EXHIBIT 1

THOMPSON COBURN LLP

2100 Ross Avenue
Suite 3200
Dallas, TX 75201

972 629 7100 main
972 629 7171 fax
thompsoncoburn.com

Katharine Battaia Clark
972 629 7114 direct
kclark@thompsoncoburn.com

April 5, 2025

VIA ELECTRONIC MAIL
c/o shanelle.taylor@hcdistrictclerk.com

The Honorable Michael Gomez
129th Judicial District of Harris County, Texas
Harris County Civil Courthouse
201 Caroline St 10th floor
Houston, TX 77002

Re: Cause No. 2024-48085; *Atlantic Wave Holdings, LLC and Secure Community, LLC v. Cyberlux Corporation and Mark D. Schmidt*, Individually; In the 129th Judicial District Court, Harris County, Texas

Dear Judge Gomez:

I write on behalf of Cyberlux Corporation and Mark D. Schmidt (collectively "Defendants" or "Cyberlux") concerning the letter and corresponding order (the "Proposed Order")[1] filed by Plaintiffs, Atlantic Wave Holdings, LLC and Secure Community, LLC (collectively "Plaintiffs") on April 1, 2025,[2] in the above-referenced action. In short, the Proposed Order exceeds the scope of this Court's ruling, is excessively broad and ambiguous, would appoint a non-neutral receiver without any responsibility to anyone other than Plaintiffs and his own self-interests, and submits a balance due far in excess of an amount that could be due under the Virginia Consent Judgment ("Judgment") that Plaintiffs have brought to this Court.

Accordingly, Cyberlux respectfully contends the most reasonable means to get to the bottom of these issues is for the Court to set an emergency hearing. Defendants would like to post a supersedeas bond but need this Court's assistance regarding the amount to be posted. In the alternative, Defendants seek the Court's assistance to narrow and clarify the powers of any turnover or receivership order the Court may enter to comport with the record and applicable law.

[1] *See* **Exhibit 1**, April 1, 2025 Letter from David A. Walton to The Honorable Michael Gomez and corresponding Proposed Order Granting Receiver.

[2] Plaintiffs give no explanation as to why this Proposed Order is being submitted in comparison to the one Plaintiffs proposed in January, and Plaintiffs did not confer with Defendants prior to submitting the Proposed Order.

I. Plaintiffs' Proposed Order exceeds the record and statutory authority.

Plaintiffs' Proposed Order greatly exceeds what is shown in the record and statutory authority. It defines "Judgment Debtors" as the Defendants and then purports to appoint a receiver as to "Debtor," which is not defined, making the Proposed Order impermissibly ambiguous on its face, especially because this Court expressly declined to appoint a receiver as to Defendant Mark Schmidt.

The Proposed Order further states as a conclusion not based in "fact":

> "Upon evidence admitted to this court, during the hearing for appointment of Receiver the court finds the requirements for chapter 31 turnover have been met. The court takes judicial notice of the evidence and testimony presented during the appointment hearing."

Proposed Order ¶ 6.

Nothing of the kind happened, and this Court made no such ruling. Not even the balance due pursuant to the judgment has been proved as required by TEX. CIV. PRAC. & REM. CODE § 31.002. That provision requires Plaintiffs to identify the amount of money "required to satisfy the judgment." And, as Defendants demonstrated at the hearing on Plaintiffs' application, Plaintiffs have failed to meet the requirements that would show turnover and receivership is otherwise appropriate.[3] Defendants will not repeat the deficiencies previously demonstrated to the Court but rather will emphasize the additional concerns this latest Proposed Order raises.

A. The amount due to satisfy the Judgment has not been proven by Plaintiffs.

Plaintiffs have repeatedly misstated the balance due to Plaintiffs pursuant to the Judgment, despite the amount being fundamental to the relief sought in the first instance. Texas Civil Practice & Remedies Code section 31.002 requires that Plaintiffs (as judgment creditors) identify the amount of money "required to satisfy the judgment." They have not done so.

The inconsistencies and misstatement by Plaintiffs respecting the sums due stated below are palpable.

First, on July 30, 2024, Plaintiffs sought to enforce the Judgment in the amount of $1,572,500. On December 2, 2024, Plaintiffs sought a writ of execution in the amount of $1,760,363.69. Then, on January 9, 2025, Plaintiffs filed their Application for Turnover After Judgment and for

[3] *See, e.g.*, Defendants' January 21, 2025 and January 23, 2025 letter briefs and Defendants' January 27 Motion to Stay, or in the alternative, to Set Amount of Security to Suspend, Turnover and Appointment of Receiver.

Appointment of Receiver ("Application"), which states $1,430,551.30[4] is due. And now, Plaintiffs present an altogether different (and much higher) amount in the Proposed Order.

The Proposed Order states that the Judgment was originally "a judgment amount of **$1,572,500** with attorney's fees of $177,126.19, plus sanctions of $3,895.00 and $6,842.50 plus court costs with post-judgment interest accruing at the rate of 12% per annum." And then states without any evidence or support, that "as of February 18, 2025 **$2,111,086.01** remains owed and due from the Debtors to the Plaintiff."

Plaintiffs have not presented any evidence to show how the judgment amount escalated from $1,430,551.30 to the extraordinary number stated in the proposed order of **$2,111,086.01, which is nearly 1 and 1/2 times what they represented to the Court in the Application.**

There is more. At the hearing of January 16, 2025, Plaintiffs presented their Application. Their sole witness, William Welter, admitted (1) the actual balance due under the Virginia judgment, per a December 2, 2024 letter sent to Defendants, was $848,363.47, and (2) additional amounts for attorney's fees claimed not as part of the Virginia Judgment (but rather as a demand pursuant to the parties' Settlement Agreement).[5]

Finally, on January 28, 2025, Counsel for Plaintiffs in this case sent counsel for Cyberlux a spreadsheet claiming the balance due to pay the Judgment was actually $949,469.50.[6]

The sum alleged of **$2,111,086.01 is over 2.2 times greater than the** $949, 469.50 sum presented as of January 28 to Defendants' counsel.

Accordingly: what is the actual sum remaining due pursuant to the Virginia Judgment?

Plaintiffs cannot be allowed to proceed without meeting their burden to prove the balance due and owing. TEX. CIV. PRAC. & REM. CODE § 31.002. (Proof of the sum "required to satisfy the judgment."). Moreover, Defendants are prejudiced in their efforts to file a supersedeas bond because of Plaintiffs' refusal to provide clarity on the amount actually due to satisfy the Judgment.

[4] Application at p. 2, "As of December 31, 2024, there remains a total amount due and owing of $1,430,551.30 on the Judgment. Said judgment is in all respects, final, valid, and subsisting. Applicants are the owners and holders of said judgment."

[5] *See* Reporter's Record of January 16, 2025 (Plaintiffs' witness William Welter acknowledged the "Application" attached a letter dated December 2, 2024. That letter, from another counsel for Plaintiffs to a counsel for Defendants, claimed a total due pursuant to the Judgment of $1,219,671.97. However, that sum purports to include $371,307.60 in legal fees not awarded by any court. When those attorney's fees of $371,307.60 are subtracted from the purported total, the real balance due as of December 31, 2024 is $848,363.47.)

[6] **Exhibit 2**, January 28 and 31, 2025 e-mails between Travis Vargo and Alex Pennetti.

B. The scope of property subject to the Receivership is ambiguous and excessive and violates due process of law.

Cyberlux has repeatedly notified the Plaintiffs, their counsel, and this Court that a material portion of the person property located at Cyberlux's Spring, Texas warehouse includes military drones built to the Government's specifications, pursuant to contracts providing for the tasks to be performed by Cyberlux. The drones have been assembled at the direction of the Government and under federal and state law, the drones and related equipment and materials are owned by the Government.[7]

In fact, at a hearing before the United States District Court, Southern District of Texas, on March 26, 2025, counsel for Plaintiffs represented to United States District Judge Rosenthal that they have no intention of attaching the Government's property.[8] The presentation of the Proposed Order to this Court is in direct contradiction with that representation. To render a receivership order which purports to include seizure of the drones would violate not only Defendants' rights, but also those of the Government, without due process of law.

The law directs and holds that the Government has title to the drone property. It is uncontested that the United States Government contracted with HII Mission Technologies Corp (HII) who in turn contracted with Cyberlux to build the drones. The drones and related equipment have been inventoried by the Government and are ready for delivery. As such, the drones and related equipment are the Government's property to which it holds title.[9] Not only does the Proposed Order give the receiver power to seize the Government's property, it also purports to give the receiver the power to dispose of and sell the property in which "third parties" have an interest. Proposed Order ¶ 19. ("Third parties are notified that Receiver, not Debtor, is the party entitled to possess, sell, liquidate, and otherwise deal with Debtor's non-exempt property and once any third party receives notice of this order, the third party may be subject to liability if the third party releases property, unless directed by Receiver or the Court." *Id.*). These powers would arm the receiver with purported authority to violate the property rights of others, and even sell the property, without due process of law. The entire order is excessive and beyond the law.

[7] *See e.g.,* 48 CFR 45.402 Title to contractor-acquired property.(Federal Acquisition Regulations); "(a)Title vests in the Government for all property acquired or fabricated by the contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed-price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the contractor retains title to all property acquired by the contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property." *See also American Ordinance LLC v. United States*, 83 Fed. Cl. 559, 573 (2008), explaining the context of the regulation and "contractor acquired property.") and Declaration of Cameron G. Holt filed with Defendants' January 27, 2025 Motion.

[8] *See* **Exhibit 3**, Transcript of March 26, 2025 hearing, pg. 20, ll. 17-23; pg. 22, ll. 18-23.

[9] *See* n. 7, *supra*.

The Proposed Order further fails to define the "Debtor" over which the proposed receiver would be granted power, which makes the Proposed Order unreasonably ambiguous on its face, and expressly violates this Court's ruling at the January 16, 2025 hearing wherein Mark D. Schmidt was to be expressly excluded from the Order.

C. The Proposed Order is excessive, unreasonable, not supported by law, and not supported by evidence.

There is insufficient evidence of the property that is to be the subject of the order. At the hearing on January 16, 2025 relating to Plaintiffs' Application for Turnover After Judgment and for Appointment of Receiver, Plaintiffs provided only one document as their evidence. This document identified two (2) leasehold interests of subsidiaries and Cyberlux's stated ownership of the subsidiaries themselves as of a date certain. However, the Proposed Order, unsupported by evidentiary support, includes a vague list of property Plaintiffs now claim Cyberlux owns – including but not limited to "real property, tangible and intangible assets, other property, professional corporations which have accounts receivable, bank accounts that are easily moved and constantly changing in balance, and community property held jointly." Exhibit 1 at ¶ 7. This purported definition would give the Receiver unfettered power to swoop into the Cyberlux warehouse in Spring, Texas and scoop up, indiscriminately, whatever the receiver "thinks" might be property of Defendants.

Further, Plaintiffs have included in the Proposed Order that Defendants deliver certain documents to the Proposed Receiver[10] within ten (10) days of the receipt of an Order of appointment. Exhibit A of Ex. 1 at pg. 21. However, this list of documents is 43 paragraphs long, consists of multiple overarching documents not previously presented to the Court, and authorizes the Receiver to essentially have the ability to receive any document of Defendants or Defendant Schmidt's spouse that could at any point relate to any potential assets for the last three (3) years. Therefore, in addition to the defective vagueness of the topics previously mentioned, the Proposed Order would unreasonably and invasively obligate Cyberlux and Schmidt's spouse to turn over virtually all of Defendants' books and records (this list ultimately allows the receiver to hold those assets until it is determined whether they are appropriate and without the receiver or Plaintiffs posting any bond[11]) relating to:

- For each defendant, Entity, and owner, Shareholder, or Manager of the Entity in the last three years, turn over all Items, data, and records:
    - A letter for each defendant authorizing the Receiver to obtain all records and assets to which defendant is entitled (Ex. A of Proposed Order at ¶ 5);

[10] "Receiver" is defined as Robert Berleth which Plaintiffs have indicated as the Proposed Receiver. Defendants have great concern about Mr. Berleth's ability to be a fair, neutral, and trustworthy receiver in this matter and as such are not in agreement with his appointment.
[11] *See* Proposed Order at ¶ 25, 28, and 31.

- For every Entity in which a defendant is an owner, Shareholder, or Manager, or has authority over accounts in financial institutions: (a) the Entity's contact information, (b) the contact information for every owner, Shareholder, or Manager of each Entity for the last three years, and (c) the contact information for the accountants and bookkeepers for each Entity and every owner, Shareholder, or Manager for the last three years (Ex. A of Proposed Order at ¶ 8);

- Statements, canceled checks and deposit slips for all checking accounts, savings accounts, merchant service agreements, credit union accounts or other depository accounts, held either separately or jointly, for the current calendar year and for the last three years prior to the current calendar year for all accounts in which defendant's name is on the printed checks, in defendant has an interest or on which defendant has signatory authority (Ex. A of Proposed Order at ¶ 10);

- Insurance policies, active or terminated, including life, health, auto, disability, homeowners, or chattel of defendant is the owner, beneficiary, insured, heir to the proceeds, beneficiary of an existing or identified trust funded by insurance proceeds. This includes policies sought, but not obtained (Ex. A of Proposed Order at ¶ 21);

- All time and billing records, beginning ninety days before this order was signed, for attorneys who have represented a defendant or entities that a defendant owns, manages, or controls (Ex. A of Proposed Order at ¶ 22);

- All documents and records of safe deposit boxes maintained by defendant (including the spouse) or to which defendant (including the spouse) has had access, or has a claim, right or interest in, including all lists of all contents in the last three years. Identify the location of all the safe deposit boxes, the contents, and deliver the keys to the Receiver (Ex. A of Proposed Order at ¶ 27);

- Appraisals for assets owned in the past three years (Ex. A of Proposed Order at ¶ 29);

- All documents, notes, bills, statements and invoices evidencing all current indebtedness payable by defendant or paid off by defendant, and all assignments of promissory notes made by defendant (Ex. A of Proposed Order at ¶ 30);

- All deeds, deeds of trust, land installment contracts, contracts for deeds, syndications, real estate investment trusts, partnership agreements, easements, rights of way, leases, rental agreements, documents involving mineral interests, mortgages, notes and closing statements relating to all real property in any defendant has or in which defendant (including the spouse) had an interest during the last three years (Ex. A of Proposed Order at ¶ 35);

- All certificates of title, firearms, deer stands, atv's, boats, trailers, and motors, documentation regarding hunting or fishing leases or rights or the rights to time share units or the use of property, tickets to events, like ballet or sporting events, proof of spa or club memberships, current licenses, receipts, bills of sale and loan documents for all motor vehicles and farm equipment, including automobiles, trucks, motorcycles, recreational vehicles, boats, trailers, airplanes and other motorized vehicles and equipment owned by defendant (including spouse) or in defendant (including spouse) has and had any interest (Ex. A of Proposed Order at ¶ 36);

- All contracts in which defendant is a party or has or had a beneficial interest, including earnest money contracts, construction contracts and sales agreements for which defendant is due a commission or other remuneration for the last three years. If defendant is under the terms of any written employment contract or agreement or is due any remuneration under any past contract or agreement, furnish a copy of the contract or agreement (Ex. A of Proposed Order at ¶ 37);

- All documents identifying or explaining every gift, bailment, loan, gratuitous holding, assignment, sale, hypothecation, discounted transfer, transfer into lock box payment, or transfer of defendant's property (Ex. A of Proposed Order at ¶ 38); and

- All employment records or pay records to indicate every business for which defendant was employed, provided services, was an independent contractor, general contractor, superintendent, agent or subcontractor during the last three years (Ex. A of Proposed Order at ¶ 39).

Were the order to be signed by the Court, the requirement of Defendants to turn over the myriad documents would not advance the purported goal of the process Plaintiffs have initiated, that being to satisfy the Judgment.

The case law demonstrates orders similar to that proposed by Plaintiffs are overbroad and erroneous.[12] Moreover, the breadth of this Proposed Order, without regard to an amount allegedly due pursuant to an existing judgment, operates as a liquidation of any and all of Cyberlux's "non-exempt" assets. Were the Proposed Order to be imposed, Cyberlux would necessarily cease operations, as all cash, accounts receivable, and cash equivalents could be impacted. There is no

[12] *Stanley v Reef Securities Inc*., 314 S.W.3d 659 (Tex.App.—Dallas 2016, no pet.) (reviewing court concluded that because the applicant "did not solicit testimony or offer evidence that [judgment debtor] owns any of the generally described property other than the $20,000 monthly payments he receives from R.H.S. … the trial court abused its discretion by ordering Stanley to turn over property other than the $20,000 monthly payments from R.H.S); *see also Roebuck v. Horn,* 74 S.W.3d 160 (Tex. App.—Beaumont 2002, no pet.) (reviewing court held that the turnover order was not sufficiently specific nor was it sufficiently limited to seizure of judgment debtor's interest in the law firm and leasing company property); *Bran v. Spectrum MH, LLC*, No. 14-22-00479-CV, 2023 WL 5487421 (Tex.App.—Houston [14th Dist.] August 24, 2023, no pet.) ("the trial court abused its discretion in signing the [receivership] Order to the extent the Order applies to property other than the [judgment debtors'] respective ownership interests in [certain] Bank Accounts.").

evidence that such drastic and damaging action must take place in order to satisfy any judgment amount that might finally be proved to be owing.[13]

II. Plaintiffs' Proposed Order provides exceedingly broad powers to Plaintiffs' proposed receiver, Mr. Robert Berleth, to Whom Defendants Object.

Plaintiffs' Proposed Order injects Mr. Berleth as agreeing to its contents, when at this point in time, Mr. Berleth holds no power in this case and instead has presented himself in a position which shows his *bias* toward Plaintiffs, and disregard for the rule of law. As more fully set forth in section IV below, Mr. Berleth is an inappropriate selection as receiver in this matter.

Plaintiffs' Proposed Order sets forth sweeping obligations for turnover on the part of Cyberlux and wide-ranging powers of the Receiver that far exceed Texas Civil Practice and Remedies Code Section 31.002, and the record in this action. 31.002(b)(3) states "T[t]e court may: … appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor **to the extent required to satisfy the judgment**." TEX. CIV. PRAC. & REM. CODE § 31.002(b)(3) (emphasis added).

As stated above at length, there is no evidence in the record to show what is actually due pursuant to the Judgment, to support the Proposed Order, nor to demonstrate the need for such a destructive dismantling of Cyberlux.

Finally, the Proposed Order prematurely adjudicates a determined fee for the Receiver of equal to 25% of all sales of assets that come into his actual, constructive, or legal possessions, and all recoveries and credits against the judgment. Ex. 1 ¶ 53. Defendants have previously objected to this fee structure.[14] A receiver's fee must be evaluated by the Court after a receiver's services have been performed and the reasonableness of a proposed fee should be determined based on the work the receiver does and results he or she actually accomplishes. A pre-determined fee is error since it improperly skips over the necessary proof the receiver must show to recover a fee.[15]

III. Plaintiffs' Proposed Order, as it stands, would irreparably harm Defendants.

The Proposed Order grants the Receiver such broad-ranging powers that he will be enabled to act, in sum and substance, as a Master in Chancery because the Receiver will necessarily be evaluating the rights of Cyberlux, its subsidiaries, and third parties in any asset discovered, turned over, or seized. *See Five Star Glob., LLC v. Hulme*, No. 05-20-00940-CV, 2021 WL 3159792, at *2 (Tex. App.—Dallas July 26, 2021, no pet.); *see also Simpson v. Canales*, 806 S.W.2d 802, 805–12 (Tex. 1991). The Turnover Statute directs that a receiver's job is to "take possession of the nonexempt

[13] And while this Court indicated its view that giving expansive powers to a receiver can be a "just in case" they are needed approach (which approach Defendants objected to), for reasons demonstrated below, at least one federal court has reprimanded this very proposed receiver for his blatant disregard for the rights of other parties.
[14] *See* Defendants' January 23, 2025 letter brief.
[15] *Hartwell v. Fundworks,* LLC, No. 02-23-00100-CV, 2024 WL 46053, at *8 (Tex. App.—Fort Worth, Jan. 4, 2024, pet denied).

property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment." TEX. CIV. PRAC. REM. CODE § 31.002(b)(3). If the Receiver acts pursuant to the Proposed Oder, the Receiver will be supplanting the Court's authority and would do so without having posted any bond.

Where, as here, the Proposed Order empowers the Receiver (and not this Court) to assess Cyberlux's property interests and sell such assets without further order of this Court, the turnover receivership is conflated with that of a Master in Chancery, despite the strict standard for the appointment of a master in chancery having not been met. *See Simpson*, 806 S.W.2d at 811.

IV. The Proposed Receiver, Robert Berleth, Must Not Serve.

Plaintiffs have proposed that an attorney, Robert Berleth, serve as receiver, Mr, Berleth presented himself to this court at the January 16, 2025 hearing respecting the Plaintiffs' Application. At that hearing, Mr. Berleth represented to the Court he was in "good standing" as a receiver and had been appointed previously by other Texas state courts and federal courts in Houston.[16] What neither Plaintiffs' counsel nor Mr. Berleth advised the Court is that in 2020 Mr. Berleth was cited for unethical conduct by the United States District Court for the Southern District of Texas, Houston Division.[17] In that case, Senior United States District Judge Sim Lake concluded in part as follows:

> This is a troubling case. An inexperienced lawyer violated several Guidelines for Professional Conduct, and his conduct could have resulted in much more serious violations had the court found fraudulent intent. Having considered all of the relevant factors, the court concludes that Berleth should be privately reprimanded. A private reprimand is not a viable remedy, however, because the records in the underlying bankruptcy cases and in this action, which will include the court's Memorandum Opinion and Order, are publicly available. The court's Memorandum Opinion and Order will serve as a reprimand since the court has reproved Berleth for his conduct. No further sanction is necessary. The court cautions Berleth, however, to give careful attention to all of the ethical standards that govern his conduct as an attorney admitted to practice before the court and to guard against any violations of those standards.[18]

Another difficulty in which Mr. Berleth found himself is very recent, in late 2024. Neither Mr. Berleth nor Plaintiffs' counsel brought to the court's attention a 2024 Fifth Circuit decision, *In re Preferred Ready-Mix, L.L.C.*, .2024 WL 525249874, Case No. 24-20158 (5th Cir. Dec. 31, 2024). The Fifth Circuit opinion specifically recounted Mr. Berleth's activities as follows:

> In 2019, the owners of Preferred Ready-Mix were sued by a plaintiff for breach of contract [] the state court entered a default judgment against them in the amount of $173,120.68. Following the entry of a default judgment, the state court appointed

[16] *See* **Exhibit 4**, Reporter's Record of January 16, 2025 hearing at p.118-123.
[17] *See In re Berleth*, No. MC H-19-2011, 2020 WL 522710, at *25 (S.D. Tex. Jan. 31, 2020). A copy of this opinion is attached to this letter as **Exhibit 5**.
[18] *Id.* at * 25. (emphasis added).

> Robert Berleth as a receiver and ordered him to seize and maintain various assets of Preferred Ready-Mix to satisfy the judgment. [] Preferred Ready-Mix filed for Chapter 11 bankruptcy in federal bankruptcy court and demanded its property be released. Berleth agreed to do so, but only in exchange for an administrative fee.
>
> Preferred Ready-Mix paid the fee and Berleth released the property ten days later. *Preferred Ready-Mix then brought the instant adversary action in the bankruptcy court asserting four claims against Berleth: (1) turnover; (2) stay violation; (3) conversion; and (4) disallowance of claim. The bankruptcy court found in favor of Preferred Ready-Mix on every claim except the conversion claim and, concluding that Berleth had "effectively held the major assets of the debtor hostage."*

While the District Court found the bankruptcy court lacked jurisdiction under the Barton Doctrine, the Fifth Circuit reversed and found jurisdiction because Mr. Berleth did not have authority over property of the bankruptcy estate. Rather, the bankruptcy estate was created automatically on the filing of bankruptcy and thus encompassed the property Mr. Berleth was sued in the bankruptcy court for having initially failed to return. *Id.*

The Bankruptcy Court had imposed an award of $35,000 in actual damages against Mr. Berleth and punitive damages of $10,000. The Bankruptcy Court further denied Mr. Berleth's $7,000 administrative claim. In so holding, the Bankruptcy Court's words were not minced:

> Here, the Court finds Berleth's actions were with *actual knowledge of the bankruptcy filing and intentional, with the intent to deprive the debtor of his assets*. Additionally, his *actions were not in good faith and in contravention of the provisions of the automatic stay*. Furthermore, the Court finds that Berleth did more than just passive retention of estate property, as demand was made. Consequences for violations of the automatic stay can be severe. Parties that willfully violate the automatic stay may be liable to debtors for actual damages, including costs, attorneys' fees, and, in appropriate circumstances, punitive damages. Here, actual damages would be duplicative of the damage award from violation of sections 543 and 542 of the Bankruptcy Code. However, to the extent the prior award of damages is inappropriate, it is awarded here as actual damages on the same calculation noted above. *Additionally, given the finding of bad faith and intentional actions by Berleth, the Court awards punitive damages of $10,000.00.* Accordingly, total damages for violation of the automatic stay are awarded in the amount of $45,000.00 for the plaintiff against Berleth.[19]

[19] *In re Preferred Ready-Mix LLC*, No. 21-33369, 2022 WL 16952650, at *3 (Bankr. S.D. Tex. Nov. 14, 2022), vacated and remanded sub nom. *In re Preferred Ready-Mix, LLC*, 660 B.R. 214 (S.D. Tex. 2024), rev'd and remanded sub nom. *Matter of Preferred Ready-Mix, L.L.C.,* No. 24-20158, 2024 WL 5252498 (5th Cir. Dec. 31, 2024) (footnotes omitted) (emphasis added).

Mr. Berleth has already demonstrated by his past actions that he should not be appointed in this case. Mr. Berleth, before any order had been signed by the Court, inspected Cyberlux's warehouse in Spring, Texas, as if he already were a court-appointed receiver with authority, advised third parties that he was acting for Cyberlux, and then presented a declaration to this Court, not as a neutral, but as Plaintiffs' representative.

In addition, the Proposed Order is unlawfully broad, invasive, violative of the constitutional due process rights of both the Defendants and third parties, and the powers with which a receiver would be invested are too broad and vague to entrust to anyone. No receiver, especially Mr. Berleth, should not be given such unfettered powers.

V. Cyberlux's Proposed Order.

Defendants previously proposed a form of Order (attached hereto for ease of reference at **Exhibit 6**) that defines the "Receivership Property" to comport with the evidence Plaintiffs relied on at the January 16, 2025 hearing that has previously been provided to this Court. Also, Defendants' form of Order better comports with the Turnover Statute and, more practically, is an order Cyberlux and the Receiver can more readily understand.[20]

Further, Defendants continue to object more generally to a grant of any relief under the Texas Turnover Statute given the ongoing nature of the dispute of the parties in Virginia, and the fact that Plaintiffs have not met their burden to identify the amount of money "required to satisfy the judgment." TEX. CIV. PRAC. & REM. CODE § 31.002.

VI. Conclusion.

Defendants respectfully request that the Court not render the error-riddled order proposed by Plaintiffs. Rather, Defendants respectfully request that the Court set an emergency hearing to address the issues raised above, and, as a preliminary matter, require Plaintiffs to satisfy their legal burden pursuant to TEX. CIV. PRAC. & REM. CODE § 31.002 to prove the amount of money "required to satisfy the judgment." Establishing such amount will further aid Defendants in posting a supersedeas bond.

[20] *See also* Defendants' January 21, 2025 and January 23, 2025 letter briefs and Defendants' January 27 Motion to Stay, or in the alternative, to Set Amount of Security to Suspend, Turnover and Appointment of Receiver.

Sincerely,

Thompson Coburn LLP

By /s/ *Katharine Battaia Clark*
Katharine Battaia Clark,
Partner

Enclosures

cc: **Counsel to Plaintiffs**
Travis Vargo <tvargo@vargolawfirm.com>
Shawn Grady <shawn@gradycollectionlaw.com>
David Walton <dwalton@bellnunnally.com>

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Sandra Meiners on behalf of Katherine Clark
Bar No. 24046712
smeiners@thompsoncoburn.com
Envelope ID: 99327413
Filing Code Description: No Fee Documents
Filing Description: 20250405 Response Letter Brief to Court Receivership
Status as of 4/7/2025 8:23 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
David A.Walton		dwalton@bellnunnally.com	4/5/2025 8:12:50 PM	SENT
LaDonna Arey		LArey@bellnunnally.com	4/5/2025 8:12:50 PM	SENT
Sandra Meiners		smeiners@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT
Travis Vargo		tvargo@vargolawfirm.com	4/5/2025 8:12:50 PM	SENT
Roxanna Lock		rlock@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT
Shawn Grady		shawn@gradycollectionlaw.com	4/5/2025 8:12:50 PM	SENT
Shawn Grady		shawn@gradycollectionlaw.com	4/5/2025 8:12:50 PM	SENT
Jeff Brown		jbrown@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT
Bernadette Martin		bernadette@gradycollectionlaw.com	4/5/2025 8:12:50 PM	SENT
Hannah Petrea		hpetrea@bellnunnally.com	4/5/2025 8:12:50 PM	SENT
Michael Poynter		mpoynter@vargolawfirm.com	4/5/2025 8:12:50 PM	SENT
Laurie DeBardeleben		ldebardeleben@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT
Micah Jackson		mjackson@berlethlaw.com	4/5/2025 8:12:50 PM	SENT
Sheli Davis		sdavis@berlethlaw.com	4/5/2025 8:12:50 PM	SENT
Tristian Harris		tharris@berlethlaw.com	4/5/2025 8:12:50 PM	SENT
Lena Brasher		lbrasher@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT
Frankie Huff		fhuff@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT
Corinne Martin		cmartin@berlethlaw.com	4/5/2025 8:12:50 PM	SENT
Hannah Fischer		hfischer@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT
Greg Nieman		gnieman@bellnunnally.com	4/5/2025 8:12:50 PM	SENT
Jemisha Gandhi		jgandhi@bellnunnally.com	4/5/2025 8:12:50 PM	SENT
David M.Keithly		dkeithly@mortensontaggart.com	4/5/2025 8:12:50 PM	SENT

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Sandra Meiners on behalf of Katherine Clark
Bar No. 24046712
smeiners@thompsoncoburn.com
Envelope ID: 99327413
Filing Code Description: No Fee Documents
Filing Description: 20250405 Response Letter Brief to Court Receivership
Status as of 4/7/2025 8:23 AM CST

Case Contacts

David M.Keithly		dkeithly@mortensontaggart.com	4/5/2025 8:12:50 PM	SENT
Bernadette Martin		bernadette@gradycollectionlaw.com	4/5/2025 8:12:50 PM	SENT
Jocelin A.Tapia		jtapia@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT
Alex Pennetti		apennetti@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT
Edward W.Gray, Jr.		EGray@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT
Katharine Clark		kclark@thompsoncoburn.com	4/5/2025 8:12:50 PM	SENT

EXHIBIT “1”

BELLNUNNALLY
ATTORNEYS & COUNSELORS

David A. Walton
TEL: 214.740.1445
FAX: 214.740.5745
DWALTON@BELLNUNNALLY.COM

April 1, 2025

VIA EFILE.TXCOURTS.GOV
Honorable Michael Gomez
129th Judicial District Court
Harris County Civil Courthouse
201 Caroline, 10th Floor
Houston Texas 77002

RE: Cause No. 2024-48085, *Atlantic Wave Holdings, LLC, et al. v. Cyberlux Corporation, et al.*, 129th Judicial District Court, Harris County, Texas.

Dear Judge Gomez:

I represent Plaintiffs Atlantic Wave Holdings, LLC, and Secure Community, LLC (Plaintiffs) in the above-referenced action. On March 27, 2025, Senior District Judge Lee H. Rosenthal of the U.S. Southern District of Texas remanded the action to this Court for lack of jurisdiction, as shown in the notice of remand order filed in this action on the same day. Prior to the failed jurisdictional challenge raised by Judgment-Debtors Cyberlux Corporation and Mark Schmidt (Judgment-Debtors), this Court stated on January 16, 2025, it "is going to grant the [receivership] application and appoint a receiver" subject to certain revisions to the proposed receivership order (January 16, 2025, Hearing Transcript at 124:4-9.)

Attached is a revised receivership order approved by the court-appointed receiver, Robert Berleth of Berleth & Associates, PLLC, intended to address those proposed revisions. As soon as jurisdiction is formally revested in this Court, we respectfully request that the attached receivership order be signed instanter to minimize any further delay implemented by the Judgment-Debtors. To be clear, the focus of Plaintiffs' collection efforts is not to seize personal property on which the United States has or claims a mortgage or other lien as established by competent evidence, but rather to seize personal property of Judgment-Debtors as set forth in the proposed receivership order.

At the court's convenience, Plaintiffs are available for a telephonic (or other remote) status conference to further discuss the revised receivership order as needed. We appreciate your prompt attention to this pending matter.

Very truly yours,

David A. Walton

CERTIFICATE OF SERVICE

I certify that on April 1, 2025, a true and correct copy of this document was served on all parties of record via electronic service from the court's ECF system for registered users, in accordance with Rule 21a of the Texas Rules of Civil Procedure.

By: */s/ David A. Walton*

EXHIBIT “A”

4/1/2025 5:58 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 99158470
By: Lisa Cooper
Filed: 4/1/2025 4:40 PM

CAUSE NO. 202448085

ATLANTIC WAVE HOLDINGS, LLC and SECURE COMMUNITY, LLC., *Plaintiffs, Judgment-Creditors*,	§	IN THE DISTRICT COURT
v.	§	129TH JUDICIAL COURT
CYBERLUX CORPORATION and MARK D. SCHMIDT, individually, *Defendants, Judgment-Debtors*.	§	IN AND FOR HARRIS COUNTY, TEXAS

ORDER APPOINTING RECEIVER

On the date of entry below, this Court considered Judgment Creditors post-judgment Application for Turnover relief and to Appoint a Receiver, reviewed the documents on file, relevant statutory and case law, admissible evidence, all arguments of the parties and counsel, and finds the Judgment Creditors may aid from this action.

The Court DEFINES that:

1) "Plaintiff(s)" or "Judgment Creditor" refers to ATLANTIC WAVE HOLDINGS, LLC and SECURE COMMUNITY, LLC, and may be reached at the counsel of record:

David Walton, BELL NUNNALLY, 2323 Ross Avenue, Suite 1900, Dallas, TX 75201. Telephone: 214-740-1445. Email: dwalton@bellnunnally.com

David Keithly, MORTENSON TAGGART ADAMS LLP, 300 Spectrum Center Drive, Suite 1200, Irvine, CA. Telephone: 949-774-8107. Email: dkeithly@mortensontaggert.com

Shawn Grady, LAW FIRM OF SHAWN GRADY, 2100 W Loop S #805, Houston, TX 77027. Telephone: 832-692-4542. Email: shawn@gradycollectionlaw.com

James Sadigh, Law Office of James Sadigh, 9777 Wilshire Blvd Suite 400, Beverly Hills, CA 90212. Telephone: 310-747-5919.Email: JamesSadigh@aol.com

2) "Defendant(s)" or "Judgment Debtor(s)", collectively and individually refers to the following Debtors:

a. CYBERLUX CORPORATION (CORPORATION)

4625 Creekstone Dr
Durham, NC 27703-8478

800 Park Offices Dr Suite 3209
Research Triangle Park, NC 27709

TIN: [redacted]8978

ACCURINT (LEXIS) ID: 0000-3811-1939

b. MARK D. SCHMIDT (INDIVIDUAL)

1134 Fearrington Post Apt 12
Pittsboro, NC 27312-5014
SSN: [redacted]-0622
D.O.B. February [redacted] 1965

ACCURINT (LEXIS) ID: 0022-6993-6159

3) "Receiver" refers to: ROBERT W. BERLETH. Receiver[1] is the agent of this Court (not the attorney for any party), and is to be treated with the same courtesy accorded to the Court.

BERLETH & ASSOCIATES
Robert W. Berleth
Texas Bar # 24091860
SDOT #: 3062288
E-mail: rberleth@berlethlaw.com
Tristian Harris
Texas Bar # 24134449
E-mail: tharris@berlethlaw.com
9950 Cypresswood Dr. Suite 200

[1] *Davis v. Radoff*, 317 S.W.3d 301, (Tex.App-Hou 1st 2009), (citing *Ramirez v. Burnside & Rishebarger, L.L.C.*, No. 04-04-00160-CV, 2005 WL 1812595 (Tex. App.-San Antonio Aug. 3, 2005, no pet.) (mem. op.)) "Once an individual is cloaked with derived judicial immunity because of a particular function being performed for a court, every action taken with regard to that function-whether good or bad, honest or dishonest, well-intentioned or not-is immune from suit. Once applied to the function, the cloak of immunity covers all acts, both good and bad."

4) "Judgment" refers to the Order domesticated by this court dated June 23, 2023. Applicant is owed a judgment amount of **$1,572,500**, with attorney's fees of $177,126.19, plus sanctions of $3,895.00 and $6,842.50 plus court costs with post-judgment interest accruing at the rate of 12% per annum. As of 02/18/2025 **$2,111,086.01** remains owed and due from the Debtors to the Plaintiff, and subject to the Receiver's actions.

The Court FINDS that:

5) Judgment Creditors own unsatisfied final judgments against Judgment Debtors.

6) Upon evidence admitted to this court, during the hearing for appointment of Receiver the court finds the requirements for chapter 31 turnover have been met. The court takes judicial notice of the evidence and testimony presented during the appointment hearing.

7) Judgment Creditors have good faith reasons to believe that Debtor owns non-exempt rights to present or future property that cannot be readily attached or levied on by ordinary legal process as required by the standard set forth in *Tanner*[2]. Such property includes, but is not limited to, real property, tangible and intangible assets, other property, professional corporations which have accounts receivable, bank accounts that are easily moved and constantly changing in balance, and community property held jointly. The appointment of a Receiver to locate, marshal, and administer assets is justified because the Court believes that non-exempt assets exist which Judgment Creditors are justified in believing Debtor will hide.

8) A Receiver is necessary to carry out this Court's prior orders, and that the Receivership is necessary not to harass, but to serve justice. A Receiver is necessary in this case pursuant to the Texas Turnover Statute, TEX. PRAC. & REM. CODE § 31.002 and the Texas

[2] *Tanner v. McCarthy,* 274 S.W.3d 311 (Tex. App.-Houston [1st Dist.] 2009, no pet.)

Fraudulent Transfer Act §24.009, with the power and authority to take possession of all leviable property of Debtors. This Order shall also serve as a Turnover Order, and the Judgment Creditor is entitled to collect post-judgment attorney's fees under TEX. PRAC. & REM. CODE § 31.002(e).

