No. 21-10219

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re James D. Dondero,

On Petition for Writ of Mandamus to the United States District Court For the Northern District of Texas, Civil Action No. 3:21-CV-001320E
Honorable Ada Brown, District Judge

OBJECTION TO MOTION TO STAY PERMANENT INJUNCTION PROCEEDINGS PENDING RESOLUTION OF MANDAMUS

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On Petition for Writ of Mandamus to the United States District Court For the Northern District of Texas, Civil Action No. 3:21-CV-001320EDallas
Honorable Ada Brown, District Judge

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. James Dondero
2. Highland Capital Management, L.P.
3. Pachulski Stang Ziehl & Jones, LLP
4. James P. Seery, Jr.

SUMMARY OF THE ARGUMENT

Petitioner's last-minute plea for a stay of the long-scheduled permanent injunction proceeding against him should be denied for at least three independent reasons.

First, Petitioner fails to satisfy the strict standard to warrant the extraordinary remedy of a stay of proceedings. Petitioner fails to demonstrate a likelihood of success on the merits of his Petition because (i) he offers no substantive factual or legal argument demonstrating why he is likely to prevail, and (ii) the issues raised therein are otherwise not the type contemplated to warrant the exceptional remedy of mandamus. Furthermore, Petitioner would suffer no harm in the absence of a stay. By contrast, a stay would cause the Debtor substantial harm arising from the indefinite postponement of proceedings, the inability to obtain a final judgment on a critical issue, and the incurrence of unnecessary expenses. A stay would also conflict with the public interest by impeding the speedy and efficient resolution of proceedings. This is especially true because Petitioner is unlikely to succeed on the merits.

Second, the Fifth Circuit has long permitted claims for permanent injunctive relief to proceed to trial and judgement where, as here, an interlocutory appeal of a preliminary injunction is pending in the interests of judicial economy. If the Bankruptcy Court grants permanent injunctive relief, Petitioner's interlocutory

appeal of the preliminary injunction would be moot and he would have the undisputed right to appeal the final order without burdening the parties and the courts with issues concerning judicial discretion and interlocutory appeals.

Third, for these same reasons, a stay is not needed to "protect" the Court's mandamus jurisdiction and "prevent frustration of its orders." As noted, if granted, a permanent injunction would effectively merge with or extend the preliminary injunction, thereby eliminating any risk of duplication of rulings.

BACKGROUND FACTS

A. The Debtor Commences an Adversary Proceeding Against Petitioner and Obtains Temporary and Preliminary Injunctive Relief

On December 7, 2021, the Debtor commenced an adversary proceeding against Petitioner—the Debtor's founder and former president and chief executive officer—by filing its *Verified Original Complaint for Injunctive Relief against Appellant*. [Adv. Pro. Docket No. 1] (the "Complaint").[1] In its Complaint, the Debtor seeks permanent injunctive relief against Petitioner preventing him from, among other things, interfering with the Debtor's operations, management of assets, and implementation of its plan of reorganization.

That same day, the Debtor also filed its *Emergency Motion for a Temporary Restraining Order and Preliminary Injunction against Mr. James Dondero* [Adv.

[1] Citations to "Adv. Pro. Docket No." are to the docket entries in the adversary proceeding captioned *Highland Capital Management, L.P. v. Dondero*, Adv. Pro. 20-03190, pending in the Debtor's bankruptcy case. Case No. 19-34054-sgj11.

Pro. Docket No. 6] seeking to temporarily and preliminarily enjoin Petitioner from, among other things, (i) interfering with, controlling, or influencing the Debtor's business, management, and disposition of assets, (ii) threatening or intimidating the Debtor or any of its agents or employees, and (iii) otherwise violating section 362(a) of the United States Bankruptcy Code.

On December 10, 2020, following a hearing, the Bankruptcy Court issued its *Order Granting Debtor's Motion for a Temporary Restraining Order against James Dondero* to prevent irreparable harm to the Debtor pending a hearing on the Debtor's motion for a preliminary injunction. [Adv. Pro. Docket No. 13].

