

CAUSE NO. 2024-48085

**ATLANTIC WAVE HOLDINGS, LLC
and SECURE COMMUNITY, LLC,**

Plaintiff/Judgment-Creditor

v.

**CYBERLUX CORPORATION and
MARK D. SCHMIDT, Individually,**

Defendant/Judgment Debtors.

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

129th JUDICIAL DISTRICT

**DEFENDANTS' RESPONSE TO PLAINTIFFS' FEBRUARY 5, 2025
REQUEST FOR EMERGENCY HEARING**

Atlantic Wave's¹ Request for Emergency Hearing uses snippets of correspondence to try and create an issue that does not exist.

Notably, despite demanding an emergency hearing in Texas, Plaintiffs are currently opposing the setting of a hearing on an emergent nature brought by Cyberlux, in Virginia.² This illustrates Plaintiffs' request to this Court is nothing more than an effort to coerce the Court to forego reviewing the parties' competing orders, refuse Cyberlux's request for hearing on Cyberlux's pending Emergency Motion to Stay, or in the Alternative, Motion to Set Amount of Security to Suspend, Turnover and Appointment of Receiver, and Motion Set Bond for Receiver ("Motion to Stay or Set Bond"), and enter Plaintiffs' overbroad order appointing a receiver. Atlantic Wave's efforts to obfuscate this matter at every turn should not be entertained, and Plaintiffs request for emergency hearing should be refused.

¹ "Atlantic Wave" refers to Plaintiffs Atlantic Wave Holdings, LLC and Secure Community, LLC.

² See Exhibit A (e-mail correspondence between counsel for Cyberlux and counsel for Atlantic Wave).

RELEVANT BACKGROUND

On July 30, 2024, Plaintiffs filed this action pursuant to the Texas UEFJA. Plaintiffs contend the filing alone domesticated the Virginia Judgment immediately under the applicable statutory authority. While in many cases this may be true, this particular case is unique because the Virginia Judgment is part and parcel of the parties' Settlement Agreement and, moreover, because the parties' Settlement Agreement—and therefore the Virginia Judgment—are subject to ongoing litigation in Virginia.³ Because of this, Cyberlux requested a stay of enforcement. This Court heard that request on October 28, 2024, and granted a thirty-day stay of enforcement. The Court's automatic stay was lifted after thirty days, and the Court declined Cyberlux's request to extend the stay.

Even though the stay of this action was lifted at the end of November, Plaintiffs did not request a writ of execution for almost forty five days, waiting until January 2, 2025. For an unknown reason, exactly one week later and before the writ of execution was even issued (and before the Harris County Constable even knew about this action), Plaintiffs filed their Application for Turnover After Judgment and for Appointment of Receiver (the "Application").

Plaintiffs' Application was filed on January 9, 2025. According to the Court's records, the writ of execution was issued on January 15, 2025.

On January 16, 2025, the Court held a hearing on Plaintiffs' Application and indicated that the Court would appoint a receiver. Because the parties were still disputing the scope of the receivership order when the hearing concluded, the Court directed the parties to confer and submit

³ In the Settlement Agreement, the parties stipulated that all such disputes must be adjudicated in Virginia. Further, the Settlement Agreement provides that a *Virginia* court is to construe the Settlement Agreement and Judgment to determine whether a breach of the Settlement Agreement has occurred, and such a determination is required before the Virginia Judgment may be enforced.

an agreed order or two competing orders. On January 17, 2025, Robert Berleth filed an Oath of Receiver even though the Court had not yet signed its order appointing a receiver.⁴

The parties could not agree and submitted their competing orders, Atlantic Wave submitting to the Court on January 20, 2025 before Cyberlux could even provide its input. Cyberlux submitted its competing order on January 21, 2025.

On January 24, 2025, the Harris County Constable's office contacted the undersigned. On February 3, 2025, the undersigned responded to the Harris County Constable's office and provided (1) a copy of the Oath of Receiver filed by Mr. Berleth; (2) an excerpt of the January 16, 2025 hearing transcript highlighting the Court's indication that a receiver would be appointed; (3) the Declaration of Charles Watts; and (4) the Declaration of United States Air Force Major General (ret.) Cameron G. Holt.⁵ On February 5, 2025, Plaintiffs filed their Request for Emergency Hearing.

ARGUMENT

1. Despite demanding an emergency hearing in Texas, Atlantic Wave is currently telling the Virginia Court it is “not available” for an emergency hearing.

Plaintiffs' Request for Emergency Hearing should be rejected out of hand because there is not an emergency. If there was something emergent affecting Plaintiffs, Plaintiffs would not currently be opposing Cyberlux's request for hearing before a Virginia court. In fact, that Virginia court offered the parties *seven* different dates on which an emergency motion could be heard, including:

- Tuesday, Feb. 4,

⁴ Confusingly, Berleth—who is supposed to be a court-appointed neutral—has already submitted a request on behalf of Atlantic Wave urging his appointment through a written order.

⁵ A copy of the e-mail correspondence is attached as Exhibit B. Copies of the documents attached to the e-mail correspondence are attached as Exhibits C-F.

The undersigned and Deputy Constable Montgomery of the Harris County Constable's office have exchanged telephone calls but have not spoken directly.

