give rise to a bona fide dispute as to liability or amount" could still exist.[14] Several of the examples the Court gave in *Miller* of such objective, "specialized" circumstances which would justify considering a dispute bona fide - - even as to an unstayed judgment - - apply to this case, including:

> a] a judgment entered against a non-party (seizure of assets not sought in the Netsphere litigation or the Ondova bankruptcy);
>
> b] "where subsequent events cast doubt upon the judgment's enforceability, such as . . . posting of a bond;" or
>
> c] some sort of appellate holding [albeit in this case, rather than another one] that . . . suggests it is inevitable that the . . . judgment will be reversed."[15]

And while in *In re Henry S. Miller Commercial, LLC* centered on an "unstayed" judgment, that which Petitioning Creditors claim as the judgment (which clearly is not a "judgment" in any critical sense) was stayed both by the court that issued it, and also by the court that reversed it.

B. <u>*Res Judicata* Does Not Bar Baron from Establishing a Bona Fide Dispute as to the Claims of the Petitioning Creditors Since There Was No Final Determination</u>

Res judicata does not bar Baron from urging that the claims of the Petitioning Creditors are subject to bona fide dispute for multiple reasons, but most prominent among them is the absence of a final judgment determining either the Petitioning Creditors' claims or the defenses and counterclaims of Baron.

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[13] *Supra*; cited at Footnote 10.
[14] *Id*. at 921.
[15] *Id*. at 921-22.

No *Decision* on the Petitioning Creditors' Claims. Indeed, even when one disregards the effects of the various orders staying the effects of his Claims Resolution Orders, a careful examination of Judge Ferguson's Claims Resolution Order reflects not a single instance of an actual judicial determination of the claims of the Petitioning Creditors. While Judge Ferguson's clever and well-intentioned procedures established a means by which Former Baron Attorneys could either "take" or "leave" a compromise at a rate suggested by the District Court, none of the Former Baron Attorneys had their claims "adjudicated" in any meaningful sense. A judicial adjudication is not "optional"; rather, it is ***a decision by the court*** from which the options are limited to either acceptance, or appeal. Judge Ferguson's "ruling," such as it was, only provided an opt-in choice with payment of a lesser amount, plus certain benefits and protections and waivers, for those who selected it.

Further, the District Court conditionally ordered the Receiver, not Baron, to pay the claims with the payment to act as a compromise and settlement. Exhibit J-2 at pp. 20-22. Unlike a corporation in receivership, an individual whose property is seized by a receiver does not have privity with the receiver, and is not bound by the receiver's obligations. *See Booth v. Clark*, 58 US 322, 331 (1855) ("A receiver is an indifferent person between parties ... He is appointed in behalf of all parties .. The money in his hands is in *custodia legis* for whoever can make out a title to it. ... The receiver is but the creature of the court; he has no powers except such as are conferred upon him"); *Temmer v. Denver Tramway Co.*, 18 F.2d 226, 230 (8th Cir. 1927) ("The receiver could neither speak for them [parties to the suit] nor bind them"). And, recently, the Court of Appeals has negated those powers, ruling them to have been improperly granted in the first instance. Thus, to the extent that any acts by the Receiver have impacted the rights of Baron to pursue or allege bona fide disputes, the authority for those acts was improper,

and any acts compromising Baron's rights are now voided.

Turning to the Ondova Fee Enhancement Order,[16] while it establishes the "enhancements" that services provided by Mr. Pronske conferred ***upon Ondova***, it fails to establish what amount of those "enhancements" (if any) were benefits to, or the liability of, Baron. It could be said that res judicata principles would bar the assertion of any personal liability which was, or could have been, joined with that determination, but at minimum, it cannot be said that it establishes any liability of Baron.