On December 20, 2020, the Bankruptcy Court entered its *Order Regarding Adversary Proceedings Trial Setting and Alternative Scheduling Order*. [Adv. Pro. Docket No. 18] (the "Scheduling Order"). The Scheduling Order fixed discovery deadlines and set the docket call for May 10, 2021, and the trial on the merits for the week of May 17, 2021.[2]

On January 8, 2021, the Bankruptcy Court held an exhaustive evidentiary hearing on the Debtor's motion for a preliminary injunction, after which that Court entered an order granting the motion. [Adv. Pro. Docket No. 59] (the "PI Order"). In finding that preliminary injunctive relief was warranted, the Bankruptcy Court

[2] The Court's Scheduling Order became effective on or about January 21, 2021, forty-five (45) days after the commencement of the Adversary Proceeding, because the Parties did not submit a proposed scheduling order or request a status conference by that date. *See* Scheduling Order, Part II(3).

considered overwhelming evidence, including, among other things, (a) Petitioner's own sworn testimony that enabled the Bankruptcy Court to assess his credibility; and (b) documentary evidence, such as emails, text messages, and other communications illustrating that Petitioner had (i) threatened the Debtor and its employees, (ii) colluded with (now) former employees of the Debtor in order to coordinate legal strategy against the Debtor, (iii) destroyed the Debtor's property, (iv) trespassed into the Debtor's offices after being evicted for his threatening and disruptive behavior, and (v) otherwise interfered with the Debtor's operations through impeding trades of certain securities and disposition of the Debtor's assets.[3]

B. The District Court Exercises its Discretion and Denies Petitioner's Motion for Leave to Appeal the Preliminary Injunction

Petitioner subsequently sought leave to appeal the interlocutory PI Order to the United States District Court for the Northern District of Texas (the "District Court"). [D. Ct. Docket No. 2] (the "Appeal").[4]

[3] On January 7, 2021, just four weeks after the TRO was entered, the Debtor filed its *Motion for an Order Requiring Appellant to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO* [Adv. Proc. Docket No. 48] (the "Contempt Motion"). In its Contempt Motion, the Debtor seeks an order requiring Petitioner to show why he should not be held in contempt for violating the TRO by, among other things, (a) disposing of the Debtor's property in an attempt to evade discovery; (b) trespassing on the Debtor's property after the Debtor evicted him from its offices precisely because he was interfering with its business; (c) interfering with the Debtor's efforts to execute certain transactions in its capacity as portfolio manager of certain collateralized loan obligations; and (d) colluding with certain of the Debtor's then-employees to act. *See id*. The Bankruptcy Court conducted a lengthy evidentiary hearing on the Contempt Motion on March 22 and March 24, 2021. [*See* Adv. Proc. Docket Nos. 135-36]. The Contempt Motion is *sub judice*.

[4] Citations to "D. Ct. Docket No." are to the docket entries for the Appeal pending in the District Court, Case No. 21-cv-132-E.

On February 11, 2021, the District Court declined to hear Petitioner's Appeal finding that applicable law "plainly gives district courts discretion over whether to accept appeals from interlocutory bankruptcy court orders, expressly requiring leave of the district court to appeal an interlocutory bankruptcy court order." [D. Ct. Docket No. 9] (the "DC Order") at 3 (citing 28 U.S.C. § 158(a)(3)).

The District Court held that because Petitioner did not "sufficiently demonstrate[] the bankruptcy court order involves a controlling question of law," he did not satisfy the standard set forth in section 28 U.S.C. §1292(b). *Id.* For this reason alone, the District Court exercised its discretion and declined to hear the Appeal. *Id*.

C. Petitioner Files a Petition for Writ of Mandamus in the Fifth Circuit

On March 8, 2021, Petitioner sought the extraordinary remedy of mandamus [App. Ct. Docket No. 515771252][5] (the "Petition") requesting that the Fifth Circuit: (a) dissolve the PI Order, or, alternatively, (b) direct the District Court to hear the merits of the Appeal. The Petition disclosed that the "[t]rial concerning the Debtor's request for a permanent injunction is currently set for the week of May 17, 2021." *Id*. at 5.[6]

[5] Citations to "App. Ct. Docket No." refer to the docket entries maintained by the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"), Case No. 21-10219.

[6] The Petition also disclosed that the "Contempt Motion hearing has been continued or delayed several times and is now set to occur on March 22, 2021." *Id*. at 13. Despite being informed of the hearing date for the Contempt Motion, the Fifth Circuit took no action on the Petition and the hearing proceeded as scheduled.

