CIVIL ACTION NO. 3:13-cv-03461-O

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Dallas Division

JEFFREY BARON,
Appellant

v.

ELIZABETH SHURIG, *et. al.*
Appellees

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR RECONSIDERATION OF APPELLANT'S MOTION FOR STAY PENDING APPEAL OF ORDER OF RELIEF

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I. BACKGROUND

A detailed recitation of the factual background of this appeal is set forth in Baron's Brief in Support of Appeal of Bankruptcy Court Orders Granting Petitioning Creditors' Partial Summary Judgment and Order for Relief ("**Baron Brief**") [Dkt. No. 25] and such factual background is incorporated herein.[1] A shorter recitation of the facts is set forth below.

On December 18, 2012 (the "**Petition Date**"), eight petitioning creditors (the "**Petitioning Creditors**") filed an involuntary chapter 7 bankruptcy petition against Baron (the "**Involuntary Case**"). While three of the leading Petitioning Creditors have pending state court actions over their fees and all of the Petitioning Creditors were included in the Judge Furgeson's May 18, 2011 interlocutory order assessing attorneys' fees (the "**Fee Order**"), none of the Petitioning Creditors has obtained a final judgment against Baron adjudicating alleged debts.

On January 17, 2013, at the request of the Petitioning Creditors, John Litzler (the "**Trustee**") was appointed the interim trustee in the Involuntary Case and later became the permanent chapter 7 trustee.

On February 20, 2013, the Bankruptcy Court issued an oral ruling granting the Petitioning Creditors' motion for partial summary judgment on the issue of whether they had standing to initiate the Involuntary Case, pursuant to section 303(b) of the Bankruptcy Code.

On June 26, 2013, the Bankruptcy Court entered an order of relief and related findings of fact and conclusions of law, adjudicating Baron bankrupt (collectively, the "**Order of Relief**"). (R. 3887-3925.) The primary bases for granting the Petitioning Creditors' motion for partial summary judgment and entering the Order of Relief was that the Bankruptcy Court's clearly erroneous findings that (a) the Fee Order was never stayed pending appeal and (b) a clarification

[1] Terms not otherwise defined herein have the same meaning ascribed to them in the Baron Brief.

order entered by the Fifth Circuit Court somehow made the Fee Order enforceable in bankruptcy court. As demonstrated below, both grounds were clearly erroneous.

On July 8, 2013, 2013, Baron filed a notice of appeal regarding the Order of relief. On August 28, 2013, the appeal of the Order of Relief was docketed in this Court.

On September 6, 2013, after a failed attempt in bankruptcy court, Baron filed an emergency motion for stay pending appeal (Dkt. No. 4) and brief and memorandum in support of the stay motion (Dkt. No. 5) (collectively, the "**Stay Motion**") in this Court. On October 1, 2013, the Court entered an order denying the Stay Motion (Dkt. No. 22) (the "**Stay Order**"), but did not instruct that Baron could not amend his request or file a motion to reconsider his ruling.

On October 20, 2013, Baron filed the Baron Brief, which addresses most of the Court's rationale for denying the original Stay Motion.

Pursuant to Federal Rule of Civil Procedure 54(b), Baron files this motion to reconsider the Stay Order, because such order (a) is based on manifest errors of law and fact and/or (b) the record and newly discovered evidence reveals that the Order of Relief was entered in error and therefore must be stayed.

II. ARGUMENT

Standard for Reconsideration

Federal Rule of Civil Procedure 54(b) provides that a district court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Gulf Fleet Triger Acquisition, LLC v. Thoma-Sea Ship Builders, LLC*, 282 F.R.D. 146, 152 (E.D. La. 2012). The general practice is to review any motion under Rule 54(b) using the same standards used for reviewing motions under Federal Rule 59(e). *Id.* While a 59(e) motion must be filed 28 days after the entry of an order, however, a motion under Rule

54(b) has no time limitations. *See* Fed. R. Civ. P. 54(b), 59(e); *see also Gulf Fleet Triger*, 282 F.R.D. at 153 ("Although Rules 59 and 60 set forth specific time frames during which reconsideration may be sought, Rule 54 sets forth no such limitation.").

Motions to reconsider serve the narrow purpose of allowing a party "to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (1989) (*quoting Keene Corp. v. International Fidelity Insurance Co.*, 561 F.Supp. 656, 665 (N.D.Ill.1982), *affd.* 735 F.2d 1367 (7th Cir.1984); *Coliseum Square Assoc. Inc. v. Jackson*, 465 F.3d 215, 247 (5th Cir. 2006) (same); *Ross v. Marshall*, 426 F.2d 745, 763 (5th Cir. 2005) ("A district court abuses its discretion if it "bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence.")

The factual and procedural backgrounds in this appeal involve a four year history of several proceedings and are extremely complicated. As such, any error this Court may have made early in this appeal as to the factual or legal issues is certainly understandable. This Motion, however, attempts to clarify the record, evidence and law, so that the Court can properly evaluate Baron's motion for stay, pursuant to Bankruptcy Rule 8005.

Technical Compliance with Bankruptcy Rule 8005

As an initial matter, this Court previously denied Baron's Stay Motion because he did not technically comply with Bankruptcy Rule 8005's requirement that a movant demonstrate why the bankruptcy court did not grant his prior request for a stay pending appeal. The Fifth Circuit has held, however, that technical compliance with Rule 8005 should not be rigidly enforced and a movant should be given an opportunity to cure any technical noncompliance. *See SI Restructuring, Inc.*, 542 F.3d 131, 135 (5th Cir. 2008) (The Fifth Circuit affirmed the district court's failure to enforce technical compliance with Rule 8005, when the bankruptcy court had

made her intentions known."); *In re Berryman Prods., Inc.*, 159 F.3d 941, 943 (5th Cir. 1998) (Fifth Circuit noted that, when a district court denies a stay motion on technical grounds, the movant can file an amended motion to cure the deficiency).