No *Decision* on the Baron Claims. What can be said of Judge Ferguson's lack of a judicial determination of the Petitioning Creditors' claims is even more explicit when it comes to Baron's bona fide disputes thereof. In the Claims Resolution Order, Judge Ferguson expressly reserved Baron's claims and defenses for Baron to choose to prosecute (or not) in the future.[17] And further, in the Stay Order, Judge Ferguson ruled that "one of the appeals of Receivership Orders deals with the Court's decision regarding [the Former Baron Attorneys' fee] claims, [and] Baron should be able to contest the decision before funds are distributed." These hardly seem like the words of a decision that decides or forecloses the existence of bona fide disputes; to the contrary, they recognize the continuing vitality of the right to raise bona fide disputes. Those claims comprising bona fide disputes cannot be said to have been precluded by the very "ruling" which expressly reserves them for future decision.

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[16] Interestingly, the Claims Resolution Order suggested that the Pronske & Patel fee claim be reduced from $241,912.70 to $177,352.70.

[17] As just one example, breach of fiduciary duty is potentially a complete defense to the payment of the disputed attorney's fees, inasmuch as the common law remedy therefor is disgorgement of as much as all fees paid. "An attorney's compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation." *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999). Thus, Baron's claims for breach of fiduciary duty, pled as counterclaims and upon which a jury trial was demanded, give rise to a bona fide dispute as to the amount and liability on the attorneys' fees the petitioners are claiming. *See Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 369 (5th Cir. 1962) (counterclaims can reduce the number of creditors).

C. <u>Collateral Estoppel Does Not Bar Baron from Establishing a Bona Fide Dispute as to the Claims of the Petitioning Creditors Since the Facts Determined Were Not Essential to the Judgment, Since the District Court's Order Was Appealed, and Since the Issues Were Not Fully and Fairly Litigated</u>

Taking off from the prior argument, wherein it was shown that the Claims Resolution Order was not anything like conventional judicial decisionmaking which decides and either grants or eliminates claims and defenses, it is also clear, as the Court of Appeals makes plain, that the rulings culminating in the seizure of Baron's assets and appointment of a Receiver were in service of claims which were not the basis of the underlying dispute. Instead, the District Court's seizure of Baron's assets to pay undetermined claims of attorneys against ***Baron*** - - when the Court of Appeals found that Baron's assets were "unrelated to the underlying litigation," and when those assets "were not sought in the Netsphere lawsuit or the Ondova bankruptcy" - - was clearly not essential to an issue the District Court was required to determine, which resulted in the reversal of the Claims Resolution Order as an abuse of discretion.

This also raises one of the "sub-issues;" inasmuch as the Claims Resolution Order on which the Petitioning Creditors claims was allegedly based was not only appealed, but appealed successfully, issue preclusive effect should not be accorded it. There is, of course, no collateral estoppel effect that attaches to orders reversed on appeal.[18]

Last, it appears there is good cause to question whether the rights of Baron were "fully and fairly litigated" separate and apart from the appellate determination that the imposition of the Receivership was an abuse of discretion. The order relied upon by the Petitioning Creditors was granted without allowing Baron discovery, paid counsel, or several other elements due process.

See Exhibit D-3. Orders granted without due process are void and have no legal effect.[19] The Fifth Circuit has also ruled that a defendant should be afforded a fair opportunity to secure counsel of his own choice.[20] And due process typically will also include a reasonable opportunity to conduct discovery.[21] Finally, the hearing held April 28, 2011 included no live testimony; it is well established that a party not "afforded notice and an opportunity to be heard on the motion" has been denied the requirements of due process of law.[22] Baron was denied the opportunity to be heard on how the district court's finding as to the excessive, unreasonable fees, should impact the Court's granting of relief.

D. Baron Objects to Any Determination of the Claims of Insolvency on this Motion

Baron objects that the inclusion of the "insolvency" question in the Petitioning Creditors' Motion is a direct violation of this Court's January 17, 2013 order, which provides, in relevant part, "ORDERED that ***the sole legal issue*** to be determined by the Court at Trial is whether the claims of the petitioning creditors are subject to a bona fide dispute . . .". (Emphasis added) The inclusion of this issue in the Motion is thus improper, and given the seven days Baron had to prepare, with no prior determination of his jurisdictional or pleadings motions and with no prior discovery, this imposes an undue hardship on Baron and denies him his right to due process. This denial of due process is all the more troubling (putting aside the improper seizure of his personal assets through Receivership by the District Court) in a matter which, as this Court pointed out in *In re Henry S. Miller Commercial, LLC*, evokes special policy concerns requiring

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[18] *Angel v. Bullington*, 330 U.S. 183, 208 n.15 (1947)("If . . . a judgment has been vacated by the trial court or reversed by an appellate court, it is no longer conclusive between the parties, either as a merger of the original cause of action or as a bar to an action upon the original cause of action. . . .".