On March 16, 2021, the Debtor filed its opposition to the Petition. [App. Ct. Docket No. 515783702]. The Petition is pending before the Fifth Circuit.

D. On the Eve of Trial, Petitioner Seeks a Stay of the Permanent Injunction Proceeding in the Bankruptcy Court and the Fifth Circuit

On April 30, 2021, Petitioner filed with the Bankruptcy Court his *Emergency Motion to Stay Proceedings Pending Resolution of Defendant's Petition for Writ of Mandamus or, Alternatively, Motion to Continue Trial Setting* [Adv. Pro. Docket No. 154] (the "First Motion for Stay"), in which he seeks a stay of the permanent injunction proceedings pending the Fifth Circuit's resolution of his Petition, or, alternatively, a 60-day extension of the trial date.

The Debtor did not oppose Petitioner's request to have his First Motion for Stay heard on an expedited basis and filed its substantive objection to that Motion in the Bankruptcy Court on May 4, 2021. [Adv. Pro. Docket No. 160].

On May 6, 2021, the Bankruptcy Court granted Petitioner's request to have his First Motion for Stay heard on an expedited basis, and set the hearing date for May 10, 2021, in conjunction with the long-scheduled docket call. [Adv. Pro. Docket No. 163].

On the same day, Petitioner filed another motion for a stay of the permanent injunction proceedings, this time in this Court. [App. Ct. Docket No. 515851560] (the "Second Motion to Stay").

For the reasons that follow, Petitioner's Second Motion to Stay is without merit and should be denied.

ARGUMENT

A. Petitioner Does Not Meet the Standard For A Stay

1. The Applicable Legal Standard

A stay pending appeal is an "extraordinary remedy." Under applicable case law, courts only grant a stay pending appeal if the movant proves *all* of the following four elements: (1) substantial likelihood of success on the merits of its appeal; (2) irreparable injury if the stay is not granted; (3); the stay will not substantially harm other parties; and (4) the stay would serve the public interest. *See In re First S. Sav. Assoc.*, 820 F.2d 700, 704 (5th Cir. 1987); *In re Scotia Dev. LLC*, *2008 Bankr. LEXIS 5127, *7-8* (Bankr. S.D. Tex. July 15, 2008) ("The Indenture Trustee must satisfy each of the following elements in order to obtain a stay pending appeal of the Confirmation Order pursuant to Federal Rule of Bankruptcy Procedure 8005. . . . Failure to establish any of these four elements is grounds to deny the request for a stay"); *Arnold v. Garlock Inc.*, 278 F.3d 426, 438 (5th Cir. 2001) (noting that each part of four-part test must be met for stay to be granted).

The moving party "bears the burden of establishing its need," and must "[m]ake out a clear case of hardship or inequity in being required to go forward." *Earl v. Boeing Co.*, 4:19-CV-507, 2021 WL 1080689, at *3 (E.D. Tex. Mar. 18, 2021) (internal quotations omitted); *see also Odonnell v. Harris County*, 260 F.

Supp. 3d 810, 814 (S.D. Tex. 2017) ("A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and the 'party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion") (internal quotations omitted).

Petitioner implicitly concedes that he cannot meet this burden. *See* Second Motion to Stay at 3 (Petitioner attempts to re-write the Fifth Circuit's long-standing four-part test for a stay pending appeal, contending that he "has shown one or more of the [] guidepost factors for staying an injunction").

2. Petitioner Fails to Prove Likelihood of Success on the Merits

Petitioner fails to prove a substantial likelihood of success on the merits of his Petition. In order to satisfy this element, the movant "must make a strong showing that [they are] likely to succeed on the merits." *Odonnell*, 260 F. Supp. 3d at 815 (internal quotations omitted).

Here, Petitioner fails to make ***any*** substantive showing that he is likely to succeed on his Petition. For example, Petitioner does not focus on any specific provision in the PI Order that he contends is unlawful, choosing instead to broadly attack the entire PI Order as if every word were "vague and overbroad," unclear and indefinite. In addition, Petitioner does not describe, cite to, rely on, or challenge any of the evidence admitted during the hearing on the preliminary injunction. Finally,

Petitioner fails to cite to any precedent showing that any court has ever granted the relief sought under similar or analogous circumstances.