Here, in Baron's original Stay Motion, Baron attached the Bankruptcy Court's order denying his stay request but did not describe why the Bankruptcy Court denied his stay motion. This task was made difficult because the Bankruptcy Court only made oral findings on his stay motion. (*See* Order Denying Stay, Ex. A.) Baron nonetheless will now describe why the Bankruptcy Court denied his prior stay request.

In its oral ruling, the Bankruptcy Court found that the stay was not warranted, because Baron was not likely to succeed on the merits, given Judge Ferguson had already issued a final judgment that collaterally estopped him from challenging the Petitioning Creditors' claims. The Bankruptcy Court also ruled that Baron had not shown any harm by the absence of a stay and instead the petitioning creditors—who had already been paid over $3 million and had asserted the same claims against Baron's company (Ondova)—would be harmed because they had not been paid—approximately $500,000—in several years. Finally, the Bankruptcy Court orally ruled that she found no public interest in the granting of the stay.

As more fully explained in the Memorandum in Support of Baron's Motion to Reconsider, Baron believes that this Motion cures the technical deficiencies in its original Stay Motion, seeks to correct manifest errors of law and fact, and presents newly discovered evidence.

Standards for Stay Pending Appeal

As previously demonstrated, the Fifth Circuit employs a four part test in determining whether to grant a stay pending appeal:

> (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable

> injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest.

Ruiz v. Estelle, 666 F.2d 854, 856 (5th Cir. 1982); *Arnold v. Garlock, Inc.*, 278 F.3d 426, 438-39 (5th Cir. 2001). While each part must be met, the appellant "need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits" when a serious legal question is involved, as here. *In re First S. Sav. Assoc.*, 820 F.2d 700, 704 (5th Cir. 1987) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. Unit A June 1981). As demonstrated below, Baron meets all four of these factors.

A. IRREPARABLE HARM

While irreparable harm is traditionally the second element in obtaining a stay, the importance of this element cannot be understated in this case. As this Court has correctly noted, there is a high risk that this appeal will be mooted by the actions taken in the Involuntary Case and this risk constitutes irreparable harm. The magnitude of this harm will be severe, absent a stay.

Indeed, notwithstanding this appeal, the Bankruptcy Court has taken the position that the Involuntary Case should proceed "full steam ahead." This is the same approach that Judge Furgeson took after he issued the Receivership Order and it has caused Baron to expend over $3 million on the fees for an illegal receivership (and likely over $4 million if Judge Furgeson's final assessment withstands appeal) and over $2 million in the Ondova bankruptcy case. (App. 1 at 6; App. 5.5 at 66, 122; App. 34; R. 424-25, 437.)[2] All of these expenditures were made at the

[2] References to "App." constitute references to the Appendix [Dkt. No. 26-27] filed in connection with the Baron Brief. Because the Appendix is voluminous, Baron is not refilling it in connection with this motion for consideration. As mentioned in the Baron Brief, the Appendix consists of case law and public filings in several federal proceedings before the Bankruptcy Court, the Fifth Circuit and Judge Furgeson, and therefore this Court may take judicial notice of the documents included in the Appendix.

request of, and presumably to benefit, the alleged creditors of Baron.

Yet this enormous cost does not begin to explain the irreparable harm to Baron. Baron's constitutional rights have been, and continue to be, eviscerated. In particular, (a) Baron has never been allowed counsel of choice to challenge the Petitioning Creditors' claims during any proceeding, including the Involuntary Proceeding, (b) his right to a jury trial on these disputed claims have been waived by an illegal receiver and are being entirely ignored by the current Trustee and Bankruptcy Court during the Involuntary Case, and (c) Baron's property rights have been stripped away without Baron being afforded due process of law.

As a start, in January 2013, when the Involuntary Case commenced, the Bankruptcy Court rejected Baron's request to hire counsel (Mr. Matt Probus) to defend against the Involuntary Case and instead only authorized Baron to spend $25,000 during the entire seven month involuntary proceeding. (R. 382-83, 444, 1593-1599.) The Bankruptcy Court thereafter repeatedly denied Baron's request for additional funds to pay counsel. As a result, Baron has had to endure very limited assistance from counsel during the entire Involuntary Case and now has no counsel because his prior bankruptcy counsel quit after the Order of Relief was entered (for lack of funds) and he cannot find anyone to represent him without a substantial retainer. Meanwhile, the Bankruptcy Court appointed the Trustee, who has hired both counsel and accountants of choice (since March 2013), and further has allowed the Receiver, the Ondova Trustee, the Trustee and the Petitioning Creditors access to millions of dollars of Baron's funds to challenge Baron at every step of the way.[3]

Absent a stay, the irreparable injury will assuredly cause irreparable harm to Baron. For example, at a July 15, 2013 status conference, the Bankruptcy Court told Baron he did not need

[3] On August 9, 2013, the Petitioning Creditors alone filed a fee application to be paid $250,000.00 for challenging Baron during the Involuntary Case. A true and correct copy of the fee application is attached hereto as Exhibit N.

any counsel during the Involuntary Proceeding and she would proceed with the case full steam ahead. A copy of the relevant portion of the transcript of this status hearing is attached hereto as Exhibit B and a tape of the full hearing will be provided to the Court. During this status conference, which lasted several hours, the Bankruptcy Court invited the Ondova Trustee, Receiver, and Petitioning Creditors to make a record, so that she could make a Recommendation to the District Court to authorize the Receiver to transfer all of the Receivership assets, including Baron's exempt assets and assets belonging to third parties (which the Fifth Circuit unequivocally held did not belong in receivership) to the current Trustee. Based on the record made at such status conference, the Bankruptcy Court did issue such a Recommendation, a true and correct copy of which is attached hereto as Exhibit C. But, Baron never had a voice to defend himself against the allegations being tossed against him at this status conference.