[19] *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949) ("a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void.")

[20] *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *Texas Catastrophe Property Ins. Ass'n v. Morales*, 975 F.2d 1178, 1180 (5th Cir. 1992) ("there is a constitutionally guaranteed right to retain hired counsel in civil matters").

[21] *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981) ("the district court must give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion").

protection for involuntary debtors.[23] Debtor has put forth evidence which raises an issue of fact with regard to alleged insolvency and shows that many of his debts, including those of several of the Petitioning Creditors, were paid as due until they became disputed. Nevertheless, in an abundance of caution, if this Court will consider the insolvency issue, then Baron has contemporaneously filed herewith a motion for continuance, which is incorporated in this portion of the Response.

E. Analysis of the Fee Disputes Reveals Issues of Fact Precluding Judgment

Mr. Hall had a written contract, capping his fee at $10,000 per month and containing a merger clause requiring any modification be in writing. Exhibit D-6. Mr. Hall admits being paid in full for 10 months, but alleges that in the 11th and last month Mr. Baron orally agreed to a $5,000.00 fee increase. Exhibit P-H. Hall asserts a claim that Baron breached the written contract by paying the amount specified in the written agreement, $10,000, as payment in the eleventh month. *Id*.

In light of the written contract's merger clause, Mr. Hall's claim of an oral modification increasing the fee by $5,000 for the last month is groundless as a matter of law. Mr. Hall has the fiduciary duty to fully inform his client about the legal effect of his contract. *E.g.*, *Holland v. Brown*, 66 S.W.2d 1095, 1102 (Tex.Civ. App.-Beaumont 1933, writ ref'd) (duty to affirmatively disclose all material facts that would affect their relationship as well as legal consequences of those facts, and that breach of this duty states a claim for constructive fraud).

Moreover, an attorney's attempt to increase the fee charged by modifying an existing

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[22] *International Transactions v. Embotelladora Agral*, 347 F.3d 589, 594, 596 (5th Cir. 2003).

[23] *Id*. at 919; *see also In re Staxxring, Inc.*, 2010 Bankr. LEXIS 1803 (Bankr. N. D. Tex. 2010; Jernigan, J.) (holding, in dismissing a six creditor petition after eliminating all but two, "Congress has expressed an intent in section 303 of the Bankruptcy Code that creditors with questionable claims ought not to be allowed to force companies into bankruptcy, and in light of this policy, has put forth somewhat stringent standards in section 303(b)(1).")

contract is, as a matter of law, automatically subject to a bona fide dispute and is presumed invalid. *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964)("There is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney"). If further response be necessary, Mr. Baron denies the oral modification alleged by Mr. Hall. Exhibit D-7. Accordingly, Mr. Hall's claim is clearly subject to a bona fide dispute as to validity and amount.

Further, it is a violation of an attorney's fiduciary duty to fail to reduce a fee agreement to writing, where such a requirement could be reasonably expected by the client. *Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 22--23* (Tex.App.---Tyler 2000, pet. denied). Making misrepresentations about the legal effect of an attorney's contract, is also a violation of the attorney's fiduciary duty. *Cantu v. Butron*, 921 S.W.2d 344, 349--50 (Tex.App.---Corpus Christi 1996, writ denied).

Breach of fiduciary duty is a defense to the payment of the disputed attorney's fees. This is because as a matter of dispositive Texas law, "An attorney's compensation is for loyalty as well as services, and his failure to provide either impairs his right to compensation". *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999). Thus, Baron's claims for breach of fiduciary duty, pled as counter claims and upon which a jury trial has been demanded, if successful, defeat the attorney's right to compensation and thus independently constitute a bona fide dispute as to the amount and liability on the attorneys' fees the petitioners are claiming. *See Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 369 (5th Cir. 1962) (counterclaims can reduce the number of creditors).