9) The unique power of a Receivership derives from the doctrine of *custodia legis.* Once a turnover order containing an appointment of a Receiver is signed, all of the judgment debtor's nonexempt property becomes property in *custodia legis,* or "in the custody of the law".[3] In other words, the judgment debtor's property is considered to be in the constructive possession of the court. During the pendency of a Receivership, the Receiver has exclusive possession and custody of the judgment debtor's property to which the Receivership relates.[4]

10) Pursuant to this order, the Receiver will have a judicial lien on all non-exempt assets of Debtor and on all non-exempt community assets of Debtor, regardless of whether the Receiver takes actual possession. No one-not even a lien holder with a prior filed deed of trust-can sell property held in *custodia legis* by a duly appointed Receiver without first obtaining approval from the Court in which the Receivership is pending.[5] Any unauthorized transfer of property in the custody of a Receiver is *not merely voidable, it is* void.[6] Thus, any attempt by a judgment debtor to transfer any of his nonexempt property after the turnover order has been signed is void, and any conveyance of property in the custody of a Receiver without approval by the court has no effect upon the Receivership and the accomplishment of its purposes.[7]

---

[3] *First Southern Properties, Inc. v. Vallone,* 533 S.W.2d339, 343 (Tex. 1976).
[4] *First S. Props.,* at 343; *Ellis v. Vernon Ice Co. & Water Co.,* 86 Tex. 109, S.W. 858 (1893).
[5] *First S. Props.,* at 341; *Huffmeyer v. Mann,* 49 S.W.3d 554,560 (Tex.Civ.App.-Corpus Christi, 2001).
[6] *First S. Props.*, at 341.
[7] *T.H. Neel v. WL. Fuller,* 557 S.W2d 73, 76 (Tex. 1977).

11) The Judgment is not considered a "consumer debt" as defined by the 15 U.S. Code § 1692, the Fair Debt Collection Practices Act (FDCPA).

12) This Order specifically serves as the Court order required by 47 USC Sec. 551, and satisfies all obligations of the responding party to obtain or receive a court order prior to disclosing material containing personally identifiable information of the subscriber and/or customer.

13) The disclosure of information pursuant to this Order is not a violation of PUC Substantive Rule 25.272. This Order satisfies the law, regulation, or legal process exception to the Proprietary Customer Information Safeguards found in PUC Substantive Rule 25.272 (g)(1).

THEREFORE, the Court ORDERS the relief as set out below:

14) The Court assumes jurisdiction over and takes possession of Debtor's non-exempt property (collectively, the "Receivership assets"). Debtor is enjoined from selling non-exempt property, and must report to Receiver all sales and transfers of exempt property, within 5 days. The Receivership owns all non-exempt assets of all Debtors, regardless of whether Receiver takes actual possession. This includes accounts in financial institutions and banks.

15) Appointment. After considering the propriety of receivers whom the Court has appointed in other cases and the plaintiff's recommendations, the Court appoints Robert W. Berleth as Receiver over each Debtor's non-exempt assets, under TEX. CIV. PRAC. & REM. CODE § 31.002, to serve as Receiver after taking the oath of office.

16) No Bond. No bond is required of the Receiver. After taking the oath of office, the Receiver shall be authorized, subject to the control of this Court, to do any and all acts necessary to the proper and lawful conduct of said Receivership.

17) Immunity. Except for acts of intentional misconduct, Receiver and persons engaged or employed by him are not liable for loss or damage incurred by any person or entity by

reason of any for any act performed or omitted to be performed by Receiver or those engaged or employed by Receiver for the discharge of their duties and responsibilities for the Receivership, including exercising control over Receivership assets.

18) Peace Officers Responsibilities to Receiver and the Court. Every constable, deputy constable, sheriff, deputy sheriff, and other peace officer may accompany Receiver to locations designated by Receiver where Receiver believes that a Debtor's assets or records may be located. The peace officers are ordered to prevent interference with Receiver's carrying out any duty under this order or interference with property in Receiver's control or subject to this order.

19) Third Parties Responsibilities to Receiver and the Court. Every person with actual notice of this order is ordered not to interfere with property in Receiver's control or subject to this order, and is ordered not to interfere with Receiver in the performance of Receiver's duties. Third parties are notified that Receiver, not Debtor, is the party entitled to possess, sell, liquidate, and otherwise deal with Debtor's non-exempt property and once any third party receives notice of this order, the third party may be subject to liability if the third party releases property, unless directed by Receiver or the Court.

a. All third parties who hold a Debtor's property or records are ordered to immediately notify Receiver and to deliver the property within ten working days of Receiver's demand.

b. All third parties knowing of this order are ordered to immediately notify Receiver if they discover the existence of a Debtor's property, or of facts that might lead to the discovery of property in which any Debtor has any interest.

c. Anyone resisting Receiver's order or request, based on legal or other advice, is ordered to give the full name, address, fax number, e-mail address, cell phone

number, and direct telephone number for each person giving that advice and to instruct those persons to immediately contact Receiver. Doing so waives no attorney-client communication privilege.

20) Fraudulent Transfer. This Court shall maintain exclusive jurisdiction over any fraudulent transfer litigations brought by the Receiver or Creditor. The Court shall further maintain exclusive jurisdiction over any litigation pertaining to the ownership interests disputed during the Receiver's actions against a relevant third party.

21) Debtor's Responsibilities to Receiver and the Court. Each Debtor is ordered, within the time periods set out in this order and the attached Exhibit A, to:

a. Deliver to Receiver, at the address of the Receiver, the items described in Exhibit A, attached hereto as part of this Order, and all documents and records requested by Receiver, within ten days, then occasionally, in the time periods, manners, and formats requested;

b. Turnover to Receiver all non-exempt funds to the extent required to satisfy the Judgment. No Debtor may spend non-exempt funds, or sell, transfer, or encumber non-exempt assets without Receiver's prior written consent;

c. Disclose to Receiver all assets of each Debtor, and directly nor indirectly interfere with or impede Receiver to perform his duties. Debtor must disclose all exempt and non-exempt assets so the exempt status of every asset can be determined. Debtor's disclosure must provide sufficient specificity to permit a constable to identify and levy on the assets;

d. Supplement all disclosures, in writing, within five days of knowledge of information required to be disclosed, without being prompted;

e. Organize and collate the disclosed information and documents in the formats and manners required by Receiver. The disclosures must be indexed and refer to the request to which it is responding. Responses like, "See response number so and so." are prohibited;

f. Deliver to Receiver all passwords, user identification, login and other credentials used to access websites, owned, controlled, or managed by each Debtor and on-line accounts that allow the control of assets (e.g. financial accounts, webhosting accounts, and other accounts used to control assets).

g. Debtor may not dispute a check that Receiver seizes and deposits, without first obtaining the Court's permission.

h. If Debtor believes that the Receiver's demands are inappropriate, the Debtor must first comply, then seek protection from the Court. Debtors seeking protection must set the matter for the earliest possible hearing date, after giving full notice to the Receiver and attempting to resolve the issues.

22) Conduct and Disposition of Entities. If Debtor is an individual, all legal right, title and ownership of any limited partnership interest, partnership interest, stock, or membership interest it has in any entity and business entity of that Debtor is divested from the individual and placed in *custodia legis* with the Receiver.[8] If the debtor is the sole owner of that entity or business, all management authority is vested in the Receiver as if Receiver were the Receiver over that entity. If the Respondent is a business entity, all authority and power of the Debtor in the management of the entity is vested in the Receiver and no decision may be made or carried out

[8] *Chitex Communication v. Kramer*, 168 B.R. 587, 590 (S.D. Tex. 1994) "the president of an insolvent corporation had no authority to affect the corporation's property interests once a state court had placed it into receivership".

without the express approval of the Receiver.[9] This order supersedes the authority of any officers, directors or managers of the business entity debtor.

23) No Serial Receiverships. The first receivership order signed controls. The Court, as of the date of signing this order, has no knowledge or belief of any other controlling receivership. The assets are in the control of the court for the first receivership. Thus, they are not available to the court ordering a later receivership. The Receiver may obtain permission from this and other courts to satisfy several judgments against the same debtor.[10] The Receiver may notice other subsequent receiverships or their controlling court of this receivership and may take legal actions necessary to quash subsequent receiverships.

24) Claims against Receiver: This Order enjoins CYBERLUX CORPORATION and MARK D. SCHMIDT, individually and each and all of their past, present, and future parents, subsidiaries, affiliates, owners, members, partners, directors, officers, employees, agents, attorneys, predecessors, successors, transferees, assigns, and other representatives from filing, maintaining, prosecuting, or appealing any litigation against the Receiver or his law firm outside of this Court.

REMAINDER OF THIS PAGE INTENTIONALLY BLANK

[9] *Id.* "Texas law asserts that Receiver has the full rights that the corporation had."
[10] *Barrera v. State*, 130 S.W.3d. 253 (Tex.App.--Houston [14th Dist.] 2004, no pet.)

Powers GRANTED unto the Receiver by this Court:

25) Possession. The Receiver may take possession of Debtor's non-exempt property in Debtor's actual or constructive possession, custody, or control, including but not limited to the items described in Exhibit "A". The Receiver may secure control over all non-exempt property and engage in presale activities, including appraisals, evaluations, listing and advertising agreements. Receiver may transfer title into the receivership or place a hold on the title of personal and intangible property, including but not limited to:

a. All patents, trademarks, service marks, copyrights, websites, and domain names;

b. All documents or records, including financial records, related to such property that is in actual or constructive possession of the Debtors;

c. All financial accounts (bank accounts), certificates of deposit, money-market accounts, and accounts held by any third party;

d. All federal and state tax returns filed or prepared by or on behalf of the Debtors for the past five (5) years;

e. All non-exempt vehicles, to include boats, motor vehicles, cars, trucks, utility vehicles, recreation vehicles, aircraft, trailers, or other wheeled vehicles;

f. All real property owned or rented by any Debtor or Debtor's agent or assigns in part or whole;

g. All securities;

h. All gifts, inheritances, or divisions of property;

i. All safety deposit boxes, safes, lock boxes, or vaults;

j. All cash;

k. All negotiable instruments, including promissory notes, drafts, and checks;

l. All causes of action;

m. All contract rights, whether present or future;

n. All accounts receivable;

o. Any and all leases or leaseholds;

p. All collections, including but not limited to artwork, stamps, coins, guns, crystal, sports memorabilia, records, and trains;

q. Accounts receivable for and all other entities controlled by Debtors;

r. All Debtors' ownership interests;

s. All personal bank accounts upon which Debtors are signatories;

t. All business bank accounts upon which Debtors are signatories;

u. All bank accounts owned, possessed, controlled by, or in the name of any Debtor individually;

v. All bank accounts owned, possessed, controlled by, or in the name of and Debtor by corporate affiliation;

w. All diamonds, gems, and other precious stones, gold, silver, platinum, and all other precious metals, watches, and jewelry;

26) Access to Property. The Receiver may take all actions to gain access to and enter all real property, leased premises, storage facilities, and safe deposit boxes where non-exempt property, or records of a Debtor may be situated, and to seize the contents. The Receiver may employ reasonable destructive means to bypass or gain access to lockboxes, safes, security systems, or any other area he reasonably believes contains non-exempt assets within any real property or associated curtilage owned or controlled by any Debtor. The Receiver may change locks to all premises at which any property is situated. The Receiver may operate an unmanned

aircraft to conduct surveillance of the Debtor's property held in *custodia legis*, and such operations are deemed essential for the safety of the Receiver in his official duties under Tex. Gov. Code § 423.002(a);

27) Disable or remove non-exempt property. The Receiver may disable or remove non-exempt property belonging to a Debtor or place the property into storage; insure any property taken into his possession; obtain such writs as Receiver deems necessary to obtain possession; and change the locks to premises belonging to the Debtor. Receiver has no duty to take these actions, or to maintain, guard, or insure property taken into *custodia legis*, or to maintain or pay any lease, nor shall Receiver be required to pay any mortgage, lien or assessment, defend against any lawsuit, pay any tax or fee, file tax returns, maintain any insurance coverage, or have any obligation except as specifically ordered.

28) Assume property is not exempt. A Receiver may assume Debtor's property is not exempt, until the person claiming the exemption files a statement that claims the exemption, cites the legal and factual grounds for the exemption, and describes the property with sufficient specificity that a constable can levy upon it. If there be any dispute whether an asset is exempt or belongs to a Debtor, Receiver may take custody of the asset until the Court determines the rights of those claiming an interest in the asset. Objections to the Receiver's assumption must be made to this Court within 21 days of collection;

29) Personal Property Rights of Judgment Debtor. Receiver must comply with Texas Rule of Civil Procedure 679b.

30) Receiver to Hold Property. Receiver must not disburse funds to Judgment Creditor or sell property within 14 days after serving Judgment Debtor with the Notice of Protected Property Rights, the Instructions for Protected Property Claim Form, and the

Protected Property Claim Form approved by the Supreme Court, or within 17 days if service was by mail. If the Judgment Debtor asserts an exemption, Receiver may only disburse funds to Judgment Creditor or sell property with Judgment Debtor's written consent or a court order.

31) Disputes. If there be any dispute whether an asset is non-exempt, or property of a Debtor, the Receiver is authorized to take custody of the asset until the Court can determine the rights of those claiming interests in the asset. The Court may require a disputing party to post a bond to cover the Receiver's efforts in the dispute.

32) Real Property Sale. All real property sales must be individually ordered, after notice and hearing.

33) Objections. All objections to (i) this order, (ii) the bond amount, including its sufficiency, (iii) all affidavits that support or relate to this order, (iv) Receiver's qualifications, and (v) every issue relating to this order, are waived if they are not filed within twenty days of the service on or notice of this order to Debtor or his counsel.

34) Redirect Postal Mail. The Receiver may redirect, read, and copy Debtor's mail, whether electronic, paper, or facsimile, or otherwise, and whether sent to a street address, telephone line, post office box, or via the internet, before and exclusive of receipt. The Receiver may establish procedures for allowing Debtors to retrieve the mail, or copies, which includes making copies available to the Debtor electronically.

35) Obtain credit reports. The Receiver may obtain credit reports, financial institution statements, and other reports to aid in locating assets. Receiver may order Consumer Reporting Agencies, as defined by the Fair Credit Reporting Act ("FCRA") 16 USC §1681b(f) to provide consumer reports on Debtors and witnesses as allowed under FCRA 16 USC §1681b(a)(1).

36) Utilities. The Receiver may order providers of utilities, telecommunications, telephone, cell phone, cable, internet, data services, internet website hosts, email hosts, iCANN providers, satellite television services, and similar services (including ComCast, AT&T, Verizon, Sprint, and Direct TV), and financial institutions to turnover information that Receiver believes may prove or lead to the discovery of the existence or location of a Debtor's whereabouts or non-exempt assets, including account information, telephone numbers, names, service addresses, telephone numbers, payment records, and bank and credit card information.

a. The orders must be directed to the entity from which the information is sought and specifically describe the information requested with the dates for which the information is required, which may not be more than one year before issuing Receiver's request, unless specifically stated in the request or attachments.

b. This order specifically defines Receiver as a state official, acting in an official capacity, as defined in section 182.054(1) of the Texas Utility Code.

c. This order specifically serves as the court order required by 47 U.S.C. § 551, and TEX. FIN. CODE §59.001, and satisfies all obligations of the responding party to obtain or receive a court order prior to disclosing material containing before contained personally identifiable information of the subscriber or customer;

d. Disclosing information under this order does not violate PUC Substantive Rule 25.272. This order satisfies the law, regulation, or legal process exception to the Proprietary Customer Information Safeguards found in PUC Substantive Rule 25.272 (g)(1).

37) Compel Third Parties. The Receiver may require the attendance of third parties, issue and serve subpoenas and notices to appear to third parties and those who may possess knowledge or information about a Debtor's non-exempt assets. A subpoena does not have to compel attendance. Receiver may require the attendance of and issue subpoenas to any Debtor, third party, or witness, to deliver receivership assets and information about receivership assets, including employment records from the Texas Workforce Commission,[11] for the production of documents, things, and information, including matters about the employment or location of any Debtor or witness, the existence, location, or value of Debtor's assets. Receiver may schedule and issue notices for stenographic or non-stenographic examinations of anyone who may know of facts about a Debtor's exempt assets. The Receiver may issue subpoenas with the following language to third parties: "Please do not disclose or notify the user of the issuance of this subpoena. Disclosure to the user could impede an investigation or obstruct justice." The Receiver may not be charged fees for subpoena fulfillment expenses.

38) Support and Assistance. The Receiver may hire any person, firm or company to further remedies available to Receiver, including hiring persons to: change locks to premises belonging to Debtor; exclude persons from interfering with Receiver's custody of the premises; moving or storing Debtor's property; collect accounts receivable; or sell Debtor's non-exempt property;

39) Checks and Transactional Instruments. The Receiver may endorse and cash checks and negotiable instruments payable to Debtor, except paychecks for current wages;

[11] The Receiver is considered a public employee in the performance of public duties, pursuant to§ 301.081 of the Texas Labor Code, and may subpoena employment records from the Texas Workforce Commission.

40) Receiver's Writs. Writs of turnover issued under this order, must not be limited in time or have an expiration date. Those serving the writs must return them to Receiver, not the clerk, unless otherwise instructed. More than one writ of turnover may be issued and outstanding at the same time. The clerk is ordered to issue writs on an expedited basis, upon request.

41) Texas Unclaimed Property. Receiver may collect all unclaimed funds belonging to Debtor, including from the Texas Comptroller's Office, and may collect, sell, or assign Debtor's rights to air miles and rewards programs.

42) Certify copies. The Receiver may certify copies of this order as would a clerk of this Court, including but not limited to certifying copies for service upon a financial institution in the manner specified by Section 59.008, Finance Code, and Texas Civil Practice and Remedies Code § 31.002(g).

43) Service to Receiver. All parties must serve Receiver with copies of all motions, notices, discovery responses, correspondence, and communications between them at the Receiver's address provided above, unless the Receiver provides alternative instructions.

44) Service by Receiver. The Receiver may serve Debtors by placing the documents to be served in the Debtor's mailbox, taping them to the Debtor's door, or delivering them to any adult person at the Debtor's residence or place of business. The Receiver may serve non-natural entities by placing the documents to be served in the registered agents for the entities' mailbox, taping them to the registered agent for the entities' door, or delivering them to the receptionist of the registered agent for an entity's place of business.

45) Texas Driver's License. The Receiver may obtain Debtor's and witness' driver's license records from the Texas Department of Public Safety, and all similarly named entities. Those entities are ordered to release Debtor's records to Receiver, including Debtor's photograph.

46) Discovery. The Receiver may propound discovery to any party to this suit, under the rules of civil procedure. Receiver may shorten the time periods as required. He is not required to employ does not have to employ the discovery rules, and may obtain discovery by requesting the information or documents from Debtor and third parties. Upon request, Debtor must provide documents in WordPerfect, Microsoft Word, Microsoft Excel, Rich Text Format, JPEG, Adobe, or other format acceptable to Receiver, with indices. The Debtor is not entitled to serve the Receiver or Creditor with any type of discovery under this cause number.

47) File reports. The Receiver may occasionally file reports with this Court. Any party to this suit or subject to the Receiver's actions may file an objection to the Receiver's report. Should no objections be timely received, reports by the Receiver will be considered facts and conclusions of law. Unopposed facts will be conclusively admitted. The Court, *sua sponte,* may confirm, modify, correct, reject, reverse or recommit the report, after it is filed, as the court may deem proper and necessary. Objections must be filed within 20 days, state each disputed ground, the reasons for each dispute, and attach the documents supporting each objection.

48) Duty to maintain. The Receiver has no duty to maintain, guard, or insure property taken into *custodia legis*, or to maintain or pay any lease, nor shall Receiver be required to pay any mortgage, lien or assessment, defend against any lawsuit, pay any tax or fee, maintain any insurance coverage, or have obligation to preserve assets except as specifically ordered.

49) Notice of Intended Abandonment or Sale. Notice of abandonment of receivership assets must be provided:

a. At least ten days before any abandonment, Receiver must file a notice of the intended sale or abandonment that describes the property to be abandoned, its sale price, and how it will be sold or abandoned;

b. By first class mail to Debtor and every person who has filed a request for notice;

50) Objection to Abandonment or Sale. Objections to the proposed abandonment or sale must state the grounds and be filed within five days after Receiver's service of the notice.

a. If no objection is timely filed, Receiver may abandon the property as described in the notice, without further order.

b. If an objection is timely filed, the proposed abandonment or sale must not be completed until the Court has decided the objection.

51) Retention of counsel. Receiver may employ counsel, at not more than $300.00 per hour, for representation and assistance in the prosecution of this order.

52) Ancillary Litigations. Receiver does not have to defend or prosecute any litigation regarding the Debtor, but may intervene in any litigation for any party to this litigation.

53) Receivers Fees. The Receiver's fees and expenses are considered costs of court. Competent and experienced receivers are rare and the time and effort required by a receiver to keep time, apply for fees and the lag between filing for fees and being paid and that the fees earned would be at an ordinary rate. Not being paid at the time of or shortly after rendering of services would inhibit the recruitment of experienced receivers. Given the chances of no recovery, contingent fees are the most economical fee schedule. The costs of proving an hourly fee could easily exceed the original judgment. A contingency fee is the only way that plaintiff can afford a receiver. Debtor has not tried to pay the judgment. The costs of proving an hourly fee are prohibitive. Therefore, the Receiver is entitled to a fee equal to 25% of all sales of assets that come into his actual, constructive, or legal possession, and all recoveries and credits against the judgment. Upon hearing, and once the *Rohrmoos Ventures*[12] elements have been proven, the Court

12 *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 490 (Tex. 2019) "To assist district courts in awarding attorney's fees, the Fifth Circuit in *Johnson v. Georgia Highway*

finds 25% is a fair, reasonable, customary, and necessary fee for Receiver. A Receiver's fee exceeding 25% of all funds coming into Receiver's possession may be awarded after notice and opportunity for hearing to all parties. Specifically, the Court may award the Receiver 33% of collected funds should the Receiver collect the full amount of the judgment. If the Debtor files bankruptcy, Receiver's fee shall be equal to 25 percent of the debt owed when the bankruptcy is filed, and may be filed as a secured claim should a valid abstract of judgment be on file at the time of bankruptcy filing. Receiver is directed to pay plaintiff's attorney, as plaintiff's trustee, the remainder of all funds coming into Receiver's possession, after deducting Receiver's costs and payment of liens or set offs as Receiver deems reasonable within a reasonable time.

54) Appeals. If Receiver has to defend against a motion to vacate, a motion to replace receiver, or any similar motion to this Court, upon proof and notice of the same, the Receiver shall be entitled to additional attorney's fees from debtor or debtor's counsel by fees or sanction. The Receiver will presumptively be awarded $5,000.00 or attorney's fees as proven at the time under *Rohrmoos Ventures*[13]. If Receiver or Judgment Creditor has to defend against an appeal to this Order Appointing Receiver, the debtor is required to post a bond in the amount of $15,000 for an appeal to the intermediate Court of Appeals. If the Receiver or Judgment Creditor has to defend against an appeal to the Texas Supreme Court, the debtor is ordered to post an additional $25,000. These bonds will be held in the registry of the court pending the appellate ruling and awarded to the prevailing party as attorney's fees as proven at the time."

Express, Inc., 488 F.2d 714 (5th Cir. 1974), set out twelve factors that a court should consider in determining a reasonable fee."

[13] *Id.*

55) Attorney's fees. The Court takes judicial notice of the time that is reasonable and necessary for obtaining this order, and Debtor is ordered to pay Creditor $1,750 in attorney's fees for obtaining this order. Additional fees may be awarded, after notice and hearing.

56) Receiver's Final Accounting. The Receiver shall promptly file a final accounting with a motion to close the receivership. Should no collection be made against the Debtor after reasonable attempts by the Receiver, the Creditor shall reimburse the Receiver a sum of $1,500 plus reasonable and necessary expenses upon the Court granting the Receiver's motion to close the receivership.

BE IT SO ORDERED. Any and all further relief not expressly stated herein is denied.

Signed and Dated: _____

_____
Hon. Michael Gomez
JUDGE PRESIDING

Approved as to form and substance:

Berleth & Associates
Robert W. Berleth
Texas Bar # 24091860
SDOT #: 3062288
E-mail: rberleth@berlethlaw.com
Tristian Harris
Texas Bar # 24134449
E-mail: tharris@berlethlaw.com
9950 Cypresswood Dr. Suite 200
Tele: 713-588-6900

PROPOSED RECEIVER

Exhibit A
Documents Ordered to be Delivered to Receiver, at His Office, Within Ten Days of Receipt of the Order Appointing Receiver

Definitions and instructions.

1) Time Periods. All time periods are for the three years before this order was signed, unless otherwise stated.
2) Continuing duty to supplement. The turnover order is continuing and must be supplemented. Should a defendant or witness come into possession, custody, or control of anything that was ordered turned over or produced, that person must turn over the item within ten days.
3) Definitions:
   a. "Order" means the turnover order in this caseorder.
   b. "Account Information" means the login, username or other account identifier with all passwords associated with accessing the accounts.
   c. "Contact Information," "telephone number," and "address," mean that person's full name, nick names, d/b/a's, and all addresses (including work and residence), all telephone numbers (including home, office, fax, pager, and cell numbers), and e-mail, Facebook, social networking, and web site addresses. If any of the information is lacking, provide the Contact Information for every person believed to be able to provide the missing information.
   d. "Defendant" includes every judgment defendant and every spouse or ex-spouse of the judgment defendant within three years of signing the order.
   e. "Copies" means complete, legible copies. Illegible copies are to be provided, with a notation showing where legible copies can be found.
   f. "Entity" includes all business organizations, whatever their form, including public or private corporations, limited liability companies, partnerships, joint ventures, unincorporated associations, and individual proprietorships.
   g. "Manager" refers collectively to anyone who is an officer, director, manager, or supervisor of an Entity, or who makes business decisions for an Entity.

h. "Produce," means to deliver. If an item is not listed in this exhibit, the defendant or witness must turn over the item in the time specified by the demand.

i. "Records" and "Documents" are mutually inclusive, and include the records, documents, and items formally ordered turned over, or requested by the Receiver. Requests regarding property or Documents owned or possessed by a defendant also apply to defendant's spouse, ex-spouse, brother sister, child, step-child, mother, father, sister, brother, partner, or co-owner of a small business, if the requests involve documents that a defendant would be required to turnover had defendant possessed or controlled the item.

j. "Shareholder" includes the owners, members, partners and others who have ownership rights any Entity.

k. "Turnover" includes creating a list or report, if no list or report exists. "Turnover" also means to convey the information that is available to you, not merely the information of your present knowledge, including providing information, Documents or Records known by you, or that is in your possession, or the possession of your family, employees, co-workers, co-owners or agents, including your attorney or any agent or investigator of your attorney.

l. "Witness" means any person who is not a defendant but who may have information, Records or Documents relating to defendant.

4) Document labeling and identification.

a. "All" is presumed to apply to every item. If a type of item is listed, this Order means all similar items.

b. Each turned over Document, file, or photograph must be given a consecutive identification number and produced in the condition and order of arrangement in which it existed when the application for this Order was filed, including all file labels, dividers, or associated identifying markers. An index must be provided, if the documents are large, or if the Receiver requests.

c. Creating lists and compilations. If the Order or this exhibit requires a defendant to compile or create a list or document, each defendant is ordered to do so.

d. Lost Document, Records, or tangible things. If a defendant, or a defendant's attorneys, agents or representatives, had possession or

control of a Document, Record, or tangible thing ordered turned over that has been lost, destroyed, purged, or is not in their possession or control, identify the item and describe the circumstances surrounding the loss, destruction, purging, or separation from your possession or control, indicating the dates that the circumstances occurred.

e. No Document, file or photograph requested may be altered, changed, modified, disposed of or destroyed.

f. Indicate to which paragraph of the Order the Document, Record or tangible thing applies. When producing data or information in electronic or magnetic form, make a paper copy. If it is not reasonably possible to make a hard copy print-out of the data or information, copy the data or information and provide it in WordPerfect, Microsoft Word, Microsoft Excel, Rich Text Format, JPEG, Adobe, or other format acceptable to the Receiver.

For each defendant, Entity, and owner, Shareholder, or Manager of the Entity in the last three years, turn over all Items, data, and records:

5) A letter authorizing the Receiver to obtain all records and assets to which defendant is entitled;

6) Contact information for each defendant and witness controlling or knowing of relevant documents or information;

7) All royalty payments, rights to receive payment, websites, url, domain names,

8) For every Entity in which a defendant is an owner, Shareholder, or Manager, or has authority over accounts in financial institutions:
   a. The Entity's Contact Information;
   b. The Contact Information for every owner, Shareholder, or Manager of each Entity for the last three years;
   c. The Contact Information for the accountants and bookkeepers for each Entity and every owner, Shareholder, or Manager for the last three years;

9) Copies of all personal and business federal income tax returns filed by or prepared for defendant for the current year and for the last three years prior to the current year, with all schedules, attachments, W-2 forms, 1099 forms and all similar federal income summary forms for the same years;

10) Statements, canceled checks and deposit slips for all checking accounts, savings accounts, merchant service agreements, credit union accounts or other depository accounts, held either separately or jointly, for the current calendar year and for the last three years prior to the current calendar year for all accounts in which defendant's name is on the printed checks, in defendant has an interest or on which defendant has signatory authority;

11) All checks, cash, securities (stocks and bonds), promissory notes, deeds, deeds of trust, documents of title, contracts, accounts receivable, escrow agreements, retainage agreements, records and all documents that identify all property in which defendant has an interest and that is collateral or security for any obligation or contingent obligation of defendant, with all documents indicating any interest of the defendant in rental agreements, royalty agreements, licenses, bailment agreements, filings under the Uniform Commercial Code, security agreements, assignments, all filed or recorded liens, lis pendens, lawsuits, recorded mechanic's and materialman's lien affidavits, judgments, abstracts, partnership agreements, employment agreements, and all documents indicating each defendant's present and prospective heirship, beneficial interest in trusts, beneficial interest in insurance policies and insurance coverage and right to any insurance policy's cash surrender value or ownership in which defendant or defendant's spouse has any interest;

12) A copy of defendant's driver's license, social security card, and other items used to identify the witness, like an identification card issued by the Texas Department of Public Service or Department of Public Safety, corporate franchise certificate, or other licensing authority (ex: city health department);

13) Copies of all financial statements prepared on defendant's behalf, including statements presented to financial institutions or other parties to guarantee, secure or attempt to secure a loan or financial assistance;

14) All booklets, annual statements and other documents evidencing the nature and extent of defendant's rights under any stock option plan, retirement plan, pension or profit sharing plan, employee stock ownership plan, company savings plan, thrift fund matching plan and all other similar plans prepared or received during the last three years;

15) The Contact Information of everyone knowing the status of assets and income in which defendant has an interest, whether being community or separate property, defendant's liabilities or the location and value of defendant's assets, including banks, savings and loan associations, mortgagees, merchants, credit providers, brokers, credit unions, financial institutions, security dealers, people and organizations dealing with mineral interests who have received information from defendant regarding defendant's assets, income, liabilities, employers, employees, partners, co-shareholders and members of corporations and LLC's, bookkeepers and CPA's, agents, ex-spouses, girl friends, boy –friends (current or past), family members, advisors, and attorneys;
16) All records that would indicate the cost basis of defendant's assets;
17) The most recent statements, deposit confirmation slips, and documents evidencing the balance, term and interest rates for money and assets in which defendant has any interest, whether separately or jointly, invested by or for defendant in any cash management funds, certificates of deposit, money market funds, treasury bills, bonds, debentures or any other type investment and acquisition paying or promising to pay a return on defendant's monies invested during the past three years;
18) All certificates of stock and brokerage house statements evidencing ownership and the purchase, sale, assignment or transfer of stocks, bonds, debentures or other securities (whether in privately held or publicly traded companies or institutions) owned by defendant or in which defendant has an interest;
19) Documents and records showing all business holdings, partnerships (general, limited or otherwise), sole proprietorships, trusts, corporations, joint ventures and any other business organizations in which defendant is a manager, shareholder or defendant has an interest;
20) Assumed name certificates under which defendant has done or is doing business;
21) Insurance policies, active or terminated, including life, health, auto, disability, homeowners, or chattel of defendant is the owner, beneficiary, insured, heir to the proceeds, beneficiary of an existing or identified trust funded by insurance proceeds. This includes policies sought, but not obtained;

22) All time and billing records, beginning ninety days before this order was signed, for attorneys who have represented a defendant or entities that a defendant owns, manages, or controls;
23) All deeds, deeds of trust, land installment contracts, contracts for deeds, syndications, real estate investment trusts, partnership agreements, easements, rights of way, leases, rental agreements, documents involving mineral interests, mortgages, notes and closing statements relating to all real property in defendant has had an interest;
24) The leases for, and addresses for all storage facilities, or places where defendant's assets are stored, including the contact information for the facility;
25) Certificates of title, current licenses, receipts, bills of sale and loan documents for all motor vehicles and farm equipment, including but not limited to automobiles, trucks, motorcycles, recreational vehicles, boats, trailers, airplanes and other motorized vehicles and equipment owned by defendant or in defendant has and had any interest;
26) For every trust of which defendant is a trustee, joint trustee, beneficiary, settlor or trustor that conveyed, transferred, assigned, created any options to purchase, or disposed of any interest in real property or personal property, turnover documents evidencing the manner of disposition and the consideration. Documents showing all evaluations of defendant's interest, share of principal and income, and showing the principal and income allocated to defendant;
27) All documents and records of safe deposit boxes maintained by defendant (including the spouse) or to which defendant (including the spouse) has had access, or has a claim, right or interest in, including all lists of all contents in the last three years. Identify the location of all the safe deposit boxes, the contents, and deliver the keys to the Receiver;
28) Documents constituting or describing defendant's accounts receivable, for the past three years, including documents identifying the accounts receivable of the ongoing businesses that defendant owns or has had an interest, and copies of all collected, offset, credited, uncollected, discounted, assigned, pledged and exchanged accounts receivable;
29) Appraisals for assets owned in the past three years;

30) All documents, notes, bills, statements and invoices evidencing all current indebtedness payable by defendant or paid off by defendant, and all assignments of promissory notes made by defendant;

31) A current inventory and all past inventories, accounts receivable of all ongoing businesses that defendant owns and had an interest and copies of all collected, offset, credited, uncollected, discounted, assigned, pledged and exchanged accounts receivable of all businesses owned by defendant and in defendant has and had an interest;

32) Lease agreements for personal and real property, whether as lessee, lessor, sublessee, sublessor, assignee or assignor, including mineral interest leases;

33) All lease agreements for personal or real property executed or signed by defendant, whether as lessee, lessor, sublessee, sublessor, assignee or assignor, including any mineral interest leases or places where defendant resides or works;

34) Records of all travelers checks, cashier's checks, money orders, draft and draws purchased or cashed;

35) All deeds, deeds of trust, land installment contracts, contracts for deeds, syndications, real estate investment trusts, partnership agreements, easements, rights of way, leases, rental agreements, documents involving mineral interests, mortgages, notes and closing statements relating to all real property in any defendant has or in which defendant (including the spouse) had an interest during the last three years;

36) All certificates of title, firearms, deer stands, atv's, boats, trailers, and motors, documentation regarding hunting or fishing leases or rights or the rights to time share units or the use of property, tickets to events, like ballet or sporting events, proof of spa or club memberships, current licenses, receipts, bills of sale and loan documents for all motor vehicles and farm equipment, including automobiles, trucks, motorcycles, recreational vehicles, boats, trailers, airplanes and other motorized vehicles and equipment owned by defendant (including spouse) or in defendant (including spouse) has and had any interest;

37) All contracts in which defendant is a party or has or had a beneficial interest, including earnest money contracts, construction contracts and sales agreements for which defendant is due a commission or other remuneration for the last three years. If defendant is under the

terms of any written employment contract or agreement or is due any remuneration under any past contract or agreement, furnish a copy of the contract or agreement;

38) All documents identifying or explaining every gift, bailment, loan, gratuitous holding, assignment, sale, hypothecation, discounted transfer, transfer into lock box payment, or transfer of defendant's property;

39) All employment records or pay records to indicate every business for which defendant was employed, provided services, was an independent contractor, general contractor, superintendent, agent or subcontractor during the last three years;

40) A listing of all air miles and rewards programs, with the last year's statements;

41) Regarding entities in which a defendant has an interest, turnover:
   a. Articles of Incorporation.
   b. Bylaws and all amendments.
   c. Shareholders Agreement and amendments.
   d. A specimen of the corporation's Share Holder Certificate including stock transfer restrictions noted on the face of the certificate or referred to thereon.
   e. All records of the original issuance of shares issued by the corporation and a record of each transfer of those shares presented to the corporation for registration of transfer.
   f. The names and current addresses of all past and current shareholders of the corporation and the number and class or series of shares issued by the corporation held by each.
   g. A copy of the current share transfer ledger of the corporation showing the certificate number, date of issuance, shareholder name and number of shares represented to be held by the shareholders.
   h. Any financial statements of the corporation prepared for or issued by the corporation in the previous two years.
   i. The books and records of accounts of the corporation for the last fiscal year.
   j. The corporation's annual statements for its last fiscal year showing in reasonable detail its assets and liabilities and the results of its operations and the most recent interim statements that have been filed in a public record or otherwise published.

k. The minutes of the proceedings of the owners or members or governing authority of the corporation and committees of the owners or members or governing authority of the corporation.
l. The corporation's federal, state, and local information or income tax returns and franchise tax returns for each of the corporation's six most recent tax years.

42) Provide all of the following documents for any limited liability company ("Company") in which defendant has an interest.
a. The Articles of Organization.
b. The Operating Agreement or Company Agreement and all amendments and modifications.
c. The Regulations and all amendments and restatements.
d. The Company's books and records of accounts for the last three years.
e. The Company's minutes of the proceedings of the owners or members or governing authority of the Company and committees of the owners or members or governing authority of the Company.
f. The current list of each member's name, mailing address, percentage or other interest in the Company owned by each member, and if one or more classes or groups are established in or under the articles of organization or regulations, the names of the members who are members of each specified class or group.
g. Copies of the federal, state and local information or income tax returns and franchise tax returns for each of the Company's six most recent tax years.
h. Copies of any document that creates, in the manner provided by the articles of organization or regulations, classes or groups of members.
i. Unless contained in the Articles of Organization or regulation, a written statement of:
    i. the amount of a cash contribution and a description and statement of the agreed value of any other contribution made or agreed to be made by each member;
    ii. the dates any additional contributions are to be made by a member;
    iii. any event the occurrence of which requires a member to make additional contributions;

iv. any event the occurrence of which requires the winding up of the Company; and
v. the date each member became a member of the Company.

j. A specimen of the Company's Member Unit or Share Certificate including any transfer restrictions noted on the face of the certificate or referred to thereon.
k. The current unit or share transfer ledger of the Company showing the certificate number, date of issuance, unit holder or shareholder name and number of shares represented to be held by any owner of the Company.
l. The income and expense statement for the Company for the past three years.
m. Any financial statements of the Company prepared for or issued by the Company in the previous two years.

43) Provide all documents for any limited partnership in which defendant has an interest:

a. A current list that states:
i. the name and mailing address of each partner, separately identifying in alphabetical order the general partners and the limited partners;
ii. the last known street address of the business or residence of each general partner;
iii. the percentage or other interest in the partnership owned by each partner; and
iv. if one or more classes or groups are established under the partnership agreement, the names of the partners who are members of each specified class or group.

b. A copy of:
i. the limited partnership's federal, state, and local information or income tax returns and franchise tax returns for each of the partnership's six most recent tax years;
ii. the partnership agreement and certificate of formation; and
iii. all amendments or restatements.

c. Copies of any document that creates, in the manner provided by the partnership agreement, classes or groups of partners.
d. An executed copy of any powers of attorney under which the partnership agreement, certificate of formation, and all

amendments or restatements to the agreement and certificate have been executed.

e. Unless contained in the written partnership agreement, a written statement of:
    i. the cash contribution and a description and statement of the agreed value of any other contribution made by each partner;
    ii. the cash contribution and a description and statement of the agreed value of any other contribution that the partner has agreed to make as an additional contribution;
    iii. the date on which additional contributions are to be made or the date of events requiring additional contributions to be made;
    iv. events requiring the limited partnership to be dissolved and its affairs wound up; and
    v. the date on which each partner in the limited partnership became a partner.
f. The records of the accounts of the limited partnership.
g. The income and expense statement for the limited partnership for the past three years if they are not contemplated under No. 6 above.
h. Any financial statements of the limited partnership prepared for or issued by the limited partnership in the previous two years.