The irreparable injury will ensure an evisceration of Baron's constitutional rights.[4] On October 13, 2013, Baron filed an application (the "**Application**") to retain proposed counsel, Pendergraft and Simon, LLP ("**Proposed Counsel**"). A true and correct copy of the application is attached hereto as Exhibit D. The necessity of the Proposed Counsel is described in detail the Application. Among other reasons, the Trustee is currently (a) fighting Baron in this appeal, (b) attempting to validate the Petitioning Creditors' claims, (c) attempting to examine Baron's current and former counsel (disregarding attorney-client privilege issues), (d) attempting to conduct discovery, and (e) attempting to prosecute non-dischargeability (fraud) claims against Baron, and (f) attempting to extinguish—without filing a lawsuit or adversary proceeding—

[4] This irreparable harm does not even take into consideration Baron's sever health issues. As the Petitioning Creditors are well-aware, Baron has type I diabetes, a progressive disease that can be fatal. Complicating his type 1 diabetes, Baron also suffers from other disabling diseases, including macular degeneration (chronic degeneration of the eye that leads to blindness), cataracts, neuropathy (peripheral nerve damage), grand mal seizures and severe thrombocytopenia (which causes dangerous internal bleeding). These diseases have been greatly aggravated by the stress caused by these proceedings, as well as the resulting disruption in his disease management routine.

substantive property rights of Baron (to exempt assets) and third parties (Novo Point and Quantec).

And the Trustee is not waiting for any adjudication of this Appeal by this Court. While asking this Court for an extension of time to file his initial opening brief, the Trustee is forging full steam ahead in the Involuntary Case and in other proceedings. Within the last two months, the Trustee has expressly waived Baron's property rights (a) in the Ondova bankruptcy case, by consenting to the sale of assets, like servers.com (once valued at millions of dollars), and (b) in the Fifth Circuit, by abating Baron's appeal of the final award of the Receiver's fees and expenses. And this waiver has had significant consequences. The Bankruptcy Court has already approved the sale of servers.com for a fraction of its value, and the Receiver recently filed a motion in the District Court seeking immediate payment of $1.3 million in legal fees and expenses, plus additional ongoing expenses, even though the payment of such fees and expenses is currently on appeal. (*See* Sale Order, Ex. E; Receiver Mtn. to Pay, Ex. F.)

On October 3, 2013, the Trustee filed in the Involuntary Case a motion to extend the time to object to the dischargeability of Baron's debts. A true and correct copy of this motion is attached hereto as Exhibit G. The Trustee apparently wants to preserve the right to argue that Baron has committed some type of fraud against creditors.

On October 17, 2013, the Trustee filed in the Involuntary Case a motion to conduct a 2004 examination—admittedly a fishing expedition—of Baron's appellate counsel. A true and correct copy of the motion is attached hereto as Exhibit H. On the same date, knowing Baron is not represented, the Trustee filed a motion to compel (the "**Motion to Compel Baron**") Baron to be examined and produce thousands of pages of financial documents, many of which are in the possession of the Receiver and/or Baron's former counsel. A true and correct copy of the

Trustee's Motion to Compel Baron is attached hereto as Exhibit I.

On October 18, 2013, the Trustee filed in the Involuntary Case a motion to compel a 2004 examination of one of Baron's former counsel who previously assisted Baron in establishing certain spend-thrift trusts. A true and correct copy of this motion is attached hereto as Exhibit J. The sole purpose of this examination is to establish a record that certain spend-thrift trusts are not legitimate. The injury to Baron is obvious; the examination of this friendly witness—who is a Petitioning Creditor—risks waiving Baron's attorney-client privilege with his former counsel.

On October 24, 2013, the Trustee filed an objection to Baron retaining the Proposed Counsel, taking the position that Baron should only be allowed $25,000 for representation, even though the Trustee himself has access to all of Baron's money. A true and correct copy of the objection is attached hereto as Exhibit K. The Ondova Trustee filed a similar objection, but took the incredible position that the Bankruptcy Court had no authority to allow Baron to employ any counsel at all. (*See* Ondova Trustee Objection, Ex. L, ¶ 23-24.)

On October 28, 2013, the Bankruptcy Court conducted a hearing on the retention of Proposed Counsel, where the Ondova Trustee, Trustee, Receiver and Petitioning Creditors were all allowed to grill Baron and Proposed Counsel for several hours. Even though she has been told time and time again no one will represent Baron without a substantial retainer, the Bankruptcy Court ruled that she would "recommend" to the District Court that Baron should only have $25,000 for bankruptcy counsel, provided he not use any funds to appeal her Order of Relief or in any other proceedings. Of course, Proposed Counsel then declined to represent Baron, and Baron again is left with no counsel.

On October 31, 2013, the Receiver filed a motion in the Involuntary Case requesting that certain assets in the possession of the Receiver be turned over to the Trustee (the "**Receiver**

Turnover Motion"), even though the Fifth Circuit had previously ordered the Receiver to return these assets to their respective owners. A true and correct copy of this motion is attached hereto as Exhibit M.

On November 1, 2013, the Bankruptcy Court granted (a) the Motion to Compel Baron, compelling Baron to be examined and to produce numerous documents regarding his financial affairs, (b) the motion to extend the time to object to Baron's dischargeability of debt and (c) setting an expedited hearing on the Receiver Turnover Motion. (*See* BK. Docket Nos. 373-375.]