Instead, Petitioner argues that he has established a substantial likelihood of success on the merits because: (i) he has "presented a substantial case on the merits and raised a number of legal questions regarding the legality and scope of the Preliminary Injunction," (ii) the Fifth Circuit asked the Debtor to respond to the Petition, and (iii) he argues that the Fifth Circuit's determination of the Petition will "undoubtedly impact" the permanent injunction proceedings. [Second Motion to Stay at 11]. Petitioner's arguments fail to prove a substantial likelihood of success on the merits.

First, although the Petition challenges the breadth and scope of the Preliminary Injunction, Mr. Dondero is unlikely to succeed because these issues are not the type contemplated for the exceptional remedy of mandamus.

Mandamus relief is "sparingly exercised." *United States v. U.S. Dist. Court, S. Dist. of Tex.*, 506 F.2d 383, 384 (5th Cir. 1974). It is "a drastic and extraordinary remedy reserved for really extraordinary cases." *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 350 (5th Cir. 2017) (internal quotations omitted). The Petition does not involve such an extraordinary case. Indeed, the issue presented in the Petition—*i.e.*, whether the District Court erred in exercising its discretion to decline to hear the Appeal—is precisely the type that is *inappropriate* for mandamus relief. *See United*

States v. Comeaux, 954 F.2d 255, 261 (5th Cir. 1992) (mandamus relief is not appropriate when "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction" and that "[s]uch use of the writ would 'thwart the congressional policy against piecemeal appeal'") (internal citations omitted); *In re LeBlanc*, 559 Fed. Appx. 389, 392 (5th Cir. 2014) ("If a matter is within the district court's discretion, the litigant's right to [mandamus relief] cannot be 'clear and indisputable'") (internal quotations omitted); *In re Ford Motor Co., Bridgestone/Firestone N. Am. Tire, LLC*, 344 F.3d 648, 654 (7th Cir. 2003) (noting that a district court's refusal to certify under section 1292(b) "is the end of the matter" in determining mandamus relief, and explaining "[t]he whole point of §1292(b) is to create a dual gatekeeper system for interlocutory appeals: both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden"); *Arthur Young & Co. v. U. S. Dist. Court*, 549 F.2d 686, 698 (9th Cir. 1977) ("We hold that mandamus to direct the district judge to exercise his discretion to certify the question is not an appropriate remedy").

Second, the Fifth Circuit's request that the Debtor respond to the Petition does not support a "strong" or substantial showing of success on the merits. [*See* Second Motion to Stay at 11]. "To make the requisite showing under this element, the movant must demonstrate a strong case that it is 'likely to succeed on the merits ...

not [just] a mere possibility of relief.'" *Earl*, 2021 WL 1080689). Petitioner shows, at best, that he has a "mere possibility" of obtaining the requested relief.[7] Petitioner simply fails to offer any factual or legal basis for why he is likely to succeed on the merits of his case. *See Scrum All., Inc.*, 2021 WL 720703, at *2 (E.D. Tex. Feb. 24, 2021) ("Defendants have not offered new arguments or authority indicating a likelihood of success on the merits, let alone a strong case at that").

Third, the Fifth Circuit's determination of the Petition will not "undoubtedly impact any determination" in the permanent injunction proceedings. [Second Motion to Stay at 11]. Indeed, contrary to Petitioner's assertions, "it is settled that a [] court has jurisdiction to proceed with the merits of the case and to grant a permanent injunction while an appeal of a preliminary injunction order is pending." *FTC. v. Assail, Inc.*, 98 Fed. Appx. 316, 317 (5th Cir. 2004); *see also Webb v. GAF Corp.*, 78 F.3d 53, 55 (2d Cir. 1996) (finding it was appropriate for district court to issue a permanent injunction while appeal of preliminary injunction was pending). "Once an order granting a permanent injunction is entered, the order granting the preliminary injunction is merged with it, and an appeal is proper only from the order granting the permanent injunction." *La. World Exposition, Inc. v. Logue*, 746 F.2d 1033, 1038 (5th Cir. 1984).

[7] Even this interpretation is charitable. Petitioner's speculation aside, there is no evidence that the decision to ask the Debtor to respond was anything more than common practice upon this Court's receiving a request for a writ of mandamus.