END OF DOCUMENT

EXHIBIT “2”

From: Travis Vargo <tvargo@vargolawfirm.com>
Sent: Friday, January 31, 2025 10:21 AM
To: Pennetti, Alex; Clark, Katharine B.
Cc: 'shawn@gradycollectionlaw.com'; Michael Poynter
Subject: RE: Order
Attachments: image003.png

RECEIVED FROM EXTERNAL SENDER - USE CAUTION

Alex,

We have **not** received anything from your client contesting my calculations (below). Do you have any information that would alter my calculation distributed below?

We have **not** received zero payments from your client.

We have **not** received dates for depositions that were court ordered.

We have **not** received proper discovery responses. We did receive useless/document-less discovery responses.

We do however continue to receive motions, briefing and argues to delay, hinder, and stop my creditor client's collection efforts. Your client's continued silence, non-compliance and subversion of the collection process is resulting in continued collection costs. Rest assured, that this email begging your client for payments and/or compliance will be an exhibit to the request for fees if/when your client says they are unreasonable.

Travis B. Vargo
Vargo Law Firm, PC
(713) 524-2441 - Office

From: Travis Vargo
Sent: Tuesday, January 28, 2025 3:41 PM
To: Pennetti, Alex <APennetti@thompsoncoburn.com>; Clark, Katharine B. <KClark@thompsoncoburn.com>
Cc: 'shawn@gradycollectionlaw.com' <shawn@gradycollectionlaw.com>
Subject: RE: Order

Alex,

Here is a pay-off that I prepared based on documents that I've seen. This does not include collection fees and costs that my client is entitled to under the settlement agreement, which I understand to be a substantial sum. Obviously, I need to investigate this number, declare it, and provide support for it. I also need to confirm this spreadsheet with my client. In the meantime, please let me know your thoughts. If your client made payments that are not shown on tab 2, please send me evidence of the payment so that I can discuss it with my client and provide proper credit, if applicable.

Yes, provide dates for the court ordered depositions please.

I don't have authority to move a court ordered deadline. My client also opposes in light of your client's continued filings that necessitate responses from my firm.

Travis B. Vargo
Vargo Law Firm, PC
(713) 524-2441 - Office

From: Pennetti, Alex <APennetti@thompsoncoburn.com>
Sent: Tuesday, January 28, 2025 3:03 PM
To: Travis Vargo <tvargo@vargolawfirm.com>; Clark, Katharine B. <KClark@thompsoncoburn.com>
Cc: 'shawn@gradycollectionlaw.com' <shawn@gradycollectionlaw.com>
Subject: RE: Order

Hi, Travis.

With the tight timeframe, we need to proceed with the depositions of the three court-ordered witnesses first. I'm working on those dates, as Katie said. For the other two, as Katie asked, let us know on Mr. Robinson because I'm not clear on whether we're trying to coordinate everyone or if you guys want to depose him twice.

Do you have any update on the payoff letter and supporting documentation that we discussed last week? Given the existing dispute over what is owed, without a payoff letter and supporting documentation, we need to depose Messrs. Welter, Peterson, and Keithly.

If we need to pursue the depositions of Messrs. Robinson, Watts, Welter, Peterson, and Keithly, perhaps we can schedule a full week to conduct these. But as you told the Court, the plaintiffs have been crediting amounts received or collected against the judgment, so I would imagine a payoff history and payoff amount is something that can be provided relatively easily, which would mean those depositions wouldn't be necessary.

Also, may we have until next Friday, 2/7, to serve discovery responses?

Best,

Alex Pennetti
apennetti@thompsoncoburn.com
P: 972 629 7168
F: 972 629 7171

Thompson Coburn LLP
2100 Ross Avenue Suite 3200
Dallas, TX 75201
www.thompsoncoburn.com

[redacted]

[redacted]

REDACTED - IRRELEVANT

[redacted]

[redacted]

[redacted]

EXHIBIT “3”

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

****

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

Plaintiffs/Judgment-Creditors,

VS.

CYBERLUX CORPORATION and MARK D. SCHMIDT, Individually,

Defendants/Judgment-Debtors.

4:25-CV-00626

HOUSTON, TEXAS

MARCH 26, 2025

****

TRANSCRIPT OF MOTION HEARING PROCEEDINGS
HEARD BEFORE THE HONORABLE LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

****

APPEARANCES:

FOR THE PLAINTIFFS:

MR. DAVID ALAN WALTON
Bell Nunnally & Martin LLP
2323 Ross Avenue
Suite 1900
Dallas, Texas 75201

MR. DAVID M. KEITHLY
Mortenson Taggart Adams LLP
300 Spectrum Center Drive
Suite 1200
Irvine, California 92618

Proceedings recorded by mechanical stenography, transcript produced via computer.

FOR THE DEFENDANTS:	MR. GABE WRIGHT Hahn Loeser & Parks LLP One America Plaza 600 West Broadway Suite 1500 San Diego, California 92101
Official Court Reporter:	Lanie M. Smith, CSR, RMR, CRR Official Court Reporter United States District Court Southern District of Texas 515 Rusk Room 8004 Houston, Texas 77002

P R O C E E D I N G S

THE COURT: Good afternoon. Are we ready to proceed?

MR. KEITHLY: Yes, Your Honor.

MR. WRIGHT: Yes, Your Honor.

02:00PM MR. WALTON: Yes, Your Honor.

THE COURT: All right. Go ahead and state your appearances, please.

MR. WALTON: Your Honor, David Walton on behalf of Atlantic Wave Holdings, LLC, and Secure Community, LLC.

02:00PM I also have with me David Keithly, who you recently *pro hac* admitted, from California; and we have a client representative, William Welter.

THE COURT: All right. Very good.

MR. WRIGHT: Good afternoon, Your Honor. Gabe Wright 02:00PM for Defendants Cyberlux Corporation and Mark D. Schmidt.

THE COURT: All right. Thank you.

So this is your motion to remand for Cyberlux. Go ahead.

MR. WALTON: Your Honor, just for clarity, it's our 02:01PM motion for remand, which is Atlantic Wave Holdings.

THE COURT: Oh, that's right. I'm sorry. I was looking at the wrong -- yes, go ahead.

MR. WALTON: Your Honor, I'm going to let Mr. Keithly start with argument; and then I'll be here to answer any 02:01PM questions that may follow.

THE COURT: So I do have one preliminary question that may help the argument that would be clearer to me. The order that Cyberlux has cited as its basis for removal includes nonexempt property. That's all -- that's the language used.

02:01PM What is nonexempt property in this context?

MR. WALTON: Mr. Keithly, do you want to --

MR. KEITHLY: I'm not familiar with what would be exempt versus nonexempt; but what I can tell you, Your Honor, is that the state court was managing this effectively and

02:02PM wasn't going to sell any government property without making a determination of who the property belongs to.

As you know, receivers can't just, you know, go in and sell property willy-nilly. And the Court -- the state court was working with us to appoint a receiver who could then

02:02PM determine what properties were available to satisfy the judgment.

THE COURT: I understand that Mr. Berleth -- or Berleth (pronouncing), if that's how you pronounce his name -- was going to fill that role and he made statements disavowing

02:02PM any intent to sell government property.

But I guess my question is: Does nonexempt refer to government property within the Cyberlux Texas warehouse or to something else?

MR. KEITHLY: I'm not sure what nonexempt property

02:02PM refers to in the order for the receiver.

THE COURT: Mr. Wright, do you know?

MR. WRIGHT: Your Honor, that goes right to the heart of the issue; and I think that the receiver's letter on February 3rd is what gave us clarity on what they considered to be nonexempt property, which is that Cyberlux Spring, Texas, facility, you know, soaking wet and with my thumb on the scale, has about a hundred thousand dollars worth of nonexempt property. He believes there's seven to eight and that that number only can be derived from the drones. And so the question of whether or not those drones are nonexempt property and whether or not they're government property is a purely federal law question.

THE COURT: Well, what does nonexempt mean? Is that -- I mean, in Texas that might mean something other than a homestead.

MR. WRIGHT: It would, Your Honor, but I would submit that the risk is that the nonexempt property is going to include these drones and that's what that letter indicates.

THE COURT: So nobody here can give me a definition of what nonexempt as used in this case and used in the order means?

MR. WALTON: Your Honor, what I can say -- and I think I'm the Texas lawyer here present. What I can say, nonexempt would be defined under Texas law and as under Texas law when it reaches that definition is anything that the creditors can

reach.

As you know and you made reference, that homestead is exempted. There are certain things under Texas law that are exempted. So it would be anything that the creditor could reach that is not otherwise exempted under some other law or statute.

It doesn't mean that it can be anything and everything that the government may stake claim to. It's simply what can the creditors reach; and that's a determination that the Texas state court and the receiver were intending to undertake in this case as to what in that warehouse, what within Cyberlux's possession, custody, or control can a creditor reach when it's trying to enforce the judgment. Whether it includes everything in that warehouse or whether it includes a small portion of the assets in that warehouse, that's a determination that needs to be undertaken by the state court as well as the receiver.

It doesn't trigger any federal law or federal issue just because the exemption may be premised upon some type of federal regulation or federal law. Which again we don't concede that is triggered here, but that would be the only circumstance that that would be in play.

But nonexempt is just a general reference to anything that the creditors can reach in enforcing the judgment.

THE COURT: Do you have a cite that I could use for that proposition?

MR. WALTON: Your Honor, I apologize. I don't have a cite off the top of my head, but I'm glad to supplement or provide a notice to the Court with those citations.

THE COURT: That would be great. Thank you.

And the other side can respond or provide me something on the same day.

MR. WRIGHT: We would be happy to provide something on the same day, and I believe that exemptions are under the Texas Property Code Chapters 41 and 42.

THE COURT: Okay.

All right. You can start your argument now. Sorry.

MR. KEITHLY: Okay. Your Honor, this case presents an example of procedural abuse. The removal wasn't filed to really vindicate any legitimate federal interest. It was filed to obstruct what the state court was doing, the state court enforcement action midstream.

Shortly before the state court had said, as we submitted to the Court, that it was going to appoint a receiver, compel depositions, and allow the collections process to proceed, the night before the CEO was scheduled to be deposed, seven months after this case was initially filed, it was removed to federal court.

It's part of a well-documented and ongoing pattern of delay that I don't really want to spend too much time on.

But the main issues here are that the removal is procedurally defective, it's untimely for the reasons that we've stated in our motion. More importantly, there's no federal jurisdiction under either Section 2410 or Section 1442(a)(2).

To take the first, Section 2410 doesn't apply because there is no lien. So this statute applies only where the United States has asserted a lien or an interest in property. The United States has not interpled. They have not asserted that they have a lien on such property. All we have are the statements of the judgment debtors.

Moving to 1442(a)(2), so the argument there, as I understand it, is that Cyberlux believes that it is acting under a federal officer; but it really brushes over what a federal officer is. What it really is is a subcontractor under a prime contractor that has a contract with the federal government.

This fails the acting-under test that's outlined in *Watson versus Phillip Morris* that we cited in our papers. There is no direct supervision or delegation by the federal government. Drone equipment is not classified. Documents at issue are not sensitive and --

THE COURT: We've been hearing a lot about that today in different contexts.

MR. KEITHLY: That's certainly right.

Our concern, Your Honor, is that this removal is a continuation of a pattern of delay and obstruction. We've been trying to collect on this judgment, which is a final judgment from the State of Virginia, now for over a year, in three different jurisdictions and we've been stymied at every opportunity until the Texas state court judge denied a motion to vacate the judgment and said he was going to appoint a receiver, compel depositions, and compel discovery. And as soon as he did that, they removed it to federal court.

We think this is an abuse of the removal statute, that it was inappropriately removed, and that it should be remanded as soon as possible so that the state court judge can continue his efforts of helping us to collect on a judgment.

THE COURT: Is the relevant question for the role of the receiver -- that is, whether the receiver is an officer of the Court -- is that a federal law question or a state law question?

MR. KEITHLY: Whether the receiver is an officer of the Court?

THE COURT: Yes, sir.

MR. KEITHLY: My understanding is that's a question of state law.

THE COURT: I would think that's right.

MR. KEITHLY: Yeah, we cited in our papers as well that the receiver is generally working for the Court. He's not a representative of the plaintiffs. He's there to determine on behalf of the Court what assets are available, which are exempt, which are nonexempt, which are subject to levy under the judgment.

THE COURT: All right. Mr. Wright.

MR. WRIGHT: Your Honor, thank you.

I want to first address the characterization that our actions are designed to obstruct or delay or obfuscate because that is simply not the case; and the fact that Cyberlux may have asserted its procedural and legal rights in California, Virginia, and Texas, is not tantamount to delay or obstruction. It's just exercising its rights to defend itself and make sure that things are appropriately complied with.

With respect to the timeliness of removal, we're required to remove within 30 days of, you know, the federal question issue coming up; and that issue became crystalized between January 20th and February 3rd, between the broad-sweeping order for all nonexempt property and the proposed receiver -- and I think we need to be clear about that -- the proposed receiver saying that he believes there's seven to eight digits' worth of equipment that he can sell in order to satisfy this judgment.

THE COURT: Well, let me back up a minute, Mr. Wright.

MR. WRIGHT: Yes.

THE COURT: So you've said that your motion was timely. So the motion to quash was filed on January 6th and it seems clear from the record that you knew at that time that there was U.S. Government property in the Texas facility at that time and you also knew from the original petition that the plaintiffs were going to collect -- were trying to collect the judgment from Cyberlux or levy on and sell Cyberlux's property.

02:12PM So what new information relevant to triggering a right to remove did the proposed order add?

MR. WRIGHT: Because we had telegraphed and even as was stated in the hearing on the appointment of receiver, we had been saying that, you know, government property is involved here and --

THE COURT: Right.

MR. WRIGHT: -- the indications we were given were that they weren't going to go after the government property.

So we didn't think that there was a ripe issue to remove and it would have been premature for us to do it just on the hunch, for lack of a better term. There was no longer a hunch once the January 20th order and the February 3rd letter were issued which made it clear that the intent was to seize U.S. Government property to satisfy this judgment.

MR. KEITHLY: And, Your Honor, to be clear, that was

never ever the intent of plaintiffs; and I would be absolutely shocked if the receiver or the judge, subject to the requirements that they are, would sell U.S. Government property. That was never our intention.

02:13PM I think what Mr. Wright is referring to is an inspection that plaintiffs did just to go and look and see what was there at the property. And the proposed receiver, Mr. Berleth, was there as well and he listed what he saw there.

There have been no determinations of what was 02:13PM exempt versus nonexempt, what was going to be subject to sale or not.

And they've known from the very beginning, as Your Honor pointed out, the only assets that have any real value or catalyst are those drones. So, you know, if there 02:13PM were a federal question, they've known from the very beginning since we initially brought this action.

THE COURT: And my understanding was that the receiver disavowed any intent to levy on and sell the government property so --

02:14PM MR. KEITHLY: 100 percent.

THE COURT: So square that peg for me in the round hole of your contention that they're just a valid trigger for removal.

MR. WRIGHT: Well, again, Your Honor, the February 3rd 02:14PM letter submitted by the receiver to the Court is in evidence.

It's part of our motion. And it indicates that he thinks there's seven to eight digits' worth of assets there, which clearly is the drones.

And I want to be very clear about this receiver --

THE COURT: But that's not equivalent to saying, "And those are the assets I intend to levy on and sell, all of those assets."

MR. WRIGHT: In mentioning those assets, Your Honor, he says that he will be able to satisfy the judgment with them. That is in the February 3rd letter.

MR. KEITHLY: And that's assuming they're -- you know, assuming they're nonexempt.

THE COURT: "Could" versus "would."

MR. KEITHLY: What we need to understand, Your Honor, is that this was a very preliminary analysis. This was the first time the receiver had ever been into the warehouse, or plaintiffs, for that matter, although we've been trying to get in for months and months now. So this was just our first look at what was there and essentially an inventory of what we saw there.

We're at Step 1 of determining, you know, whose assets are these. If indeed they are the federal government's assets, then the receiver, my understanding would be that he would contact the federal government and say, "How can I get

these to you as quickly as possible?"

We have no interest in selling assets that belong to the federal government.

MR. WRIGHT: Your Honor, they're making representations back to the would-or-could thing. If this is remanded and the receiver moves on those assets and tries to liquidate them, we have an issue where U.S. Government property prepared for the military is being put out on the open market.

THE COURT: Well, if the receiver did that, then you might have a trigger for removal.

MR. WRIGHT: Right.

THE COURT: But that's not what happened. And it might and I'm not sure that even then it would because I'm not sure that federal officer removal, as broadly as that's construed, would apply, but that's not -- the record as to what documents were filed or presented and when in relation to your time of removal, I'm trying to nail down which particular -- you're relying on the proposed order.

MR. WRIGHT: The proposed order and the January 3rd letter, which I want to clarify again for the receiver. The receiver was nominated by the plaintiff. He has not been --

THE COURT: He's appointed by the Court.

MR. WRIGHT: He was not yet appointed by the Court.

THE COURT: But that was the mechanism that had to occur to make him the receiver, correct?

MR. WRIGHT: Correct. And that had not occurred, and we did not invite him to the Spring facility inspection. Plaintiffs --

THE COURT: Of course not. You're in no hurry to get the preliminary work done that would enable the other side to levy on your property to satisfy their judgment.

MR. WRIGHT: We made the inspection available, Your Honor, to Atlantic Wave, as was ordered, and when that receiver showed up, who was not appointed by the Court and was not instructed by the Court to do that, we let him in as well and that led to the triggering event for us, which is his identification of these assets as something that he can use to satisfy the judgment. He's not acting for the Court at that point; and he's certainly not acting for us, as you pointed out.

MR. KEITHLY: And he's not actually empowered to do anything at that point aside from look at what's there and make a list of it so that the Court can determine --

THE COURT: He was basically conducting an inventory at that point.

MR. KEITHLY: Exactly, yeah.

THE COURT: Is that wrong, Mr. Wright?

MR. WRIGHT: It's my position that he wasn't conducting an inventory because he was not appointed by the Court yet, and he was acting in furtherance of the plaintiffs' interests at

that point.

MR. KEITHLY: But he wasn't acting at all except to create an inventory.

THE COURT: Make a list.

02:18PM MR. KEITHLY: Which the judgment debtors have known what's in that warehouse for months and months. We haven't. This --

THE COURT: And so have you.

MR. KEITHLY: -- is our first opportunity.

02:18PM THE COURT: Mr. Wright, you knew about it -- presumptively you knew what was in that warehouse, your client knew what was in that warehouse --

MR. KEITHLY: For months.

THE COURT: -- long before the other side did.

02:18PM MR. WRIGHT: But if he's not appointed by the Court and he's submitting letters to the Court not on behalf -- not in furtherance of his duties to the Court or us, it's in furtherance of the plaintiffs' interests, Your Honor.

THE COURT: It may have had the effect since it is the 02:19PM identification of assets that might, depending on what category they fell into, be subject to levy and execution sale to satisfy the outstanding judgment that had been, as I understand it, domesticated and reduced to an enforceable judgment in Texas.

02:19PM But the fact that it's -- the whole point of the

exercise was to figure out assets on which the judgment -- against which the judgment could be enforced. So in that sense it favored the plaintiff, but the judge -- it's a fairly ministerial exercise: Make a list, figure out whether that's any basis for taking items off of that list, and go forward.

02:20PM

MR. WRIGHT: Your Honor, the reason why we allowed this inspection to happen is because --

THE COURT: You didn't have a choice, Mr. Wright, as best I can tell. They had plenty of Texas remedies to require that inspection and levy on the --

02:20PM

MR. KEITHLY: It was court ordered.

THE COURT: -- recoverable property.

MR. WRIGHT: We're operating under the impression that these assets are not going to be identified as something that is going to be levied on and they -- following that hearing and that inspection, the letter submitted identifying those as assets that could be levied upon is what has triggered this. We have an obligation to protect these assets once we understand that this is what their intent is.

02:20PM

THE COURT: What is the statutory basis that was cited for removal?

MR. WRIGHT: 1442, Your Honor, and that's the federal officer removal statute.

THE COURT: So where is your authority that this kind of collection attempt would have fallen under the federal

02:21PM

officer removal statute?

MR. WRIGHT: The fact that the federal officer removal statute -- and I'm actually glad that they mentioned *Watson versus Phillip Morris* because there is a Fifth Circuit case that distinguishes that called *Wilde versus Huntington Ingalls.*

THE COURT: Cite?

MR. WRIGHT: 616 F. App'x 710. The pinpoint cite is 713.

And in that case there was discussion about whether Huntington Ingalls, or HII in our case, was a federal officer; and I think the Court put it best in that case when it said presumably the federal government would have had to build those ships itself had Huntington not done so and that therefore meets the requirements of 1442.

And we're in that same position. The federal government isn't the one that's --

THE COURT: But you didn't cite that in your notice of removal, did you -- or did you?

MR. WRIGHT: I believe we cited 1442(a) and another case called -- just bear with me for a second, Your Honor, because I always -- *Latiolais versus Huntington Ingalls*.

And if you would like the cite, I can give you that one as well, Your Honor.

THE COURT: Yes, please.

MR. WRIGHT: 951 F.3d 286, 292.

And those are both cases out of the Fifth Circuit where HII was found to be a federal officer under 1442 and then by extension -- there's two arguments. There's two ways to skin this cat here.

02:23PM We are by extension a federal officer since we're working for HII in performing the manufacturing of these drones and drone components for the federal government or aiding the federal officer in the manufacture of these drones and drone components for a U.S. Government contract for the United States 02:23PM Government.

THE COURT: There's still a 30-day deadline to remove on that basis, correct?

MR. WRIGHT: There is, Your Honor.

THE COURT: Okay.

02:23PM MR. WRIGHT: Once the federal question arises.

THE COURT: So I'm looking for your notice of removal to see what -- the statutory basis you cited, but I'll find it.

MR. WRIGHT: Your Honor, our statutory basis -- we did a notice of removal and an amended notice of removal, 02:23PM Your Honor.

MR. WALTON: Yes, Your Honor. In their original notice of removal, they only relied on Section 2410. It wasn't until the amended notice of removal that they then brought in 1442.

Obviously we would take the position that the 02:24PM amended notice of removal was something beyond just curing a

procedural defect in their original motion and should be disregarded in its entirety; but nonetheless, we still tried to address 1442 just in case the Court was curious about it.

And what's being left out of this discussion -- obviously we don't believe that they've jumped the first hurdle, but there is a second hurdle on 1442 that they can get nowhere near and that is the issue must affect the validity of law of the United States.

And the validity factor is not just someone may argue something inconsistent with U.S. law. It has to be the person is taking a challenge as to the validity of U.S. law. In other words, U.S. law is invalid for these reasons. And nobody in this enforcement proceeding has taken that position.

So we believe 1442 falls on its face not only because of the first hurdle, but certainly because of the second hurdle as well.

THE COURT: So if I were to grant your motion and remand, presumably what you're telling me is that you would proceed to enforce your judgment against the nongovernment property in that warehouse?

MR. KEITHLY: Yes.

THE COURT: And only that property?

MR. KEITHLY: Yes.

MR. WALTON: That's right, Your Honor. And we would have the expectation that they would have the burden to prove

what is government property and what is not government property, which they have failed to do to this date.

THE COURT: Well, I assume that the position is you know a drone when you see a drone.

02:25PM MR. WALTON: Yeah, but just because it's a drone doesn't mean it's government property, right? They have to demonstrate that, in fact, the government does, in fact, have a property interest in the inventory in that warehouse; and they've not done that to date. If they're able to satisfy that

02:26PM burden and the Court and the receiver accepts that they have satisfied that burden, then of course. We can only --

THE COURT: These are military drones, aren't they?

MR. WRIGHT: They are manufactured for military purposes, Your Honor, in accordance with the United States

02:26PM Navy's request and it falls under Federal Acquisition Regulation 52.249-6(c). And upon termination of the contract, the drones -- title to the drones go over to the federal government.

THE COURT: So, Mr. Wright, it sounds like you've got

02:26PM nothing to worry about it. It sounds like you will be able to satisfy your obligation to point out what is government property and why it is therefore not subject to collection efforts in the state court and whatever is not government property in that warehouse and not otherwise exempt from

02:26PM collection would be all that would be seized.

MR. WRIGHT: Your Honor, I would love to believe that that is the case, but I am in a bit of a double bind here because we have taken this position that that position has been rejected by the plaintiff and we have --

02:27PM THE COURT: I just heard them accept it.

MR. WRIGHT: We have the documentation and all we need is for them to sign a protective order for us to be able to provide them that documentation that shows -- because it's subject to a confidentiality obligation that we have to HII.

02:27PM MR. KEITHLY: Well, Your Honor, all of that is incorrect. There's already a protective order in place in the state court proceeding. We've been in contact with HII, and they say the only reason the documents haven't been released is because Cyberlux will not allow HII to release contract

02:27PM documents to us.

MR. WRIGHT: I don't believe that that is the case, Your Honor.

THE COURT: Well, it sounds like from the representations made in this hearing by lawyers who are

02:27PM officers of the Court that the only levy and execution will be on whatever is in that warehouse that is not government property or otherwise exempt from the levy and execution process under the state court law.

So I think you are where you wanted to be to

02:28PM protect your client's interest and obligation to protect the

government's interest.

MR. WRIGHT: I appreciate that, Your Honor, and I --

THE COURT: And when I say "where you want to be," I mean where you want to be in the state court.

02:28PM MR. WRIGHT: And I understand the Court's position on that. I do appreciate the Court getting the express commitment out of the plaintiff that they're not going to move on the government property which we believe we do have an obligation to protect, which is why we removed in order to protect that

02:28PM property.

THE COURT: So I am going to remand because I don't find that this was timely removed because you knew that there was government property in there; you knew that the plaintiffs were going to levy on your Texas facility; and you knew that

02:29PM more than 30 days before you filed your motion, your removal.

So I think this is appropriate to remand, but I'm not going to impose attorneys' fees for what we used to call improvident removal.

MR. KEITHLY: Understood, Your Honor.

02:29PM THE COURT: I think there was -- it's not a situation of no colorable basis at all.

MR. KEITHLY: Understood, Your Honor.

THE COURT: So no fees, but back in state court.

MR. WRIGHT: Understood, Your Honor.

02:29PM THE COURT: All right. Well, thank you all very much.

This has been an interesting case. Thank you for your time.

MR. KEITHLY: Thank you, Your Honor.

MR. WRIGHT: Thank you, Your Honor.

THE COURT: Thank you.

02:30PM MR. WALTON: May we be excused?

THE COURT: You as well.

MR. WALTON: Thank you.

(The proceedings were adjourned.)

* * * *

REPORTER'S CERTIFICATE

I, Lanie M. Smith, CSR, RMR, CRR, Official Court Reporter, United States District Court, Southern District of Texas, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

/s/ Lanie M. Smith
Official Court Reporter

G

H

I

S

T

U

EXHIBIT “4”

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. 2024-48085

ATLANTIC WAVE HOLDINGS, LLC AND SECURE COMMUNITY, LLC	)	IN THE DISTRICT COURT
vs.	)	HARRIS COUNTY, TEXAS
CYBERLUX CORPORATION AND MARK D. SCHMIDT, INDIVIDUALLY	)	129TH JUDICIAL DISTRICT

HEARING

On the 16TH day of January, 2025, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Michael Gomez, Judge Presiding, held in Houston, Harris County, Texas.

Proceedings reported by computerized stenotype machine.

APPEARANCES

Mr. Shawn Grady
SBOT NO. 24076411
Law Firm of Shawn Grady, PLLC
2100 West Loop South
Housrton, Texas 77027
Counsel for Plaintiff

Mr. Travis Vargas

Mr. Alex Pennetti
SBOT NO. 24110208
THOMPSON COBURN LLP
2100 Ross Avenue
Dallas, Texas 75201
Counsel for Counsel for Cyberlux Corporation

Ms. Katharine Clark
SBOT NO. 24046712
THOMPSON COBURN LLP
2100 Ross Avenue
Dallas, Texas 75201
Counsel for Counsel for Cyberlux Corporation

THE COURT: Court's on the record, Cause No. 2024-48085, Atlantic Wave Holdings, LLC versus Cyberlux.

Will everyone, please, introduce themselves for the record?

MR. GRADY: Good afternoon, Your Honor. Shawn Grady for Atlantic Wave Holdings. And my co-counsel, Travis Vargo, is here, as well.

MR. PENNETTI: Alex Pennetti for Cyberlux and Mark Schmidt.

MS. CLARK: Katharine Clark on behalf of Cyberlux and Mark Schmidt.

THE COURT: So how can I help you today?

MR. VARGO: Well, I believe there's a couple matters that are set for today. One is an application of appointment of post-judgment receiver under Texas C.P.R.C. 31.002, the turnover statute. And the other one is a request for access to the premises.

In this case there's a written motion. There's also ample evidence inside the docket that would support the appointment of a receiver. The -- to the extent that it's deficient, we would also ask for access to a premises. Because in the debtor's response, they're saying, Well, there's no evidence attached to the application of what's at that premises.

Well, so we said, Okay. Well, let's go look at the premises. And then there's obviously opposition to that, as well.

So I think what the Court is going to find is that it falls within the purviews of the -- I think it's the *Klinek* case that's the Fourteenth Court of Appeals and its progeny, which really stands for the proposition that when a judgment debtor starts to put up roadblocks and hurdles to gain the information that could be attached to an application to appoint receiver, the equities of justice militate toward the appointment of a receiver.

Because you can't, on one hand, block someone from obtaining evidence for their application and then, on the other hand, file a response that says they have none.

In this instance, Judge, we have supplemented to the docket their quarterly filings, which establish and show that they have an interest in the subsidiary, at least one. We have a witness that's on Zoom that is present to authenticate it, if the Court would indulge us and to the extent that you prefer not to rely on the *Klinek* case.

And in addition to that, we would establish that their discovery responses are nil. We

sent out post-judgment discovery, and we got objections and a Motion for a Protective Order to some of the discovery. That is not an excuse to provide us responses to the remainder of the discovery.

If someone -- if someone propounds 50 requests and you have objections to 22 of them, you would still have an obligation to respond to the remaining, you know, 18 or 28, whatever the math comes to there -- 28. And in this instance that was not done.

Yet, they're here resisting a receiver; and we would submit that the application should be granted.

MS. CLARK: Your Honor, Katharine Clark on behalf of Cyberlux Corporation.

We dispute the statements that are in the papers before the Court today, in particular that go to the heart of the matters with respect to the motion to enter property and with respect to the receiver. But I'd like to talk about the discovery first, because from our prospective, that's a watershed issue here.

We -- it is true, the parties are in a dispute with respect to discovery, primarily because Cyberlux is a business that has contracts that involve the United States Government, the Department of Justice, and military operations in the Ukraine conflict. And so

there's very sensitive information that the plaintiffs' discovery touches.

And so we have a Motion for Protective Order before the Court that is -- speaks directly to our concern. Because the parties, try as we may, have not been able to get to an agreement about what a protective order might look like in this case.

We also, as part of that Motion for Protective Order, have disputed the scope of this discovery because it is not post-judgment. It is almost exactly the duplicate of the discovery that's pending in the active litigation matters in Virginia.

But in an effort to try to resolve discovery and make progress, we've been willing to set aside those issues with respect to scope and proceed with discovery as long as we can get some form of protective order that is relatively fulsome, Your Honor. What we proposed is essentially the form from the federal district court here in the Southern District of Texas. And we just have not been able to get to an agreement.

And so from our perspective, if we can get to a resolution on the motions that are already fully briefed before Your Honor and are on submission to Your Honor, then we can have discovery proceed in

earnest. And so that's our position with respect to discovery.

With respect to the merits of these motions --

THE COURT: So on discovery, there's really no objection post -- vis-a-vis post-judgment, right? You can't make objections as long as it relates to post-judgment collection efforts, right?

So to the degree that doing merits on something else, I can see how that might be an issue. But if it's related to what do you own, the things that I would assume that they're interested in, there really is no objection that you can make, right?

So either you turn it over, or you don't. And if you don't turn it over, then it's a problem. So you can't hide your assets. To the degree that you're hiding what you own, what you have, then it's a problem because then it justifies the appointment -- well, I don't think there's any problem with an appointment of receiver.

I think the concern is on a Motion for Turnover, right. And there is some case law that makes -- that's problematic, right, in terms of turnover orders and specificity and those things -- things of that nature.

But that being said, I do agree with the concept that, Look, if you're not telling us what you have and you're hiding your assets, then that specificity requirement can't be met; and you can't really hold the receiver responsible -- or the applicant responsible for the failure to provide that information. So it weighs against the denial of a Motion for Turnover.

So that's just sort of -- so I agree with those sort of guiding principles. So to the -- if the issue is, Look, we're not willing to turn over because we're concerned about them giving it to third parties, I don't have a problem with that conceptually. I don't know what the problem is on a protective order.

What's your issue?

MR. GRADY: Your Honor, I can speak to this.

They did submit a protective order from the Southern District. It has an attorney's eyes only provision on there. And, you know, we don't -- I don't understand this business, and I need -- my client needs to see the documents, simple as that. But we have made --

THE COURT: So why does your client need to see the business?

MR. GRADY: They need to see the documents from, you know, their production, you know, to see -- to make sense of it and to make decisions.

THE COURT: Why, from a collection standpoint?

MR. GRADY: Well, for settlement purposes, I think, mainly; but, also, I think --

THE COURT: I need to understand, like -- so I understand if we're -- again, if we're just talking about your typical post-judgment discovery, which is, you know, your financial statements, your bank accounts, your stuff, then why would your client need to see that?

MR. GRADY: Well, to evaluate --

THE COURT: I mean, those actual documents.

MR. GRADY: Well, I think to evaluate the financial condition to determine the -- you know, the value --

THE COURT: What's -- I mean, again --

MR. GRADY: You're telling me they don't.

THE COURT: I don't know why they need to see those specific documents.

MR. GRADY: Right.

THE COURT: If they have ten gold coins, why does your client need to see the document that says

they have ten gold coins?

MR. GRADY: Right. And I guess some of it I don't know exactly as far as the operations go. You know, they manufacture drones; and so I don't know -- I mean, financial statements, yes.

MR. VARGO: Judge, in this instance this is a business that frankly we're lawyers and that we don't know and our clients are engaged in a similar industry. Giving client access to the documents would provide -- at this point, in the absence of a receiver, would provide --

THE COURT: Understood. Look, so I don't have a problem with a receiver.

MR. VARGO: Yeah.

THE COURT: So I think you can get a receiver today.

MR. VARGO: Okay.

THE COURT: So the issue is turnover, right?

MR. VARGO: Certainly.

THE COURT: So the issue is -- you know, and I know -- I know they're kind of two peas in a pod. And the turnover order is the order that they turn over nonexempt assets, right?

MR. VARGO: Correct.

THE COURT: And generally -- the order doesn't have to be specific, but the basis for the order -- there's case law that says, You need to tell us what those nonexempt assets are before you get that turnover order, right?

MR. VARGO: Yep.

THE COURT: And then there's case law that says --

MR. VARGO: Then the exceptions.

THE COURT: And then the exception. And I don't know which Court of Appeals. But like if the judgment debtor is hiding from you, won't respond to discovery, then how the heck are you supposed to know, right? So how are the heck are you supposed to identify specific assets? They're obviously hiding something.

So that gives the -- that lends -- that provides at least the legal basis to sort of relax that requirement of specificity. And I may not be elaborating the -- I may not be explaining the actual legal threshold because I don't have the case in front of me, but I think both sides are probably familiar with it.

So I don't -- we don't need to spin our wheels. Like, they just need to tell you what they have. If they're not going to tell you what they have,

I'll enter a turnover order; and you can go fight at the Court of Appeals or mandamus. But I anticipate it's -- this is common sense. This is not hard.

So if they won't turn over the stuff because you won't give them a protective order, give them a protective order. If they're saying everything is attorney's eyes only, we can come back and figure those things out.

But if you're just -- again, if you need to show it to your receiver, who I assume is someone who has some sort of financial accounting or expertise, then they probably have what they need. If there's something specific that you need to know or see, then -- I just don't see where your client really needs to get involved, right?

I can understand from a liability perspective, right, understanding causation, what kind of business they're in, that kind of thing. But I don't see why they need to see those documents.

MR. VARGO: With a receiver, the receiver can go collect the judgment; and I believe that we agree with you insofar as we wouldn't need to see the documents because the receiver as a neutral can handle those items.

Without a receiver, our client is in a

position to assist us in figuring out how to target assets to use to satisfy the judgment. So that's why we would need to give our client access to documents without a receiver.

But if the Court is inclined to grant the turnover receiver, then clearly we don't need to -- our client doesn't need to see documents. It would alleviate all the concerns.

MS. CLARK: Yeah, I just need to understand -- I'd like to make at least a more specific record. Because from where I sit, I think we sit in -- we're of the same mind, that if we can get a protective order, it breaks the law jam. We can go forward with discovery.

We've had deposition dates scheduled saying, Let's just get a protective order. We'll have these depositions. We didn't get agreement on protective order. Depositions didn't proceed.

So we're not resisting discovery for the sake of resisting, Your Honor. We want to have this discovery. We want to let this proceed with respect to post-judgment collection. And that's why we brought the motions before the Court, to try to break the law jam.

So if we can get past that today, Your Honor, then what Cyberlux deserves is an

opportunity to let them get this discovery; and if that doesn't provide them the information that they need with respect to the turnover, et cetera, then we can come back. Their Motion for Turnover then becomes properly supported.

But before today, and very different from the *Klinek* case, Your Honor, we have not been so resistent and obstreperous to this Court that we should be sanctioned, essentially, with a receiver being appointed.

THE COURT: Well, I don't want to conflate two things. A receiver is different from a turnover order. I understand that that prevents -- so I can appoint a receiver; and then we get to custodia legis, right? Everything becomes property of the Court. So you -- you're basically -- that's what I want to get to.

We get that. You don't have to turn anything over right now. They can identify the assets. The receiver can come back, file a Motion for Turnover. You own 20 planes. Turn those over, right? You can identify those specific assets.

But I can appoint a receiver. The Court always has the option to appoint a receiver. The concern is and where the law is -- where there are potential issues is the turnover. And there are

specific statutes that deal with that, and there's specific interpretations of those statutes that talk about the turnover of specific nonexempt assets.

And before the Court orders that those nonexempt assets be turned over, generally there has to be some sort of showing, assuming that it's contested in this case, right? And so I don't mind appointing a receiver. Now, I don't know -- I mean, it will be limited in terms of its powers; but they can get -- they basically take this case from you, the post-judgment case from you; and they'll be handling going forward.

But they're -- you know, they're generally -- they'll set up the depositions. They'll start doing post-judgment discovery, and then they'll be imbued with certain powers. But I won't order the turnover of certain assets at this point, if you want that.