On November 12 and 14, Novo Point and Quentec filed in the District Court and in the Involuntary Case emergency motions to protect the dignity of the District Court and to withdraw the reference from the Bankruptcy Court in connection with the proceedings related to the Receiver Turnover Motion and the Trustee's motion to examine counsel (collectively, "**Motions to Withdraw**"). Attached hereto as Exhibits O and OO are both Motions to Withdraw filed by Novo Point and Quantec. Among other reasons, Novo Point and Quantec point out that the Receiver and Trustee are seeking attorney client privilege information in connection with their various requests and are seeking to circumvent the Fifth Circuit mandate.

On November 15, 2013 the Bankruptcy Court entered orders allowing the Trustee to (a) examine Baron's former counsel and review attorney client privileged information and (b) examine Baron's current appellate counsel. [*See* BK. Docket Nos. 389-390.]

On November 15, 2013, the District Court (Judge Lindsey) issued an order requesting the Bankruptcy Court to make a recommendation on the Motions to Withdraw. A copy of the Order is attached hereto as Exhibit P.

On November 18, 2013, the Receiver filed an objection to the Motions to withdraw, a true and correct copy of which is attached hereto as Exhibit Q. On November 21, 2013, the

Trustee and Ondova Trustee filed their objections to the Motions to Withdraw, copies of which are attached hereto respectively as Exhibits R and S. Baron has had no counsel to assist him with any of these matters, as appellate counsel has been specifically engaged solely to handle this Appeal and Baron cannot find anyone who will represent him in bankruptcy for a mere $25,000 retainer.

On November 21, 2103, the Receiver filed numerous confidential and privileged documents under seal in the Involuntary Case. (*See* BK Docket Nos. 408-413.) Baron has not been provided a copy of any of these documents.

Very soon—with unlimited assets, friendly witnesses and Baron unrepresented—the irreparable harm will become apparent. Trustee will make a record in the Involuntary Case that (a) assets belonging to Novo Point and Quantec belong in the bankruptcy estate, (b) Baron holds no assets, like retirement funds, that are exempt from creditors, (c) the claims of the Petitioning Creditors are valid, and (d) Baron's claims against third-parties, i.e., the Petitioning Creditors, are waived and/or compromised.

Baron cannot continue to fight against several parties who are using all of his assets against him to eviscerate his rights. It took him 3 years to reverse an illegal receivership and it has costs him millions of dollars during the process and resulted in an ill-advised fee assessment (i.e., the Fee Order) that is now being used against him. The same prejudice will occur during the Involuntary Case, except this time his remaining assets will be extinguished and the issues on appeal will be mooted. Baron understands the danger enough that, if a stay is granted, he is willing to agree to deposit all of his assets in the registry of this Court, provided he be given $250,000 to pay counsel of his choice to properly challenge the arguments made in this appeal in and in other proceedings.

B. LIKELIHOOD OF SUCCESS

(a) Bankruptcy Court clearly erred refusing to Enforce the Receivership Order which enjoined the Petitioning Creditors from filing the Involuntary Petition against Baron

The Bankruptcy Court clearly erred in failing to enforce the Receivership Order, which enjoined the Petitioning Creditors from initiating the Involuntary Case. At the time the Involuntary Case was commenced, the Receivership Order was still effective and such Order contained a broad injunction banning any creditors from attempting any collection efforts against Baron. Among other things, the Receivership Order provided that "all other persons aside from the Receiver are hereby stayed" from:

- "[c]ommencing, prosecuting, continuing, entering, or enforcing any suit or proceeding . . .;"
- "taking or attempting to take possession, custody or control of any asset"
- "[e]xecuting, issuing, serving or causing the execution, issuance or service of, any legal process . . . whether specified in this Order or not;"
- "[d]oing any act or thing whatsoever to interfere with the Receiver taking custody, control, possession, or management of the assets or documents subject to the receivership."

(*See* App. 6, 139-140.) As discussed below, pursuant to Federal Rule of Civil Procedure 41 and the Clarification Order, the Reversal Opinion would not become effective until the Fifth Circuit's mandate issued. Moreover, there is no provision in the Fee Order that somehow modified the original injunction imposed by Judge Furgeson. Thus, the Receivership Order was effective when the Involuntary Case was commenced.

In clear contravention of the Receivership Order, the Petitioning Creditors commenced an Involuntary Proceeding, which is akin to a lawsuit, in order to collect on their alleged debt. They also quickly moved for an interim trustee to dispose the Receiver of possession of property. *See*

11 U.S.C. § 543. The Bankruptcy Court clearly erred in ignoring Judge Furgeson's broad injunction against this type of collection activity. At a minimum, the Bankruptcy Court should have realized that Judge Furgeson's injunction casted a doubt on the Petitioning Creditors' claims.

(b) Bankruptcy Court clearly erred in ruling that, as a matter of law, Baron could not demonstrate a *bona fide* dispute as to the amount or liability of the Petitioning Creditors' claims

This Court correctly noted that the Fifth Circuit has adopted the "objective basis" for determining whether there exists a legal or factual dispute as to the validity of a debt under section 303(b) of the Code. (Stay Order at 10.) The Court, however, was under the incorrect impression that the Bankruptcy Court actually applied the objective test. The Bankruptcy Court never did, as she weighed no evidence in granting summary judgment for the Petitioning Creditors and instead ruled, as a matter of law, the Fee Order precluded Baron from arguing that there was any bona fide dispute.

In the Baron Brief, Baron has demonstrated that the Bankruptcy Court clearly erred in providing preclusive effect to the Fee Order for several reasons. First, the Bankruptcy Court ignored that the Fee Order was, in fact, stayed pending appeal and was permanently stayed and nullified after the appeal of the Fee Order concluded. While the Bankruptcy Court cited to a June 18, 2012 decision by Judge Furgeson enforcing the stay, she completely ignored that Judge Furgeson stayed the Fee Order six days after it was entered and used unequivocal language that this was a stay pending appeal of the Fee Order. According to Judge Furgeson on May 24, 2011, "**having consulted with the Clerk of the U.S. Court of Appeals for the Fifth Circuit, the Court advises the parties that it is STAYED from taking any action in the various matters [including the Fee Order (Dkt. No. 575)] involved in the instant appeal**." (App. 28, p. 214.)