Here, if a permanent injunction is granted, Petitioner will have the right to appeal the final order on the merits since the permanent injunction would essentially be an extension of the Preliminary Injunction. *See La. World*, 746 F.2d at 1038 (dismissing interlocutory appeal of preliminary injunction as "moot" where "the Defendants will be able to obtain as broad a review on the merits of the order granting the permanent injunction as they could have obtained on appeal from the order granting the preliminary injunction," further noting that because "the appeal of the issues peculiar to the preliminary injunction are moot … this case presents an appeal only from the order granting the permanent injunction"); *Sec. & Exch. Comm'n v. First Fin. Group of Tex.*, 645 F.2d 429, 433 (5th Cir. 1981) (dismissing appeal of preliminary injunction as moot, noting that "[o]nce an order of permanent injunction is entered … the order of preliminary injunction is merged with it, and appeal is properly only from the order of permanent injunction"); *FTC*, 98 Fed. Appx. at 317 (holding that district court's grant of a permanent injunction rendered moot nonparty's appeal from its motion to dissolve preliminary injunction where appeal did not involve issues "particular" to the preliminary injunction").[8]

[8] Because the Bankruptcy's Court's final ruling on the Debtor's claim for permanent injunctive relief will render the Petition moot, Petitioner (and the Debtor, the District Court, and the Fifth Circuit) will actually be better off proceeding with the imminent trial on the merits rather than forcing the parties (and the courts) to wade through the legal thicket of an interlocutory appeal and judicial discretion. Then, if an adverse judgment is entered against him, Petitioner will have the undisputed right to appeal that judgment.

For these same reasons, there is no risk of "duplication" of proceedings or "contradictory rulings." [Second Motion to Stay at 12].

Petitioner has failed to establish that he is likely to succeed on the merits and his Second Motion to Stay should be denied on that ground alone.

3. The Debtor Will Suffer Substantial Harm if a Stay Is Granted; Petitioner will Suffer no Harm if his Second Stay Motion is Denied

Petitioner devotes two paragraphs to his argument that he will be "irreparably harmed" in the absence of a stay, citing to no facts and no law. [Second Motion to Stay at 12]. Petitioner first contends that his "legal and due process rights may be restricted or otherwise negatively impacted" if a permanent injunction is entered against him. Petitioner's generalized and unsubstantiated contention is without merit.

Petitioner has no right to (i) threaten the Debtor or any of its directors, officers, employees, professionals, or agents, (ii) interfere with the Debtor's business, (iii) collude or improperly communicate with the Debtor's employees, (iv) control or destroy the Debtor's property, or (v) use entities that he owns and controls to engage in the same wrongful conduct. But that is generally all the Preliminary Injunction restrains him from doing. PI Order §§2-5.[9] Notably, the PI Order expressly states that it "does ***not*** enjoin or restrain [Petitioner] from (1) seeking judicial relief upon

[9] The evidence against Petitioner supporting the entry of injunctive relief is overwhelming. *See Debtor's Proposed Findings of Fact and Conclusions of Law*. [Adv. Pro. Docket No. 156 ¶¶ 30-149].

proper notice or from objecting to any motion filed in this Bankruptcy Case, or (2) communicating with the committee of unsecured creditors (the "UCC") and its professionals regarding a pot plan." *Id*. at n.2 (emphasis added).[10] Thus, there is no factual or legal basis to support Petitioner's contention that a permanent injunction will adversely or improperly impact any legally cognizable right.

Petitioner's second argument fares no better. Petitioner vaguely contends that he will be irreparably harmed because he "does not believe" a permanent injunction will moot his Appeal and therefore a risk exists of "contradictory rulings" or the "duplication of proceedings." [Second Motion to Stay at 12]. Petitioner's unfounded beliefs aside, the case law is clear that trial courts can proceed with hearings on the merits of claims for permanent injunctive relief even though an interlocutory appeal of a preliminary injunction is pending precisely because the subsequent entry of a permanent injunction moots the appeal thereby eliminating the very risks Petitioner identifies. *See FTC*, 98 Fed. Appx. at 317; *La. World Exposition*, 746 F.2d at 1038; *Sec. & Exch. Comm'n*, 645 F.2d at 433; *Webb*, 78 F.3d at 55.