MR. VARGO: What assets would you turn over if they weren't identified and if there's not a -- I'm a little lost. If you could maybe phrase it differently, so I could at least educate -- counsel with client on this.

THE COURT: Well, have you spoken to a receiver?

MR. VARGO: I'm sorry?

THE COURT: Have you spoken with your receiver?

MR. VARGO: Yes. It's Robert Berleth.

THE COURT: What does Berleth want?

MR. VARGO: I have not posed that question. I posed, Are you willing to serve?

Yes.

He was thinking, like most receivers -- I do receivership work, as well. So I'm very familiar with it. You call somebody and says, Do you want a Chapter 31 turnover receivership in Cause No. X?

What's the dollar amount?

It's seven figures.

Absolutely.

That was the conversation.

THE COURT: So I just need to know with that guidance what you want to do. Do you want to get the discovery? Do you want a receiver? You want both? I'm not going to give you a turnover today, if they're willing to provide discovery subject to a protective order.

MR. VARGO: So even practicing in this area, I'm not familiar with what you're referring to about getting a receiver but not a turnover.

THE COURT: Typically, they're hand in

hand; but I can give you everything but the turnover at this point of the nonexempt assets. So I can appoint a receiver to whatever it is that you want to do. Let's see.

So under 31.002, the Court may, one, order the judgment debtor to turn over nonexempt property, right? That's one thing I can order.

MR. VARGO: Uh-huh.

THE COURT: Two, apply the property to the satisfaction of the judgment. That's another thing I can order. Or, three, appoint a receiver to the authority to take possession of nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment, right?

So I can do those three things or, right? So I can do a turnover order, I can apply property satisfying the judgment, or I can appoint a receiver. Usually you appoint a receiver and a turnover order.

MR. GRADY: So a receiver would not be able to levy bank accounts, for example? Or would they, in this order that you're --

THE COURT: I can't order the turnover -- so under -- I don't know. What year is this?

So under --

MR. VARGO: The statute hasn't changed

since 2017, that I'm aware of. So it should be the same one.

THE COURT: Under (h), a court may enter or enforce an order under this section requires a turnover of nonexempt property without identifying in the order the specific properties subject to turnover, right? So I don't have to identify the specific property; but in order to get the turnover order, you generally have to identify the specific property, right?

That's generally how the courts of appeals have addressed it. So you generally have an affidavit that said they have these nonexempt property that are subject to turnover, and so I want an order -- a turnover that says they have to turn it over, right?

And so I guess what I -- I think the benefit -- what I think you can and generally I'm -- you know what, why don't we do it this way. Why don't you talk to your receiver and see what he wants to do and then figure out if he wants to be appointed receiver, but I don't grant a turnover.

MR. VARGO: I think his question at that point is going to be, Well, then what am I doing; and how am I compensated?

MR. GRADY: Can we pay him hourly? Could we pay -- because if they can't seize anything, I was

just thinking about the practical aspect of payment for the receiver. And so if they're only in power to do discovery -- but maybe we can pay them hourly to do that if that -- you know, there's no rule against that. But we need some financial compensation. But I think it does solve the discovery probably totally.

MR. VARGO: Well, we wouldn't be paying anybody by the hour, because the judgment debtors would be paying them.

MR. GRADY: True.

THE COURT: Right.

MS. CLARK: Your Honor, if I may, I just want to talk -- cite to a case that -- I think that the Section 31.002(a), which is the preliminary subsection of this statute that we're all talking about today, it's the preliminary requirement to (b) and (c) and all that come next.

And that requires that there be a showing that there are nonexempt assets that can be levied. And so I think that getting a receiver in this instance puts the cart before the horse. I mean, we can have --

THE COURT: It says "or."

MS. CLARK: Excuse me?

THE COURT: It says "or."

MS. CLARK: In part (b), it does,

Your Honor. But part (a) is just a sentence, full stop with a period. And in *Tanner versus McCarthy*, 274 S.W.3d 311, 323, they talk about the fact that even as to 31.002(h), that just because of the way that the statute is written, it does not eliminate the fundamental preliminary requirement that the conditions of subsection 31.002(a) must first exist.

And that is an opinion out of the Houston First District Court of Appeals in 2008.

MR. VARGO: And the exception to that is Your Honor already stated with the *Klinek* case. And I can give you the citation for purposes of the court reporter is going to be -- hold on. Hold on.

THE COURT: Have you identified any nonexempt property?

MR. VARGO: We are prepared to with our witness, and it's on the docket. So --

THE COURT: I mean, you just have to give me something.

MR. VARGO: Sure.

THE COURT: And the turnover would be limited to whatever that thing is. But you get your receiver.

MR. VARGO: It's --

THE COURT: I mean, it's -- I mean, you

just got to tell me one thing.

MR. VARGO: Right. Just --

THE COURT: I mean, if the order says I get to do more than one thing, you're going to have a problem; but that gets us there.

MR. VARGO: Sure. It's going to be the subsidiary named Catalyst Metalworks [sic], which has an office and a manufacturing facility located at 21631 Rhodes Road, Spring, Texas 77388. This is a 21,450-square-foot facility with a renewable three-year lease with one and a quarter years remaining.

THE COURT: So what are you seeking?

MR. VARGO: We're seeking a turnover of that -- of the subsidiary.

THE COURT: So -- what kind of business entity is it?

MR. VARGO: Well --

MR. GRADY: Manufacturer.

THE COURT: I mean, no, what kind of --

MR. GRADY: Yeah, it's an LLC, I believe, Your Honor. Actually, I don't know that for sure.

Your Honor, this is a -- Plaintiffs' Exhibit 2 is an operating report of Cyberlux, which is a corporation. And as a corporation, it discloses its income in this. This report is dated September 30th,

2024. It is an operating income. So it is getting cash flow. It's getting sales.

And so that is evidence -- some evidence, more than a scintilla, that there is nonexempt property. And so the income alone -- but they also disclose that facility that's manufacturing drones, I presume, in Spring, Texas.

And what page was that?

MR. VARGO: 28 of the PDF.

MR. GRADY: Page 28 or 18?

MR. VARGO: 18 of the document, PDF 28.

MR. GRADY: PDF 28.

MR. VARGO: It's on the Court's docket. It was attached to the original petition to enforce foreign judgment. And it was authenticated there.

MR. GRADY: The report, the quarterly report is not.

MR. VARGO: No, no.

Yeah, plaintiff would like to offer that today, Your Honor. We intend to offer that through our witness.

MS. CLARK: Are you offering it now or --

MR. VARGO: Well, we need to call our witness and -- if we may, Your Honor.

MS. CLARK: We have significant objections

to that as evidence, Your Honor. It's a consolidated statement on its face. The parties who created that are not here, Your Honor. It's not a sworn document. It can't be authenticated. It's not self-authenticating. It's hearsay within hearsay. It's based on multiple reports, again, on its face. It was prepared for a different purpose.

If what we're talking about is admitting that evidence just to show that we have a leased facility in Spring, Texas, Your Honor, at the address described, we can stipulate to that. And I can stipulate to it from my own personal knowledge. I personally prepared the amended lease for Cyberlux and Catalyst related to that space.

THE COURT: And what do you have there?

MS. CLARK: They have -- there's a declaration by our client, Your Honor, that demonstrates that what's in their warehouse -- it's a big warehouse facility. You know, they're noncontiguous; but there's two warehouse units, wherein drones that have been manufactured are stored.

And those drones are property of the United States Government. They have been prepared pursuant to a government contract, and there is an inventory of those items. And, again, Your Honor, we

are willing to have them come on property and look at all these things; but we can't have that done without notification to our landlord, the owner of our building, and the U.S. Government or our contract counterparty.

So we'll stipulate that that is our building in terms of pursuant to a lease and that there are items inside that building, but it's our position that that property cannot be levied. It can't be executed upon. It cannot be taken, because it's not our property. So that is our position; and we've been very clear about that, Your Honor, before today.

MR. VARGO: So given the stipulation, we move to appoint receiver. She just testified and stipulated to the asset. It's the leased premises. A lease is an asset.

MS. CLARK: I don't see how a lease is something that can be -- you know, you can go and levy against it; but for whatever it's worth, I mean, I -- it is what it is, Your Honor. I just -- I don't think that's what we're -- this is not productive in terms of getting to an endpoint to the case, and so -- but yeah, it's -- again, it's --

THE COURT: So -- hold on. We'll go off the record for a second.

(Discussion held off the record)

THE COURT: The Court is back on the record.

So I've been tendered a copy of Plaintiffs' first set of requests for admissions to defendant.

Did they respond to that, the RFAs?

MR. PENNETTI: Sorry, Your Honor?

THE COURT: I'm assuming they responded to the RFAs?

MR. PENNETTI: Judge, we have a Motion for Protection pending. We asked for a hearing on that. Mr. Grady didn't give us availability. Your first availability when I asked for the hearing was actually Monday of this week, and I never got a substantive response on that. And then we engaged on a variety of other motion --

THE COURT: So you haven't responded to the RFAs?

MR. PENNETTI: No.

And, again, Your Honor, as Ms. Clark pointed out, those are not standard post-judgment RFAs anyways. They're outside the scope. The scope of post-judgment discovery is relevant to the collection efforts. And most of those, as you'll see, are not.

MR. VARGO: Admit that Cyberlux has not

been awarded any direct contracts to the U.S. Government, No. 8. So it sounds like an asset to me. Just need one of these to create an asset, and they didn't respond to any of them.

MS. CLARK: Respectfully, that would create the absence of an asset. Yeah, these are not post-judgment.

THE COURT: So is there -- are you asserting that -- obviously, you mentioned that the drones located at the leased premises are property of the United States Government. The nature of these discovery requests seem to suggest that you have -- that there may be other concerns related to the United States Government.

MS. CLARK: There may have been with respect to the underlying litigation, Your Honor. That I'm not privy to. I was not involved in the Virginia litigation, which has restarted. There are four matters pending in Virginia.

Like I say, this discovery is exactly the discovery that's been propounded there. So I don't know what it suggests. I think you can -- I have some guesses when I read it; but I honestly don't know, Your Honor. I --

THE COURT: But some of these aren't

problematic, right? I mean, if you're trying to figure out -- admit that Catalyst Machineworks is a wholly-owned subsidiary of Cyberlux Corp.

MS. CLARK: Right.

THE COURT: That's not a problem.

MS. CLARK: No, it's not. And it's in our -- that's in our disclosure. I mean, there's some of this stuff that they know; and we -- Your Honor, you're right, we should have responded to the things that were not objectionable and --

THE COURT: And to the degree that you're going to object, you should say, you know, it's merits based -- it's --

MS. CLARK: Right. We put our objections within our motions for protection. But, again, we should have -- best practice would definitely have been to do a separate document, Your Honor. But we have been focused on trying to get them the deuces tecum and the depositions, and that's where our areas of focus have been in our conferences. But beyond that, Your Honor, I understand.

THE COURT: And I understand some -- part of it, too, is it may be dual purpose. I mean, some of these can potentially be used in other litigation, but that's not necessarily -- you talk about the Virginia

litigation, and I'm not familiar with it.

But if you have -- if fraudulently transferred assets, right, and they want to know what you own, when you transferred it --

MS. CLARK: Yeah.

THE COURT: Misrepresentations that were made regarding ownership or whatever, yeah, they could -- that's not necessarily -- I mean, collection is a very broad umbrella, because then he could -- potentially a receiver, they could a file fraudulent transfer claim against somebody else that you may have transferred assets to that they would need that they would be entitled to get discovery on those issues in post-judgment discovery because it's about what you owned --

MS. CLARK: Right.

THE COURT: -- and how you may have misrepresented what you owned or how it was transferred or -- so I don't know that that's necessarily a problem. I think -- so on -- let me see.

MS. CLARK: But to the extent that they are for this dual purpose, Your Honor, or with respect to the substantive operations, the day-to-day operations of the business, or anything else, that is why we asked for -- okay. If we're going to go full scope, not

really worry so much about what these questions ask but get them the answers, then that's why the protective order became the thing that was the most important.

And so, again, Your Honor, we've submitted that. We've briefed it. It's before Your Honor, and --

THE COURT: So produce the last five years tax returns, right, that's 2. Produce letters of intent, asset purchase agreements. Produce documents of sale of assets. Produce contracts. I don't know why you would need security clearances.

What's the issue with the security clearances?

MR. VARGO: Judge, I was affiliated with this case a number of hours ago. So I couldn't tell you, but what I can tell you -- what I can tell you definitively, and more important than that, that's obviously a misnomer. I don't believe that that is probative for post-judgment discovery. It's not.

MR. GRADY: Well, I have a -- there's a specific reason behind that one. They're claiming that these drones, the U.S. Government has an interest; but really they're just producing regular drones. They're not, like, special -- you know, there's nothing special about them. That's what I understand through my client. I don't have any personal knowledge of this.

And so we want to say, Okay. You keep hiding behind this, you know, cloak of, like, Oh, this is all secretive and the government is involved, but we don't believe that to be the case at all. And so that's what the discovery request -- as I understand it, that's why it's there, to debunk what they're claiming to protect themselves in post-judgment.

MR. VARGO: Where you were going earlier, I mean, this pretty much -- it opens and it shuts fairly quickly with RFA No. 7, Catalyst Machineworks is a wholly-owned subsidiary of Cyberlux Corporation. That's what we need the receiver over. Let's get to selling it.

What we haven't heard at this hearing today, and what I think Your Honor wants to hear is, There's a judgment. How are you going to pay it? And why shouldn't I appoint a receiver today? There are no overtures that says, Here's the amount of money we're willing to pay today. We don't need a receiver because we have a plan to start paying you, and here's what we're going to do.

We're not hearing that. What we're really hearing is, Hold on. Let's mediate and talk about it later. And besides talking about it later, let's actually start to fight and re-litigate some sort of

Virginia matter with all of the other stuff that has nothing to do with financials.

As I stated earlier when I used the hypothetical number of 50 requests and I said 22 of them were -- let's just call it, don't need to be responded to, they still could have responded to the 28. They are not telling us where their assets are.

We have an asset right here that's ready to be sold. We're not hearing, It's for sale. Okay? We're not hearing, Why don't we jointly go sell this together. You get your judgment payoff and pay us the balance.

We're not hearing any of that. That's what we should be hearing.

MS. CLARK: Well, Your Honor, as I've said, we have paid this judgment down, from our perspective, exactly in accordance with the settlement agreement. The parties had litigation. They settled the litigation. Part of the settlement said, Here's the total we agree to settle, and we will pay it out over time.

And we have done that. They don't agree. They didn't like the timing on the payments. And so they have commenced post-judgment discovery, collection efforts. They've garnished bank accounts, half a

million dollars worth. Maybe they've applied it to the judgment. We can't tell because they keep saying, Judgment is for a million, it's for 1.2, it's for 1.4.

They keep changing how much is owed to them; but we have been making payments, Your Honor.

THE COURT: How much do they owe you?

MR. GRADY: Your Honor, my client witness can testify to this and also about how they've been evasive in their payments and how they've sold their receivables to a factory company, when they didn't tell us, in violation of the agreement we had.

Mr. Will Welter, he's the managing director of Atlantic Wave, the plaintiff. He's on the Zoom call; and he can testify directly to this, Your Honor, if we can present him.

MR. VARGO: Off the cuff, I think I remember reading it was 1.5, if I'm not confusing with another case.

MR. GRADY: Yeah, I think that is accurate.

THE COURT: 1.5 million?

MS. CLARK: There's a letter, Your Honor, from counsel to Atlantic Wave in plaintiffs' filings before Your Honor today. It was in their response, I think they called it, at -- well, we don't have docket

numbers in state court; but it was the last thing that they filed before their witness and exhibit lists.

And it's a letter from counsel, J. Chapman Petersen, Esquire. And in that, he talks about the actual amounts owed under the judgment as of October 31st, 2024. For some reason they bifurcate the amounts as between Atlantic Wave Holdings at $453,859.17 and Strikepoint at $394,504.20.

And then there's a line item for, quote, legal fees for $371,307.60, even though the judgment that they're seeking to enforce specifically lists out attorney's fees; and they're $177,126.19. And that amount, Your Honor, was paid within a month of the entry of that judgment.

So they claim in total, in their filings before Your Honor, that $1,219,671.97 is due under the judgment. That's what the letter says. And then in their motion, with respect to turnover, they say that the respondents owe a balance in the amount of $1,430,551.30.

So what is owed under the judgment? That is a question. It is changing what they say that they're owed, why they say they're owed it. And from our perspective, Your Honor, it is roughly $800,000. I'd have to open my computer and get to that exact

amount, but it is nowhere near $1.5 million.

THE COURT: So what do you think you owe?

MS. CLARK: Let me see, I have it here.

Mr. Welter.

MR. WELTER: Yes, Judge. Good morning, Judge.

THE COURT: Yeah, is --

MR. WELTER: Oh, are you asking me, Judge?

THE COURT: Are you affiliated -- is he affiliated with somebody?

MR. GRADY: He's the managing director --

MR. WELTER: Yes, Judge.

MR. GRADY: -- yes, of the plaintiffs' entity -- plaintiff entities.

THE COURT: Okay.

MR. WELTER: Can you hear me, Judge?

THE COURT: Yes.

MR. WELTER: Okay. So, first of all, when she talks about the -- when counsel talks about the attorney's fees, that was for the initial litigation, Judge. The $300,000 plus is we are -- under the settlement agreement, we are entitled to collect attorney's fees in collecting the settlement agreement.

I also need to correct counsel. They are not current on their payments. The reason Mr. Petersen

wrote that letter is they wired partial payments in November and December; and in the description they put, Settlement of all litigation, to try to sneak it through and try to say that they are up to date.

But to answer your question, Judge, our figures, which have been calculated in California litigation, Virginia litigation, and Texas litigation is approximately $1.4 million.

THE COURT: And when you say the payments they made in November and December, I'm assuming you didn't accept those payments?

MR. WELTER: They were wired, and we wired them straight into the trust account of the San Diego counsel. And we also sent a letter immediately saying, These payments are not being accepted.

And keep in mind, Judge, they hadn't made payments on one account that they owe us since October of 2023. They haven't made payments on the other one since May of 2024. And our attorney fees are just outrageous because every time we try to -- yesterday, for instance, we spoke to them; and they said that they wanted to try to negotiate a settlement.

And when we tried to call them back and get details on what they wanted to do, before we knew it they had filed a notice with the court saying that we

agreed to sit down and negotiate and we wanted to call this hearing off.

And we've literally been chasing them now since around November of 2023.

THE COURT: On the --

MR. WELTER: On the judgment, collecting the judgment.

THE COURT: On those accounts that you're talking about, are those subsumed in that 1.4?

MR. WELTER: Yes, correct, Judge. All in, all fees, all outstanding is 1.4.

THE COURT: On the -- the -- so the attorney's fees that were actually granted by the court, that's what counsel was alluding to; but what you're referring to is additional attorney's fees occurred in post-judgment and collection efforts.

MR. WELTER: Correct, Judge. The attorney's fees that the Virginia court put in the judgment, those were for attorney's fees for the initial litigation to get the judgment.

THE COURT: Has anybody reduced those attorney's fees and --

MR. WELTER: They did make a payment --

THE COURT: I'm sorry. I'm sorry. Reduce those attorney's fees into the form of a judgment or an

order or anything like that?

MR. WELTER: It was. It was reduced to the judgment in the Virginia court. The judge did put the attorney's fees -- they liquidated them and put them in the judgment.

THE COURT: You understand what I'm saying, right?

MR. GRADY: Yes. Yes, Your Honor. Yeah.

THE COURT: So are -- you're claiming -- it sounds -- and I asked him to explain it. I don't want him to go too long, because I don't know -- you probably would want to control what he says.

But in terms of -- so it sounds like this 300,000-dollar figure is attorney's fees that he's expended in the course of filing different lawsuits to try to collect on this; is that right?

MR. GRADY: Yes. I think there's another order. It's not been -- it's not part of this domestication. I mean, we just have this judgment, obviously, for this proceeding. But he's got another order, as I understand it. I'm not a hundred percent on that; but that there is an order that supports the award of these additional attorney's fees that he's referring to, Your Honor.

THE COURT: And the judgment in this case

was for how much?

MR. GRADY: 1.572 -- $1,572,500.

THE COURT: And is it still -- has it been reduced in any way? I mean, have they made any payments on it?

MR. GRADY: I'd have to defer on my client on that one.

THE COURT: It sounds like they made payments in California.

This is domesticated. Which -- is it out of Virginia?

MR. GRADY: Right. Originally entered in Virginia and domesticated in California and Texas.

THE COURT: So it's domesticated in two different courts. And so you're trying to collect in California and trying to collect in Texas. It sounds like they made some payments in the Virginia litigation? You mentioned they paid attorney's fees.

Has that already been accredited?

MR. WELTER: Yes, Judge. The judgment was for $1.5 million in principal. And then on top of that, the Judge ordered $178,000, I believe, in attorney's fees. And on top of that, she ordered them to pay the three times that they were sanctioned by her for not producing any documents, not one document in the initial

litigation.

And since that time, Judge, the same judge in Virginia, which they claim is -- has entered a stay, the same judge has entered an additional order, a fourth order, Judge, for another 9,000-dollar sanction for improper -- and we can provide that judgment to you, as well, Judge.

THE COURT: Okay. So it's -- 1.572500 was the amount of compensatory damages. There's 170 -- in addition, there was another 177,000 in attorney's fees. Plus sanctions, I guess, for about 4,000, roughly, and another 7,000, roughly, and then you have interest.

And so out of all of that, we're down to 1.4. Is that where we're at, it looks like? Not include --

MR. WELTER: That's correct, Judge.

THE COURT: Not including what they wired to you in California. It sounds like you didn't accept that.

MR. WELTER: No. We gave them credit for that. We gave them credit. We wrote a letter saying, We're not -- it cannot be used as a settlement, but we're going to give you credit to the outstanding balance.

THE COURT: Okay. So the 1.4 --

MR. WELTER: We gave them credit.

THE COURT: So the 1.4 includes even those payments made in November and December?

NMR. WELTER: Yes, Judge.

THE COURT: How much were those payments?

MR. WELTER: They made one payment for approximately -- their payments were -- on one account, their payment was roughly $21,000 a month. On the other account, it was roughly $18,000 a month. So they made a payment in November, on November 27th, for $11,000. And then they made -- on December 1st, they made a payment of $18,000.

But they completely ignore the other account, which was due 20 -- roughly $22,000. And that has not been paid since -- they haven't paid on that account since October of '23.

THE COURT: Okay. I just want to get through the -- I think we're good, Mr. Welter. I was just trying to get a background. I want to get through the discovery real quick.

They -- do you have a copy of the protective order?

MR. WELTER: Judge, can I say one thing about the protective order?

THE COURT: Yes.

MR. WELTER: So on the protective order -- and sorry if I'm -- I'm an attorney, as well, Judge, and just running the business as managing director.

But on the protective order, we couldn't disagree on it. So we went above and beyond. We said that instead of saying -- requiring one party to say this is confidential, you know, and the other party disagrees, we said that we would, under Rule 11 of the Texas -- we would agree that we would hold the entire deposition, everything in the whole deposition, confidential for 30 days, which would give them a chance to come to your court, Judge, and ask them -- ask you to make decisions on this, whatever issues they had, and then any objections that they -- and we also offered them, Judge, that if they weren't able to get a hearing before the Court within 30 days, we would extend it as long as they could get a hearing.

And it just made it so simple, because they're tangling the three separate state litigations together. And if we enter a protective order in this case, it's going to wind up -- we're not going to be able to admit it in another case, the documents.

So the easiest way was we gave them more than they were asking. And we said the entire deposition, everything in the deposition, will be held

confidential. And we will -- it will be held confidential for 30 days or longer until they can go to the Court and ask for and receive the appropriate remedies.

Does that make sense, Judge?

THE COURT: I think so.

Do you have a copy of theirs?

MR. GRADY: Yes, Your Honor, right here.

THE COURT: I know we talked about AEO. Is there a specific issue you have with it?

MR. GRADY: Just -- I think it's just the AEO.

THE COURT: So the added --

MR. GRADY: I think that it's designed -- so there's some -- it's kind of a little bit technical, but it's from the federal court. So it references, you know, ECF and filings done under seal. We probably should -- but other than that, it's fine, Your Honor.

THE COURT: Hold on.

MR. GRADY: It's in Section 9. It contemplates using PACER, basically, or the federal filing system.

THE COURT: The -- I'm going to -- I don't have my own form, but I will use the 125th's. I'm going to print it out. I'll let you guys take a look at it

and then see if you have any changes. It has confidential and AEO.

I understand there may be some disagreement on those designations, but we can probably hammer that out if we need to. I just want to get documents flowing to you as soon as possible.

(Brief pause)

THE COURT: I'm going to give you, like, a few minutes to take a look at this. We'll go off the record.

(Discussion held off the record)

(Recess taken)

THE COURT: Anything for the protective order?

MR. GRADY: Yes. Yes, Your Honor.

So --

THE COURT: We're back on the record.

MR. GRADY: Your Honor, the language looks fine. We discussed with our client -- they've had protective orders with attorney's eyes only in the California and, I believe, the Virginia litigation.

And the production has shown, you know, records from overseas companies that are specific to their industry; and their lawyers have -- because of their lack of familiarity with the industry, they're

unable to evaluate it and -- as they've come to determine that it's a total sham.

And so they look at it. Yes, they're able to see it. Of course, they see P&Ls and all these reports; but they're not able to understand that these entities are not real. So in order to make that determination, our client requests that they can see that so that they can evaluate are these --

THE COURT: When you say they're not real, what do you mean?

MR. GRADY: I mean the companies are not real, I guess, or the -- or it's a sham. Maybe they're formed; but they're not actually, you know -- you know, what the financials are saying is not real. I don't know anything more than that, but -- but, yeah, I wouldn't be able -- you know, if you gave me some financials from an LLC in, you know, whatever, Columbia, I'm not going to know anything about if it's real or not. I mean --

THE COURT: Right. But a lot of that you could run down -- okay. A lot of that you could run down in a deposition. But on the AEO documents that you received in the California litigation, did you get those designations removed; or did you --

MR. GRADY: You know, I'd have to defer to

Mr. Welter. I don't know. I don't have any knowledge about it.

THE COURT: Okay. Besides the practical issue, is there any other issue on them?

MR. GRADY: No -- no, Your Honor.

MR. PENNETTI: We're fine with it, Judge.

THE COURT: Okay. I'm going to go ahead and enter the joint confidentiality order. If for some reason you need to change the designation, we'll have a meeting on it. It will be a test, right? I mean, I -- it's like everything else. We'll see what they designate AEO. If they're designating everything AEO, it's a problem, right? So let's just see what happens. But you're going to get the documents.

Counselor?

MR. VARGO: Because I came out of a Judge McFarland AEO nightmare case that was a saga of seven years, particularly because this is a post-judgment scenario, I would advocate for a reversal on the burden relating to the attorney's eyes only.

Specifically, I'd submit to the Court that I believe that the withholding party needs to file a motion to designate as attorney's eyes only, file it under seal with the Court, and set a hearing.

It puts the onus on them to be drafting

motions because they're the ones withholding the documents pursuant to whatever it is that they're saying is so confidential and proprietary and that we shouldn't have, as opposed to us continuing to expend resources on these items.

THE COURT: Response.

MS. CLARK: Your Honor, I just -- we had time out there. Nothing was proposed to us. I think I understand what he's saying, but I would love to see what it really looks like on paper. I mean, if the bottom line is, is that you want us to come to court but we can mark them and they're going to remain AEO for a time, I don't have a problem with that, Your Honor.

I don't think there's any issue with that. I think we would have the burden to show they're AEO at the end of the day no matter what.

THE COURT: So I -- look, it's post-judgment. I don't think I've had an AEO post-judgment discovery --

MR. VARGO: Exactly.

THE COURT: -- issue, ever. So my assumption is you're going to have very few AEO documents, unless they involve something that is a trade secret, a privilege of some sort, some sort of national security issue.

But, like, financial stuff, I can see maybe confidential or something; but AEO, I think, is going to be -- so if you're marking everything AEO and they show up and say, Hey, they marked, you know, all these documents, you know, AEO and there's nothing -- it's just, like, your financial statements, yeah, it's -- that's going to be -- that's going to be a problem. So --

MS. CLARK: Understood, Your Honor.

MR. VARGO: Like a sanctionable problem?

THE COURT: I'm hesitant -- I'm sorry?

MR. VARGO: Like a sanctionable problem?

THE COURT: Potentially. I mean, if we're going to spend hours and hours trying to untangle a mess, the default should be there needs to be a good reason why these are marked AEO, because that's going to be a rare occurrence.

Again, you know, we're talking about the government and maybe there's government contracts and maybe there's provisions in there regarding how you make these drones or something, I don't know, but I don't think you care.

Like, a lot of this stuff is -- you're not going to come up and say, There's -- I want to know how to make these drones. Why didn't they tell us, right?

I want these unmarked as AEO, right? I assume that's not going to be what you're going to show up and say, They need to take the AEO designation on that part of this document that they gave me, right?

You're going to be focused on assets. You're going to be focused on transfers. You're going to be focused on corporate governments. You're going to be focused on their stuff, where it's at; leases; agreements; you know, purchases; sales; things of that nature; bank accounts.

That's where you're going to have an issue, and so -- and you're going to want to be able to show anybody who's going to do any forensic analysis. I don't know who you're going to have to follow up on -- who's going to try to figure out what's going on with this company and what they're doing here.

It's not a -- I mean, it's 1.4 million. I know that's a lot, but it's not a lot a lot. Like, I mean, I don't know -- I have cases where people own a 5-million-dollar piece of property, right? You're -- we just need to kind of see what they have.

MR. VARGO: Can I make another suggestion?

THE COURT: Yes.

MR. VARGO: There's a reluctance to -- I forgot if they called it a tax or a surplus or an

inefficiency. Basically, the receiver's fee that's going to go on top that's going to make this too much or whatever, right? The whole purpose of discovery is to identify the assets that we're going to use -- get, use, sell to discharge the judgment.

We have an asset right here that's unequivocally and undeniable through the admissions that are in the record, an asset of the defendant. We would move for a turnover of that subsidiary asset today.

THE COURT: We can get there; but I just want to deal with this, unless you don't want discovery.

MR. VARGO: Well, I would like discovery, too; but there's an asset right there that we can sell soon, like --

MS. CLARK: Well, there's no evidence of its marketability; but, I mean, I think we should get through this discovery point. That's what we've been trying to do, Your Honor.

MR. VARGO: Well, marketability is a different issue. It has value, and we would like to recognize the value to discharge our judgment.

THE COURT: Understood.

I don't want to get sidetracked. I'm just -- we're talking about stuff -- to the degree that it's post-judgment and you need -- you're going to get

compensated with attorney's fees, I'll award attorney's fees to the degree that they -- it's post-judgment. They should be complying. They should be giving you stuff.

To the degree that you have to spend time, write motions, do that thing, I'm going to award attorney's fees, right? So you're going to get that back to the degree you can get any of that back.

But we're spending a lot of time talking about hypotheticals. Let's see what they do, and then we talk about what happens. So I'll go ahead and enter that order, and then we can move on discovery and then we can move on to this other stuff.

So the Court -- what are the -- so what's the outstanding discovery? So you have your first request, and then you have -- you want to do an inspection, and then you wanted to do depos.

MR. GRADY: Yes, Your Honor.

THE COURT: What did you want to deal with first?

MR. GRADY: Depositions.

THE COURT: So who are you looking to do depos of?

MR. GRADY: Three witnesses; Neill Whiteley, Phil Tucker, and Mark Schmidt. Mark Schmidt

is a party defendant, judgment debtor.

THE COURT: Mark Schmidt.

What's the concern about Mark Schmidt?

MS. CLARK: Your Honor, we -- there's not a concern. We've tried to come up with dates. Mr. Schmidt does travel internationally as part of his business, given the conflicts overseas right now and the nature of this business.

So we have asked that his deposition be scheduled virtually, which I think is what is in their Motion to Compel Depositions, Your Honor, is that all depositions would be virtual. That's a change. They want to have it in person. So that's been difficult to arrange, Your Honor; but there's no issue with Mr. Schmidt, now that we've got the protective order in place, Your Honor.

THE COURT: What's his schedule?

MS. CLARK: I'm sorry. Say that again, Your Honor.

THE COURT: What's his schedule?

MS. CLARK: What is his schedule? I don't know; and he is overseas right now, Your Honor. So I think he's -- it's the middle of the night, but I can try to contact someone at the offices and get some dates. Everything that we've proposed, I believe, were

outside the range of the dates we had proposed in January.

THE COURT: So I understand he's overseas; but, like, generally, when does he come back? Where does he live? What's the --

MS. CLARK: Your Honor, I don't know where he lives. I believe that he is on the East Coast. The company is in North Carolina. I believe he lives in or around that area, but I don't know that. That's a complete -- I'm just guessing. I don't speak with Mr. Schmidt. That's not my client contact.

THE COURT: Who's your client contact?

MS. CLARK: I speak with their outside in-house counsel, Mr. Charles Watts. And so I have access to Mr. Watts. I don't know how much access he has to his schedule immediately, but he could tell me the answers to the questions you're asking.

THE COURT: When would you like his deposition?

MR. GRADY: In the next 30 days, Your Honor. And we would like it in person, as well.

MS. CLARK: I just think that's going to be difficult, but -- I mean, and I don't understand the necessity, especially given what we've lived through through COVID. A deposition is a deposition, but --

THE COURT: Is there a reason why you want it in person?

MR. VARGO: My personal experience is that I watch coaching go on and witness manipulation through Zoom depositions.

MS. CLARK: Your Honor, I'm sorry. I have to object because he has maligned not only at my client this entire hearing on baseless accusations, but me personally. I'm an officer of the court. I practice in state court. I practice in federal court. That's not the kind of lawyer that I am.

So I object to the way that he's characterizing me as a lawyer and our client here today. We're going to conduct ourselves pursuant to the rules in any deposition that is scheduled.

MR. VARGO: I'm not sure what she heard, and I wasn't referring to her. I said my prior experience in another case led me to a desire to have in-person depositions. I've never met these people in my life. I've frankly never even heard their names before today, and I have no reason to believe that they have any issues going on ethically. So I'm not casting any aspersions or direction.

THE COURT: Besides the coaching, do you have any other issues? And I get it, right. You don't

know who's in the room. There's all these other issues. The -- this is kind of -- it's not a liability, right? So we're just trying to get information, what you own, that kind of stuff.

And so, it's not necessarily about trying to get the words right. I mean, it's about -- and that's going to be used at trial in front of a jury to convince them that this person violated a legal duty, right? So those concerns are probably not as important.

MR. VARGO: I understand. You asked why, and I was answering the question.

THE COURT: I get it. And I'm not naive. But here, outside that general concern, is there any other need?

MR. GRADY: No, Your Honor. That's the main concern.

THE COURT: Okay. Assuming this person is not local, they're -- they don't live here. If you want -- it sounds like it may be a little bit of a burden for them to appear. I assume you want them to appear here in person; is that right?

MR. GRADY: Yes, Houston, Your Honor.

THE COURT: You're pretty sure he can appear via Zoom within the next 30 days?

MS. CLARK: Yes, Your Honor. I can't

imagine why we couldn't find a time and a date in 30 days that we can present him. We've been able to do that each time we've gone out looking for dates.

THE COURT: Okay. And let me table whether it's in person or not for a moment.

Who are the other two folks?

MR. GRADY: Neill Whiteley and Phillip Tucker.

THE COURT: Whiteley. And what's his relationship to the case?

MR. GRADY: So there's been some confusion or -- you know, we asked opposing counsel, you know, their capacities and were told different things at different times. I've got notes.

THE COURT: I'm sorry. Whiteley's relationship, again, is what?

MR. GRADY: Well, we believe that they're executives of Cyberlux and that they're represented by same counsel over here.

THE COURT: Is that true?

MS. CLARK: No, Your Honor. And Mr. Pennetti knows the details.

MR. PENNETTI: It's been our understanding they've been consultants. I've conveyed that consistently ever since this started. Both of them were

represented by us until -- I think it was January 6th, which was a -- I'm sorry, January -- let me look at my calendar, Judge. I don't want to get this wrong.

THE COURT: Early this year?

MR. PENNETTI: It was Jan 5 is when they retained independent counsel, and I found out about that. So they have their own counsel now, but we represented them up until then.

THE COURT: Okay. And then on -- these are pending, right? These motions are pending?

MR. PENNETTI: Correct.

THE COURT: What's the concern -- understanding that they're not here, or it doesn't look like they're here --

MS. CLARK: Here today or you mean in the area? They are actually local.

MR. PENNETTI: I think they might be local to Houston.

MS. CLARK: Yeah, they are.

THE COURT: Okay. What's the concern about their appearance?

MR. PENNETTI: In person?

THE COURT: No, for depo.

MR. PENNETTI: Oh, I don't think there is one. It was just the protective order issues.

THE COURT: Okay. So you're fine with both of them?

MR. PENNETTI: Yeah.

THE COURT: Okay. So 30 days, they can appear in person?

MR. PENNETTI: I don't see why not.

THE COURT: Okay. So we'll order all three in 30 days. The two local folks, they'll be in person; and Mr. Schmidt via video deposition. If it turns out it's a problem, he's not cooperative, then you can come back and say, I want an in-person depo. So that will be the -- that will be the potential sanction.

What's next?

MR. GRADY: Written discovery. We've got requests for production, request for admissions. I believe we have interrogatories, too.

MR. PENNETTI: That's right.

THE COURT: So I have RFAs 1 through 31. Any of these you find highly problematic that you can't answer yes or no?

MR. PENNETTI: Based on my recollection, no. But let me -- I don't remember any that are highly problematic. The ones that I point out, No. 9 references a government contract. And while I think my clients did reference that contract online, I'm not sure

to the extent that there's any confidentiality regarding cancellation of the contract. So, I mean, that's the only piece that I point out.

THE COURT: Right. I mean, I don't think they're going to spend a lot of time on this. It's just a question of --

MR. PENNETTI: No.

THE COURT: They're just trying to see if you can admit certain facts. You can only use "yes" answers, typically.

MR. PENNETTI: Yeah.

THE COURT: So you can't really use --

MR. PENNETTI: I think we're okay, Judge.

THE COURT: Okay. So we're good on the RFAs.

On the request for production, you have 18; is that right? Or am I missing a page?

MR. PENNETTI: 18.

THE COURT: Any of these that are a problem?

MR. PENNETTI: The tax returns, Judge. And then --

THE COURT: Why are the tax returns a problem?

MR. PENNETTI: Confidentiality. I mean, I

agree with you they're entitled to the financial statements and other documents that show assets, but tax returns would be confidential.

MR. VARGO: There's nothing confidential about tax returns in a post-judgment instance. He's talking about pre-judgment.

THE COURT: Yeah, they're entitled to your tax returns, assuming they're a defendant.

MR. VARGO: Correct.

MS. CLARK: I mean, we have objections that are made to these pending before Your Honor. And I don't know if you're wanting us to go through those objections, if they're per the rules or --

THE COURT: You didn't file any objections to these, right? You didn't respond with objections?

MS. CLARK: Yes -- we did respond with objections, Your Honor, in our pleadings, yes. And very specifically, especially with respect to requests for production and the interrogatories. Because we understood that those were their most important asks. So, yes, we have responded to these with our objections.

THE COURT: There are no objections to these specific requests that you served on the other side; is that right?

MR. PENNETTI: That's right.