Mr. Lyon has failed to produce his written contract for review by this Court. Lyon's billing 'invoices' establish that he claims his fee increased from $40/hour to $300/hour as of

September 2009. Exhibit P-D. Lyon's claim is shown fictitious and subject to a bona fide dispute by **Lyon's own email sent to other attorneys in October 2009**, seeking more work from Mr. Baron on the basis he was only charging Baron **$40/hour** and therefore provided "**more bang for the buck**". Exhibit D-5 at page 2. Lyon's own email clearly states and admits that his billing rate was the $40.00 /hour he was paid, and not the $300/hour he now claims. Mr. Lyon's claim is clearly subject to a bona fide dispute as to validity and amount. If further argument is necessary, Baron disputes the fees and testifies that Lyon settled his dispute in a written accord and satisfaction that was paid on by Baron. Exhibit D 7. The fiduciary duty violations discussed above, apply also to Mr. Lyon.

Mr. Taylor's contract has a monthly fee cap, which Mr. Taylor admits he was paid in full. Exhibit P-F. Mr. Taylor, however, claims that he is also entitled to a contingency fee. Taylor's claim is groundless as a matter of law as, according to Mr. Taylor, "no specific value was ever negotiated that would be subject to the contingency-fee calculation." *Id.* Since Taylor admits he cannot show that he met the contingency conditions, as a matter of law there is a bona fide dispute as to his claim for contingency fees.

There is no provision in Mr. Taylor's contract allowing him to increase the hourly fee he agreed to because no value was negotiated that would satisfy the conditions required for the attorneys to be entitled to a contingency fee. After the case was fully settled, Taylor sent Jeff an email confirming that the only remaining fee due was a small bill—with no mention of any claim of any entitlement to any contingency fee. Exhibit D-7.

Notably, the lawsuit Taylor handled was for an asset owned by Jeff Baron's Roth IRA. Taylor's principal client was the IRA with Jeff only involved through his beneficial interest. Exhibit P-F. The IRA received no benefit what-so-ever from the settlement. Exhibit D-7.

Under the terms of the settlement, hundreds of thousands of dollars that the defendant had been willing to pay prior to the settlement were lost, as were substantial revenue from the asset. *Id.*

Taylor's right to be paid a contingency fee was expressly conditioned on an express formula contained in the written contract. Exhibit P-F. Pursuant to the written formula in Taylor's contract, to satisfy the contingency condition Taylor must show that he obtain a recovery greater in value than the value of the domain name itself added to the hundreds of thousands of dollars the defendant was willing to pay at the time Taylor was retained. Exhibits P-F, D-7. Pursuant to the formula in Taylor's contract, that value is deducted from any recovery in computing the contingency fee that would be due.

Taylor lost the money offered by the defendant prior to Taylor's litigation and Taylor won nothing and has admitted that he can demonstrate no benefit to his client. Exhibit D-7. Taylor admits he received a substantial fee for his work on an hourly basis, exactly as called for in his written contract. Exhibit P-F. Taylor admits that he is seeking a sum of money not called for in his written contract, but rather was computed in a way Taylor unilaterally invented and which was not a term or provision of the written agreement. *Id*. Accordingly, the Taylor/Power's claim is clearly subject to a bona fide dispute as to validity and amount.

The fiduciary duty violations discussed above, apply also to Taylor/Powers. If further argument is necessary, Baron disputes Taylor's claim for additional fees. Exhibit D-7.

Mr. Ferguson's claim is clearly subject to a bona fide dispute as to validity and amount. Mr. Ferguson was paid in full under the terms of his written agreement letter attached to his summary judgment evidence even though Ferguson has failed to produce any work reports detailing his purported work hours to justify those fees. Exhibits P-C and D-7. For the period prior to September, Ferguson admits he had an agreement and was paid under that contract.