A month later, Judge Furgeson reiterated it had "**stay[ed] orders concerning . . . fees to be paid to Baron attorneys pending appeal**." (App. 31, p. 217.) Thus, while Baron did not file a motion for stay pending appeal of the Fee Order, he never needed to do so. The Bankruptcy Court also committed clear error in ignoring that, on May 29, 2013, after the Fifth Circuit mandate was issued, Judge Furgeson made it abundantly clear that the Fifth Circuit banned him from ever enforcing the Fee Order. (App. 34, p. 443.) Further, this Court cannot ignore that the Fifth Circuit has held that stayed orders create *bona fide* dispute as to the claims in such orders.[5]

The Bankruptcy Court also clearly erred in applying the wrong collateral estoppel principles, relying on state law instead of federal common law, and the error caused the Bankruptcy Court to neglect two important factors. First, the issue of whether there existed a *bona fide* dispute over the Petitioning Creditors' claims was not necessary to support the Fee Order. (Baron Br. 26-27.) The Petitioning Creditors and Receiver specifically represented to Judge Furgeson that the Summary Proceeding was not a trial on the fee claims and "[was] not extinguishing Baron's right to dispute these fees." (R. 1357, 1373.) The Fee Order itself preserved Baron's and the Petitioning Creditors rights to assert claims against one another over the fee claims (R. 1327-28) and thus the Fee Order, at best, represents a compromise between the Petitioning Creditors and the Receiver; but not Baron.

The second factor ignored was whether there existed special circumstances that would

[5] *See In re Norris*, 183 B.R. 437, 453 (Bankr. W.D. La. 1995), *aff'd*, 114 F.3d 1182 (5th Cir. 1997) ("if the judgment had been stayed, the claimant would appear to be precluded from joining the involuntary petition"); *In re Placid Oil Co.*, 1989 Bankr. Lexis 334 (N.D. Tex. March 13, 1989) (citing *In re Drexel*, 56 B.R. 960, 967 (Bankr. S.D.N.Y. 1986)); *In re Raymark Indus.*, 99 B.R. 298, 299 (Bankr. E.D. Pa. 1989) (holding 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."). Even the sole case cited by the Bankruptcy Court on unstayed judgments acknowledges that there is no *per se* rule that such unstayed judgments dispel a bona fide dispute and a bankruptcy court must still examine under the objective test under *In re Sims*, 994 F.2d 210 (5th Cir. 1993), whether "subsequent events cast doubt on the judgment's enforceability." *See In re Henry S. Miller, LLC*, 418 B.R. 912, 921-22 (Bankr. N.D. Tex. 2009). Here, the Fee Order was stayed pending appeal, but even if it had not been, subsequent events certainly left no doubt that such Order was not enforceable and therefore could not objectively confer standing on the Petitioning Creditors.

make it unfair to apply collateral estoppel. (*See* Baron Br. at 26, 32-36.) Specialized circumstances did existed, including, but not limited to, (a) Baron's denial of funds to hire counsel, hire experts or conduct discovery prior to the Summary Proceeding; (b) Baron's denial of counsel during the Summary Proceeding; (c) Baron's denial of jury trial rights during the Summary Proceeding; (d) the Receiver's and Petitioning Creditors' representation that the Summary Proceeding was not an adjudication of disputed fee claims and Judge Furgeson's findings in the Fee Order regarding the same; and (e) Judge Furgeson's (i) instant stay of the Fee Order pending appeal and (ii) permanent stay of the Fee Order after the Fifth Circuit mandate was issued. Baron has also demonstrated, beyond doubt, that the Petitioning Creditors' claims are disputed, though the affidavit he filed with Judge Furgeson, as well as his motion to dismiss and response to summary judgment filed in the Bankruptcy Court. (R. 230-33; R. 1526-1537.) The Bankruptcy Court erred in never considering this evidence.

The Baron Brief further demonstrates that the Bankruptcy Court clearly erred in determining that the Fee Order was "tantamount to a final judgment," because such order patently did not resolve all the claims between the parties, as required by Federal Rule 54, and did not otherwise contain a clear indication that Judge Ferguson intended it to be final. (Baron Br. 27-28.) Thus, Judge Furgeson was always able to vacate, stay or nullify the Fee Order—which is exactly what he did six days after he entered it and after the Fifth Circuit mandate. For all intend and purposes, Judge Furgeson was required to nullify the Fee Order after the Fifth Circuit mandate, because of clear precedence denying him authority to enforce such interlocutory order after the receivership was reversed. *See Jacksonsville, T. & K. W. RY. CO. v. American Const. Co.*, 57 F. 66 (5th Cir. 1893); *Coskery v. Roberts & Mander Corp.*, 189 F.2d 234 (3rd Cir. 1951); *Coburn v. Hill*, 103 F. 340, 340-41 (6th Cir. 1900); *Sclafani* v. *Sclafani*, 870

S.W.2d 608,611 (Tex. App.-Hous. [1 Dist.] 1993); *Christie v. Lowrey*, 589 S.W.2d 870, 873 (Tex. Civ. App.-Dallas 1979, no writ).