THE COURT: Okay. I understand you filed a Motion for Protection saying, Hey, we don't want to produce documents; and we object to some of this stuff. But you didn't file -- that doesn't count.

MS. CLARK: Well, okay, but we did not serve it --

THE COURT: The only thing that counts is --

MS. CLARK: We did not serve it on them in that format, Your Honor; but they got served with our response that had a detailed objection to these requests per the rules.

THE COURT: The only thing that counts is responses to requests for production and the objections that you make therein.

MS. CLARK: Okay.

THE COURT: If you didn't do that, then you didn't object. It's not any motions you file with me. It's the actual objections you made to their discovery requests.

MR. PENNETTI: Judge, I understand. The only note I'd make is under 192.6, it expressly says a Motion for Protection, we're not waiving objections. That's expressly in the rule.

MR. VARGO: But there are no objections.

MR. PENNETTI: Again, by filing a Motion for Protection, you don't waive your objections. That's what I'm saying is in the rule.

MR. VARGO: Right. And the rule would contemplate a circumstance where you file a Motion for Protection to object to these other objections, too. We didn't see any of those objections.

THE COURT: Where in 192.6?

MR. PENNETTI: I'm pulling it up, Judge. Sorry for the delay.

192.9(a). It's the fifth line, end of the sentence.

THE COURT: I understand it says you don't waive it, but it doesn't say that you've asserted it. So filing a motion doesn't waive anything, but it sure as heck doesn't assert anything either, right?

MR. PENNETTI: Well, I agree with that.

THE COURT: I mean, at least on the face of -- based on that statement.

MR. PENNETTI: Based on that statement; but based on that statement, it doesn't require us to assert anything because of the motion pending, so long as we have basis -- bases.

MR. VARGO: I think 197, 198 require you to assert the objection, whatever the Texas rule

relating to RFPs is.

196.3, subject to any objections stated in the response. There's none stated in the response.

196.3(a), time for production on RFPs.

THE COURT: Understood. And the rules kind of work together, and I could -- for example, RFAs, the effect of not filing a response means you've admitted them being admitted. I'm fine with the late response on the RFAs.

Generally, it's required that you file a response. So the protection and the motion doesn't -- you can't assert you -- I mean, you can; but it's supplement to whatever you've asserted in your response to the actual discovery requests. It's not in lieu of, generally.

Now, there may be specific instances and certain circumstances where you may be okay, like time, manner, place, that kind of thing. Maybe you get to do that. But, generally, if you have a substantive objection to the actual motion -- to their discovery response, you need to put it in the discovery response.

You can't just not file anything and then file a motion or serve a response and say, I made a motion. I didn't want to produce documents because I'm objecting to this stuff. That's not going to be

sufficient.

And so that being said, is there something here that you have an issue with that you would like the court to address?

MR. PENNETTI: Not at this time.

THE COURT: Okay. So you're fine with producing documents responsive?

MR. PENNETTI: Yes.

THE COURT: Okay. So it looks like we're good with 18.

Do we have anything else?

MR. GRADY: The site inspection.

THE COURT: Where are we on the site inspection?

MR. PENNETTI: The only thing I'd say is what's important with that is we'd have to have some sort of protocol. It can be very basic, a record of who's there, whether there's going to be photographs, videos taken, a provision for exchange of those, and then the fact that the inspection and anything collected -- data collected there is subject to the protective order, and that's all we ask.

And, again, I think we're generally fine with that, so long as the real property owner and the owner of the property and if we give them notice, I

think that's fine.

THE COURT: So why does the landlord need to know?

MR. PENNETTI: So I would say as a practical perspective liability, I think the landowner would want to know of third parties who aren't tenants on the property; but that's just --

THE COURT: I mean, don't -- you're saying that when somebody visits, you let the landlord know?

MR. PENNETTI: Well, I would characterize it differently from a visit, Judge, but point taken.

THE COURT: The only reason I -- I'm fine with you -- if you give the landlord notice. What I'm concerned with is if the landlord says no, right? And then we're going to come back and say, Well, the landlord said he didn't want them on the property.

Well, I don't know why that would be an issue. I would need to know why -- I guess you can tell whoever you want that these folks are going to come subject to a -- or pay a visit subject to an order, if you want. But just like any invitee, it seems out of the ordinary to say, Hey, we got to get the landlord's permission for someone who's going to -- to visit our property.

Definitely the tenant because they're the

owner -- excuse me, they're the occupier and they have a leasehold interest and a possessory interest on the property. And so I've had at the reverse, where someone has a suit against the landlord; and I'm, like, We need to let the tenant know. We need to see if they have an objection before we go in their apartment or the warehouse. Because that's their stuff.

But I don't really see -- I don't really see that as a --

MR. PENNETTI: Well, again, we're not opposed to the inspection. We'd just -- we'd like a reasonable protocol. That's all.

MR. VARGO: Can we specifically enumerate what the protocol is again?

MR. GRADY: Well, so in our order we do provide some provisions that -- photographs and videos, limit it to three hours. We would ask to get it done very soon in case, you know, they could theoretically move, you know, property out in advance of the inspection.

And so we feel -- and we do feel that's a potential real risk. My client is concerned about that, certainly. And so we'd like to get it done immediately, like tomorrow. I mean, we're just going to walk around and take photos; and there's no -- you know, no risky

business here. I mean, it's just --

THE COURT: Right. And this is not someone's house, right?

MR. PENNETTI: Right.

THE COURT: Where they live.

MR. GRADY: Right. Yeah.

THE COURT: This is --

MR. GRADY: There's no invasion of their dirty laundry or whatever, yeah. So we just -- you know, we just want to make sure and see what's in there and that's it and get out.

MR. PENNETTI: I think that's generally okay. We just want it to be subject of the protective order in terms of what pictures and photos are taken for purposes of whatever property in there might be subject to a -- is subject to a government subcontract. That's really it.

The only thing I'd ask in timing, Judge, I'm probably going to be asked to go in person. I live up in the DFW area. And next Sunday, I leave for New York for expert depositions. I return Thursday morning. So I'd ask that we not schedule it during that time frame, but otherwise --

MR. GRADY: Well, Your Honor, he -- I mean, you don't need counsel there. And that gives them

time to move the stuff, which is exactly our concern -- reason for having it done quickly.

MR. PENNETTI: I don't really think this is a --

THE COURT: Where's the warehouse?

MR. GRADY: In Spring, Texas.

THE COURT: And it's a warehouse, right?

MR. PENNETTI: That's right.

THE COURT: Can you describe it for me, please?

MR. PENNETTI: It's a --

MS. CLARK: It's two units at an industrial complex in the Spring, Texas area that -- I can't remember the square footage, but they're relatively large. I bet it would take a little while to walk it, if that helps Your Honor. It's, like, Unit A and D; and they're not contiguous. That's what I know. I have not visited the site, but I've seen pictures.

THE COURT: Is it -- are people officed there, or is it just a storage warehouse?

MR. PENNETTI: Predominantly storage.

MS. CLARK: I think -- yeah, I think at one time it had manufacturing capability; but at this point my understanding is that it's primary storage of the produced product.

THE COURT: So that's where they store things. No business goes on there?

MS. CLARK: Yeah, they store the product that is subject to the contract, right. That's my understanding. I've never been there. I don't know, but that's my understanding.

THE COURT: So there's no one officing there?

MS. CLARK: No, I think there is someone who offices there, Your Honor.

MR. PENNETTI: I don't know.

MS. CLARK: I do.

THE COURT: So there may be someone who offices there?

MS. CLARK: Right. Right. I think they have a little -- for example, I don't know where Mr. Tucker and Mr. Whiteley office; but my understanding is that if someone were to office there, it would be those two gentlemen. So I don't know if they have a hybrid situation. I just don't know those details, Your Honor.

THE COURT: And you said it's two units?

MS. CLARK: Yes, Your Honor.

THE COURT: A and D?

MR. PENNETTI: Two separate buildings.

THE COURT: Okay.

MS. CLARK: I believe it's A and D. I didn't negotiate the lease. So -- but yeah, whatever they are; but there's two.

THE COURT: Okay. So them visiting wouldn't really be a disruption.

MS. CLARK: I don't think it's a disruption to the operations, as we know them, Your Honor, at all. I think the concern is it's a government issue. We want to make sure we're not breaching anything as it relates to the government. We don't want to get sideways, but -- so that's our issue with notice.

THE COURT: So they want to go tomorrow.

MS. CLARK: I've lost track of what day we are.

THE COURT: Thursday.

MR. PENNETTI: Your Honor, if the client approves, I can --

THE COURT: Can you call your client?

MR. PENNETTI: Sure.

THE COURT: If it's just a storage area --

MR. PENNETTI: No, I understand.

THE COURT: You want to take a five-minute break to call?

MR. PENNETTI: If you don't mind, Judge.

THE COURT: Yeah. Let's see if we can get it done tomorrow.

You're available tomorrow?

MR. GRADY: Yes, Your Honor.

MR. VARGO: Somebody is going to be there.

MR. GRADY: Yeah, somebody, for sure. Yeah.

THE COURT: I mean, that's what you asked for.

MR. GRADY: Right. No, we will make sure that -- yeah, no problem. Yeah, absolutely.

THE COURT: Counsel, I apologize. If for some reason he's not available, kind of figure out why and then what the availability is after. And then I don't know what that is. I'm assuming it's sometime next week. I understand that you may have some issues.

You said when? This Sunday you're leaving?

VENIREPERSON: I leave Sunday, and I return Thursday morning.

THE COURT: Do you have -- I assume you have co-counsel or --

MS. CLARK: We could find someone who might be able to come, Your Honor. We don't have a huge

office in Dallas, but we have a few other people who we could ask who are familiar a little bit with this case.

THE COURT: Okay.

MR. PENNETTI: I'll make the call, Judge.

THE COURT: Okay. We'll take a short break.

(Recess taken)

MR. PENNETTI: Judge, I texted, e-mailed, and called him twice. He hasn't responded yet.

THE COURT: Counselor, did you want to say anything?

MR. VARGO: I sit all day. It's a habit to want to stand up.

THE COURT: Do you see any issue with -- if I do it within the next three business days; is that fine?

MR. GRADY: That's fine, Your Honor.

THE COURT: Like, Friday or early next week sometime?

MR. PENNETTI: I think we can work that out.

THE COURT: Okay.

MR. GRADY: Your Honor, there's one thing that I -- it's my fault. There's two additional witnesses. We didn't notice them yet. We were

discussing dates with the other side. They're important witnesses; Charles Watts, Chuck Watts, and Jimmy Robinson, too. So we -- and that's it. That's all the depositions. I forgot to mention those. My apologies.

THE COURT: That's fine. But you haven't noticed them yet, right?

MR. GRADY: We have not. We were discussing dates and trying to arrange it.

THE COURT: I'll just see if you folks can work it out, and then the assumption is that they'll provide you dates soon. And then you'll find a date within the next -- within a reasonable time period.

MR. GRADY: Okay.

THE COURT: If they don't provide dates, then we can have a conversation about it. But I'll let you work together first.

MR. GRADY: Will do, Your Honor.

THE COURT: Okay. Let me go ahead and -- how much time did you need to respond to the discovery requests?

MR. PENNETTI: Judge, may I have two weeks?

THE COURT: Is that fine? Fourteen days?

MR. GRADY: Fourteen days, calender days?

THE COURT: Yes.

I'm going to put January 29th. For the inspection, by January 29th -- oh, I'm sorry. By January 22nd.

Okay. So we are -- you requested a writ of execution. Have you -- have you tried to --

MR. GRADY: We got possession of it, and I believe it got FedEx'd to the constable in Spring, you know, in the jurisdiction of the Spring warehouse. And so it should be --

MR. VARGO: Just say no.

MR. GRADY: Huh?

MR. VARGO: Just say no.

MR. GRADY: What? No?

MR. VARGO: No, it hasn't been executed.

MR. GRADY: Oh, it hasn't been -- oh, I'm sorry. I'm sorry. It hasn't been executed. I'm getting a little tired. Sorry.

THE COURT: Okay. So you have an application for turnover after judgment to appoint receiver. We talked a little bit about why before. So you have an outstanding -- or you believe an outstanding judgment debt for about 1.4 million; is that right?

MR. GRADY: Yes, Your Honor.

THE COURT: Why is it that you need a receiver?

MR. GRADY: Well, the other side has shown that they have been evasive with discovery; but, also -- of course, we have discovery orders today; but more importantly, they've dissipated assets. They had an agreement in place with us that they would give us a percentage of the receivables; and then without telling us, they sold that to a factory company.

THE COURT: So was this agreement the settlement agreement on the Virginia judgment?

MR. GRADY: Exactly, Your Honor.

THE COURT: When was that entered into?

MR. GRADY: It was entered into, I think, current -- around the time of the judgment, which is in June of '23. And then I was informed by my client, who could speak in greater detail, but that they learned about this either in October or November about the sale -- they had sold the receivables to the factor much earlier in '24, I believe in March, and then -- but we did not find out until late, you know, in the fall.

THE COURT: So you entered into a settlement agreement June 15th?

MR. GRADY: Yes, that sounds right, Your Honor.

THE COURT: Okay. So right after you got the judgment, or right around?

MR. GRADY: Yeah, around the time. I think that's --

THE COURT: Because it says the judgment was entered on June 23rd.

MR. GRADY: Right. That sounds accurate, Your Honor.

MR. VARGO: Well, in response to your question, one of the reasons we would need a receiver, as counsel pointed out, there's an issue with potential marketability. And given that's the case, number one, it would behoove us to put a receiver in place that was able to assist with the marketing efforts.

They've expressed grave concern relating to these alleged confidential issues, attorney's eyes only type scenarios. I can't think of any better scenario than to have a court-appointed receiver, neutral, selling the assets that they're complaining about that are in need of this heightened protection.

THE COURT: Okay. And so what are those assets that you have identified that you think they're subject to turnover?

MR. VARGO: Well, for one, it's the subsidiary that owns the contents of this facility that we're going to inspect. That would be the low hanging fruit. Beyond that, obviously, a receiver makes it much

more economical to levy accounts as opposed to filing, you know, however many garnishment lawsuits with service on banks, liability for attorney's fees, banks, et cetera. That's an issue.

Obviously, the dollar amount is seven figures. It's not 50 grand. Those are just a couple reasons why a receiver would be really helpful.

THE COURT: Response.

MS. CLARK: Your Honor, I'm not sure what we're talking about when we say "receiver." Because if we're talking about under the turnover statute, as I stated -- and maybe it's just for the record because Your Honor has a different view of the world, and that's fine.

But under 31.002(a), those requirements in the section of the statute of 31.002(a) must be demonstrated, including with respect to nonexempt property and the concerns that the Court has with respect to a turnover order. And that is what the statute says, and that is what the case law requires.

The relief allowed by Section 31.002(b), therefore, may be granted only when the conditions of Section 31.002(a) exists. And that's in the case that I cited, Your Honor, earlier, which is *Tanner versus McCarthy*, 274 S.W.3d 311. And we cite to that case in

our papers.

And so, Your Honor, if we're talking about the receivership under the turnover statute, we believe that the predicate has not been laid. We believe there's no evidence. There's no evidence of nonexempt assets. While there may be evidence with respect to a lease in Spring, Texas, that holds property, there's no evidence with respect to whether that property is nonexempt, whether they've attempted levy, whether they can execute on it. It's just not before Your Honor today. And so we would say that this request for receiver is extremely premature.

And when I look, Your Honor, to their proposed order appointing a receiver, it doesn't seem to me that what they're really asking for is a turnover receiver. What they're asking for is a receiver who will come in and take over the business, including changing the locks, including opening the mail, including messaging every single creditor that we might have -- or excuse me, vendor that we might have that would owe us money, et cetera.

So they want to be able to, essentially, take over the business, run it for the purpose only of liquidating to this judgment, and no matter whether they have evidence of what we have or don't have, et cetera.

And I think, Your Honor, that is highly inappropriate, far outside the turnover statute. And so we don't think a receiver of any kind is needed.

The other thing, Your Honor, is that with respect to, like, if we're talking about efficiency, which I'm not aware of a receiver being able to be appointed for efficiency sake, but if that's the case, these -- this is not their first time trying to look for assets of Cyberlux.

They have issued garnishments. They have garnished -- I think I mentioned this at the top of the hearing -- half a million dollars in money that our client needed to operate its business. So they have already been doing a lot of this work. They already have access to the banks, as far as I understand, know where they are.

This is a process that's -- they're just repeating here in Texas, we believe, for harassment. But nevertheless, Your Honor, I just don't see how a convenience argument makes any sense when we're talking about receivership.

And if Mr. Welter does come back to the virtual stand, Your Honor, he has told Cyberlux that it's his intention to put them out of business. And we think that's what's really going on with respect to a

receiver. And if you look at their form of receivership order, that's what I see.

So we absolutely believe that there is no evidence in this record that would support a receiver of any kind, not a receiver with respect to the turnover statute, and not for the purposes of simple convenience.

MR. VARGO: So with that, Judge, I don't think --

MR. WELTER: That's not true, Judge.

THE COURT: No one has asked you anything, Mr. Welter. So --

MR. WELTER: I'm sorry.

MR. VARGO: I think that counsel just made a wonderful argument for having a receiver. What she just said, just to repeat it, was that our client has gone to great lengths to collect judgments unsuccessfully against these people; and she --

MS. CLARK: That is not what I said. That is not what I said. $500,000 is not insignificant effort.

THE COURT: Counselor -- will you please let him finish, Counselor?

MR. VARGO: I let her speak.

I'm sorry, Judge.

She made it very clear that my client had

worked tirelessly to discharge judgments and done so at a very great expense unsuccessfully. That is a hallmark of a receivership.

As far as the evidence that's on -- that's on file, we covered this probably ad nauseam by now; but RFA No. 7, this is a subsidiary. It is in the record. We're even getting ordered to go look at the assets of the entity that is the asset.

It shocks the conscience at this point that we could even make the argument that there's nothing being discussed that would satisfy 31.002, because she clearly stipulated that there was a lease on the record. It is a contractual right. A contractual right is an asset.

There is discussion and an admission in the record that the subsidiary company is an asset of the judgment debtor. We know where the assets are. We know what they are. We're seeking a turnover of the assets that can be liquidated for discharge of the judgment. It's really just that simple.

And as I stated before -- and, obviously, if this is the direction that Your Honor wants to go -- we are scheduling depositions and inspections to go identify additional assets that we can go take when we already have evidence here today of an asset that we can

go take and use and sell for the discharge of the judgment.

I would submit that we don't have to do that. If they want to pay the judgment, we can provide them a payoff. If they don't want to pay the judgment, then that's what the legal process is for; and that's why we're here today.

There have been zero overtures of payment. Instead, what we're hearing is contesting the amount that's due, Motions for Protection, and scheduling other items of inspections or depositions in the future to continue identifying assets but not actually doing anything to sell them to satisfy this judgment.

THE COURT: And so what evidence do you have to support?

MR. VARGO: RFA No. 7 is an admission that their subsidiary company is an asset of the defendant. That's all we need for today. We're even having discussions and admissions of stipulations. This is their asset. It is their company. It's their subsidiary company. We have a receiver in the courtroom. That should be the end of the inquiry.

If they want to the pay the judgment, let's give them seven days to pay the judgment. If they don't want to pay the judgment, then let's get the legal

proceedings rolling.

I understand that they may not want to pay some receiver fees. I understand that they may not want to pay the judgment, but they have legal remedies. They're not exercising them. They're exercising delay tactics.

THE COURT: Would you like to call anybody to testify in support of the application?

MR. VARGO: Certainly.

What's his name?

MR. GRADY: William Welter, managing director of plaintiff entities.

THE COURT: Mr. Welter, are you there?

MR. WELTER: Yes, Judge. Before we get started, I'm having a problem with hearing. So can you hear me?

THE COURT: Yeah -- hold on. I guess while we're waiting for him to log back on, on your application, do you have any evidence to support the application?

MR. VARGO: That's the evidence we're putting on right now at the hearing.

THE COURT: Okay. So you don't have anything that's been filed for the Court to consider?

MR. VARGO: We have the discovery

responses, which is the admission of the same company that's the subsidiary that he's going to authenticate these records as a belt and suspenders.

So there's the admission, and we're putting on a witness to authenticate the quarterly report.

THE COURT: Right. But --

MR. VARGO: The quarter report says the subsidiary is their company. The owning of that company is a nonexempt asset. And it's the same RFA is referring to the same company.

MS. CLARK: Your Honor, I'm still not clear how they're going to get this statement that is the quarterly report into the report. But what we're talking about is Catalyst, and is it a subsidiary. Yes, it is. It is a subsidiary.

If the only thing they're asking for a receiver over is our interest -- is Cyberlux' interest in Catalyst and that's all we're here about today, I need to understand it.

Is that what they're asking the Court for that? That's the limited ask? Because their receivership order is so much more broad; and that's maybe where I'm misunderstanding, Your Honor.

MR. VARGO: Well, under the plain language

of 31.002, we don't have to identify every single asset that we're trying to use to discharge the judgment. It's --

MS. CLARK: I think I've said it twice for the record, but I'll just remind Your Honor that the case law is very clear that 31.002(a) has to be complied with before the Court can enter an order assisting the judgment creditor or else it can be dismissed as an abuse of discretion.

And so there has to be not just evidence, but I believe the court says substantive -- evidence of substantive and probative character. That is what is required in order to support this type -- the turnover order and the receivership order. They go -- as you said earlier, Your Honor, they go hand in hand.

MR. VARGO: And that would be an admission and a quarterly report that they originated and adopted and published.

MS. CLARK: Your Honor, if they're asking for it to be admitted as evidence, I have objections; and I'll state those.

THE COURT: Mr. Welter?

I'm sorry? Hold on a second.

(Brief pause)

THE COURT: Mr. Welter?

MR. WELTER: Yes, Judge. Can you hear me?

THE COURT: I can. I think -- can you speak up?

MR. WELTER: When counsel speaks from the table, I can hear them fine. It's just when they stand. Someone just opened up the whole courthouse view. So I can now see the whole courtroom. And when they stand up, for some reason maybe they're too far from the microphone.

THE COURT: Yeah, the microphones are in front of them.

But you're not getting any reverb, and you can hear me?

MR. WELTER: I can hear you fine, Judge.

THE COURT: Can we test?

Counsel, can you --

MR. VARGO: Yes. Can you hear me?

MR. WELTER: Yes.

MR. VARGO: Outstanding.

MR. WELTER: Whoever just spoke, I can hear.

MR. PENNETTI: Can you hear us?

MR. WELTER: Yes.

THE COURT: Okay. Let's -- it's supposed to be piping through here, through the Court's speakers.

It's not doing that. I'm not sure why. And so I'm outputting what he's saying through the laptop speakers. I think Mr. Welter is getting a little bit of that. We're getting a little bit of reverb.

But in any event, let's see if we can make that work for right now.

MR. VARGO: Certainly.

Are we ready to proceed?

THE COURT: Yes.

MR. VARGO: Let's see if we can make it work.

Do we need to swear in the witness?

THE COURT: Hold on a second. Let me...

(Discussion held off the record)

(Witness duly sworn)

THE COURT: You may proceed, Counselor.

WILLIAM WELTER,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VARGO:

Q Please state your name.

A William Welter.

Q Mr. Walter, what is your affiliation to this matter?

(Technical difficulties)

THE WITNESS: I'm sorry, Judge. The reverb just started really bad again. Can I try to call in -- just to call in, because that worked perfectly?

THE COURT: That's fine. Let's try that.

THE WITNESS: Let me try to do that.

(Brief pause)

THE COURT: If this doesn't work, and I think it might not work either, we'll just call you.

MR. WELTER: I can hear you perfectly, Judge, now.

THE COURT: I know, but there may be some reverb on our side.

You want to try it, Counselor.

Q (By Mr. Vargo) What is your affiliation with this case?

(Technical difficulties)

(Brief pause)

Q (By Mr. Vargo) Okay. You're on a speakerphone and you're pointed toward the gallery. The judge is behind you. So make sure you're speaking up for the court reporter and the Judge, please.

A Okay.

Q All right. What is your affiliation to this case?

A I am the legal counsel and also the managing

director.

THE COURT: Can he introduce himself for the record, please?

MR. VARGO: Yes.

Q (By Mr. Vargo) Just introduce yourself, as far as the company affiliation, et cetera.

A Okay. My name is William Welter. And I am on the side of Atlantic Wave Holdings and Secure Community.

Q And that's the judgment creditor, correct?

A Yes.

Q All right.

THE COURT: What is his position there?

Q (By Mr. Vargo) And what is your position there, sir?

A I am the managing director, and I'm also the legal counsel.

Q All right. In preparation for today, are you familiar with the documents that were filed on January 16, 2025, titled Plaintiffs' Hearing Exhibit List and Exhibits Atlantic that are three pages and 66 pages?

A I am.

Q All right. Could you please turn to Exhibit 2 of the 66-page PDF document that was filed with the Court, please?

A Okay.

Q And tell us what you're looking at.

A The disclosure statement pursuant to the Pink -- Pink basic disclosure guidelines, Cyberlux Corporation.

Q Okay. Hold on just a moment.

THE COURT: You have a copy of that, I'm assuming?

MR. VARGO: I do. It's filed in the record. It's the 66-page document.

THE COURT: Does opposing counsel have a copy?

MR. PENNETTI: We have a copy.

MR. VARGO: All right.

MS. CLARK: Well, Your Honor, excuse me. My confusion is just that the document I have is labeled Exhibit 3, and he just said Exhibit 2. Think we're talking about the same thing, but I just want to double-check. I apologize.

MR. VARGO: Yeah, no problem. Here you go. On the docket, it's the one that's 66 pages.

MS. CLARK: Okay. Thank you.

MR. VARGO: Yes.

Q (By Mr. Vargo) Okay. Sir, so on -- let me pull this thing back up.

All right. On page 10 of the PDF, it says, Exhibit 2, amended quarterly report 9/30/24; is that right?

A Page 10, did you say?

Q Yes, page 10 of the PDF.

A Okay. I don't have the PDF, but I have the document.

Q All right.

A It's Cyberlux Corporation, that front page, I think you're referring to.

Q Yes. Okay. So that's the next page, which is page 11 of 66.

Can you tell us what document you're looking at?

A It's the disclosure statement pursuant to the Pink basic disclosure guidelines, Cyberlux Corporation, amended quarterly report for the period ending September 30, 2024, filed on November 14th, 2024.

Q Did where did you obtain this document?

A From the OTC Markets.

Q All right. Can you -- for those of us in the courtroom that aren't familiar with that, can you explain what the OTC Markets are?

A The OTC Markets is a pseudo-governmental agency, quite like the NASDAQ or The Dow would be,

except the OTC Markets regulate a different market, which is pretty much what they call penny stocks.

Q And so when you said you got it from the OTC Markets, did you physically go there; or how did you come into possession of the document?

A I went to OTC Markets website, and I downloaded the -- and printed the annual report.

Q And can you explain in a little bit more detail how you went about doing that?

A Okay. So you go -- you go to -- first of all, it's a penny stock. So -- and they're on the OTC Markets. So you go to the OTC Market website. And then in the upper left-hand corner, you will type in the ticker symbol, which is C-Y-B-L. And you'll hit "enter."

And that will bring you to a whole separate section that's dedicated just to that ticker. And there's a menu where you can choose a variety of actions. If you go -- I think it's the fifth one over, it's "disclosures." And you punch on that, and then your -- the screen populates with all of their filings.

They're required to make filings every quarter, no more than 45 days after the end of each quarter.

Q As -- in connection with your business, are you

familiar with filing and researching these types of documents?

A Yes.

Q And after you looked this disclosure statement up on the website, what did you do with it to get it in front of the Court?

A I believe Mr. Grady downloaded it himself from the website and then I also sent him a copy, but I believe the copy from the website -- the OTC Markets website comes out much clearer. You'd have to ask him which one he used, whether it was mine or whether it was his.

Q I understand.

A Same document, though.

Q So let's turn to -- in my PDF, it's page 28; but on the disclosure, it is page 18 of 46.

Can you turn to that one, please?

A Okay. I'm there.

Q All right. And it says, Issuer's facilities.

Can you tell us, who is the issuer in this document?

A Cyberlux Corporation.

Q Is that the judgment debtor?

A Yes, that's the judgment debtor, correct.

Q All right. So can you tell us what's helpful

or important concerning Section 5 on page 18 of 46?

A Well, it -- in this section, it details the different companies that are involved with Cyberlux. It talks about their -- what is located at each facility. And primarily to Texas, it says, Catalyst Machineworks has its offices and manufacturing facilities located at 21631 Road, Spring, Texas 77488.

And then it goes on to say, This is a 21,450-foot square-foot facility, with a renewable three-year lease, with one and a quarter year remaining.

Q Is this document a true and correct copy of the disclosure that you downloaded from the OTC's website?

A Yes.

Q All right. I see the next paragraph down there refers to "our Datron World Communications subsidiary."

Is that what it says there?

MS. CLARK: Your Honor, I object. The document speaks for itself --

A That is correct.

MR. CLARK: -- and it's not in evidence, Your Honor.

THE COURT: That's fine.

MR. VARGO: I move to admit the disclosure.

THE COURT: You're seeking to move what,

specifically?

MR. VARGO: The disclosure, I move to admit it into evidence for purposes of the hearing.

THE COURT: So you're moving to admit as, I'm assuming, your Exhibit --

MR. VARGO: My Exhibit 2 that's on the docket.

THE COURT: You want to call it Exhibit 2?

MR. VARGO: Let's call it Exhibit 2.

THE COURT: Okay. Plaintiffs' Exhibit 2, which is the -- hold on one second. Let me get the -- the amended quarterly report for the period ending September 30th, 2024; is that right?

MR. VARGO: Yes.

THE COURT: And this is disclosure statement pursuant to the Pink basic disclosure guidelines?

MR. VARGO: Yes.

THE COURT: Any objections?

MS. CLARK: Yes, Your Honor. We object to this being admitted into evidence. The -- I'm not quibbling with the source of this document. I think that the plaintiffs have shown chain of custody with respect to this particular document and where it came from.

The issue with it being admitted into evidence is that it's hearsay, and it's hearsay within hearsay. It's a document that's signed, but it's not sworn. It's a document that expressly is a report that's based on a summary of information.

And in particular, when we get to the financial statements, Your Honor, it's consolidated information, which this document discloses is related to not only Cyberlux, which is the judgment debtor, but also multiple subsidiaries.

So it is impossible, from the face of this document, for purposes of this hearing, to understand who owns what. And it's hearsay within hearsay. They have not presented an exception to that, Your Honor. It should not be admitted for today's purpose.

It will confuse the trier of fact, which is you, Your Honor, because it is something that we can look at; but it's impossible to discern its full import --

THE COURT: Okay. So just --

MS. CLARK: -- from the face of it.

THE COURT: So hearsay -- the concern with hearsay is the truth of the matter asserted. Here, this is a public filing, right --

MS. CLARK: Your Honor --

THE COURT: -- on a market that's certified on the -- I guess OTC Market or Pink Sheet. I know there's different markets, but over-the-counter market. And I don't know -- I guess this is a public exchange?

MR. VARGO: Yes.

THE COURT: They're regulated by the security -- I guess that's a different issue. I'm not familiar. But at the very least, it's certified, right, by Mark Schmidt?

MS. CLARK: Yes, Your Honor.

THE COURT: And David Downing?

MS. CLARK: Of course.

THE COURT: And it says, Based on my knowledge, this disclosure statement does not contain any untrue statements of material fact, right?

MS. CLARK: Absolutely, Your Honor.

The issue is -- from my perspective, is that this is a summary of information that none of us here in the courtroom, the lawyers, have seen. And so it's hard for me to defend against the data that's in here, whether it's true or not. It's backward looking, and it's consolidated.

And so for today's purpose, what their burden is, is to show what assets this particular

judgment debtor owns. And this document does not show that, if we're talking about the financial statements. It is made for a different purpose.

And that's why I think it's confusing, Your Honor. This is made to comply with GAAP, and it's made to comply with the disclosures that the OTC Markets require. And so it's not the laser precision that this type of, let's appoint a receiver and get someone to come and take your stuff, is designed for.

And that's my concern, Your Honor.

THE COURT: Understood. I don't think there's -- I don't think the trustworthiness here is an issue.

MS. CLARK: I don't -- yes. I didn't mean to suggest that.

THE COURT: So the hearsay objection is overruled. I understand you have a concern about the weight and perhaps that it's unfairly prejudicial --

MS. CLARK: Yes.

THE COURT: -- because we don't completely understand what this stuff means and -- but that's something we can talk about and you'll have an opportunity to elaborate on.

You can continue.

So Plaintiffs' Exhibit 2 is admitted into

evidence.

(Plaintiffs' Exhibit No. 2 was offered and admitted into evidence)

MR. VARGO: Thank you.

For purposes of the witness, pass the witness.

THE COURT: Nothing else?

MR. VARGO: No, Judge.

MS. CLARK: I need to come up there, right, Your Honor?

THE COURT: Yes, please.

CROSS-EXAMINATION

BY MS. CLARK:

Q All right. Are you able to hear me?

A I am.

MS. CLARK: Oh, it's here. I see.

Q (By Ms. Clark) With respect to the -- you just talked about the facility listed in the disclosure statement in Spring, Texas, right?

A I'm a little confused. If I can ask you a question. I heard earlier that you referenced this facility as a warehouse, but in the company -- this is a document that's -- the company provided to the OTC to tell them where their products are manufactured. It says that there's a 21,450 --

MS. CLARK: Your Honor, I'm going to object as nonresponsive.

THE COURT: Sustained.

She hasn't posed a question. So until then, please don't say anything.

THE WITNESS: Okay.

Q (By Ms. Clark) I just wanted to direct your attention to what you were just talking to your counsel about, and that was a statement in the disclosures with respect to the -- an address reference.

Do you remember talking to your attorney about that, sir?

A For the address of Cyberlux or their Spring, Texas, facility?

Q Spring, Texas, sir.

A Yes, I remember that.

Q I'm trying to go get to that page.

Have you ever visited the facility in Spring, Texas?

A I have not.

Q So you don't know what's inside it, right?

A I do not. We've been trying to find out for about a year and -- with no -- no --

MS. CLARK: Your Honor, I'm going to object again as nonresponsive.

THE COURT: Please just answer the question.

THE WITNESS: Sorry, Judge.

Q (By Ms. Clark) You don't know what's inside the facility, right?

A No.

Q Same with respect to Datron World Communications, that was listed at a 995 Joshua Way, Vista, California.

Have you ever visited that facility?

A No.

Q Do you know what's inside that?

A No.

Q Now, I believe that you stated that you're familiar with the Virginia amended final order and judgment, right?

A I am.

Q And in that order, it talks about an amount of $1,572,500 being due, correct?

A Let me get a copy of that so I can answer you, if you don't mind waiting for just a second.

MS. CLARK: Your Honor, I'm not sure if we can show that with the way that this is all working out; but we --

THE COURT: I think he has a copy.

MS. CLARK: Okay. Okay.

THE COURT: The amended and final order. So --

MS. CLARK: Okay.

A I'm having trouble finding it, but I know the judgment pretty well. And if you want to -- I don't want to hold you up any further. If you want to go forward. I cannot find a copy on my computer of the judgment for some reason.

Q (By Ms. Clark) Well, sir, so within the judgment it talks about specifically that there is an amount of $177,126.19 for reasonable attorney's fees.

Do you remember that part of the judgment?

A I do.

Q Okay.

MR. VARGO: Objection, relevance.

THE COURT: It's overruled.

I'll let her --

MR. VARGO: All right.

THE COURT: -- for right now.

Q (By Ms. Clark) And you were talking with the Court earlier. My understanding is that that amount of $177,126.19 has been paid; is that true?

A I don't mean to interrupt you, but I have found a copy of it.

Q Okay. Good.

A Of the judgment.

Q I'm at part C on -- I believe it's the second page.

A Okay.

Q Do you see the --

A It starts off with that "The plaintiffs"?

Q Yes.

A Okay. Yes, I do see that.

Q Okay. And so that amount, that $177,126.19, is it your testimony that that amount has been paid?

A I believe it has.

Q What about the next line down that talks about -- it talks about them as sanctions, $3,895 and 300 -- excuse me, $6,842.50.

Do you see those amounts?

A I know for sure those have been paid, because the Judge ordered those paid.

Q Okay. And so are you familiar with a J. Chapman Petersen?

A I am. He's one of our attorneys in Virginia.

Q Okay. And are you aware of a letter that he wrote to a Jimmy F. Robinson on January 22nd, 2024?

A I am.

Q Okay. So -- and did you -- do you know that

your counsel used that -- attached that letter in a filing in preparation for today's proceeding?

A He did not prepare it for today's proceedings.

Q I'm sorry. I meant your Texas counsel had submitted it to the Court, along with the filing for today's proceeding.

Do you know that?

A He submitted it for today's hearings, but he did not prepare it for today's hearings.

Q And if I said that, I misspoke. That was not my intention. Okay.

A That's okay.

Q So -- and in that letter -- have you seen that letter?

A I have.

Q Okay. And in that letter, it has a breakdown. And before it gives the breakdown, it says, The actual amounts owed under the above judgment as of October 31st, 2024, is as follows. And then it gives this breakdown.

Did you provide a breakdown of amounts to Mr. Petersen?

A No. There's two points. I worked with Mr. Petersen's office. I also worked with Mr. Keathley's [phonetic] office, but the -- I think

where you're off on the numbers is that -- those numbers are as of October 31st, number one. And they didn't include the interest, and they didn't include the ongoing attorney's fees.

So I think that's where your numbers may be off a little bit. Because those numbers are as at October 31st everything that we could tabulate, and they're not as January 16th.

Does that make sense?

Q I hear what you're saying, but I want to understand. The reason I asked about whether you're familiar -- well, are you familiar with the line items in terms of the amounts owed, how it's broken down in this letter dated December 2nd from Mr. Petersen?

A Yes, I am.

Q Okay. And so there's a line item that says, Legal fees, $371,307.66. Do you see that -- or do you know that -- that number was listed?

A I take your word for it. I don't have the document, but that sounds about right.

Q Okay. Where is this $371,307.60 in the form of order from Virginia that we looked at?

A It's not. Where you'll find that is in the settlement agreement, where it says that upon breach, we are allowed attorney's fees for -- to collect the -- on

the judgment.

MS. CLARK: Your Honor, I pass the witness.

MR. WELTER: Judge, can I add one thing to that last sentence?

THE COURT: No.

MR. WELTER: All right. Thank you.

THE COURT: Did you have any questions?

MR. VARGO: No, Judge.

THE COURT: Okay. Any other witnesses or any other evidence?

MR. VARGO: No.

THE COURT: Okay.

Okay. So what -- so where are we at now?

MR. VARGO: Plaintiffs move for entry of an application to appointment a receiver.

MS. CLARK: Obviously, Your Honor -- or would you like to hear my argument about why it shouldn't be awarded?

THE COURT: Yes, please.

MS. CLARK: Your Honor, we object to the appointment of a receiver. The statutory prerequisites of 31.002 have not been met. Mr. Welter testified he had no knowledge of the property that's located in Spring, Texas, or at the Datron facility.

And there's no other evidence, Your Honor -- before Your Honor with respect to what property Cyberlux would have that is not subject to other levy or attachment and is in need of aid from this Court by virtue of appointment of a receiver.

And the statute is very specific on what it needs. The case law is pretty strenuous that a requirement has to be met. It can't just be a generic list of property. It needs to be what property is there, how do you know it, what is -- is it exempt. Those are the things that need to be shown, Your Honor. And -- and that's for turnover.