Exhibit P-C. Ferguson seeks to avoid the agreement- paid on in full (Baron's payment for Ferguson's hotel and meal present a $107.00 dispute that Ferguson makes). There is no question that, at a minimum, the written agreement for Ferguson's work prior to September was substantially performed by Mr. Baron and Ferguson was paid. *Id.*

Ferguson seeks to avoid the agreed upon fee of his written contract by claiming Baron failed to pay $107.00 or, allegedly paid 'untimely'. Even if his claim were true, Ferguson, accepted the payments. Having accepted payment based on a written fee arrangement, Ferguson cannot demand a higher rate for that work. The fiduciary duty violations discussed above, apply also to Mr. Ferguson.

Ferguson sent a letter, during the same period Ferguson claims to have been subject to 'late payment', and the letter does not mention any such events such as 'late payment'. Moreover, his own letter confirms that Ferguson will not charge for more than 10 hours work (at $300/hour) for the period *after* September 1st (Ferguson admits that for the period prior to September 1st, he was paid pursuant to his written agreement). Exhibits P-C and D-7. Ferguson provides no work reports, which is another violation of his fiduciary duties, and in any event, pursuant to his written agreement is limited to a maximum $3,000.00 fee unless he can produce written authorization for working more hours. That fee would only be due if he can prove that he worked 10 hours in September. Ferguson has produced no billing records to substantiate his claim and Baron denies that Ferguson provided the work in September. Exhibit D-7. Again, Ferguson has provided no evidence of his work and no billing reports. At most, Ferguson is entitled to $3,000.00 based on his own letters, yet his claim is for over $70,000.00. His fee demand is unconscionable and a violation of Ferguson's ethical and fiduciary obligations. By virtue of those violations, and by virtue of his excessive fee demand, Ferguson forfeits his right

to payment, if any such right had existed.

Ferguson's claim for fraud is legally meritless. Ferguson claims he was 'defrauded' because Baron told him that Baron would not pay his fee, but rather, the million dollar trust would pay the fee. There is no materiality to the alleged 'false representations', which Baron denies making. Exhibit D-7. If Baron promised to pay from his own pocket, or with money funded from a multi-million dollar trust, the money is just as green.

Notably, no hourly work reports were provided to his client, nor attached to Ferguson's affidavit. Ferguson also appears to admit violating his fiduciary duties and committing malpractice, as follows: <u>According the Ferguson</u>, his client wanted to void an agreement but against his client's wishes (if Ferguson is to be believed) Ferguson got the agreement finalized by non-appealable order. Exhibit P-C. Ironically, Ferguson feels perfectly free to try to avoid a contract he entered into and was paid upon, but is proud that he-- according to him-- violated his client's wishes and instructions and locked his client into an agreement his client sought to void. If further argument is necessary, Baron disputes Ferguson's fees. Exhibit D-7.

Ms. Schurig now claims a debt from Mr. Baron of $93,731.79, but swears under oath that she was paid over a million dollars in fees and that her claim against Mr. Baron is only for $1,331.50. Exhibit P-B. The district court's single factual finding made after the 'hearing' held on April 28, 2011, was that the **maximum reasonable fee** for the work alleged to have been preformed for Baron was $400.00 per hour. Exhibit D-2. Schurig's billing to Baron includes hourly work charged in excess of $400/hour. Exhibit P-B. The total excess charges over $400.00 per hour in her billing exceed the amount Schurig testified was due from Baron.

It is a breach of fiduciary duty charge an unreasonable fee, and is a defense to payment that a fee requested is unreasonable. District Court's order establishes that Schurig's fees over

$400/hour are unreasonable. When those unreasonable fees are removed from the billing, no amount is due. The fiduciary duty violations discussed above, apply also to Ms. Schurig. If further argument is necessary, Baron disputes Schurig's fees. Exhibit D-7.

Further, Mr. Baron provided Ms. Schurig over $2 Million to hold in trust, which funds have never been reasonably or rationally accounted for by Ms. Schurig. Exhibit D-7.

Notably, Baron does not own Asia Trust and no explanation in fact or law has been offered as to why Jeff Baron would be liable under the law for their debt, if that debt were due. Moreover, as a matter of Texas law, collection from Jeff for the debts of Asia Trust are barred by the Statute of Frauds. Similarly, there has been no showing that the claimant law firm with respect to the Schurig affidavit has any rights against Mr. Baron.