Finally, the Baron Brief demonstrates that the Bankruptcy Court clearly erred in recognizing that law of the case doctrine and the mandate rule ensured that the Fee Order could never be enforced because the Reversal Opinion clearly established that the Petitioning Creditors had unresolved claims and, in any instance, Judge Furgeson could never satisfy such claims with Baron's property and property of third parties that were not the subject of the underlying lawsuit. (R. 181, 185, 186-88) While the Bankruptcy Court incorrectly found that "the Fifth Circuit did not set aside or overturn in any way the May 18, 2011 Fee Order" and "[a]ll appeals of it have been exhausted" (R. 3913), **this Court fundamentally should ask itself why Judge Furgeson rejected the Petitioning Creditors' request to enforce the Fee Order after the Fifth Circuit mandate issued, stating "the Fifth Circuit found this Court could not order the payment of these fees from the Receivership estate." (App. 34, p. 0443.)**

The Bankruptcy Court clearly erred in relying on circumstantial evidence in concluding the Fee Order was a final judgment, without citing to any authority. The Bankruptcy Court first relied on the Clarification Order, which was taken completely out of context. (R. 3904, 3905, 3913.) The temporary Clarification Order, issued thirteen days after the Reversal Opinion, merely clarified that the mandate had not yet issued and that the orders on appeal remained in place until the mandate issued. (*See* Baron Br. 29-30.) Moreover, the clarification request was made by the Receiver in order to curb the Petitioning Creditors from filing the Involuntary Petition. (App. 48, p. 450-51.) According to the Receiver, absent intervention by the Fifth Circuit, such actions by the Petitioning Creditors were causing confusion and expense and irreparable harm to the Receivership estate. (App. 48, p. 453.) In any instance, the temporary

Clarification Order became moot when the Fifth Circuit issued its mandate. (App. 49, p. 462-63.) Thus, the Clarification Order had no bearing on finality or enforceability of the Fee Order.

The Bankruptcy Court also clearly erred in relying on allegations by Petitioning Creditors that Baron was afforded due process during the Summary Proceeding. These allegations are unsupported by the record; in particular, the transcript of the Summary Proceeding itself. As clearly demonstrated in such transcript, contrary to the Bankruptcy Court's findings, (a) Baron was not provided funds to hire counsel, hire experts or conduct discovery, (b) Baron was not represented by counsel; (c) Baron did not have counsel to cross examine witnesses; (d) Baron did not invoke his Fifth Amendment rights; and (e) Baron did file contravening evidence, via an affidavit, with Judge Furgeson, but was forced to withdraw his affidavit because of lack of representation. (R. 1346-47, 1364, 1399, 1401, 1402, 1549, 1550).

Because the Bankruptcy Court clearly erred in giving preclusive effect to the Fee Order, this Court cannot and must not rely on her conclusions in determining whether a stay pending appeal should be granted. This Court's reliance on the Bankruptcy Court would ignore errors manifest errors of law and/or fact.

(c) The Bankruptcy Court clearly erred in failing to give preclusive effect to the Fifth Circuit's Reversal Opinion and mandate

This Court believed that the central issue in the 5th Circuit appeal was whether Judge Furgeson could impose a receivership on a vexatious litigant. (Stay Order, n.1.) That is simply not the case, as the Reversal Opinion analyzed all six grounds used by Judge Furgeson to impose a receiver. The second ground that the Fifth Circuit addressed was whether Judge Furgeson could impose a receivership at the request of non-judgment creditors. (R. 185-88.) In fact, the Fifth Circuit analyzed the "Paying Attorneys" factor before the "Vexatious Litigation" factor and found that this was Judge Furgeson's primary factor for the imposing a receivership. (R. 185,

189.)

This Court incorrectly believed that the Fifth Circuit only took into consideration the status of the Petitioning Creditors as of November 10, 2010. (D. Ct. Stay Order n. 1.) That is also incorrect. The appeal of the Receivership Order included the appeal of the Fee Order, as the Fifth Circuit consolidated the appeals of both Orders. ((App. 26, p. 205-212; App. 35, p. 221-22.) As a result, Baron, the Ondova Trustee, the Receiver, and Novo Point and Quantec fully briefed the Fifth Circuit with the merits of the Fee Order. (*See* Baron Br. at 10) (citing App. 36, 37, 38, *in passim*.) Thus, the Fifth Circuit was abundantly aware, in finding that the Petitioning Creditors had unresolved claims, that Judge Furgeson had assessed $870,000 in attorneys' fees in the Fee Order. (R. 185-88.)

Moreover, the Fifth Circuit did not need to specifically vacate the Fee Order, because the Reversal Opinion and related mandate made this Order unenforceable as a matter of law. As demonstrated in the Initial Brief, the reversal of a receivership vacates any related orders issued pursuant to that receivership and strips the district court from any authority to enforce such related orders. (Baron Br. at 27.) That is precisely why Judge Furgeson said he was banned from enforcing the Fee Order after the Fifth Circuit mandate. Even though the trial on the Involuntary Case occurred in June 2013 (after the May 29, 2013 Furgeson Order), the Bankruptcy Court never addressed, or considered, this last treatment of the Fee Order.

(d) The Bankruptcy Court clearly erred in finding that Baron had not been paying his debts as they came due

Without citing to any evidence in the record, the Bankruptcy Court found that Baron was generally not paying his debts solely to former attorneys. Presumably, the Bankruptcy Court was relying again on the Fee Order. There are several reasons, however, why the Bankruptcy Court clearly erred in her factual finding.