And if you don't meet the standard for turnover, then you're not going to be able to get a receiver. And that is what we would say with respect to -- with respect to the appointment of a receiver under the turnover statute.

What we have, Your Honor, is -- essentially, is arguments of counsel. And the cases are very clear, we cite them in our papers, that that is not enough.

Your Honor, I also would like to say that if you are going to appoint a receiver, that the order has to be -- just like anytime a receiver is appointed, it must be very specific. And the statute language is

very clear and direct on what the receiver needs to -- the language around a receiver.

It's -- appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

So knowing what is nonexempt property is important. Understanding what amount is outstanding pursuant to the judgment is important. So that if a receiver is appointed, he or she can do their job, and the receivership report needs to be specific.

The order that's been proposed by plaintiffs is exceedingly broad. It talks about all property, bring it to me, marshal your assets, and then I'll decide what to do with it. And that's just not the situation we're here in. We are going to have discovery, Your Honor. It's in a very short period. And we're going to get on with it.

And so we think that there is not a basis under the statute to appoint a receiver under the turnover statute, and there's not a general basis for a receiver. That's a very serious act, Your Honor. And so we would just ask that you deny their application.

MR. VARGO: This isn't a new judgment. They've had time to pay it. They've had time to make

some payment. That hasn't happened. There's a place for relief. It's the United States Bankruptcy Court. They're welcome to go seek that relief if they want to.

They have the assets. They don't qualify. They don't want to give the assets. They don't want to sell their assets. And they don't want to satisfy the judgment. We're here for delays so that we can continue putting off satisfying the judgment.

As counsel put it, this judgment creditor did an exhaustive amount of garnishments on banks unsuccessfully to satisfy the judgment. This is stereotypical time that you would need a receiver. The assets that are identified are in Exhibit 2. It's on page 18 of 46. We need not go any further. It's in evidence.

Catalyst Machineworks is a subsidiary. Datron World Communications, a subsidiary.

THE COURT: What are -- what kind of entities -- are those corporations?

MR. VARGO: Well, whether they're corporations or they're LLCs, even --

THE COURT: Don't you need a charging order for LLC?

MR. VARGO: Yes, but they would still be enough to satisfy the turnover requirement. And in that

instance, under the case law, a receiver is the perfect vehicle to monitor the charging order, because the judgment creditor is not in a position to do so.

THE COURT: Do you know what kind of -- I mean, I can look it up right now at the Secretary of State. I mean, somebody has got to know.

MS. CLARK: Your Honor, I believe Catalyst is an LLC. I don't know about Datron. And I don't know whether those assets are available for attachment or not. I don't know if those assets are pledged. I can't tell from this disclosure. I read the whole thing on the plane, because we didn't get even notice that they wanted to use this exhibit until this morning.

So what it says -- it says what it says in the document. But whether they can use them for -- and monetize them, we don't know that today. Are we going to know that in 30 days? Yes. And so there will be a lot more for a receiver, if one is going to be appointed, to do when he or she can be directed with actual facts about whether it can be sold, is it pledged to someone else.

I'm not saying that it is, Your Honor. And I'm not trying to quibble. But this is what I view as the statute requirement, and so that's why I'm pointing it out.

THE COURT: So they just got to show that you own some property, right? Not readily ex- --

MR. VARGO: We have to establish that they own property.

THE COURT: -- executable. Then the burden shifts to them to show that it's exempt.

MR. VARGO: To which they're a business entity, and Chapter 42 doesn't identify exempt property for that.

MS. CLARK: That's not the only statute that applies here, Your Honor. That is just not.

MR. VARGO: Well, then what exception are they availing themselves under?

MS. CLARK: If these are pledged assets, for example, then they're going to be exempt from execution. And so I --

THE COURT: But I don't have any evidence of that.

MS. CLARK: Well, Your Honor, actually you do with respect to Datron. And that's in this disclosure statement. It talks about that there are -- it indicates that -- I'm sorry, Your Honor. I have to find where it was.

MR. VARGO: Respectfully, just because something has a lien doesn't mean you can't execute on

it. It means that you execute on it and satisfy the secured lender. We can't just execute on it and not pay off the secured lender. That's how you execute on secured property.

MS. CLARK: I think it depends on what the documents say, Your Honor, and how it's pledged, who holds the stock, for example. It's just complicated. And what I'm trying to avoid is a bunch of, Well, who has possession or where's it going to be and what do we do with it and once they get it, what happens.

I think that there needs to be some sort of order so that Cyberlux can continue to operate its business and have money that it needs to operate and also, by operating, generate funds that can continue to pay on the judgment. Because the testimony was that the amount -- that the judgment has been reduced. That's what the testimony was.

THE COURT: So, I mean -- and I'm not insensitive to potential turnover or receivers hampering your ability to operate as a going concern and potentially pay off. I know the receiver would be sensitive to that. Everybody wants to get paid.

So -- but I guess the issue is, is what's the plan. So to the degree they say, Look, we have a going concern. A receiver comes in or there's a

turnover, it's going to disrupt; and then we're not going to have anything to pay. And it's going to be a problem.

But I don't think those discussions have been had, right?

MS. CLARK: No. We've been spending all our time just trying to get ready for today, and we -- I think the parties -- the most they could do is say, Let's try mediation and --

THE COURT: And I'm not --

MS. CLARK: So, no, I don't think the discussions have been had.

THE COURT: I understand, Counselor. And I appreciate that you've just been brought on; but this is not a new judgment for your client, right? So I'm not -- I'm talking about your client when I --

MS. CLARK: Yes. No, no, no.

THE COURT: And I'm not --

MS. CLARK: That's what I was speaking to, whose talked about it.

THE COURT: And I appreciate your position as counsel being difficult, but I'm trying to -- we're really just talking about the judgment debtor here, what have they done since the judgment was entered --

MS. CLARK: Right.

THE WITNESS: -- back in 2023 or in 2025 --

MS. CLARK: Right.

THE COURT: -- and these -- they've obviously been engaged in collection efforts for a while.

MS. CLARK: Excuse me. I didn't hear that, Your Honor.

THE COURT: They've obviously been in -- undertaking collection efforts for a while. They have proceedings in California.

MS. CLARK: Right.

THE COURT: And so none of this is new. The -- or a surprise. It's just trying to figure out, like, what's the plan to start making arrangements to work this out. There was an initial settlement agreement.

MS. CLARK: Yes.

THE COURT: It sounds like that fell through.

MS. CLARK: Well, our position is the opposite; and that's why we have opposed the enforcement here and in California. And in California, the judge has stayed enforcement. So our position is, is that the parties have a settlement agreement. The order simply

facilitates that.

THE COURT: Right. But it's out of Virginia.

MS. CLARK: Exactly. Exactly. And there's multiple proceedings pending there, yes.

THE COURT: And so if Virginia says, Hey, this is -- you know, there's a problem with my judgment, then the court obviously will suspend here --

MS. CLARK: Understood.

THE COURT: -- because that's what I'm relying on; but until that happens, there's no way for this Court to navigate, you know, those sorts of issues when this is not a domestic judgment out of this court.

So all I can do is take a foreign judgment that's currently not superseded and allow the normal legal process to pave through. We probably have enough, you know. The issue is it gets a little bit problematic. If that's all we have, then that's all we can turn over. And so I would need to have an amended order presented to the Court regarding that specific --

MR. VARGO: So specific to the Datron and the other entity that are identified?

THE COURT: Correct, whatever you have evidence for.

MR. VARGO: Okay.

THE COURT: The -- the other thing is I think there's been some recent case law regarding receiver fees that you might want to take a look at.

MR. VARGO: I'm familiar. It's a presumptive fee, and there's a subsequent hearing.

THE COURT: Yeah.

MR. VARGO: He needs to talk about his time and the factors.

THE COURT: Yeah. So I don't know if that's been -- the order has been changed to reflect that.

MS. CLARK: Right now, Your Honor, it speaks to a 25 percent cap to be earned on everything that is taken and sold. And the case law, as I recall, Your Honor, talks about the resume being required of the receiver to understand their qualifications to even serve and then to look at what is appropriate, because it has to be reasonable.

And so right now I do not think that the order, as it's written, takes into account that case law.

MR. VARGO: We'll file an amended order, and we'll address those two items. If she's got concerns about the qualifications, can I call Mr. Berleth to talk about his qualifications?

MS. CLARK: It's not my request. So my concern is there's no evidence right now. But, yeah, Your Honor, as I said, I have serious concerns about the form of order in general, the way that it's been presented.

THE COURT: Is there -- is there other things in the order that you have concerns about?

MS. CLARK: Yes.

THE COURT: We talked a little bit about discovery, and you've agreed to produce that within the next 14 days.

MS. CLARK: Yes.

THE COURT: To the degree that the order discusses that, it needs to be amended to reflect the current understandings from this hearing regarding the discovery requests.

Is there anything else?

MS. CLARK: Your Honor, can I ask a clarifying question about that? Because I -- I think that the discovery is pursuant to motions that are pending, and I had envisioned that we would submit -- or review an order from the motions with respect to discovery that were previously pending, and then that's where the order to produce would come in and that the -- with respect to this order appointing receiver and to

compel discovery, that the discovery piece would be struck from this receiver order that they have proposed.

THE COURT: I mean, it really doesn't matter to me. I don't know if it matters to you.

MS. CLARK: Okay. Well, I just --

MR. VARGO: Well, the document request that's attached to the turnover order, I can appreciate that perhaps Your Honor wants to limit the turnover for now to the two entities that have been identified as far as the nonexempt property; but I don't think we ought to clip the receiver's wings to identify new nonexempt property and participate in some discussions and in discovery with the judgment debtor that would be helpful to discharge the judgment.

THE COURT: I agree. I guess the question is -- you already have pending discovery. The Court has just ordered it. I don't know where the overlap is. I don't know what, you know -- and I have a bunch of windows open. So I was looking at it, and I moved away. I can go back and look through it.

I assume there's some overlap; and it may say it needs to be produced in five days, that kind of thing. But maybe we can kind of figure out -- if that's duplicative of what's already been ordered, we've already had discussions on that.

MR. VARGO: I can cut out any duplicative stuff; but, I mean, I would submit that the RFPs that are attached -- I say "RFPs," the requests for documents related to the debtor that we ordered be produced, this is, you know, elementary-type stuff. Where are your bank accounts? What are your assets?

THE COURT: Right. And so I understand there's a continuing obligation and whatnot. That's fine. Why don't you take a look at that. And you can take a look at the form.

MR. VARGO: I can condense it and cut it down and obviously send an MS Word to your staff so you can -- with copy to counsel, of course.

MS. CLARK: Your Honor, I really think it's important to go through this order. Because this is an extreme remedy to have a receiver appointed to just come in and open our mail, change our locks.

THE COURT: So is that the plan, or what's the plan?

And so why don't you introduce yourself for the record.

MR. BERLETH: Your Honor, may I approach?

THE COURT: Yes.

MR. BERLETH: My name is Robert Berleth. I'm the proposed receiver. I am a member in good

standing of the Texas Association of Turnover Receivers. I am also a member of good standing in the National Association of Federal Equity Receivers. I've been a receiver exclusively for nearly my entire law practice.

This Court has appointed me. Many other courts in both this building and the federal courthouse across the street -- or down the street have appointed me. I exclusively practice in receivership and collections law.

So their fears of the receiver coming in and, you know, kicking in doors and changing locks is -- while the language is there, is grossly misinterpreted. The reality is, is that a good receiver many times can facilitate the settlement payments. I can find some assets and say, Look, here you've got these assets. If you want to, you know, turn these assets over or we can leverage them to regain the settlement and start working on that again.

I've worked on many, many settlements. I'm working on one for Judge Garrison and Judge Roth right now on a very complex six-style case -- or six separate cases that are all coming together and working conglomerate.

So I pride myself on also working quasi mediator and trying to get these parties together and

get this case back on track without the need for hearings with multiple lawyers long after the sun has gone down.

And then also I'd like to apologize about the way I'm dressed. My --

THE COURT: That's fine.

MR. BERLETH: We were upstairs with Ms. Brown for her admittance today. She's a good friend of mine. My son is a good friend of her son's. And I've been out the -- we were doing some construction equipment inventory today as a receiver. So I'm wearing some work boots and pants, and I apologize for my attire.

THE COURT: That's fine.

So I guess the present intention is not to the take over the business or the property?

MR. BERLETH: Correct. I will work with counsel for the debtor. I work with counsel for the creditor. I will bring everybody together, Hey, look, this is what I need. This is the documentation I'm going to expect.

If the creditor says, Hey, Look, we just want to get back on the payment plan and the debtor has a way of doing that, then I can come back to His Honor with an agreed order hopefully in a few weeks.

If the debtor, you know, digs in and starts hiding, moving, liquidating, pilfering assets, then I have the language necessary by His Honor's order that I can actually go and turn on a dime. And that's one of the advantages of the receiver, is I don't have to come back and wait 30 days for a hearing; and while they pilfer or secret or disguise assets, I can turn on a dime and take those assets right then. And that's the big advantage of a receiver.

I'm hoping that's not the case. I want to work with counsel. I want to get this case done and off of your bench.

THE COURT: Counselor.

MS. CLARK: I don't have -- I mean, what is the fee that you would be seeking in this case?

MR. BERLETH: My fee is assigned by the Court. If I can solve it very quickly -- I had a case just a few weeks ago where I literally sent two letters; and the fee proposed at 25 percent would have been, like, $350,000. And I greatly, greatly reduced that. The court would have reduced it if I hadn't. So the Court will always have the final say on my fee.

I am your arm, Your Honor. I work for you. If you say I earned a penny, I earned a penny. If you say I earned a million dollars, well, I appreciate

that. But the fees are what the Court and what I can prove up to the Court.

THE COURT: And just so we -- so your fees are on top of the underlying debt?

MR. BERLETH: My fees are assessed as costs of court. And so the costs of court would be in addition to. However, many times in a settlement, it turns out that the creditor is actually the one paying the receiver because they want to go back on the settlement; and the creditor ends up paying the receiver.

THE COURT: So -- and if there are insufficient assets to satisfy the judgment, right -- so let's say the judgment is a million dollars, and the assets -- the only assets that you're able to locate are $500,000. So at that point how are your fees worked out?

MR. BERLETH: In that instance, I would come back to the Court and I would say, Judge, I found a 500,000-dollar asset. I want to sell it. I'm expecting my fee to be 125. I have agreed to reduce it to $75,000 with His Honor's approval. Here's an agreed order from the creditor, from the debtor -- sorry, vice versa, but from the debtor, from the creditor. And they have agreed to liquidate this asset, and that will solve this

problem.

THE COURT: So they would get 425, you would get 75.

MR. BERLETH: If they want to fight about it and they want to drag us up and down the appellate ladder four times -- you know, I can tell you from personal experience that is the exact same order that I use in 90 percent of my cases. It's been up and down the appellate ladder more times than I could count.

Most of the appellate law that you're going to find challenging that order has my name on it. So I'm comfortable with the language in that order. I'm comfortable with all of the, you know, reasonableness of that order. And it's been used by, almost verbatim, federal courts and state courts in this county and around the state nearly verbatim.

THE COURT: Anything else?

MS. CLARK: Not for this gentleman, no.

MR. VARGO: No, Judge.

THE COURT: Thank you, Counselor.

MR. BERLETH: May I be excused, Your Honor?

THE COURT: Yes. Have a good day.

So I'm going to --

MS. CLARK: Your Honor, can I please make

a record with respect to objecting to this form of order? Because I was not done, and I really want a record on this.

THE COURT: Okay. So before you do that, the Court is going to grant the application and appoint a receiver. We need to -- we talked about fixing the order and amending it to address the concerns that were raised before. And so what the Court currently has is not what I'm going to enter.

I don't know specifically what your objection -- if you have additional objections than we've already discussed.

MS. CLARK: Yes.

THE COURT: Yes, you want to go ahead and elaborate on those?

MS. CLARK: Yes, I would, Your Honor.

The receiver statute states that the Court may appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.

That's what the statute says. This order does not do that. This order allows the receiver lots of powers. And, basically, he can go on a wild goose chase, look at everything. What's the point of the

discovery that we just spent three hours on, essentially?

He can go -- he's going to get all documents or records, including financial records related to any property not described in this form of order that is in the actual or constructive possession or control of the respondents. He's going to get all financial -- and that's with respect to Mr. Schmidt, who they haven't presented any evidence of any assets. So Mr. Schmidt needs to be struck in the order.

He's supposed to collect records on all financial bank accounts, et cetera, all securities, all real property, all safety deposits, all cash, all negotiable instruments, all causes of action, all contract rights, all accounts receivable, and tangible property.

So I thought what we were talking about, Your Honor, is that this receiver is going to talk to -- look at the assets they presented proof of, which is with respect to a lease at the facility in Spring, Texas, and the Datron -- the ownership of a subsidiary by the name of Datron.

This talks about anything in the whole wide world, and he's going to be able to take custodia legis of that. I don't think that they have met that on

this record, Your Honor. I think that well exceeds the statute.

And then with respect to additional powers, Your Honor, in addition to the powers of the receiver set forth herein, the receiver shall have the following rights, authority, and power with respect to the respondent's property.

So he can collect all accounts receivable, all rents due. He can change the locks. He can open any mail. He can redirect delivery of the mail. He can endorse and cash all checks. He can hire a real estate broker.

I mean, that is not what we've been talking about today. This is a general receiver over the business. And I don't care if he's going to decide to exercise his power or not. That's not what this turnover statute requires.

And so if -- it's just not -- it's not in compliance with the statute, this form of order. And it is very oppressive to our client's ability to run its business. So --

THE COURT: So do you have a case that says this form of order is a problem?

MS. CLARK: Your Honor, I have the statute. I have the case -- let me find my case. I do

have a case with respect to the specificity required in the order.

THE COURT: So we talked a little bit about what specifically the turnover needs to apply to just so we don't have an issue on its face.

In terms of -- she did raise a point regarding Mr. Schmidt. We didn't have anything on Mr. Schmidt; is that right?

MR. VARGO: The turnover is just against the company. It's not against Mr. Schmidt.

THE COURT: Okay. So he's going to be removed?

MR. VARGO: Yes.

THE COURT: So they're only seeking a turnover regarding the company. So in the amended order he'll be removed.

MS. CLARK: A turnover order that does not identify specific nonexempt property that's subject to the order -- this is in the *Burns versus Miller* case that talks about the order needing to be specific, starting from what property in particular the receiver has power over, not a free ranging where can I find any property anywhere in the world, then decide what to do with it. And so that is 948 S.W.2d, 317.

THE COURT: We talked about that. I

wanted them to limit it. That doesn't change the discovery issue, though.

MS. CLARK: Your Honor, I don't disagree with that. I just wanted to -- on the discovery piece, as I've said, we want to give them discovery. We have our protective order. You've given us two weeks. I just don't -- when things are blended together, I feel like it creates ambiguity when there doesn't have to be.

THE COURT: Right.

MS. CLARK: But I don't mean to --

THE COURT: But this order shouldn't be a surprise, right? I mean, these orders kind of read the same. And so there's cases -- I mean, there's probably some cases that deal with this. But if you can find a case that says, Hey, they can't change the locks, then I'll take it out. I mean --

MS. CLARK: What does that have to do with getting the property -- changing the locks, what does it have to do with getting the property and selling it? That's where I'm having a problem, these extra powers that you would have when you take over a business, not just when you secure the property.

This form of receiver order looks like what I would write when I take a debtor out of possession or when I take a business owner out of its

ability to run its business. That's how this reads, and that's not what we're doing here.

We are talking about two assets that they say that they've identified and giving free range and power over everything anywhere in the world that this company might have and having the receiver guess what he might want to do with that.

THE COURT: Counselor.

MR. VARGO: Well, you heard Mr. Berleth say there's an easy way and there's a hard way. He's trying to get the easy way. He's seeking their cooperation. Obviously, if he has to come back to seek additional authority every time, by the time he gets the additional authority, the opportunity is gone. That doesn't mean that he has to exercise the authority immediately.

As far as the locks, I mean, as she just stated, taking a debtor out of possession, yes, it's specifically tailored to a situation where you have a warehouse storage facility and things may go missing pretty quickly. Until he assesses the threats at the premises that he has been entrusted with, he may need to change the locks. That doesn't mean that he wouldn't say, Okay, here's what we're looking at.

I mean, if he shows up and there's a

reasonably small amount of property that's going to be sold that's not going to satisfy the judgment, he needs to absolutely sequester that, keep it safe, and make sure that he has the ability to sell it.

Many times things might weigh a lot. A transport could be crazy. I can tell you personally that I went to South Texas one time and dealt with 23 locomotives. I had to get a special court order out of Harris County to specifically sequester the property in place and hold an auction within 48 hours.

Well, there was a lot of heavy equipment. It was 2 miles from the border. All types of circumstances come up that would require very heightened authority. In this instance, that doesn't mean he has to use it.

MS. CLARK: We're not talking about -- they identified leasehold rights and stock. We are not talking about the property that's inside it, which they state is owned by a subsidiary, we state is owned by the government. So we're talking about stock. We're talking about leasehold rights. So that's where I have the issue.

THE COURT: Right.

Mr. Berleth, you're not going to sell government property, right?

MR. BERLETH: Your Honor, you know, my history is military. I formally held a top secret clearance. I'm familiar with what the military and the government's, you know, property rights are. And I have no intention of going across those lines.

And, again, and just to kind of assuage some of the fears of the debtor here, you know, there's three steps to selling a real property. The first is, is that, you know, I would have to come back to you and say, Okay, Judge, I found this real property. I'm going to ask to engage a broker. Let's just say it's a boat, real property --

THE COURT: Understood. Here, they're potentially about -- there's drones that potentially they have --

MR. BERLETH: Yeah, I'm familiar with Cyberlux.

THE COURT: Yeah. So I think -- you know, I'm being a little bit rhetorical; but I -- to the degree if the Court felt that you were exceeding or being unreasonable, these folks can come back and say, Look --

MR. BERLETH: Absolutely.

THE COURT: -- Mr. Berleth is -- he's run amuck and he's crossing lines, he's being unreasonable

and it's a problem, and, you know, they can obviously come back and say there's issues here and the powers that the Court has granted have been abused, right? And they're free to come back and identify that.

My understanding is that you obviously -- you have these powers, but that's not the first -- that's not what the present intent is to go in there and create issues. You want to make sure that this debtor is able to do whatever they need to do to pay the debt, keep their business.

But you -- we also understand that they haven't paid it up to this point; and so they need to understand that you're serious about working this out and that if they don't, then there may be some consequences. And you may have to do things that are -- that they may not like for you to do.

MR. BERLETH: Correct, Your Honor.

THE COURT: But, you know, that's a function of, you know, debt collection. But that's not the first, maybe not the second or the third, but it may ultimately be what needs to happen. And to the degree that you have to undertake these steps where you take these things over or take possession of things, you're obviously very -- you're sophisticated enough to know that there may be security interests, liens, other

property interests. They deal with the government. The government may have some interest, and you don't want to run afoul of any of those potential issues.

And so I assume you're going to try to clear all that up and make sure you're doing the right thing as it relates to that kind of property.

MR. BERLETH: Correct, Your Honor. I have not been as successful in this courthouse by being unreasonable.

THE COURT: Again, and some of this is rhetorical; but we're just having this conversation on the record so there's no misunderstandings. And you -- I'm sure you're -- I'm sure this is not anything that is a problem; but just so we're clear, we've had this discussion before and so there's no surprises. And I'm sure you'll try to do everything in an appropriate way going forward.

So with that, I think we're spinning our wheels a little bit.

MS. CLARK: Your Honor, respectfully, I do not want to walk out of this courtroom without understanding the order with respect to the receiver. Does he have to have a bond? What is the language going to look like so that I can inform my client, at a minimum, how to get ready for the disruption that is

about to occur at their business and so that we can decide what proper legal remedy we're going to seek.

And so I just don't want to leave it to, Okay, they'll e-mail the Court an order. The Court sees it. The Court signs it. It may or may not hit the electronic docket. Sometimes it takes us a week to even see an order.

So I do not want to leave this courtroom without seeing this order. It's a very, very extreme remedy. And for us to ask to have an order written out -- if we're going to interlineate it, fine. I would ask for a recess so that we can go through. They can do that, present it to Your Honor; and we can see what it looks like today.

Because I don't -- I know how it is when we get out of the courtroom, especially these hearings that are so long, and we all forget exactly where these tweaks are supposed to be and somebody heard it one way, another person heard it another. So that is my chief concern, especially if we're going to have these wide range of powers.

So I hear what the receiver is saying. I totally respect that but I also understand what my job is going to be and I need to be able to do that.

THE COURT: I've heard your request.

We're not going to stay here and interlineate an amended order.

You will need to submit an amended order, and you'll need to submit it to the other side. And I ask that you confer --

MR. VARGO: Sure. Yes.

THE COURT: -- and -- on that order, just kind of identify any changes you made, and then give them an opportunity to provide any feedback. But once you've done that, you can submit it.

And then if you have any objections, you can submit those objections.

How long is it going to take, do you think, to amend the order?

MR. VARGO: I believe we'd have the amended order tomorrow and circulate it to them.

THE COURT: Okay. And then I'll give you until Monday to make any objections. And then at that point the Court will enter the order by Tuesday.

MS. CLARK: Thank you, Your Honor. I appreciate that.

THE COURT: Is there anything else?

MR. GRADY: No, Your Honor.

MR. VARGO: I'll be down here tomorrow. I promise to bring it by.

THE COURT: Sounds good. Have a good day.

(END OF TODAY'S PROCEEDINGS)

STATE OF TEXAS

COUNTY OF HARRIS

I, Jennifer Gajevsky, Official Court Reporter in and for the 129th District Court of Harris, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

/s/ Jennifer Gajevsky

Jennifer Gajevsky, CSR
Texas CSR 9250
Official Court Reporter
129th District Court
Harris County, Texas
201 Caroline
Houston, Texas 77002
Expiration: 2/2026

EXHIBIT “5”

2020 WL 522710
Only the Westlaw citation is currently available.
United States District Court, S.D. Texas, Houston Division.

IN RE: Attorney Robert W. BERLETH

Miscellaneous No. H-19-2011
|
Signed 01/31/2020

MEMORANDUM OPINION AND ORDER

SIM LAKE, SENIOR UNITED STATES DISTRICT JUDGE

I. Background

***1** Robert W. Berleth was licensed to practice law in Texas on May 1, 2017, and he was admitted to the Southern District of Texas on May 5, 2017. [1] Berleth's practice involves debt collection and consumer bankruptcy, and he has offices in Houston, Texas, and Helena, Montana. [2]

In January of 2019 Berleth appeared as attorney of record in two bankruptcy cases before Judge Marvin Isgur and a third before Judge Jeff Norman. [3] In each case the petitioner was either referred to Berleth by Synergy Law LLC ("Synergy") or Synergy was otherwise involved in preparing the debtor's petition. [4]

Around the same time, Berleth represented Synergy in settlement negotiations with a former Synergy client, Sean Cavness, who had threatened to bring an adversary proceeding against Synergy related to its handling of Cavness's bankruptcy case, also assigned to Judge Isgur. [5]

In the course of these proceedings, allegations arose that Berleth had offered to refer cases to Cavness's lawyer, Charles Newton, if Newton would agree to settle the proposed adversary proceeding for less than previously agreed. [6]

Details of the underlying dispute between Cavness and Synergy, and its ultimate resolution, as well as the allegations against Berleth, and the events that led to this referral, are documented in the five cases assigned to Judge Isgur. [7]

A. Synergy Law Operations

***2** Synergy Law LLC, which appears to have been based in Virginia and Washington, DC, offered loan modification, foreclosure defense, and bankruptcy filing services to clients throughout the country. [8] As recently as March of 2019, Synergy advertised itself as "an experienced full service law firm," with "an extensive and experienced nationwide network of attorneys." [9]

When a potential client contacted Synergy, the company's non-lawyer staff in Virginia would advise the client about various options, including bankruptcy. [10] If the client elected to file for bankruptcy, Synergy's non-lawyer staff would prepare the client's bankruptcy petition using automated software, and Synergy would then forward the petition to an "Of Counsel" attorney in the state where the petition would be filed. [11]

It appears that clients would not necessarily provide a "wet ink" signature on the original petition prior to electronic filing, and in certain cases the "Of Counsel" attorneys shared their CM/ECF login credentials with Synergy's non-lawyer staff, who themselves filed the petitions. [12]

B. Scott Marinelli

Synergy's former managing partner, Scott Marinelli, was reportedly suspended from the practice of law in New Jersey in 2017, as well as in DC in May of 2018. [13] In June of 2018 Marinelli was charged criminally for fraud and theft related to various real estate transactions in Pennsylvania. [14] After June of 2018 Marinelli was removed from the managing partner role at Synergy and appointed as COO, until early December of 2018, when he appears to have been terminated. [15]

C. Berleth's Work for Synergy

According to Berleth, Scott Marinelli contacted him in mid-to late-September of 2018 and informed him that Synergy was facing approximately $150, 000 in sanctions in Montana. [16] Synergy retained Berleth, and he was able to reach a favorable settlement for Synergy. [17]

Berleth also agreed to be an "appearance counsel" for Synergy in connection with certain bankruptcy cases filed on behalf of

Synergy clients. [18] According to an Agreed Order filed in the bankruptcy court:

> On October 10, 2018, Berleth & Associates and Synergy Law entered into an agreement whereby Berleth & Associates would provide bankruptcy assistance. Synergy Law is not a member, partner, or regular associate of Berleth & Associates. Pursuant to the agreement, Synergy Law would collect the fees from clients and prepare the paperwork, and then would pay Berleth & Associates in accordance with their agreement. [19]

***3** According to Berleth, sometime between Thanksgiving and Christmas of 2018 Synergy approached him about doing additional work for Synergy in Texas. [20] Synergy flew Berleth and his wife to Washington, DC, and Berleth met with Marinelli. [21] After the meeting Berleth agreed to assist Synergy with a threatened legal action against it by former Synergy client Sean Cavness and Cavness's lawyer, Charles Newton. [22]

D. Sean Cavness Case

In June of 2018 Cavness, who lives in Kingsville, Texas, was facing foreclosure. He contacted Synergy regarding modification of his home loan. [23] Cavness signed an engagement letter with Synergy that identified Scott Marinelli as the attorney in charge and referenced various "Counsel Attorneys" in the states in which Synergy operated – including two attorneys in Houston. [24] Berleth does not appear to have been listed in the agreement.

According to Cavness, Synergy sent him forms he would need to file for bankruptcy and instructed him, over the phone, how to complete the forms. [25] Synergy instructed him to file the forms, but not to disclose that Synergy had assisted him, not to attend the meeting of creditors, not to complete the required paperwork, and to disregard any mail he received from the court. [26] The sole purpose of filing was to temporarily stop the foreclosure of his home. [27]

On June 29, 2018, Cavness filed a pro se Chapter 13 petition, initiating Case No. C-18-BK-20275, which was assigned to Judge Isgur. Cavness failed to appear at his meeting of creditors. [28] He also failed to appear at an August 15 hearing. [29] The court dismissed Cavness's Chapter 13 case and issued an order barring Cavness from future bankruptcy filings for 180 days. [30]

On September 26, 2018, Cavness filed another bankruptcy petition, this time with counsel, initiating case No. C-18-BK-20425, which was also assigned to Judge Isgur. Cavness did not identify Synergy Law in his Statement of Financial Affairs, which asked whether Cavness had paid anyone in the last year in connection with preparing a bankruptcy petition. [31] The following day Judge Isgur entered an order directing Cavness to appear and show cause why he should not be held in contempt for violating the August 15 order. [32]

On October 17, 2018, Judge Isgur held a show cause hearing. [33] Based on testimony at the hearing, the court removed the prejudice in its prior order and allowed Cavness's new case to proceed. [34] The court also appears to have instructed Cavness and his counsel to conduct an inquiry into whether enough evidentiary support existed to file a cause of action against Synergy Law, and potentially others, for violation of the debt relief agency and other bankruptcy provisions and rules. [35] The court directed Cavness to file a status report by November 1. [36]

***4** On November 1, 2018, attorney Charles Newton filed a status report on behalf of Cavness, stating that (1) Newton's investigation revealed that Cavness had paid Synergy Law $2,550 in connection with his prior bankruptcy petition, and (2) there was reason to believe that Synergy misrepresented its services, committed malpractice, and that Synergy violated various provisions of 11 U.S.C. §§ 526-528, as well as the Federal Rules of Bankruptcy Procedure. [37] Newton proposed filing an adversary proceeding on behalf of Cavness to pursue those causes of action. [38] In "an attempt to mitigate," Newton proposed to first provide a copy of the status report to Synergy to "ascertain the possibility of a settlement resolution." [39] Newton also advised the court that "[s]hould a settlement or resolution result without the need to file an adversary proceeding, Mr. Cavness will file and circulate a motion for approval pursuant to F. R. Bankr. P. 9019." [40]

On November 9, 2018, Cavness filed an Application to Employ Charles Newton & Associates "to represent [Cavness] in analyzing and prosecuting an adversary proceeding against third parties, Synergy Law, LLC, and possibly its lawyers and affiliated companies."[41] Cavness reported that he had negotiated a contingency fee arrangement with Newton "that requires payment of hourly sums, in addition to expenses and costs, as approved by the Court, from any funds or sums awarded and recovered."[42] The fee agreement states: "We will not seek to collect our fees and expenses against you but will strive to collect the fees and costs you incur from the violators. "[43]

On December 5, 2018, Judge Isgur granted the Application to Employ Charles Newton.[44]

E. Settlement Negotiations With Marinelli and Berleth

On December 11, 2018, Newton emailed Scott Marinelli at Synergy, referencing and rejecting a December 7 offer from Synergy to settle the Cavness dispute for $10,000.[45] Newton wrote: "We do not agree with your opinions concerning this case and your belief that this is a 'shakedown'. Synergy seems to have identical trouble across the Country."[46] Newton offered to settle the case for $15,000, based on the $2,550 Cavness paid to Synergy, Cavness's $310 filing fee in the first bankruptcy, an anticipated court sanction against Synergy of at least $1,500, and anticipated attorneys' fees to Newton of $10,000.[47]

On December 14, 2018, Marinelli accepted Cavness's offer to settle for $15,000, with a change in the dates of payment.[48] According to Newton, he and Marinelli spoke by phone on December 27, 2018, and Newton emailed Marinelli on December 28, but they did not communicate thereafter.[49]

On December 31, 2018, and January 1, 2019, Berleth's CM/ECF credentials were used to file bankruptcy petitions in the Southern District of Texas on behalf of Afaf Ali Ahmad and Darian Butler.[50] In each case Synergy prepared and/or filed the petition or other documents.[51] Each case was assigned to Judge Isgur.

***5** On January 11, 2019, Berleth contacted Newton and advised him that Marinelli was no longer associated with Synergy.[52] According to Newton, Berleth requested a working lunch meeting with Cavness's attorneys to further discuss settlement.[53]

On January 14, 2019, Berleth and Berleth's wife met with Newton, Newton's wife, and Newton's daughter (all of whom are attorneys at Newton & Associates) at a Mexican restaurant in the Woodlands.[54]

Berleth's and Newton's accounts of what was said at the meeting are detailed in Section II, below. It is undisputed that at the meeting (1) Berleth informed Newton that Synergy was repudiating the settlement agreement reached with Marinelli; (2) Berleth sought to settle the case for less than $15,000; (3) Newton did not agree to settle the case for a lesser amount; and (4) during the course of the meeting, Berleth told Newton that (a) Synergy files 50 bankruptcy cases a month, at least some of which are in the state of Texas; and (b) Synergy could refer automatic stay and discharge injunction work from those cases to Newton's law firm.[55]

F. Ongoing Proceedings Involving Berleth, Synergy, and Cavness

On January 15, 2019, Judge Isgur held a hearing to address deficiencies in the Ahmad and Butler petitions.[56] At the hearing Berleth stated that Synergy had prepared the Butler petition, which he conceded was "grossly deficient," and that Berleth was being paid as "appearance" counsel in the case.[57] Based on Berleth's statements at the hearing, Judge Isgur scheduled another hearing for February 1, 2019, and directed Synergy to appear.[58]

According to Newton, on January 19, 2019, he "followed up with Mr. Berleth after the Cavness lunch meeting by email but [Berleth] never responded back."[59] Neither a copy of that email nor a quotation of its contents is in the record. Berleth stated in his deposition that "I made that [$10,000] offer to Mr. Newton, and then sometime later he emailed me his decline of that offer."[60]

On January 23, 2019, Newton filed an Updated Status Report in the Cavness bankruptcy informing the court that he had met with Berleth, who informed Newton that Synergy was repudiating the settlement agreement reached with Marinelli.[61] Newton wrote: "With the repudiation of the settlement of which was in the process of being finalized, along with other issues that have come to light, Mr. Cavness

informs the Court of his intent to file an adversary proceeding against Synergy Law, its associated entities, its principals, Scott Marinelli and its local counsel on or before February 28, 2019." [62] The Updated Status Report does not mention an offer by Berleth to refer cases to Newton.