Mr. Garrey's testimony is not credible, and is provably false. Accordingly, his claim is clearly subject to a bona fide dispute as to validity and amount. Garrey swears that he was asked by Jeff Baron to prepare and file a Special Appearance on behalf of The Village Trust in a lawsuit pending in Dallas State District Court. Garrey swears that he performed all of these tasks. As a matter of public record, no such special appearance exists. Moreover, Garrey's emails establish that contrary to his testimony, he solicited the Village Trust to be retained to file the special appearance and the Trust rejected his offer and did not retain him.

Garrey's bitter reply email to the Village Trust confirmed that, directly contrary to his affidavit testimony, he was NOT ASKED OR RETAINED TO PROVIDE ANY LEGAL SERVICES FOR THE TRUST, AND HE PROVIDED NONE. Exhibit D-7.

Similarly, Garrey claims that he was retained by Mr. Baron to object to the fee requests of the Receiver's counsel, and asked to devise a strategy to remove the Receiver and the Receiver's counsel. Exhibit P-E. However, Mr. Garrey's sworn testimony is that he stopped

working for Baron *prior to any motion to appoint the receiver* and it is **<u>impossible</u>** for Mr. Garrey to have performed the services he claims. Garrey's testimony is false.

Not only is Garrey's factual account false, but when examined, Garrey's affidavit establishes that <u>Mr. Baron's alleged obligation</u> -- for three months and including a bonus-- totaled <u>at most</u> **only $375.00.** Exhibit P-E at page 9. Notably, Garrey states he worked only for two weeks, and clearly did not earn the full $375.00 his affidavit establishes is the amount that would be due from Mr. Baron if Garrey had performed actual work, had done so for three months, and had not forfeited his fee by violating the fiduciary duties he owed to his client.

The fiduciary duty violations discussed above, apply also to Mr. Garrey. His 'lawsuit' against Mr. Baron is a clear violation of his duty of loyalty and to maintain attorney-client confidences, and not to fabricate false allegations against a former client. If further argument is necessary, Baron disputes the fees. Exhibit D 7. Mr. Garrey's claim is clearly subject to a bona fide dispute as to validity and amount.

Mr. Pacione seeks payment for fees but provides only a 'block' report of the alleged work he performed. Exhibit P-H. The written contract relied upon by Pacione is clear that his work obligation -- and Mr. Baron's payment obligation was to start in March, not January or February. Pacione, however, claims fees for January and February.

In making his affidavit Pacione failed to provide the written terms for his January and February work. Mr. Baron, however, has provided evidence of those terms. Exhibit D-7. The work product for which Mr. Pacione was to be paid is clear and explicit, including specific deadlines. Mr. Pacione, however, failed to perform and provided Mr. Baron **no work product**. Exhibit D-7. Mr. Baron testifies that he asked Pacione to sign a contract. *Id*. Pacione's failure to do so before engaging in work is a violation of Pacione's fiduciary duty to Mr. Baron. *See*

Jackson Law Office, 37 S.W.3d at 22-23.

Baron testified that he offered to pay Pacione based on the work product he provided, for example, a memorandum of law, but that Pacione produced no work product. Mr. Pacione's claim is clearly subject to a bona fide dispute as to validity and amount. Pacione notably fails to provide an hourly work report. The fiduciary duty violations discussed above, apply also to Mr. Pacione. If further argument is necessary, Baron disputes the fees. Exhibit D 7.

Mr. Pronske certainly worked hard in the Ondova case and was awarded a substantial contribution claim ***against Ondova*** for the same work he seeks to recover against Mr. Baron. Exhibit P J-4. As Mr. Pronske is not entitled to a double payment for his work, any claim against Baron for the same work is contingent upon the disposition of the Ondova fee award.

Notably, Pronske admitted under oath the Mr. Baron did not negotiate to pay his fee. Exhibit P-A. Rather, Pronske testifies that he agreed to be paid by the Village Trust and understood up front that Mr. Baron would not be responsible for paying the fee. *Id*. Mr. Pronske's attempt to enforce his alleged fee thus violates Texas law including the Statute of Frauds, and thus violates Pronske's fiduciary duties to Mr. Baron.