The record is devoid of any evidence that Baron was not paying his counsel when he was in control of his assets prior to the Netsphere Litigation. In point of fact, only one of the Petitioning Creditors had a relationship with Baron, Ondova, Novo Point and Quantec prior to the Netsphere Litigation, and that sole Petitioning Creditor admits in her affidavit that she was only owed $1,300.00 by Baron, individually, after having a 7 year client relationship and after being paid over $2 million in fees. (R. 2604, 2722, 3753-59)

After the Netsphere Litigation commenced, the Bankruptcy Court ignored that Baron was dispossessed of all assets necessary to satisfy the Petitioning Creditors' claims. Indeed, less than two months after the Netsphere Litigation began, Judge Furgeson ordered all of Ondova's revenues to be paid to one set of counsel. (App. 7, p. 38.) This essentially prevented Baron from paying any of Ondova's operating expenses, including the expenses incurred by the Petitioning Creditors on behalf of Ondova. Judge Furgeson's order also caused Ondova to file bankruptcy, which again prevented the payment of any prepetition claims of the Petitioning Creditors and required the Petitioning Creditors to request Bankruptcy Court permission before their post-petition claims were paid. *See* 11 U.S.C. §§ 362(a) (automatic stay), 329 (application for compensation by attorneys). Moreover, when the Ondova Trustee was appointed, Baron was completely without any authority to direct the use of Ondova's assets to satisfy any creditor claims; instead the Ondova Trustee was charged with that task. *See* 11 U.S.C. §§ 1106 (duties of chapter 11 trustee); 1108 (authority of trustee to operate business).

The Bankruptcy Court also clearly erred in failing to consider that since November 2010, the Receivership Order prevented the payment of the Petitioning Creditors' claims for two reasons: (a) the Receiver took possession and control of all of Baron's assets; and (b) the Receivership Order banned the Petitioning Creditors from attempting to collect any money from

Baron. (App. 6, p. 129-132 (exclusive control over Baron's current and future assets and personal records); p. 133-35 (broad powers of receiver); p. 139-140 (stay of all actions by Petitioning Creditors to collect money.) Indeed, as discussed above, the Receivership Order's injunction against collection activities is very broad and, independently, prevented the Petitioning Creditors from being paid anything with Baron's assets. (*See* App. 6, 139-140.)[6]

Furthermore, the Bankruptcy Court clearly erred in not giving Baron any credit for agreeing to have $2 million dollars in settlement proceeds—essentially all of the proceeds—from the Netsphere Litigation transferred to the Ondova bankruptcy for the payment of all of Baron's and Ondova's creditors. (App. 1, p.5-6.) This amount of money, which was paid in full, was more than sufficient to cover the $870,000 in fees assessed under the Fee Order.

Finally, the Bankruptcy Court never gave Baron any credit for paying for over $3 million in receivership costs (and possibly $4 million), all of which were caused by the Petitioning Creditors' request to impose a Receiver over Baron's assets. (App. 34, p. 424-25, 437.) This money should have been used to pay creditors, but instead was used by the Receiver and Ondova Trustee to fight Baron's appeals to dissolve the illegal Receiver and to fight Baron in the Ondova bankruptcy case. Baron had absolutely no control over how the Receiver and Trustee were using his money, and if anyone is to blame for why the Receiver spent most of Baron's money the way he did, it should be cast on the Petitioning Creditors who requested the receivership in the first place.

C. HARM TO OTHER PARTIES

The Court previously found that the Petitioning Creditors would suffer substantial harm

[6] Besides ignoring the Receivership Order's broad injunction, the Bankruptcy Court also erred in ignoring that on two occasions (June 2012 and May 2013), the Receiver and Petitioning Creditors even attempted to enforce the Fee Order, but Judge Furgeson rejected them out right.

because they are not being paid amounts owed. But this finding places the cart before the horse because it assumes that the Petitioning Creditors are entitled to be paid based on an enforceable judgment, and they clearly are not.

It has been over 2 years since the Fee Order was entered and no Petitioning Creditor or Receiver has been able to enforce the Fee Order before the issuing court (Judge Furgeson) or on appeal—nor will they ever be able to do so. The Fee Order was nullified by the Reversal Opinion, as demonstrated above, because it was the product of an illegal receivership, where Baron was denied fundamental constitutional rights, including right to counsel, right to a jury and denial of property without due process of law. Indeed, no fair civil dispute between two parties is ever resolved in the manner in which the Fee Order was entered. Moreover, if the Petitioning Creditors did believe they had something akin to a final judgment, then they (*e.g.*, Pronske; Hall; and Pacione) had adequate time to make their cases in the several state court lawsuits pending for over 3 years, even before the receivership. The following are a list of lawsuits pending in state court, where the fee issues of the Petitioning Creditors could have been decided many years ago:

> (1) *Baron v. Gerritt M. Pronske, Individually and Pronske & Patel, P.C.*, District Court, Dallas, Texas, Cause No.1 0-11915 removed by Gerritt Pronske to Bankruptcy Court in 20 1 0; stayed and pending before the Bankruptcy Court;
>
> (2) *Pacione v. Baron*, District Court, Dallas, Texas, Cause No. DC-I0-06464 (Case Type: Debt); and
>
> (3) *Hall v. Baron*, Dallas, Texas, Justice Court, Precinct 3, Place 3, Cause No. JC-1O-00721N;

The facts that the Petitioning Creditors (a) lost before the Fifth Circuit and Judge Furgeson in collecting their fees and (b) have waited so long to make their case in front of a friendly forum clearly demonstrates that any harm—if any—was caused by Petitioning Creditors and

themselves alone.

But there is absolutely no harm to the Petitioning Creditors because they have never established in trial that they are owed any amount of money and Baron has never been given an opportunity to properly challenge their claims as well as assert his own claims against the Petitioning Creditors. Thus. this Involuntary Case then represents nothing more than a two-party dispute between two parties over claims that has never been adjudicated. And courts have repeatedly found that involuntary cases which essentially are two-party disputes should be dismissed from bankruptcy court.[7] The rationale in these opinions is that "[i]t is not appropriate to file an involuntary petition in an effort to gain control of a business" or where another forum exists to resolve claims or enforce remedies. *In re Axl Indus, Inc.*, 127 B.R. 482, 484-85 (S.D. Fla. 1991); *see also In re TPG Troy, LLC*, 492 B.R. 150, 160-61 (Bankr. S.D.N.Y 2013) (finding bankruptcy courts should abstain from involuntary case where other forum exists to resolve claims"); *In re Hodges*, 351 B.R. 758, 771 (Bankr. N.D. Okl. 2006) ("Courts generally dismiss two-party disputes that could be resolved in other forums"); *In re ABQ-MCB Joint Venture*, 153 B.R. 338, 342 (Bankr. D.N.M. 1993) ("A court may properly abstain from hearing an involuntary case which is essentially a two-party dispute, when the creditor has adequate state court remedies.")