***6** On February 1, 2019, Judge Isgur held a hearing in the Butler bankruptcy case at which Synergy Law was ordered to appear. [63] Based on testimony at the hearing, Judge Isgur entered an Order to Show Cause why Synergy Law should not be sanctioned for violating "numerous provisions of sections 526, 527, and 528 of the Bankruptcy Code" and be barred from the unauthorized practice of law in Texas, and why Berleth should not have his CM/ECF filing privileges suspended for allowing Synergy Law to file cases using his login credentials. [64]

On February 4, 2019, Judge Isgur held a hearing on the February 1 Order to Show Cause. [65] At the conclusion of the hearing, the court temporarily suspended Berleth's CM/ECF filing privileges. [66]

On February 6, 2019, Judge Isgur entered a Temporary Restraining Order ("TRO") prohibiting Synergy Law from practicing law in Texas. [67]

On February 20, 2019, counsel for Synergy and the Bankruptcy Trustee appeared and preliminarily agreed to a permanent injunction against Synergy practicing law in the Southern District of Texas, and Synergy agreed to disgorge fees received from several clients, including Cavness. [68] Berleth agreed in principle to a bar from filing any bankruptcy petitions in the Southern District of Texas for one year, a two-month suspension of his CM/ECF filing privileges, to re-take the ECF filing class, to perform five hours of ethics CLE, and to disgorge $4,000 in fees received in connection with the Ahmad case. [69] The court set another hearing for March 5 at which the parties would either present an agreed Form of Orders or, if there was no settlement, present witnesses. [70]

On February 22, 2019, Newton was reportedly first notified of the pending agreed judgment against Synergy and the existence of a miscellaneous case addressing it. [71]

On February 26, 2019, Newton filed a notice of appearance in the Synergy miscellaneous case. [72]

On March 1, 2019, a proposed Agreed Judgment was entered against Synergy. [73] The Agreed Judgment would have provided for a permanent injunction barring Synergy Law from operating as a debt relief agency, bankruptcy petition preparer, mortgage assistance provider, or from the unauthorized practice of law in the Southern District of Texas. [74] The Agreed Judgement also provided for disgorgement of fees received from several Synergy Law clients, including $2,550 received from Sean Cavness. [75]

On March 3, 2019, Cavness (through Newton) filed an objection to the proposed Agreed Judgment Sanctioning Synergy Law, stating that Cavness was an interested party, that Cavness was not consulted before submission of the Agreed Judgment, and that the Agreed Judgment did not include awards for Cavness's filing fees, emotional anguish, punitive damages, or attorneys' fees. [76]

***7** Included in Cavness's objection to the Agreed Judgment was the allegation that, at the January 14, 2019, lunch in the Woodlands, Berleth told Newton that if Newton would agree to no longer pursue the Cavness matter Synergy would refer all of its automatic stay and discharge injunction work to Newton. [77]

On March 4, 2019, an Agreed Order was signed and entered sanctioning Berleth in connection with the Butler, Ahmad, and Botello bankruptcy cases. [78] The parties to the order stipulated that Berleth assisted Ahmad, Butler, and Botello – directly and indirectly through Synergy – with filing bankruptcy petitions in the Southern District of Texas; that Berleth provided his CM/ECF credentials to Synergy; and that Synergy used Berleth's credentials to file documents in all three cases. [79] The court ordered that Berleth:

(1) be enjoined from filing bankruptcy petitions on behalf of debtors in the Southern District of Texas for one year,

(2) have his CM/ECF filing privileges suspended for 60 days,

(3) return $4,000 to Ahmad,

(4) retake the CM/ECF training course for users within five days, and

(5) complete five hours of ethics Continuing Legal Education within six months. [80]

On March 5, 2019, Judge Isgur held the scheduled hearing concerning Synergy and Berleth. He began by stating he wanted to address the allegations in Cavness's objection to the Agreed Judgment Sanctioning Synergy Law. [81] Specifically, Judge Isgur stated:

> ... I want to know why I should not vacate my order approving the Berleth settlement until there can be a full hearing on whether those allegations are accurate and whether the Court is required by law to refer Synergy and Mr. Berleth for a criminal prosecution based on the alleged bribe offered to Mr. Newton. [82]

Based on testimony at the March 5 hearing, Judge Isgur entered a Show Cause Order and scheduled a hearing for May 23 to determine whether the court was required to make a criminal referral. [83] Judge Isgur also entered a Show Cause Order stating that the court would determine at the hearing whether it should vacate, alter, or amend its March 4 order approving sanctions against Berleth. [84]

On April 9, 2019, Cavness filed an adversary proceeding against Synergy Law, several of its employees, and two Texas-based "of counsel" attorneys, alleging violations of the automatic stay, as well as restrictions on debt relief agencies, failure to provide bankruptcy disclosures, and other causes of action. [85]

On May 11, 2019, Berleth was deposed by attorneys for the United States Trustee's Office and Synergy Law. [86]

On May 22, 2019, attorneys for Berleth, Synergy, and Cavness filed a Joint Agreed Response to the Show Cause Order against Synergy and Berleth. [87]

***8** On May 23, 2019, Judge Isgur held a hearing on the Show Cause Orders against Berleth and Synergy, at which counsel for Berleth, Synergy, Cavness, and the Trustee appeared. [88] After hearing from the parties, the court took the criminal referral under advisement pending review of Berleth's deposition. [89] The court also observed that, based on a recent filing from Newton, it appeared that Synergy was continuing to file bankruptcy petitions in Texas in violation of the TRO. [90] Counsel for Synergy and the Trustee stated that they were discussing the matter and would file any necessary pleadings. [91] The court stated that it would await filings before scheduling any hearings. [92]

Newton and counsel for Synergy stated at the May 23, 2019, hearing that they had reached an agreement to settle the Cavness matter and would circulate a motion for the court's approval. [93]

On June 19, 2019, Cavness filed a Motion to Compromise Controversy, seeking the court's approval of a settlement with Synergy on the following terms: Synergy agreed to pay Cavness $5,410 (two times the amount Cavness paid Synergy, plus a filing fee), and Synergy agreed to pay Charles Newton and Associates $25,000. [94] In support of his motion, Cavness averred that the factors to be considered by the court all weighed in favor of approval, including that "the parties have engaged in arms-length negotiations and that the settlement agreement reached is an arms-length settlement." [95]

On June 26, 2019, Judge Isgur issued a Memorandum Opinion finding that (1) the court had reasonable grounds to believe that Berleth violated § 152(6), and that (2) the court therefore had a mandatory duty to report Berleth to the United States Attorney pursuant to 18 U.S.C. § 3057 (a). [96] Referrals would also be made to the United States District Court and the State Bar of Texas with a recommendation that disciplinary proceedings be commenced against Berleth. [97]

On July 9, 2019, a copy of the Memorandum Opinion was docketed in the instant case as a charge of misconduct. [98]

On July 17, 2019, Judge George C. Hanks, Jr. sent a letter to Berleth in which he (1) notified Berleth that the disciplinary matter had been referred to Judge Hanks for preliminary review, and (2) ordered Berleth to file any response to Judge Isgur's charge by July 31, 2019. [99]

On August 12, 2019, Berleth wrote to Judge George C. Hanks, Jr. informing him that Berleth did not receive Judge Hanks' letter until July 29, and apologizing for the delay. [100] Berleth attached a Respondent's Preliminary Statement, described in more detail below, in which he stated: "The Respondent strongly disagrees with the characterization and interpretation

of [Judge Isgur's] opinion, and adamantly den[ies] any and all criminal wrongdoing associated therewith." [101]

On August 23, 2019, Judge Hanks issued a Preliminary Report recommending that "disciplinary proceedings should proceed on the charge that Robert W. Berleth committed a violation of 18 U.S.C. § 152(6) by offering case referrals to an opposing lawyer to induce that lawyer to reduce his settlement demand in a bankruptcy adversary proceeding. Specifically, such proceedings are necessary to resolve key factual disputes raised by [Berleth's Preliminary Response] ...." [102]

***9** On August 28, 2019, Chief Judge Lee H. Rosenthal entered an order appointing the undersigned judge as hearing judge pursuant to Rule 5 of the Southern District of Texas Rules of Discipline. [103]

On September 5, 2019, the court appointed Jon Liroff as special prosecutor pursuant to Rule 5(E). [104]

On December 9, 2019, the court entered an order setting the case for hearing on January 14, 2020. [105]

On January 14, 2020, the court held a hearing in open court at which the special prosecutor and Berleth presented evidence and arguments. [106]

Having carefully considered the evidence and the parties' arguments, the court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a)(1).

II. Factual Issues

Newton and Berleth have provided several statements, directly and through counsel, regarding the January 14, 2019, meeting in the Woodlands.

A. January 23, 2019 – Updated Status Report on Rule 11 Inquiry [107]

In an Updated Status Report to the bankruptcy court on Cavness's proposed adversary proceeding against Synergy, filed nine days after the January 14, 2019, lunch meeting with Berleth, Newton stated:

> On Monday, January 18, 2019 [sic] [108] undersigned counsel met face-to-face with Robert Berleth, who had reportedly been retained by Synergy Law due to the recent termination of Scott Marinelli by Synergy Law. During that meeting Mr. Berleth advised that Synergy Law wished to substantially reduce the amount of the settlement funds that had previously been agreed upon with Scott Marinelli. It was explained that Scott Marinelli, who was employed by Synergy Law at the time, did not have the authority to enter into the agreement made with undersigned counsel. Therefore, Synergy Law was repudiating the agreement and wished to negotiate a new agreement with lighter terms.
>
> With the repudiation of the settlement of which was in the process of being finalized, along with other issues that have come to light, Mr. Cavness informs the Court of his intent to file an adversary proceeding against Synergy Law, its associated entities, its principals, Scott Marinelli and its local counsel on or before February 28, 2019. [109]

B. March 3, 2019 – Cavness Objection to Agreed Judgment Sanctioning Synergy [110]

In an objection to a proposed Agreed Judgment sanctioning Synergy – and ordering disgorgement to Cavness, among others – Newton stated:

> 17. It appears that the local counsel Synergy engages are typically compromised in some way, either ethically, or lack experience, and/or lack earnings.

***10** For example:

> [Discussion of two attorneys in the Southern District of Texas and one attorney in the District of Kansas who were reportedly affiliated with Synergy Law and had been suspended from the practice of law or otherwise sanctioned.]
>
> ...
>
> c. Robert Berleth only recently graduated from law school, is inexperienced, and is self-employed.
>
> [Discussion of criminal charges against Scott Marinelli and actions against Synergy Law in other jurisdictions.]

20. Synergy's recruitment of Mr. Berleth and its handling of the SDTX cases of Butler, *Botello, Cavness*, and/or *Martinez* and *Villarreal*, is evidence that the limited sanctions against Synergy has neither averted, discouraged, impeded, nor forestalled the same inappropriate conduct from occuring [sic] in the SDTX or elsewhere.

[Discussion of damages to Cavness and prior settlement agreement with Synergy.]

39. On January 11, 2019 undersigned counsel was contacted by Robert Berleth advising that Scott Marinelli was no longer with Synergy Law. Mr. Berleth requested a working lunch meeting with Mr. Cavness' attorneys in The Woodlands, Texas to discuss the settlement further.

40. On January 14, 2019 counsel for Mr. Cavness had a lunch meeting at Natalita's #2 Mexican Restaurant in The Woodlands, Texas *per* Mr. Berleth's request. During that meeting, Mr. Berleth informed counsel:

a. That Synergy Law was repudiating the settlement agreement it had reached with Mr. Cavness.

...

c. That Synergy Law files approximately 50 bankruptcy cases a month in the State of Texas, and if counsel would agree to no longer pursue Mr. Cavness' matter that Synergy would refer all of its automatic stay and discharge injunction work in Texas to Charles Newton & Associates, which could be, in Mr. Berleth's view, substantial. (This offer was refused).

...

43. On January 19, 2019 undersigned counsel followed up with Mr. Berleth after the Cavness lunch meeting by email but [Berleth] never responded back. [111]

C. March 5/ 2019 - Hearing on Preliminary Injunction Against Synergy Law [112]

At a March 5, 2019, hearing, after being sworn before Judge Isgur, Newton testified as follows regarding paragraph 40(c) of the Cavness Objection:

THE COURT: Is that a truthful statement?

MR. NEWTON: That's a truthful statement.

THE COURT: Is there anything that needs to be added to it to make it the truth, the whole truth, and nothing but the truth?

MR. NEWTON: The only reason I'm hesitating is we had a lengthy conversation, and part of it began in this restaurant and proceeded out into the parking lot when we left, and the issue arose twice during that time. The last time was in the parking lot, and we told Mr. Berleth that we would not accept that offer. The first time it was broached I told Mr. Berleth that I was here to discuss my client and not my relationship or my business - pardon me - the law firm's business with any client. And I had thought that that would push the subject off. It didn't. It continued. [113]

***11** At the March 5, 2019, hearing, Berleth's attorney, Adelita Cavada, stated:

> **MS. CAVADA:** Thank you. Your Honor, I think the accusation of a bribe is not an accurate description of the communications between Mr. Berleth and Mr. Newton. I think it's sensationalized a little bit. Mr. Berleth at the time (indisc.) tried to work things out on Synergy's behalf. I'm not sure when that conversation was, but it appeared that - I think it was more of a, look, Synergy has these bankruptcy cases; would you consider - can we refer bankruptcy cases to you. I don't think it - I don't believe it was in any way a bribe. [114]

D. April 9, 2019 - Cavness Adversary Complaint Against Synergy [115]

In an adversary complaint filed by Cavness against Synergy Law, Newton alleged:

56. On January 11, 2019 undersigned counsel was contacted by Robert Berleth who advised that Scott Marinelli was no longer with Synergy Law. Mr. Berleth requested a working lunch meeting with Mr. Cavness'

attorneys in The Woodlands, Texas to discuss the settlement further.

57. On January 14, 2019 counsel for Mr. Cavness had a lunch meeting at Natalita's #2 Mexican Restaurant in The Woodlands, Texas per Mr. Berleth's request. During that meeting, Mr. Berleth informed counsel that the global settlement between Mr. Cavness and Synergy Law was repudiated. [116]

E. May 11, 2019 - Berleth Deposition [117]

Berleth was deposed by Hector Duran for the U.S. Trustee's Office and Brad Parker for Synergy Law, LLC. Berleth was represented at the deposition by Adelita Cavada.

Berleth testified as follows:

Scott had apparently entered into some kind of settlement agreement with Chuck outside of Synergy's knowledge. And Synergy basically said - asked me to fix it, similar to the situation I had in Montana, which is what I was trying to do. It was a settlement discussion, which is exactly why we tried to - I wanted to meet with him face-to-face to see if we could work a reasonable settlement out. I believe that Chuck Newton was at the time trying to basically extort Synergy for the idea of we're going to file all these horrible terrible things about you and bring the wrath of the bankruptcy court down upon you if you don't pay me money. [118]

...

I'm not sure what you're characterizing there, whether you're saying that I'm the one that told them I could reduce it or whether they asked me to reduce it, but that was the intent with me meeting with Chuck Cavness (sic), for me to reduce the amount of money, reduce their exposure. And I think everybody on the Synergy side agreed that Chuck Cavness was asking an exorbitant amount. [119]

...

Q. So you made a $10,000 settlement offer to Mr. Newton. Did he accept that offer?

A. I recall I had authorization from Synergy to settle if for $10,000. I made that offer to Mr. Newton, and then sometime later he emailed me his decline to that offer. [120]

...

Q. Did Mr. Newton, on January 14th, 2019, ever tell you how much money it would cost Synergy Law to settle the Cavness matter?

***12** A. I think he wanted 20,000 or - I think he wanted 20,000 for him and 5,000 for Mr. Cavness, as I recall. It may not be. I think that was what he wanted off the top of my head. I don't know the details as we sit here today. [121]

...

The other point that I made to him was, I believe Mr. Cavness paid I think about $4,500, $5,000 as I recall, and my conversation to him was, This makes your client whole, right? So your client is going to get all of the money they paid to Synergy back and it pays your client's bankruptcy counsel, right? Because the presumptive rate is I think 4750. I don't know what it is, but it's around - less than $5,000 in the Southern District of Texas. And so this would make your client whole and pay for his bankruptcy through other counsel. So, you know, not negotiating with Chuck Newton because I really felt like while we were there, it was Chuck Newton was doing the negotiating for himself, not for Mr. Cavness, because the $10,000 settlement that I offered would have made his client whole and made the -- not only made his client whole, but also paid for his client's bankruptcy. So that was another one of my points in the settlement. [122]

...

Q. Okay it is alleged in paragraph 40C that you informed Mr. Newton that Synergy Law files approximately 50 bankruptcy cases a month in the state of Texas, and if Mr. Newton would agree to no longer pursue Mr. Cavness' matter, that Synergy would refer all of its automatic stay and discharge injunction work in Texas to Charles Newton and Associates, which could be, in your view, substantial. Is that allegation true?

A. It is patently false.

Q. You deny ever making that statement to Mr. Newton?

A. Certainly. I never said that they filed 50 cases a month in the state of Texas. I think that they file 50 bankruptcy cases a month. I don't know if the state of Texas is a correct assessment there. Going through it sentence by sentence,

there was no - if Counsel would agree to no longer pursue Mr. Cavness' matter, there was no quid pro quo. There was a conversation about general networking of what is his law firm surrounded, what does he do, what's his business model for his law firm, and we had that conversation. But it had nothing to do with the current bankruptcies and nothing to do with Mr. Cavness. [123]

...

A. I think I mentioned 50 bankruptcy cases a month. I don't think I said they were solely in the state of Texas. [124]

...

Q. And the second part of paragraph 40C of Exhibit 2 is you never - I believe you said that there was never any quid pro quo?

A. Absolutely not.

Q. So you didn't make an offer to Mr. Newton that he drop the Cavness matter in return for helping Synergy out with stay and discharge injunction work?

A. Absolutely not. I did discuss the settlement of the Cavness matter. We did discuss at a completely later time in the conversation about, again, just general networking. I offered my own services because typically my law firm is a collections law firm so I offered to him to, you know, hey, I know you've got some default judgments that are sitting there taking up drawer space. Send them over and maybe I can take a look and collect some of them which is kind of what I do. But there was certainly no quid pro quo any more than he was trying to bribe me with work of collecting his default judgment.

***13** Q. So are you alleging that Mr. Newton is telling a lie when he includes paragraph 40C in Exhibit 2 and files it with the bankruptcy court?

A. I think he is very self-servingly interpreting the conversation that we had at lunch. [125]

...

A. I haven't called any of them liars. I said they are self-servingly interpreting multiple different parts of a two-hour long conversation to take certain components of it out of context or line up certain components of it to make this paragraph, so that's a self-serving interpretation. It's obviously a biased paragraph that I disagree with. [126]

...

A. Yeah. We talked about everything from Mexican food to pickup trucks to general networking. So at some point what I do and my business model came up. At some point what he does and his business model came up and we discussed those. It had nothing to do with Cavness. At that point, I mean, the first 30 or 45 minutes of the meeting, we had already said everything we were going to say about Synergy and Cavness, and then we moved on to generic. [127]

...

Q. And your testimony here today under oath is that you never tied that offer of your own services to dropping the Cavness matter?

A. Absolutely not. Not even close. There was no connection to the Cavness case or my services or his services or any future networking at all. [128]

...

unlike paragraph C of Chuck Newton's exhibit where I can patently stand up and say he's lying or misinterpreting. [129]

Q. And that's the position you're going to take on May 23rd when the ordered show cause is heard by the bankruptcy court?

A. On paragraph C?

Q. 40C of Exhibit 2.

A. That interpretation of the conversation is absolutely patently false. [130]

...

Q. Okay. But I'm just asking for your opinion of it. You thought that Chuck Newton was charging way too much money for that kind of work, didn't you?

A. Absolutely. Nobody asked him to go and do all of this .... I don't think Shawn Cavness asked him to do that. And, you know, Synergy's position was, again, like I told him, if we're going to pay $20,000 on this thing, we're going to

pay it to Cavness. We're going to pay off the balance on his house and be done with it. [131]

...

The first half of the lunch, I was merely negotiating with him as a settlement. Then we closed those settlement negotiations. We talked about Mexican food. We talked about - my wife is from El Paso. She speaks Spanish. She talks about Mexican food a lot. And we talked about pickup trucks, and that's when his business model came up of, well, this is what I do. I wait for the violation of the automatic stay typically against - I think he described it as the big banks are the ones that violate the automatic stay, whether intentionally or unintentionally, doesn't matter, but they do. And his business model is kind of going and, for lack of a better term, popping the big banks for violating that stay. In a completely separate conversation, that's when I said, well, Synergy has a lot of clients just by the numbers. Some of those clients are going to have their automatic stays violated. By the numbers, some of those clients are going to be here in Texas. [132]

...

It was simply a networking issue, similar to him saying I've got a whole drawer full of default judgments that are empty. [133]

***14** ...

Q. But this guy is saying, I need 15,000 bucks. And isn't it true that you were trying to do what you could to knock that down for Synergy and say, listen, I think I can get that down; I think I can get it down?

A. Sure. It wasn't about I think I can get it down. I think the conversation my opinion of it - without having a conversation that I had with them - my opinion of it was that it was an unrealistic number. Compared to what other settlements had been done in other districts and jurisdictions, I felt like Chuck Newton was, you know, pigs get fat and hogs get slaughtered. He was asking for, quite frankly, way too much for what he had done, and compared to some of the other settlements, he was off the charts way too much. So that was my opinion of it, and I tried to express that to Chuck Newton. And I tried to express to Chuck Newton that an agreed settlement is probably never going to be as much as you want and but it is - it does turn the lights on for a day. [134]

...

[T]hat was the intent with me meeting with Chuck Cavness (sic), for me to reduce the amount of money, reduce their exposure. [135]

...

Now, I assert that at no point was anything I said intended to be a bribe. I didn't invite it as a bribe. It was merely a conversation about networking, and I network with opposing counsel on a regular basis. [136]

...

Q. But your testimony here today is that you never tied settlement or dropping the Cavness matter with the stay and discharge injunction work in Texas with Mr. Newton?

A. Absolutely no. Specifically, I did not make that connection. It was not intended to be that connection. There was no intent to bribe. Absolutely not. Now, we did have the conversation. But to follow-up on your previous question, I believe it's worked. Mr. Cavness still doesn't have the $10,000 that Synergy offered on that day. And so far, that settlement offer has held true. [137]

F. May 22, 2019 - Joint Agreed Response to Show Cause Order [138]

On May 22, 2019, Cavness, Synergy, and Berleth filed a Joint Agreed Response to the May 6 Show Cause Order, stipulating to a number of facts. The first paragraph of the joint response stated that it was being submitted by Cavness "by and through his attorney of record, Charles (Chuck) Newton," and by Berleth "individually, and by and through his attorney of record, Adelita Cavada." [139] The joint response states, in relevant part:

> 5. Newton and Synergy's attorney, Scott Marinelli, were in the process of negotiating a proposed settlement agreement (the "Proposed Settlement") to present to the Court when Marinelli [became] unavailable to consummate the Proposed Settlement.
>
> ***15** 6. Synergy then requested that attorney Berleth make contact with Newton for purposes only of completing the Proposed Settlement.

7. Although Synergy understood that Berleth would make contact with attorney Newton, it was unaware of [the] business luncheon requested by Berleth on January 14, 2019.

8. At the business luncheon, Berleth believed he could get the best outcome for Synergy if he was able to arrive at an agreement for an amount of less than $15,000.00 as a zealous advocate for his client.

9. As part of a trial balloon of sorts to get negotiations started toward an agreement to settle the Cavness case for an amount of less than the $15,000.00, Berleth made the statement to Newton that he believed Synergy files about 50 bankruptcy cases a month in the State of Texas. Mr. Berleth estimated that number. Synergy, however, neither knew nor authorized Berleth to make such a statement.

10. Mr. Berleth stated that Synergy could refer all of the automatic stay and discharge injunction work to Newton's law firm. Again, Synergy neither knew nor authorized Berleth to make such a statement.

11. Berleth had no knowledge of the number of bankruptcy cases [that] were filed by Synergy in Texas or whether any automatic stay or discharge injunction work emanated from any such cases.

12. At the luncheon meeting, Berleth also made other possible proposals of payment of lesser amounts to settle the Cavness case below the $15,000.00 made the subject of the Proposed Settlement.

13. Newton, on behalf of Cavness, refused all such proposals and did not rely on Berleth's foundationless statements.

14. Berleth had intended to follow up with Newton after the luncheon meeting, after he had an opportunity to advise Synergy, in a more positive way. However, he was confronted by the Court the next morning, January 15, 2019, with his representation in the Darian Butler case, and other matters.

15. Mr. Berleth is profoundly sorry for the issues caused by his attempt to negotiate down the $15,000.00 Proposed Settlement. He genuinely apologizes to this Court, Synergy, Mr. Newton, and Mr. Cavness.

16. Mr. Berleth will accept the judgment of this Court for his actions.

17. Not as an excuse but an explanation for his actions, Robert Berleth wishes the Court to know the following:

a. He was only licensed to practice law on May 1, 2017. He operates his own solo practice, and he is inexperienced in complex bankruptcy matters. His unpracticed actions were extemporaneous and unread.

b. In making the suggestion to Newton he was oblivious to 18 U.S.C. § 152(6). It was not his intent to knowingly and fraudulently offer remuneration to Newton for not filing an adversary proceeding in the Cavness case.

c. As stated, Newton did not accept or rely on the suggestion made, and the goal was merely to make Cavness more amenable to accepting less than the $15,000.00 made the subject of the Proposed Settlement.

d. Mr. Berleth's comment to Newton was wrong and at variance with the intent of the meeting. It was mercurial.

18. Sean Dean Cavness, Chuck Newton, and Synergy Law, LLC believe that Robert Berleth's comment was in error, and was made as a result of his inexperience. Mr. Berleth has already entered into an Agreed Order for sanctions, and has complied with the order, which the Parties believe is measured and appropriate. The Parties would not like to see further actions taken that may irreparably damage his ability to recover from his prior bad practices.

***16** 19. Synergy has agreed to a new settlement in the Cavness matter that will be presented to the Court.

20. The Parties each hope that given the Court's discretion, Mr. Berleth will go on in the practice of law without making such mistakes again. [140]

G. May 23, 2019 - Hearing on Order to Show Cause [141]

In a hearing before Judge Isgur addressing the Court's potential obligation to make a criminal referral regarding the Berleth matter, Newton stated:

MR. NEWTON: ... My general recommendation for the Court is I don't want you to make the referral. Mine is more a practical matter than it is a legal matter. I think we were all young attorneys once that had not practiced very long. My experience with Mr. Berleth over the course of this matter is that he can be both zealous and he's inexperienced, and those are combinations that don't go very well together. And I don't know how you get over that except with experience.

As for the law, I'm not sure that he -- I stick with what I told the Court. But I'm not sure in the hindsight, from his standpoint and from his authority, I'm not sure he knowingly made offers, in his mind, on how to proceed. And if he didn't make knowing offers, maybe the Court has to refer it, but I think the Court has to determine whether or not there's some reasonable aspect. And if there's no knowingness, I'm not sure it's reasonable.

What I would hate to see is that Mr. Berleth's - I'm not sure that he shouldn't be sanctioned in some way because I think that there - as the Court has indicated, there has to be some statement made. But I also know how these criminal referrals get out of hand. I would hate to see a young attorney's life ruined because he made some, I think, egregious errors. But he made some errors starting out in practice when he simply didn't know better. If he was with a firm or he's with some mentorship, whether he knew what he was doing, but he's a year and-a-half out of school. I'm not sure law school prepares you for that. Lord knows when I started practicing I made a lot of mistakes and the judges taught me the hard way how to practice law. [142]

...

So my point is I think he was irresponsible. I have some question on whether or not he knowingly did something, made an offer. He did make an offer, but whether he knowingly did it with - knowing that it - knowing that Synergy did not authorize that conduct, that Synergy authorized the acceptance of the $15,000 offer and that he wanted to impress Synergy. Synergy did not have any intention of sending me business. And I'm not sure where Mr. Berleth got the idea. But I think what we've narrowed down is that he -

THE COURT: I've got to ask you. Does that make it better or worse?

MR. NEWTON: I'm not sure, Your Honor.

THE COURT: I'm not either.

MR. NEWTON: But I think what makes it worse is referring it for a criminal referral. If you want to sanction him, if you want to make him go further than what you have, I think that that's appropriate. I think what happened, happened. [143]

***17** ...

THE COURT: Well, but what does knowingly mean? You're telling me he didn't do it knowingly. I think he did it very - from what I have seen, and I haven't read the deposition yet, it was very knowing. He was trying to persuade you to back off.

MR. NEWTON: Yes, he was doing that.

THE COURT: And he knew who you were.

MR. NEWTON: Yes, he knew that.

THE COURT: And he knew what he was saying.

MR. NEWTON: But I think at some point some people are - should be given the benefit of the doubt. [144]

Counsel for Berleth stated the following:

MS. CAVADA: ... If you look at the totality of that meeting, the intent, the purpose of the meeting was to negotiate down a settlement that had already been there or a settlement entered into with a previous attorney. That was the goal. There was no intent other than to reduce, you know, the 15,000 to something else. There was no intent to bribe or -

THE COURT: Well, the bribe was what was intended to reduce the 15,000, right?

MS. CAVADA: If you think there is a bribe. But those statements in a bulleted list look a lot different than what would have actually occurred in a meeting with his wife, with Mr. Newton, with his family. Those statements were made separately over a two-hour conversation. They were made at different points in time. He did make those statements, but those were statements separate from negotiating. It wasn't in exchange for reducing. There were different parts of the conversations where they talked about Synergy and the number of cases, you know, bankruptcy cases that Mr. Berleth was estimating.

THE COURT: Well, read - I'm looking at what you-all filed last night.... I'm looking at the statement your client filed with me. It directly links them.

MS. CAVADA: It directly links them as part of a conversation.

...

But not as an offer. It wasn't an offer.

...

I think when you take the statement, this paragraph with everything else in this, it's part of a bigger picture that it was more bluster or - I'm not sure of the word I should - the description I should be using. But Mr. Berleth never, never made a - getting - resolving this matter with Mr. Cavness contingent on Mr. Newton accepting any - any cases or anything. They weren't tied together.

...

Seeing it now, you know, with your explanation, I do see how that would - I do see why you would read it that way. When we were reading it and working on it last night I was coming - I didn't read it that way because that's not what Mr. Berleth did. It wasn't a bribe.

...

He knowingly - he said the words, but it wasn't to give, offer, receive or attempt to receive anything on behalf of Synergy in exchange for dropping the Cavness matter. They weren't tied together. [145]

H. August 15, 2019 - Berleth's Preliminary Statement [146]

In a written response to Judge Isgur's charge, submitted to Judge Hanks, Berleth stated the following:

> Without calling Judge Isgur's integrity into question and with the utmost respect for the bench, the Respondent absolutely disputes that he communicated with any constructive, actual, or inadvertent intent to bribe any person at any time. Specifically, he denies that a casual comment made indicating some appropriate business referrals might be possible in the future to Charles Newton was made with any intent or at a point in the conversation to persuade his action or inaction. It was a post-settlement conversation that was general, non-specific and in the nature of networking, as is customary within the legal community. Mr. Newton has stated on the record that he supports the Respondent's interpretation, and that he believes no further action should be taken.

***18** The balance and primary substance of Judge Isgur's long opinion and narrative recites events for which the Respondent has already entered into an agreed order acknowledging inappropriate actions, accepted sanctions and corrective orders, and all of which sanctions and orders have already complied with. These are closed and settled matters. In fact, 16½ pages of the 19-page opinion speak only to previously settled issues, at which time the Honorable Judge agreed no further action was needed. Because Chuck Newton had previously filed a status report in *Cavness*, Judge Isgur was fully aware of the settlement conference and discussions between Berleth and Newton at the time Isgur signed the agreed order. Obviously, his Honor would not have signed the agreed order if he believed further actions were warranted. It wasn't until Synergy Law, LLC openly and blatantly violated Judge Isgur's TRO and injunctive orders—several months later—that the "bribery" issues came to be serious enough to necessitate a 19-page opinion and criminal referral.

The Respondent strongly disagrees with the characterization and interpretation of the opinion, and adamantly den[ies] any and all criminal wrongdoing associated therewith. [147]

I. January 14, 2020 - Berleth's Statements at the Disciplinary Hearing

On January 14, 2020, the court held a hearing at which a special prosecutor presented evidence from the record, and Berleth was given the opportunity to respond. Regarding the January 14, 2019, meeting in the Woodlands, Berleth stated:

> **MR. BERLETH:** ... I think that all of the parties, Chuck Newton and everybody, are in agreement with, you know, who said what on what day. The question is about the intent of those statements. I think there is general agreement about the intent or the lack of intent of those statements,

> but there is no real factual disputes about them. [148]

Berleth did not present any additional evidence about the substance of his meeting with Newton.

III. Charge of Misconduct

A. Governing Authority

Standards of conduct and disciplinary proceedings enforcing them are governed by the Rules of Discipline, United States District Court for the Southern District of Texas ("Southern District Rules of Discipline"). [149] The Southern District Rules of Discipline state that lawyers who practice before the court must "act as mature and responsible professionals," and the "minimum standard of practice" is the Texas Disciplinary Rules of Professional Conduct ("Texas Disciplinary Rules"). [150] As such, a violation of the Texas Disciplinary Rules "shall be grounds for disciplinary action." [151] However, "the court is not limited by that code." [152] For example, Appendix D to the Southern District Local Rules provides detailed guidelines for professional conduct to which all attorneys practicing in this district are expected to adhere. [153]

The Southern District Rules of Discipline do not specify a burden of proof in disciplinary proceedings. Since the Texas Disciplinary Rules provide the minimum standards for practice before the court, the court will look to them for guidance. Alleged violations of the Texas Disciplinary Rules are governed by the Texas Rules of Disciplinary Procedure, which specify that the burden of proof in both evidentiary hearings and trials of disciplinary actions is by a preponderance of the evidence. [154] This burden of proof applies even where the alleged disciplinary violation could also be charged criminally. [155] The court will therefore apply a preponderance of the evidence standard in this case.

B. Prior Opinions

***19** The record in this case has already been reviewed by two judges, albeit through different legal frameworks. The court therefore first addresses what deference, if any, is owed to the prior opinions.

Based on the record developed in the bankruptcy court, Judge Isgur determined in a thorough, 19-page opinion that the court was required to refer Berleth to the United States Attorney pursuant to 18 U.S.C. § 3057(a). [156] As stated in Judge Isgur's opinion, the issue before the Court was to "determine whether its mandatory duty under 18 U.S.C. § 3057 (a) ha [d] been triggered." [157] Section 3057 (a) provides, in pertinent part, that if a judge has "reasonable grounds for believing" that a bankruptcy crime has been committed, the judge must refer the matter to the United States Attorney.

In response to the allegation that Berleth committed a bankruptcy crime — specifically, a violation of 18 U.S.C. § 152(6) — Judge Isgur held two hearings and allowed discovery, including a deposition of Berleth. In applying § 3057(a) to the record evidence, Judge Isgur concluded that the court had "reasonable grounds to believe that Mr. Berleth violated § 152(6)," and therefore "[t]he Court must report the violation." [158] Judge Isgur also referred the matter to the Southern District of Texas with a recommendation that disciplinary proceedings be commenced against Berleth. [159]

Judge Isgur's referral was assigned to Judge Hanks to determine whether further disciplinary proceedings should be held. [160] Following review of Judge Isgur's opinion and a response submitted by Berleth, Judge Hanks concluded that disciplinary proceedings were warranted. [161] Judge Hanks noted that, based on the record in the bankruptcy court, "18 U.S.C. § 3057 obligated Judge Isgur to refer Berleth's actions to the United States Attorney," and "a matter serious enough to warrant a criminal referral would also be serious enough to warrant referral [for] disciplinary proceedings." [162] Because factual assertions in Berleth's response were "directly contradicted by the record developed thus far in this case," Judge Hanks determined that further proceedings were "necessary to resolve key factual disputes." [163]

Neither Judge Isgur nor Judge Hanks applied a preponderance of the evidence standard or analyzed Berleth's conduct within the framework of the Southern District Rules of Discipline — nor did either judge have the benefit of a full evidentiary hearing. The court will therefore conduct an independent analysis of the record as it now exists in light of the current posture of the case.

C. Analysis

***20** Berleth is charged with violating the Southern District Rules of Discipline by offering case referrals to an opposing lawyer to induce that lawyer to reduce his settlement demand in a bankruptcy adversary proceeding in violation of 18 U.S.C. § 152 (6).[164] As discussed above, the "minimum standard of practice" under the Southern District Rules of Discipline is the Texas Disciplinary Rules, and a violation of the Texas Disciplinary Rules "shall be grounds for disciplinary action."[165] However, "the court is not limited by that code."[166] The court looks first to the Texas Disciplinary Rules to determine if Berleth's conduct violated those rules. The court then looks at the Local Rules to determine whether Berleth otherwise violated the Guidelines for Professional Conduct for attorneys practicing in this district.

1. Violation of the Texas Disciplinary Rules

Texas Disciplinary Rule 8.04 (Misconduct) contains at least two provisions that are relevant in this case:

Rule 8.04(a)(2) states that a lawyer shall not "commit a serious crime," defined to include "a felony involving moral turpitude," or "commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Rule 8.04(a)(3) specifies that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Conduct that could violate a federal criminal statute, such as 18 U.S.C. § 152(6), implicates both rules, whether or not the attorney is charged with or convicted of a crime.[167] As noted in the Texas Rules of Disciplinary Procedure, "an attorney may be disciplined as a result of the underlying facts as well as being disciplined upon the conviction [of a crime]."[168]

In determining whether Berleth violated the Texas Disciplinary Rules, the court will first determine whether there was a violation of 18 U.S.C. § 152(6), and therefore Rule 8.04(a)(2), then, more generally, whether Berleth's conduct violated Rule 8.04(a)(3).

a. Whether Berleth Violated Rule 8.04(a)(2)

In his initial referral Judge Isgur found reasonable grounds to believe that Berleth violated 18 U.S.C. § 152(6), which states:

> A person who ... knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11; ... shall be fined under this title, imprisoned not more than 5 years, or both.

An offense under § 152(6), as applicable here, requires proof of the following elements:

(1) There existed a proceeding in bankruptcy; and

(2) The defendant

— offered money, property, remuneration, compensation, reward, advantage, or promise thereof

— for acting or failing to act in such bankruptcy proceeding; and

(3) The defendant did so knowingly and fraudulently.[169]

***21** The word "knowingly" means that "the act was done voluntarily and intentionally, not because of mistake or accident."[170] "An act is done fraudulently if done with intent to deceive or cheat any creditor, trustee, or bankruptcy judge."[171]

(i) Undisputed Elements

There is no dispute as to the first element. Cavness filed for bankruptcy twice, his dispute with Synergy related to those bankruptcy filings, and the adversary proceeding against Synergy was based, at least in part, on alleged violations of title 11.[172]

There is no dispute as to the first part of the second element. As Berleth stated at the disciplinary hearing:

> ... I think that all of the parties, Chuck Newton and everybody, are in agreement with, you know, who said what on what day. The question is about the intent of those statements.... there is no real factual disputes about them. [173]

Specifically, it is undisputed that at the January 14, 2019, meeting Berleth told Newton that (1) Synergy files 50 bankruptcy cases a month, at least some of which are in the state of Texas; and (2) Synergy could refer automatic stay and discharge injunction work from those cases to Newton's law firm. [174]

(ii) Disputed Elements

There is, however, some dispute as to the remaining elements, specifically, whether Berleth's offer was intended to induce action or inaction on Newton's part, and whether Berleth acted knowingly and fraudulently.

(a) Offer for Acting or Failing to Act in a Bankruptcy Proceeding

Newton alleges that Berleth's offer was an explicit quid pro quo:

> [Berleth stated that] if counsel would agree to no longer pursue Mr. Cavness' matter that Synergy would refer all of its automatic stay and discharge injunction work in Texas to Charles Newton & Associates, which could be, in Mr. Berleth's view, substantial. [175]

Newton never retracted that allegation, although he did expand on it when questioned by Judge Isgur:

> [W]e had a lengthy conversation, and part of it began in this restaurant and proceeded out into the parking lot when we left, and the issue arose twice during that time. The last time was in the parking lot, and we told Mr. Berleth that we would not accept that offer. The first time it was broached I told Mr. Berleth that I was here to discuss my client and not my relationship or my business - pardon me - the law firm's business with any client. And I had thought that that would push the subject off. It didn't. It continued. [176]

***22** Berleth stated in his deposition and his Preliminary Response to Judge Hanks that "there was no quid pro quo," [177] and he "denies that [the offer] was made with any intent or at a point in the conversation to persuade [Newton's] action or inaction." [178] Specifically, Berleth contends that his offer to refer cases to Newton "had nothing to do with the current bankruptcies and nothing to do with Mr. Cavness," [179] that it was merely *"a* casual comment ... indicating some appropriate business referrals," [180] made in "a completely separate conversation," [181] after Berleth and Newton "had already said everything [they] were going to say about Synergy and Cavness." [182] In short, "[i]t was a post-settlement conversation that was general, non-specific and in the nature of networking, as is customary within the legal community." [183]

Berleth's denials are not persuasive for a number of reasons, and the credible evidence supports a finding that Berleth offered to refer cases to Newton to induce Newton to lower his settlement demand, i.e., to induce Newton's action and/or inaction in connection with the Cavness adversary proceeding.