Pronske admitted under oath that there are no engagement agreements relating to the representation and that he did not expect Mr. Baron to pay for his services. Exhibit P-A. Pronske claims that payment was to come from the Village Trust. *Id.* Pronske swears he received a $75,000.00 initial retainer from the Village Trust. *Id.* Pronske has admitted under oath he was to bill against that pre-paid retainer. *Id.* Despite his legal and fiduciary duties to do so, Pronske failed to send monthly billing statements, failed to send monthly reports detailing the status of the retainer, and failed to request a replenishment of the retainer. *Id.;* Exhibit D-7. Notably, Pronske's first billing statement was printed only in February 2011, a year after the work was

performed. Exhibit P-A. Pronske forfeited his right to a fee by violating the fiduciary duties he owed to Mr. Baron, by virtue of the forgoing, and as follows:

Pronske filed a motion accusing his own client of misconduct, and advocating against his own client. Exhibit D-4. Pronske's motion stated that "PronskePatel has recently learned that Mr. Baron intends to transfer assets to an offshore entity over which U.S. Courts will not have jurisdiction, in order to hide those assets from legitimate creditors". *Id*. at page 2. Pronske's motion further states that "PronskePatel has recently learned that Baron intends to hide his assets offshore as early as September 15, 2010. Thus, the hearing will need to move forward expeditiously to prevent Mr. Baron's unlawful activities." *Id.* at page 3. (Baron disputes the truth of Pronske's allegations. Exhibit D-7.) It is undisputed that Pronske made the allegations while representing Baron. Exhibit D-7.

Assuming what Pronske stated in his motion was true (Baron disputes this), that means that Pronske was revealing client confidential information. Whether Pronske's claim about threatened moving of assets (by seeking to find a replacement trustee for the Village Trust, *as ordered by the Court*,) were true or not, Pronske was placing his own personal interest (ability to collect his fee), above his clients. As discussed below, that is a violation of his core duty of loyalty.

The profession of law is unlike most other professions. The duty placed upon an attorney to his client is one of a fiduciary. **WHEN FACED WITH A CHOICE BETWEEN PERSONAL LOSS AND CAUSING LOSS TO HIS CLIENT, AN ATTORNEY IS BOUND BY LAW, TO PLACE HIS CLIENT'S INTERESTS FIRST.** Pronske failed to do this.

It was a violation of Mr. Pronske's fiduciary duties for Mr. Pronske to place his personal interests over his client's. *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex.App.- Houston [14th Dist.] 2001, pet. denied) ("placing personal interests over the client's interests");*State v. Baker*, 539 S.W.2d 367, 374 (Tex.Civ.App.—Austin, 1976, writ ref'd n.r.e.) ("Neither his personal interests, the interest of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."). It was a violation of Mr. Pronske's fiduciary duties to Mr. Baron for Mr. Pronske to act as an advocate against his client. *Delta Air Lines, Inc. v. Cooke*, 908 SW 2d 632, 633 (Tex.App.-- Waco 1995) ("not act as advocate against a person the lawyer represents").

Mr. Pronske also violated his fiduciary duties to Mr. Baron by (1) failing to reduce his fee agreement to writing, (2) failing to keep and provide on a timely basis a record of the services rendered, (3) failing to provide timely billing statements, (4) threatening to withdraw on short notice in an attempt to force a client to pay a disputed fee. *See Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22--23 (Tex.App.---Tyler 2000, pet. denied). Further, Pronske violated his ethical and fiduciary duty to his client by intentionally taking an action to prejudice and damage his client during the course of their relationship. Prior to filing his motion, Pronske threatened Mr. Baron that he would "Scorch the Earth" against him unless his newly demanded fee was immediately paid. Exhibit D-7.

The other fiduciary duty violations previously discussed above, apply also to Mr. Pronske. If further argument is necessary, Baron disputes Pronske's fees. Exhibit D-7.