- Wednesday Feb. 5
- Monday Feb. 10
- Tuesday Feb. 11
- Wednesday Feb. 12
- Thursday Feb. 13
- Friday Feb. 14⁶

Last week on January 29, 2025, Cyberlux requested a hearing in Virginia requesting guidance from the Court and clarification on the status of the judgment and settlement given the ongoing litigation in Virginia, Texas, and California.⁷

That day, the Virginia court informed the parties that the Court could hold an emergency hearing on February 4, 2025 or February 5, 2025. Atlantic Wave's counsel would not provide its availability and instead demanded information. On February 3, Cyberlux attempted to confirm the hearing, offering to have the hearing in person or over videoconference.⁸ Atlantic Wave objected to holding the hearing on February 5 because "the notice provided last week [was] insufficient" and, in that correspondence, Atlantic Wave indicated that an evidentiary hearing was appropriate.⁹

That same day, Cyberlux asked for the Court's availability to hold an evidentiary hearing on Friday, February 7, 2025.¹⁰ Atlantic Wave indicated it was not available.¹¹

The Court then offered availability for **every day** during the week of February 10. Atlantic Wave did not offer its availability. When Cyberlux offered its availability, Atlantic Wave objected to every day that Cyberlux was available.¹² Atlantic Wave indicated that the hearing could not occur until after February 14, yet it did not offer any dates on which it was available.

⁶ Exhibit A (Jan. 29 email from R. Tillery, Feb. 4 email from R. Tillery).

⁷ *Id.*

⁸ *Id.*

⁹ Exhibit A (Feb. 4 email from F. Zablah to J. Robinson).

¹⁰ *Id.* (Feb. 4 email from J. Robinson to F. Zablah).

¹¹ *Id.* (Feb. 4 email from F. Zablah to J. Robinson).

¹² *Id.*

Simply put, Atlantic Wave is on the one hand obstructing Cyberlux's efforts to get a hearing in Virginia, the proper venue set forth in the Settlement Agreement (and which this Court has repeatedly expressed interest in gaining an understanding of the Virginia courts' position on the parties dispute) while, on the other hand, telling this Court that the sky is falling because no progress is being made in Virginia. Atlantic Wave should not be permitted to continue its efforts to dupe this Court as to why and how the delays in Virginia have occurred. Plaintiffs' request for emergency hearing should not be entertained unless the Court will also address Cyberlux's Motion to Stay or Set Bond for the receiver.

2. Plaintiffs' conduct, not Cyberlux's conduct, obviated the need for the Harris County Constable to execute the writ.

Plaintiffs argue Cyberlux's communications to the Harris County Constable have "interfered with service" and that Cyberlux has been "making representations about Judgment Creditor's authority to act on a writ of execution." That is nonsense. Not only does nothing in the undersigned's correspondence to the Harris County Constable not give such directive, but also it defies logic to have a constable executing a writ to locate and seize the *same exact property* that the Court indicated the receiver would be appointed to locate and over which to take custody.

It is especially difficult to understand Atlantic Wave's suggestion that Cyberlux has given the Harris County Constable's office the excerpt of the 4-hour hearing's transcript in which the Court expressly stated it would appoint a receiver in this case. In any event, if the Harris County Constable's office disagrees with the Court's directive, the Harris County Constable is free to seek this Court's guidance on the matter.

Atlantic Wave could—and perhaps should—have sought a writ of execution earlier. They did not. When Atlantic Wave finally decided to seek a writ of execution, it almost immediately

changed its mind, filing its Application and seeking a receiver instead. This Court has indicated it would appoint a receiver (giving Atlantic Wave exactly what it asked for), and the parties have submitted competing orders for the Court's consideration. There is no basis for Atlantic Wave to say that Cyberlux has interfered with its collection efforts by informing the Harris County Constable about the receiver, so this Court should reject Atlantic Wave's request unless Atlantic Wave no longer wishes to proceed with the appointment of the receiver.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, Defendants respectfully request the Court hold an emergency hearing on Defendants' Emergency Motion to Stay, or in the Alternative, Motion to Set Amount of Security to Suspend, Turnover and Appointment of Receiver, and Motion Set Bond for Receiver; issue a stay of the Court's Proposed Order granting turnover and appointing receiver, or alternatively, suspend said Proposed Order upon payment of a security bond in the amount of \$100,000.00;¹³ and suspend the Proposed Order until the Court determines the appropriate amount of the potential receiver's bond payable to Defendants and orders that Plaintiffs file such bond. Defendants further request any such relief at law or in equity to which Defendants are entitled.

¹³ The proposed receiver has offered to post such a bond.

Dated: February 7, 2025

Respectfully submitted,

By: /s/ Alexander J. Pennetti

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Unofficial Copy Office of Marilyn Burges District Clerk

CERTIFICATE OF SERVICE

I certify that on February 7, 2025, I had this document served on all counsel of record via electronic service.

/s/ Alexander J. Pennetti
Alexander James Pennetti

Unofficial Copy Office of Marilyn Burgess District Clerk

Automated Certificate of eService

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Frankie Huff on behalf of Katherine Clark

Bar No. 24046712

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Envelope ID: 97103416

Filing Code Description: No Fee Documents

Filing Description: Defs Response to Plfs Request for Emergency Hearing

Status as of 2/7/2025 3:22 PM CST

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