First, Berleth's statements in his deposition and Preliminary Response are directly contradicted by the Joint Agreed Response he filed in the bankruptcy court. [184] The Joint Agreed Response links Berleth's offer in both timing and purpose with his attempt to convince Newton to lower his

settlement demand. Specifically, while Berleth argues that the offer was part of a "completely separate" [185] "post-settlement conversation," [186] the Joint Agreed Response states that the offer was "part of a trial balloon of sorts to get negotiations started toward an agreement to settle the Cavness case for an amount of less than $15,000." [187] Similarly, while Berleth argues that the offer "had nothing to do with Mr. Cavness," [188] the Joint Agreed Response states that "the goal" of the offer was "to make Cavness more amenable to accepting less than the $15,000.00 made the subject of the Proposed Settlement." [189]

Second, it makes sense that Berleth would try to find an alternative way to satisfy Newton. According to Berleth, Newton's attorneys' fees were the sticking point in negotiations: "Chuck Newton was doing the negotiating for himself, not for Mr. Cavness, because the $10,000 settlement that I offered would have made his client whole." [190] In Berleth's view, Newton "was asking for, quite frankly, way too much for what he had done, and compared to some of the other settlements, he was off the charts way too much." [191] As such, offering to refer cases to Newton in exchange for a lower settlement amount would have been a logical, albeit improper, negotiating tactic.

***23** Third, while Berleth asserts that "Mr. Newton has stated on the record that he supports [Berleth's] interpretation, and that he believes no further action should be taken," [192] the record does not support these assertions. When questioned by Judge Isgur, Newton confirmed that the allegations in the Cavness Objection were truthful, that Berleth in fact made the offer twice during the January 14 lunch meeting, and that Newton told Berleth that Newton was there to discuss his client, not his firm's business. [193] Newton agreed with Judge Isgur that, in offering to refer cases to Newton, Berleth was "trying to persuade [Newton] to back off." [194] As to these factual allegations, Newton did not waiver: "I stick with what I told the court." [195]

Furthermore, although Newton was concerned that a criminal referral might "get out of hand," he nonetheless felt that Berleth made some "egregious errors," and "there has to be some statement made." [196] "If you want to sanction him, if you want to make him go further than what you have, I think that's appropriate. I think what happened happened." [197]

For all of these reasons, the court finds that the second element of § 152(6) is satisfied by a preponderance of the evidence: Berleth offered to refer cases to Newton in an attempt to persuade Newton to reduce his settlement demand in a bankruptcy adversary proceeding.

(b) Acting Knowingly and Fraudulently

There is no genuine dispute that Berleth acted knowingly, i.e., "voluntarily and intentionally, not because of mistake or accident." [198] To the extent Berleth argues that he did not act knowingly because his offer was not linked to Newton reducing his settlement demand, the credible evidence is to the contrary, as discussed above. Similarly, Berleth's argument that he was unaware of § 152(6) when he made the offer to Newton is irrelevant: knowledge of illegality is not an element of § 152(6). [199]

Whether Berleth acted fraudulently, i.e., whether he made the offer to Newton "with intent to deceive or cheat any creditor, trustee, or bankruptcy judge," [200] is a closer question. There is little direct evidence in the record on which to make that determination. Deceptive intent was not addressed in Berleth's deposition or the Joint Agreed Response, and Berleth's position in his Preliminary Response and at the January 14, 2020, disciplinary hearing was simply that "there was no intent to bribe [Newton] in any way." [201]

Nevertheless, as addressed by the special prosecutor at the January 14 hearing, there is evidence in the record to suggest that had Newton accepted Berleth's offer and case referrals had become part of the settlement consideration, finalizing the settlement could have involved misrepresentations to the bankruptcy court. [202] As Newton advised the court when he first proposed an adversary proceeding against Synergy, "[s]hould a settlement or resolution result without the need to file an adversary proceeding, Mr. Cavness will file and circulate a motion for approval pursuant to F.R. Bankr. P. 9019." [203] Such a motion would require the parties to make a number of representations to the court, chief among them that the settlement was an arms-length transaction not tainted by fraud. [204] When the Cavness dispute was ultimately settled without Berleth's involvement, Newton submitted a motion stating just that: "Mr. Cavness contends that the parties have engaged in arms-length negotiations and that the settlement agreement reached is an arms-length settlement." [205]

***24** The court recognizes that this possible result is speculative. There is no evidence that Berleth was aware of Rule 9019's requirements or that he knew settlement of the Cavness dispute would involve any factual representations to the bankruptcy court. Nevertheless, as discussed in Judge Isgur's opinion referring this case, Berleth's lack of candor before the bankruptcy court and his inconsistent statements regarding the allegations against him are indicative of "dishonest character."[206] They provide circumstantial evidence of fraudulent intent. But after applying a preponderance of the evidence standard to the strict elements of § 152(6), the court does not find that the third element of § 152(6) is satisfied. There is not sufficient evidence to establish that Berleth offered cases to Newton with the intent to deceive a creditor, trustee, or bankruptcy judge. Based on the record before it, the court therefore finds that the evidence is not sufficient to prove a violation of § 152(6) or a violation of Texas Disciplinary Rule 8.04(a)(2).

(c) Whether Berleth violated Rule 8.04(a)(3)

Unlike Rule 8.04(a)(2), which requires proof of a crime, Rule 8.04(a)(3) sweeps more broadly — it prohibits any conduct "involving dishonesty, fraud, deceit or misrepresentation." The Texas Disciplinary Rules define "fraud" as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information."[207] The terms "dishonesty," "deceit," and "misrepresentation" are not defined in the Rules, but they have similar and overlapping dictionary definitions: demonstrating a lack of honesty or integrity, causing someone to accept as true or valid what is false or invalid, and giving false or misleading representations.[208]

Violation of Rule 8.04(a)(3) requires proof of fraudulent intent or an intent to deceive. As discussed above, there is no direct evidence that Berleth intended to deceive the bankruptcy court. While it could be argued that Berleth intended to deceive Cavness by insisting on terms that would benefit Synergy and Newton at Cavness's expense, the evidence in the record suggests that any reduction in the settlement demand would have come from Newton's attorneys' fees, not Cavness's recovery. Berleth stated that his reduced settlement offer would make Cavness whole, but "Newton was doing the negotiating for himself, not for Mr. Cavness."[209] The evidence therefore does not establish that Berleth sought to deceive or disadvantage Cavness by offering to refer cases to Newton.

It is true that even apart from his interactions with Newton, Berleth demonstrated a lack of candor before the bankruptcy court, and that the positions he took in his deposition were inconsistent with his statements in the Joint Agreed Response. Nevertheless, having carefully considered all of the evidence, the court concludes that there is insufficient evidence of dishonesty, fraud, deceit, or misrepresentation to prove a violation of Texas Disciplinary Rule 8.04(a)(3).

2. Violation of the Southern District of Texas Guidelines for Professional Conduct

The Southern District of Texas Guidelines for Professional Conduct states, inter alia:

> A. In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.
>
> B. A lawyer owes, to the judiciary, candor, diligence and utmost respect.
>
> ...
>
> D. A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.[210]

The court concludes that Berleth violated these Guidelines for Professional Conduct. Berleth owed a duty of candor to the judiciary. His deposition testimony, which is inconsistent with the stipulation in the Joint Agreed Response to Show Cause Order, reflects a lack of candor before Judge Isgur in violation of Guidelines A, B, and D.

***25** In addition, Berleth's attempts to renegotiate the settlement amount to be paid to Cavness by offering to refer cases to Newton if he would reduce the $15,000 settlement evidenced a lack of professional integrity. Even if Berleth's settlement proposal had only resulted in an agreement by Newton to reduce his attorneys' fees, with no reduction in the damages to be received by Cavness, the submission of such an agreement to Judge Isgur for approval could have been a breach of Berleth's duty to the judicial system in violation of Guideline A, a breach of his duty of candor to the judiciary in violation of Guideline B, and a breach of his duty to the administration of justice and personal integrity in violation of

Guideline D. The fact that Berleth's proposal did not bear fruit does not absolve him.

3. Factors to be Considered in Imposing Sanctions

Rule 5.F. of the Southern District Rules of Discipline states that if the hearing judge determines that disciplinary action should be taken, the judge shall (1) make findings of violations, and (2) order either (A) permanent disbarment, (B) a suspension, or (C) a written or oral reprimand and whether such should be public or private, with such conditions as the judge may order.

While the Southern District Rules of Discipline do not identify factors to be considered, Rule 15.02 of the Texas Rules of Disciplinary Procedure states that, "[i]n imposing a sanction after a finding of Professional Misconduct, the disciplinary tribunal should consider the following factors:

(a) the duty violated;

(b) the Respondent's level of culpability;

(c) the potential or actual injury caused by the Respondent's misconduct; and

(d) the existence of aggravating or mitigating factors."[211]

"After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose." Specific aggravating and mitigating factors are identified in sections 15.09(B) and (C).

Addressing factors (a) and (b), the court finds that Berleth knowingly violated three of the court's Guidelines for Professional Conduct. As to factor (c), although Newton did not accede to Berleth's offer to accept legal services in return for lowering his settlement demand, the offer had the potential to practice a fraud on the bankruptcy court if a settlement had been renegotiated as suggested by Berleth and presented to the bankruptcy court for approval without the court's knowledge of the true facts of the negotiations between Berleth and Newton.

Factor (d) requires the court to consider aggravating or mitigating factors. Other than the sanctions previously imposed on Berleth by Judge Isgur, Berleth has no disciplinary record.[212] The only relevant aggravating factor the court has identified is Berleth's initial "refusal to acknowledge [the] wrongful nature of his conduct"[213] before Judge Isgur. Relevant mitigating factors are "his inexperience in the practice of law,"[214] the imposition of sanctions already imposed by Judge Isgur,[215] and the remorse and contrition Berleth expressed to the court.[216]

This is a troubling case. An inexperienced lawyer violated several Guidelines for Professional Conduct, and his conduct could have resulted in much more serious violations had the court found fraudulent intent. Having considered all of the relevant factors, the court concludes that Berleth should be privately reprimanded. A private reprimand is not a viable remedy, however, because the records in the underlying bankruptcy cases and in this action, which will include the court's Memorandum Opinion and Order, are publicly available. The court's Memorandum Opinion and Order will serve as a reprimand since the court has reproved Berleth for his conduct. No further sanction is necessary. The court cautions Berleth, however, to give careful attention to all of the ethical standards that govern his conduct as an attorney admitted to practice before the court and to guard against any violations of those standards.

***26** Pursuant to Rule 5.F., the clerk of court will provide a copy of this Memorandum Opinion and Order to Robert W. Berleth and to Chief Judge Lee H. Rosenthal. The clerk will also provide copies to Judge George C. Hanks, Jr. and Judge Marvin P. Isgur.

All Citations

Not Reported in Fed. Supp., 2020 WL 522710

Footnotes

1 Texas Attorney Profile, State Bar of Texas, available at https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&te mplate=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&contactID=339245 (last accessed January 16, 2020); In re Attorney Admissions, Case No. H-17-MC-1154.

2 Oral Deposition of Robert Berleth, Case No. H-19-MP-302 (Synergy), Exhibit A at May 23 Show Cause Hearing, Docket Entry No. 27A, p. 40. The transcript of Berleth's deposition was not filed in H-19-MP-302, but it was admitted as an exhibit and incorporated into the record of the instant case at Berleth's January 14, 2020, disciplinary hearing. It was referred to at the hearing, and will be referred to in this opinion, as Docket Entry No. 27A in the Synergy case.

3 See In re Afaf Ali Ahmad, Case No. H-18-BK-37392; In re Darian Butler, Case No. H-19-BK-30007; In re Leonel Botello, Case No. H-19-BK-30032.

4 Id.

5 Id.

6 See Objection to Agreed Judgment Sanctioning Synergy ("Cavness Objection"), Case No. H-19-MP-302 (Synergy), Docket Entry No. 6, ¶ 40. Berleth also shared his CM/ECF credentials with Synergy, and non-lawyer staff at Synergy used those credentials to file bankruptcy petitions on behalf of Synergy clients. Agreed Order Sanctioning Robert W. Berleth, Case No. H-19-BK-30007 (Butler), Docket Entry No. 70. Berleth was sanctioned for that conduct, and the issue is not presently before the court.

7 See id. It was also determined that Berleth shared his CM/ECF credentials with Synergy, and that non-lawyer staff at Synergy used those credentials to file bankruptcy petitions on behalf of Synergy clients. Agreed Order Sanctioning Robert W. Berleth, Case No. H-19-BK-30007 (Butler), Docket Entry No. 70. Berleth was sanctioned for that conduct, and the issue is not presently before the court.

8 Id.

9 Exhibit CAV-1 to Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6-1, p. 1.

10 Id.

11 Id.

12 Id. at 25, 28.

13 Original Complaint Concerning Violation of Restrictions on Debt Relief Agencies; Failure to Properly Provide Bankruptcy Disclosures Information; the Violation of F. R. Bankr. P. 9011; Violation of the Automatic Stay; and, Related Relief ("Cavness Adversary Complaint"), Case No. C-19-AP-2012 (Cavness AP), Docket Entry No. 1, ¶¶ 19, 25; see also Testimony of Terrylle Blackstone, Case No. H-19-BK-30007 (Butler), Docket Entry No. 58, pp. 9, 19 (stating that Synergy learned in or about June of 2018 that Marinelli lost his law license).

14 Exhibit CAV-2 to Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6-2.

15 Testimony of Terrylle Blackstone, Case No. H-19-BK-30007(Butler), Docket Entry No. 58, p. 9.

16 Berleth Deposition, Case No. H-19-MP-302 (Synergy), Docket Entry No. 27A, pp. 50, 53.

17 Id. at 15-16.

18 Id. at 52-53.

19 Agreed Order Sanctioning Robert W. Berleth, Case No. H-19-BK-30007 (Butler), Docket Entry No. 70, ¶ 8. After entering into the October 10, 2018, agreement, Berleth does not appear to have been associated with any bankruptcy petitions filed in the Southern District of Texas until December 31, 2018. See In re Afaf Ali Ahmad, Case No. H-18-BK-37392.

20 Berleth Deposition, Case No. H-19-MP-302 (Synergy), Docket Entry No. 27A, p. 72.

21 Id. at 72-73.

22 Id. at 73.

23 Statement of Financial Affairs, Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 9, p. 6.

24 See Cavness Adversary Complaint, Case No. C-19-AP-2012 (Cavness Ap), Docket Entry No. 1, ¶ 7.

25 Id. ¶¶ 11, 33.

26 Id. ¶¶ 11, 33.

27 Id. ¶ 6.

28 Show Cause Order, Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 8.

29 Id.

30 Order Dismissing Case, Case No. C-18-BK-20275 (Cavness BK1), Docket Entry No. 20.

31 See Voluntary Petition, Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 1, p. 47.

32 Order to Show Cause, Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 8, p. 1.

33 See Courtroom Minutes, Case No. C-18-BK-20425 (Cavness BK2).

34 See id.; Status Report on Rule 11 Inquiry as to Evidentiary Support for Filing a Cause of Action Against Synergy Law, LLC and Others ("Status Report"), Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 35.

35 See id. at 1.

36 Courtroom Minutes, Case No. C-18-BK-20425 (Cavness BK2).

37 Status Report, Case No. C-18-BK-20425 (Cavness BK2), pp. 10-12.

38 Id. ¶ 15.

39 Id.

40 Id. ¶ 16.

41 Application to Employ Charles Newton & Associates as Special Counsel Pursuant to 11 U.S.C. § 328 (a) ("Application to Employ"), Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 40, ¶ 1.

42 Id. ¶ 9.

43 Engagement Letter, Exhibit 1 to Application to Employ, Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 40-1, p. 2.

44 Order Granting Application to Employ, Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 48.

45 Exhibit CAV-4 to Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6-4, p. 3.

46 Id.

47 Id. at 4.

48 Id. at 1.

49 Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6, ¶ 38.

50 See In re Afaf Ali Ahmad, Case No. H-18-BK-37392; In re Darian Butler, Case No. H-19-BK-30007.

51 See, e.g., Transcript of February 1 Hearing, Case No. H-18-BK-30007, Docket Entry No. 58, p. 12; Agreed Order Sanctioning Robert Berleth, Case No. H-19-BK-30007, Docket Entry No. 70, ¶¶ 7, 10.

52 Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6, ¶ 39; Berleth Deposition, Case No. H-19-MP-302 (Synergy), Docket Entry No. 27A, p. 14.

53 Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6, ¶ 39.

54 Berleth Deposition, Case No. H-19-MP-302, Docket Entry No. 27A, p. 19; Transcript of March 5 Hearing, Case No. H-19-MP-302 (Synergy), Docket Entry No. 14, pp. 13-14.

55 Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6, ¶ 40; Berleth Deposition, Case No. H-19-MP-302 (Synergy), Docket Entry No. 27A, pp. 14-15,17; Joint Response to Show Cause Order, Case No. H-19-MP-302 (Synergy), Docket Entry No. 25, ¶¶ 8-13.

56 Transcript of Motion Hearing, Case No. H-19-BK-30007 (Butler), Docket Entry No. 55.

57 Id. at 14-16.

58 Courtroom Minutes, Case No. H-19-BK-30007 (Butler), Docket Entry No. 13.

59 Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6, ¶ 43.

60 Berleth Deposition, Case No. H-19-MP-302 (Synergy), Docket Entry No. 27A, p. 27.

61 Updated Status Report on Rule 11 Inquiry, Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 64.

62 Id. at 2.

63 Transcript of Hearing, Case No. H-19-BK-30007 (Butler), Docket Entry No. 58.

64 Order, Case No. H-19-BK-30007 (Butler), Docket Entry No. 43.

65 Transcript of TRO/Show Cause Order Status Conference, Case No. H-19-BK-30007 (Butler), Docket Entry No. 57.

66 Id. at 24-25.

67 Temporary Restraining Order, Case No. H-19-MP-302 (Synergy), Docket Entry No. 1.

68 Transcript of Preliminary Injunction Hearing, Case No. 19-BK-30007 (Butler), Docket Entry No. 81, pp. 14-15.

69 Id. at 23.

70 Id. at 26.

71 Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6, ¶ 5.

72 Notice of Appearance and Request for Notice, Case No. H-19-MP-302 (Synergy), Docket Entry No. 4.

73 Agreed Judgement Sanctioning Synergy Law LLC, Case No. H-19-MP-302 (Synergy), Docket Entry No. 5.

74 Id. at 4.

75 Id. at 5.

76 Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6.

77 Id. ¶ 40 (c).

78 Agreed Order Sanctioning Robert W. Berleth, Case No. H-19-BK-30007 (Butler), Docket Entry No. 70.

79 Id. ¶¶ 7-10.

80 Id. ¶ 13.

81 Transcript of Hearing Re: Injunction and Order of Suspension, Case No. H-19-MP-302 (Synergy), Docket Entry No. 14, p. 4.

82 Id.

83 Show Cause Order, Case No. H-19-MP-302 (Synergy), Docket Entry No. 9.

84 Show Cause Order, Case No. H-19-BK-30007 (Butler), Docket Entry No. 73.

85 Cavness Adversary Complaint, Case No. H-19-AP-2012 (Cavness AP), Docket Entry No. 1.

86 Berleth Deposition, Case No. H-19-MP-302 (Synergy), Docket Entry No. 27A.

87 Joint Agreed Response to Show Cause Order, Case No. H-19-MP-302 (Synergy), Docket Entry No. 25.

88 Transcript of Show Cause Hearing, Case No. H-19-MP-302 (Synergy), Docket Entry No. 27.

89 Id. at 35, 42.

90 Id. at 35-39.

91 Id. at 42.

92 Id.

93 Id. at 39-40.

94 First Amended Motion to Compromise Controversy Pursuant to FRBP 9019, Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 85, ¶¶ 16-18.

95 Id. ¶¶ 19-23.

96 Memorandum Opinion, Case No. H-19-BK-30007 (Butler), Docket Entry No. 88, pp. 2, 19.

97 Id. at 19.

98 Docket Entry No. 1. References to docket entries with no case number refer to filings in the instant case.

99 Letter from Judge George C. Hanks, Jr. to Robert Berleth, Docket Entry No. 2.

100 Letter from Robert Berleth to Judge George C. Hanks, Jr., Docket Entry No. 5, p. 3.

101 Respondent's Preliminary Statement, Docket Entry No. 5, p. 2.

102 Preliminary Report, Docket Entry No. 6, p. 5.

103 Order, Docket Entry No. 7.

104 Order, Docket Entry No. 8.

105 Order, Docket Entry No. 9.

106 Minute Entry Order, Docket Entry No. 13.

107 Updated Status Report on Rule 11 Inquiry as to Evidentiary Support for Filing a Cause of Action Against Synergy Law, LLC and Others ("Updated Status Report"), Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 64.

108 January 18, 2019, was a Friday. All other references in the record indicate that this meeting took place on Monday January 14, 2019.

109 Updated Status Report, Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 64, p. 2.

110 Cavness Objection, Case No. H-019-MP-302 (Synergy), Docket Entry No. 6.

111 Id. ¶¶ 17-43.

112 Transcript of Hearing Re: Injunction and Order of Suspension, Case No. H-19-MP-302 (Synergy), Docket Entry No. 14.

113 Id. at 17.

114 Id. at 5.

115 Cavness Adversary Complaint, Case No. C-19-AP-2012 (Cavness AP), Docket Entry No. 1.

116 Id. ¶¶ 56-57.

117 Berleth Deposition, Case No. 19-MP-302 (Synergy), Docket Entry No. 27A.

118 Id. at 20.

119 Id. at 79.

120 Id. at 26-27.

121 Id. at 27.

122 Id. at 26.

123 Id. at 16.

124 Id. at 17.

125 Id. at 17-18.

126 Id. at 18-19.

127 Id. at 22.

128 Id. at 22-23.

129 Id. at 36.

130 Id.

131 Id. at 62.

132 Id. at 64.

133 Id.

134 Id. at 75.

135 Id. at 79.

136 Id. at 80.

137 Id. at 95.

138 Joint Agreed Response to Show Cause Order, Case No. H-19-MP-302 (Synergy), Docket Entry No. 25.

139 Id.

140 Id. ¶¶ 5-20.

141 Transcript of May 23, 2019, Hearing on Order to Show Cause, Case No. H-19-MP-302 (Synergy), Docket Entry No. 27.

142 Id. at 29-30.

143 Id. at 30-32.

144 Id. at 33.

145 Id. at 13-16.

146 Respondent's Preliminary Statement, Docket Entry No. 5.

147 Id. at 1-2.

148 Transcript of January 14, 2020, Disciplinary Hearing, Docket Entry No. 14, p. 46.

149 L. R. Appendix A.

150 L.R. Appendix A Rule 1.A.

151 L.R. Appendix A Rule 1.B.

152 L. R. Appendix A Rule 1.B.

153 L.R. Appendix D - Guidelines for Professional Conduct.

154 Tex. R. Disc. P. 2.17 (M), 3.08(C).

155 E. G., Wilkinson v. Comm'n for Lawyer Discipline, 2019 WL 3330587, at *6 (Tex. App.—Beaumont July 25, 2019, pet. denied) ("Attorney disciplinary proceedings are civil matters, not criminal prosecutions.").

156 Memorandum Opinion, Docket Entry No. 1, pp. 2, 19.

157 Id. at 2.

158 Id. at 19.

159 Id.

160 See L.R. Appendix A Rule 5.B ("Upon receipt of a charge that is not frivolous, the chief judge shall order the clerk to file the charge and randomly assign it to a district judge for review to determine whether further disciplinary proceedings should be held.").

161 Preliminary Report, Docket Entry No. 6; see L.R. Appendix A Rule 5.C ("After review, the judge will, by written report, recommend to the chief judge whether further disciplinary proceedings should be heard and the charges to be heard.").

162 Preliminary Report, Docket Entry No. 6, p. 5.

163 Id. at 4-5.

164 Order, Docket Entry No. 9, p. 2.

165 L. R. Appendix A Rule 1. B.

166 Id.

167 See Tex. R. Disc. P. 8.01. Violation of any of the Texas Disciplinary Rules constitutes "professional misconduct" under the Texas Rules of Disciplinary Procedure. Tex. R. Disc. P. 1.06 - Definitions CC.l. Separately, "professional misconduct" includes "conviction of a serious crime" and "conviction of an intentional crime." Tex. R. Disc. P. 1.06 - Definitions CC.7, CC.8. Where an attorney has been convicted of an "intentional crime," the Texas Rules of Disciplinary Procedure provide for "compulsory discipline" under Part VIII. However, "[p]roceedings under this part are not exclusive in that an attorney may be disciplined as a result of the underlying facts as well as being disciplined upon the conviction or probation through deferred adjudication." Tex. R. Disc. P. 8.01.

168 Tex. R. Disc. P. 8.01.

169 See Fifth Circuit Pattern Jury Instruction (Criminal) § 2.08A, 2.08B (listing elements of violations of 18 U.S.C. §§ 1, 4); Seventh Circuit Pattern Jury Instructions, 18 U.S.C. § 152(6).

170 Fifth Circuit Pattern Jury Instruction (Criminal) § 1.37 (citing United States v. Aggrawal, 17 F.3d 737, 744 (5th Cir. 1994)).

171 Fifth Circuit Pattern Jury Instruction (Criminal) § 2.08A; see also id. note ("The definition[ ] of ... 'fraudulently' may also apply to prosecution under the other paragraphs of § 152.").

172 Case No. C-18-BK-20275 (Cavness BK1); Case No. C-18-BK-20425 (Cavness BK2); Cavness Adversary Complaint, Case No. C-19-AP-2012 (Cavness AP), Docket Entry No. 1, p. 1; id. ¶¶ 64-75.

173 Transcript of January 14, 2020, Disciplinary Hearing, Docket Entry No. 14, p. 46.

174 Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6, ¶ 40; Berleth Deposition, Case No. H-19-MP-302 (Synergy), Docket Entry No. 27A, pp. 14-15,17; Joint Response to Show Cause Order, Case No. H-19-MP-302 (Synergy), Docket Entry No. 25, ¶¶ 8-13.

175 Cavness Objection, Case No. H-19-MP-302 (Synergy), Docket Entry No. 6, ¶ 40.

176 Transcript of Hearing Re: Injunction and Order of Suspension, Case No. H-19-MP-302 (Synergy), Docket Entry No. 14, pp. 17-18.

177 Berleth Deposition, Case No. 19-MP-302 (Synergy), Docket Entry No. 27A, p. 16.

178 Respondent's Preliminary Statement, Docket Entry No. 5, p. 1.

179 Berleth Deposition, Case No. 19-MP-302 (Synergy), Docket Entry No. 27A, p. 16.

180 Respondent's Preliminary Statement, Docket Entry No. 5, p. 1.

181 Berleth Deposition, Case No. 19-MP-302 (Synergy), Docket Entry No. 27A, p. 64.

182 Id. at 22.

183 Respondent's Preliminary Statement, Docket Entry No. 5, p. 1.

184 Joint Agreed Response to Show Cause Order, Case No. H-19-MP-302 (Synergy), Docket Entry No. 25.

185 Berleth Deposition, Case No. 19-MP-302 (Synergy), Docket Entry No. 27A, p. 64.

186 Respondent's Preliminary Statement, Docket Entry No. 5, p. 1.

187 Joint Agreed Response to Show Cause Order, Case No. H-19-MP-302 (Synergy), Docket Entry No. 25, ¶ 9.

188 Berleth Deposition, Case No. 19-MP-302 (Synergy), Docket Entry No. 27A, p. 16.

189 Joint Agreed Response to Show Cause Order, Case No. H-19-MP-302 (Synergy), Docket Entry No. 25, ¶ 17.c.

190 Berleth Deposition, Case No. 19-MP-302 (Synergy), Docket Entry No. 27A, p. 26.

191 Id. at 75.

192 Id.

193 Transcript of Hearing Re: Injunction and Order of Suspension, Case No. H-19-MP-302 (Synergy), Docket Entry No. 14, p. 17.

194 Transcript of May 23, 2019 Hearing on Order to Show Cause, Case No. H-19-MP-302 (Synergy), Docket Entry No. 27, p. 33.

195 Id. at 30.

196 Id.

197 Id. at 32.

198 Fifth Circuit Pattern Jury Instruction (Criminal) § 1.37 (citing United States v. Aggrawal, 17 F.3d 737, 744 (5th Cir. 1994)).

199 United States v. Zehrbach, 47 F.3d 1252, 1262 (3d Cir. 1995).

200 Fifth Circuit Pattern Jury Instruction (Criminal) § 2. 08A; see also id. note ("The definition[ ] of ... 'fraudulently' may also apply to prosecution under the other paragraphs of § 152.").

201 Respondent's Preliminary Statement, Docket Entry No. 5, p. 1; Transcript of January 14, 2020, Disciplinary Hearing, Docket Entry No. 14, p. 62.

202 See Transcript of January 14, 2020 Disciplinary Hearing, Docket Entry No. 14, pp. 42-45, 53-54.

203 Status Report, Case No. C-18-BK-20425 (Cavness BK2), ¶ 16. Rule 9019(a) states: "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct."

204 Before approving a settlement under Rule 9019, a bankruptcy court must be satisfied that the settlement is "fair and equitable and in the best interest of the estate." Matter of Foster Mortg. Corp., 68 F.3d 914, 917 (5th Cir. 1995). "To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation." Matter of Jackson Brewing Co., 624 F.2d 599, 602 (5th Cir. 1980). Specifically, the bankruptcy court must consider a number of factors, including the extent to which the settlement "is the product of arms-length bargaining, and not of fraud or collusion." Matter of Foster Mortg. Corp., 68 F.3d at 917-18.

205 First Amended Motion to Compromise Controversy Pursuant to FRBP 9019, Case No. C-18-BK-20425 (Cavness BK2), Docket Entry No. 85, ¶ 23.

206 Memorandum Opinion and Order, Docket Entry No. 1, pp. 17-18.

207 Tex. Disciplinary R. Prof. Conduct, Terminology.

208 "Dishonesty," "Deceit," and "Misrepresent," The Merriam-Webster.com Dictionary, available at https://www.merriam-webster. com/dictionary/misrepresentation. Accessed 27 January 2020.

209 Berleth Deposition, Case No. H-19-MP-302, Docket Entry No. 27A, p. 26.

210 L.R. Appendix D ¶¶ A, B, D.

211 Tex. R. Disc. P. 15.02.

212 Id. Rules 15.09.B.2. (a) and C.2. (a).

213 Id. Rule 15.09.B.2. (g).

214 Id. Rule 15.09.C.2. (f).

215 Id. Rule 15.09.C.2. (k).

216 Id. Rule 15.09.C.2. (1).

End of Document

EXHIBIT “6”

CAUSE NO. 2024-48085

ATLANTIC WAVE HOLDINGS, LLC AND SECURE COMMUNITY, LLC, Plaintiffs,	§	IN THE DISTRICT COURT OF
V.	§	129th JUDICIAL DISTRICT
CYBERLUX CORPORATION and MARK SCHMIDT, Individually, Defendants.	§	HARRIS COUNTY, TEXAS

ORDER GRANTING IN PART AND DENYING IN PART TURNOVER AND APPOINTING RECEIVER

On January 17, 2025, came on to be heard the Application for Turnover After Judgment and for Appointment of Receiver made by Plaintiffs Atlantic Wave Holdings LLC and Secure Community LLC, (hereinafter "**Applicants**"). After the Court's review of the papers on the docket and the testimony and admitted evidence, the Court **GRANTS** the Application to aid the collection of the Judgment that is on file in this cause against Defendant Cyberlux Corporation ("**Cyberlux**") on the terms set forth herein and **DENIES** the Application as to Defendant Mark Schmidt. The Court, therefore, **ORDERS, ADJUDGES AND DECREES:**

1. Applicants are judgment creditors of Cyberlux pursuant to the Amended Final Order and Judgment signed on June 28, 2023, which sets forth an award of $1,572,500 "as agreed to by the parties pursuant to the parties' separate agreement"; an award of costs of $177,126.19; and "sanctions" in the amounts of $3,895 and $6,842.50, plus interest at 12% per annum "as provided in the parties' agreement." The Final Order has been reduced pursuant to payments of the "sanctions" amounts and the costs, as well as by application of additional amounts. The amount due pursuant to the Amended Final Order as of October 31, 2024, was $848,363.37.
2. That Robert W. Berleth ("Receiver"), whose address is 9950 Cypresswood Dr., Suite 200 Houston, Texas 77070; phone: 713-588-6900, is hereby appointed Receiver in this cause pursuant to the Texas Turnover Statute, shall post a $2,000 bond, and shall serve with the powers and duties set forth herein and as limited by applicable law.
3. That Cyberlux shall make a full and complete disclosure to the Receiver with respect to the Receivership Property (as defined herein) of the matters Cyberlux has been so

EXHIBIT
1-B

ordered to disclose pursuant to this Order and to neither directly nor indirectly interfere or impede the Receiver in his performance of his duties under this Order.

4. That Cyberlux is Ordered to turnover and deliver custody to the Receiver within fourteen (14) days from Cyberlux's receipt of a copy of this Order, c/o its attorney of record, Katharine Battaia Clark via email to kclark@thompsoncoburn.com, the documents described in **Exhibit "A"** attached hereto, subject in all respects to the Protective Order entered in this cause, and is further Ordered to provide to the Receiver within 30 days hereof a copy of the responses to the previously pending Request for Admission, Requests for Production, and Interrogatories, subject in all respects to the Protective Order entered in this cause .
5. That Cyberlux shall turnover to the Receiver at Receiver's address stated above, within ten (10) days of Cyberlux's receipt of a copy of this Order through its attorney of record, Katharine Battaia Clark via email to kclark@thompsoncoburn.com, all checks, cash, securities (stocks and bonds), promissory notes, documents of title and contracts that make up the Receivership Property (defined herein), and Cyberlux is hereby Ordered to continue to turnover to the Receiver at the Receiver's address all of said checks, cash, securities (stocks and bonds), promissory notes, documents of title and contracts that make up the Receivership Property (defined herein) within three (3) days from Cyberlux's receipt and possession of such property, if, as and when Cyberlux comes into receipt and possession of any such property, but only for so long as the Amended Final Order remains unsatisfied.
6. Receiver shall have all the power and authority allowed by law to take possession of the following of Cyberlux's **non-exempt** property in its actual or constructive possession or control, which property is defined herein as the "**Receivership Property**":
    a. Its interest, if any, in the leased office and manufacturing facility of Catalyst MachineWorks, LLC, located at 21631 Rhodes Road, Spring, TX 77388, as shown on page 18 of 46 of Applicants' Exhibit 2, admitted into evidence at the hearing; provided, however, this Order shall not apply to property located at the Spring, TX facility, as Applicants have not demonstrated Cyberlux has an

EXHIBIT 1-B

interest in such property (and, instead, Applicants' witness testified he has no knowledge of what is located at the Spring, Texas facility);

b. Its interest in Datron World Communications that has a leased office and manufacturing facility located at 995 Joshua Way, Vista, CA 92081, as shown on page 18 of 46 of Applicants' Exhibit 2, admitted into evidence at the hearing; provided, however, this Order shall not apply to the lease of or property located at the Vista, CA facility, as Applicants have not demonstrated Cyberlux has an interest in such property in the form of a leasehold interest or otherwise (and, instead, Applicants' witness testified he has no knowledge of what is located at the Vista, California facility);

7. Receiver shall have all the power and authority allowed by law to take possession of all documents, books and records reasonably necessary to allow Receiver to evaluate said Receivership Property that is in the actual or constructive possession or control of Cyberlux;

8. The Receiver is hereby authorized to take all action necessary to gain access to all non-exempt real property, leased premises, storage facilities and safe deposit boxes wherein any real and/or personal property of Debtor may be situated and to seize the contents thereof.

9. The Receiver is hereby authorized to secure control over the Receivership Property, and engage in presale activities in order to secure the highest and best sales price for such Receivership Property, including but not limited to appraisals, evaluations, listing agreements, advertising agreements, etc. Receiver may not breach the peace but may seek further instruction from this Court. All sales of Receivership Property must be individually approved by this Court with reasonable and adequate notice and opportunity for hearing granted for Applicants and Cyberlux.

10. Receiver is authorized but not required to (a) disable or remove the Receivership Property or to place the Receivership Property into storage; (b) insure any Receivership Property taken into his possession, and (c) change the locks to premises belonging to

EXHIBIT 1-B

the Debtor, but only with reasonable advance, written notice to the real property owner and/or manager and only to the extent necessary to secure the Receivership Property.

11. Receiver shall have the power to subpoena from Cyberlux, third parties, and witnesses production of documents, things and information that would assist Receiver in carrying out his duties hereunder, including but not limited to matters concerning the existence, location, and/or value of Cyberlux's non-exempt assets and the location of such assets to the extent related to the Receivership Property.
12. That any constable, deputy constable, sheriff, deputy sheriff or any other peace officer is hereby authorized to accompany Receiver pursuant to a writ to locations designated by Receiver where Receiver believes the Receivership Property may be located, said peace officers being hereby Ordered to prevent any person(s) from interfering with the Receiver from carrying out any duty under this Order or interfering with any property subject to this Order.
13. That any person or any agent of any person, with actual notice of this Order is not to interfere with any property subject to this Order, and is further Ordered not to interfere with the Receiver in the carrying out of any duty under this Order. Third parties are hereby notified that the Receiver, to the exclusion of the Cyberlux, is the party entitled to possess, sell, liquidate and otherwise deal with the Receivership Property, and once any third party receives notice of this Order, they may be subject to liability should they release any of the Receivership Property to Cyberlux unless directed by the Receiver or this Court.
14. Applicants assert that a reasonable fee for a postjudgment receiver working under a contingency that requires the advancement of time and expenses without prior investigation into a judgment debtor's assets is twenty-five percent (25%) of all collections and credits against the Judgment; the Receiver must demonstrate his faithful discharge of his duties in accordance with this Order upon application to this Court. Receiver is also entitled to reimbursement of reasonable expenses incurred in connection with his collection efforts. To obtain his fee and reimbursement of expenses, Receiver shall first file a motion discussing the relevant factors and considerations to the Court with notice to the parties and set for hearing on reasonable and adequate notice. Receiver may seek interim fees and reimbursements in the same

EXHIBIT
1-B

manner. Receiver's reasonable fees and reasonable expenses will be taxed as costs against Cyberlux.

15. Any relief requested by Applicants in their Application for Turnover After Judgment and for Appointment of Receiver that is not specifically granted herein is denied.

DATE:

_____

DISTRICT COURT JUDGE

EXHIBIT
1-B

EXHIBIT A

DOCUMENTS TO BE TURNED OVER TO RECEIVER

All records, as hereinafter described, concerning affairs of Debtors; unless otherwise noted, for the preceding 36 months:

1. bank statements; pass books and other bank or financial institution records;
2. federal income and state franchise tax returns;
3. real property deeds and deeds of trust (preceding 10 years);
4. governing documents of Debtor (e.g., articles of incorporation, company agreements, meeting minutes of board meetings, etc.
5. business journals, ledgers, accounts payable and receivable files; and
6. credit applications and other documents stating debtor's financial condition.

EXHIBIT 1-B

APPROVED AS TO FORM:

THOMPSON COBURN LLP
Katharine Battaia Clark
State Bar No. 24046712
Alexander J. Pennetti State Bar
State Bar No. 24110208

2100 Ross Avenue, Suite 3200
Dallas, Texas 75201
Tel Phone: (972) 629-7100
Fax: (972) 629-7171
kclark@thompsoncoburn.com
apennetti@thompsoncoburn.com

COUNSEL FOR DEFENDANTS

EXHIBIT
1-B