Here, there is no harm to the Petitioning Creditors who have had ample time to resolve their claims in other forums. The Involuntary Case was simply commenced to forum shop the

[7] *See In re Mountain Dairies, Inc.*, 372 B.R. 623 (Bankr. S.D.N.Y. 2007) ("Even if Schneider-Valley were an eligible petitioner … the Court would be compelled to abstain … because this is essentially a two party dispute for which the parties have adequate remedies in state court."); *In re Spade*, 258 B.R. 221, 234-35 (Bankr. D. Col. 2001) ("There is no need for a federal court to resolve this two-party dispute that implicates state law."); *In re Ballato*, 252 B.R. 553, 558 (Bankr. M.D. Fla. 2000) (dismissal of involuntary case involving two party dispute with former counsel); *In re Jr. Food Mart of Arkansas, Inc.*, 241 B.R. 423 (Bankr. E.D. Ark. 1999) ("[A]n involuntary case which is essentially a two-party dispute may be dismissed."); *In re Kujawa*, 224 B.R. 104, 108 (E.D. Mo. 1998) (dismissal of involuntary case involving two-party dispute with former counsel); *In re Axl Indus., Inc.*, 127 B.R. 482 (S.D.Fla. 1991) ("Generally, a [bankruptcy] court should not take jurisdiction over a two party dispute."); *In re 7H Cattle Corp.*, 6 B.R. 29 (Bankr. D. Nev. 1980) (same).

Fee Order and ensure that (a) the illegal receivership over Baron would continue and (b) Baron would not have access to funds to challenge the Petitioning Creditors' claims. There is no evidence in the record that Baron has committing fraud, other than the very loose testimony of one Petitioning Creditor, who has never been examined by Baron and who has never provided any documentation to support his loose allegations.[8]

In any instance, any harm to the Petitioning Creditors, who have admittedly been paid over $3 million, who have never filed a bond and who have filed claims in the Ondova bankruptcy case, pales in comparison to the over $5 million that Baron has expended to satisfy their claims and the continuing amounts that Baron continues to expend to attempt to have his day in Court.

D. PUBLIC INTEREST

There are too many reasons why the granting of a stay would serve the public interest. As demonstrated in the Baron Brief, the Involuntary Case has denied Baron due process of law, in stripping him of all of his assets and allowing the Petitioning Creditors to use those assets against him. (*See* Baron Br. at 16-24.) These due process concerns should be paramount in the Court's consideration. Moreover, as demonstrated in the Baron Brief, Baron's right to counsel and right to a jury trial over the Petitioning Creditors' claims are being entirely ignored during the Involuntary Case.

Judicial economy and fairness will also be served by a stay because what the Petitioning Creditors have essentially done is forum shopped a nullified, interlocutory fee assessment, in

[8] In fact, when Baron does have an opportunity to examine this Petitioning Creditor, he will demonstrate that the Petitioning Creditor mislead the Court into believing that Baron was transferring assets, when in fact, Baron was complying with a Court approved, global settlement that required him to assist in locating a new replacement trustee of the trust at issue in the settlement. The Bankruptcy Court never investigated this issue to any degree and merely believed the unsupported testimony of the Petitioning Creditor.

contravention of rulings by the Fifth Circuit and Judge Furgeson, in order to obtain an unfair advantage over Baron in a civil dispute. This tactic has substantially prolonged the litigation between the parties (which could have been resolved several years ago in other forums) and exhausted millions of dollars in funds (which could have been used to pay valid claims).

Moreover, as recently demonstrated in the flurry of activity in this District Court before the Honorable Judge Sam Lindsey, the Bankruptcy Court is issuing orders that overlap with matters for which this Court has jurisdiction. (*See* Case 12-37921-sgj7, Dkt. 391, pg. 2). This Court, pursuant to the Order of Reference by the Honorable Judge Sam Lindsey, is currently preparing to consider a Motion to Withdraw the Reference which must first be considered at the Bankruptcy Court by status conference. (Civ. Action No. 3:09-cv-0988-L, Dkt. 1339). Multiple orders by the Bankruptcy Court targeting entities and individuals not under its jurisdiction squarely support Baron's argument that judicial economy would be preserved if a stay is imposed, where additional litigation and appeals have already ensued in response.

A stay pending appeal should absolutely be granted under these circumstances where the balance of the equities weighs heavily in favor of granting the stay. At a minimum, Baron should be allowed access to sufficient funds to challenge the Involuntary Case on appeal, challenge the Petitioning Creditors' claims, assert his own claims, and protect his remaining property. If no stay is granted, then this Court should consider immediately withdrawing the reference in this case, pursuant to 28 U.S.C. § 158(d),[9] to provide Baron with a fair and just proceeding.

III. CONCLUSION

For the foregoing reasons, Appellant Jeffrey Baron requests this Court reconsider its Stay Order and grant a stay of the Order of Relief pending an appeal.

[9] 28 U.S.C. § 158(d) provides that this Court can withdraw the reference on its own motion.

Dated: November 22, 2013

Very respectfully,

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CERTIFICATE OF SERVICE

On this date, I electronically submitted the foregoing document with the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties who receive notification through the electronic filing system.

/s/ H. Joseph Acosta
H. Joseph Acosta