Notably, none of these issues were addressed in the determination of Pronske's administrative claim for substantial contribution in the Ondova case. In that case, Baron was prohibited from litigating or contesting Pronske's claim and the determination of the

administrative claim did not determine any issues regarding Pronske's contractual rights with respect to Mr. Baron, nor Baron's fiduciary duty claims with respect to Pronske. Exhibit D-7. The substantial contribution claim allowance is based on the reasonableness of the fees with respect to the benefit provided the Ondova estate, not with respect to the work provided for Mr. Baron's benefit. *See e.g., Matter of Consolidated Bancshares, Inc*., 785 F.2d 1249,1253 (5th Cir. 1986). Nevertheless, Pronske's reliance on the substantial contribution award to allege a higher **claim against Mr. Baron** than was provided for in the district court's order, negates the petitioning creditors' argument that the district court's order finally adjudicated the validity and amount of the claims.

For further cause, should same be necessary, Mr. Pronske's claim is clearly subject to a bona fide dispute as **the district court found** Pronske's billing rate was unreasonable for the work provided to Mr. Baron. Exhibit D-2. By charging his client excessive fees, Mr. Pronske (like each of the claimants seeking excessive fees) violated his fiduciary duty to Mr. Baron, giving rise to the forfeiture not just of the excessive portion of the fees, but to the attorney's right to fees entirely. *See Braselton v. Nicolas & Morris*, 557 S.W.2d 187 (Tex.Civ.App.– Corpus Christi 1977)("There exists, therefore, a lawfully imposed duty not to charge excessive fees."); *Deutsch v. Hoover, Bax & Slovacek, L.L.P.,* 97 S.W.3d 179, 196 (Tex.App.Houston [14th Dist.] 2002, no pet.)("Attorneys owe their clients a fiduciary duty of absolute perfect candor"); *Murphy v. Gruber*, 241 S.W.3d 689 (Tex.App.– Dallas 2007) (excessive fee claim involves "the integrity of their billing practices"); *Burrow v. Arce*, 997 S.W.2d at 240.

CONCLUSION

In determining the question of the standing of the petitioning creditors, and thus the question of the Court's jurisdiction to proceed in an involuntary bankruptcy, "The court's

objective is to ascertain whether a dispute that is bona fide exists; the court is not to actually resolve the dispute." *In re Sims*, 994 F.2d at 221. Accordingly, the court is not charged with attempting to resolve the merits of the claims, but rather "to ascertain whether an objective legal basis for the dispute exists." *Id.*

The petitioning creditors carry the burden of first coming forward with the evidence, not just to establish the existence of their claims, but also to put on a prima facie case that the claims are not subject to a bona fide dispute. The ruling of the Fifth Circuit is clear, "[T]he petitioning creditor **must** establish a prima facie case that no bona fide dispute exists." *Id.*

The grounds offered by the petitioning creditors to establish a prima facie case that no bona fide dispute exists is their argument that the district court's May 18, 2011 order is unstayed and determined Baron's liability for their claims. Contrary to the allegations of the petitioning creditors, the district court's May 18, 2011 order does not determine Mr. Baron's liability for their claims, and, in any case, was stayed by the district court and reversed by the opinion of the Fifth Circuit.

As a matter of established law affirmed by the Fifth Circuit, "**a creditor who holds a stayed judgment holds a claim which is subject to a bona fide dispute, and hence, lacks standing to institute an involuntary bankruptcy case**". *In re Raymark Industries*, 99 B.R. at 299; *In re Norris*, 183 B.R. at 453, *affirmed* 114 F.3d 1182, 1997 WL 256808 (5th Cir. 1997).

For the reasons set forth above, the Motion of the petitioning creditors should be, in all things, denied and the case dismissed for want of jurisdiction.

Respectfully submitted,

STROMBERG STOCK, PLLC

By: *__/s/ Mark Stromberg*

Mark Stromberg
State Bar No. 19408830

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013 a true and correct copy of the foregoing document was sent by email to Lisa Lambert, Counsel for the United States Trustee; Gerrit Pronske, Counsel for the Petitioning Creditors, was served upon all persons identified below by regular mail, postage prepaid, and to all other persons requesting notices via the ECF system.

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