[10] Indeed, the Preliminary Injunction has not curbed Petitioner's proclivity for "scorched earth" litigation, having objected to confirmation of the Debtor's Plan, sought the recusal of Bankruptcy Court Judge Jernigan, objected to and appealed decisions from the Bankruptcy Court approving certain settlements and, through entities he controls, filed a baseless lawsuit and motion in the District Court, the latter of which is subject to a second contempt motion where the Bankruptcy Court has ordered the alleged violators (including Petitioner) to appear in person for a hearing on June 8, 2021. *See* Bankruptcy Court Docket Nos. 2235, 2236, 2237, and 2255.

By contrast, the Debtor is certain to suffer substantial harm if the Second Motion to Stay is granted, arising from (a) the indefinite nature of the stay, (b) the failure to obtain a final judgment, and (c) the substantial and unnecessary time, money, and effort the Debtor will likely be forced to incur litigating issues concerning an interlocutory order and judicial discretion.

If the Second Motion to Stay is granted, history shows that Petitioner will take the opportunity to drag this process on for years.[11] Assuming *arguendo* that the Petition is granted, what appeals will emerge, how long will they take, and at what cost, if, for instance: (a) the District Court denies Petitioner's appeal of the interlocutory PI Order on the merits, or (b) the Fifth Circuit rejects an appeal from the District Court? The possibilities are endless – and Petitioner will be the only person who will benefit. Meanwhile, justice will be delayed, and the courts and the Debtor will be forced to absorb the costs and burdens of this unnecessary litigation.

For the foregoing reasons, Petitioner has failed to establish that he will suffer irreparable harm in the absence of a stay, and his Second Motion to Stay should, therefore, be denied.

[11] Petitioner is a serial litigant. For a summary description of the expansive pre-petition litigation that Petitioner directed and that caused the Debtor to file for bankruptcy protection, see *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) and Granting Related Relief* [Bank. Docket No. 1943 ¶¶ 8, 9, and 77]. Indeed, Petitioner's penchant for "scorched earth" litigation caused the Debtor to seek, and the Bankruptcy Court to grant, meaningful protections for the Debtor and its leadership. *Id*. ¶¶ 72-74 (exculpation), 75 (plan injunction), and ¶¶76-77 ("gatekeeper" protections).

4. Granting a Stay Will Not Serve the Public Interest

Finally, and for these same reasons, the public interest will be undermined by a stay of the permanent injunction proceeding. The public interest is served by the prompt administration of justice. Proceeding with the hearing on the merits of the Debtor's claim for permanent injunctive relief in accordance with the long-standing schedule will eliminate the need for appellate practice relating to the interlocutory PI Order and will allow the parties—and the Debtor's stakeholders—to get to a final judgment as quickly as possible. *See Weingarten Realty Inv'rs v. Miller*, 661 F.3d 904, 913 (5th Cir. 2011) (finding the public interest favors denying stay where there is no "difficult question presented on appeal," movant "does not present a likelihood of success on the merits, so there is little reason to invoke the general public policy of preserving judicial resources from the risk of reversal," and the public interest is, therefore, served by the "speedy resolution of disputes").

Accordingly, Petitioner fails to satisfy the standard for a stay, and Petitioner's Second Motion for Stay should be denied.

B. There Is No Basis to Stay the Permanent Injunction Hearing Pending Resolution of Petition

Petitioner contends that the Fifth Circuit should exercise its discretion to stay the permanent injunction hearing until the Petition is determined. *See* Second Motion to Stay at 7-8. Petitioner's argument is without merit.

First, Petitioner's reliance on *Woodson v. Surgitek, Inc.*, 57 F.3d 1406 (5th Cir. 1995) for the proposition that the Fifth Circuit has the discretion to stay lower court proceedings pending a mandamus petition is misplaced. *See* Dondero Motion at 7. In *Woodson*, the Court affirmed the district court's dismissal of plaintiff's complaint pending the plaintiff's petition for writ of mandamus and request for a stay. The Court held that while "[a]s a general rule, a perfected appeal from a ***final*** judgment or reviewable order of a district court does vest jurisdiction in the appellate court and terminates the jurisdiction of the district court[,]" this rule "does not apply to petitions for writ of mandamus." *Id.* at 1416 (emphasis added). The Court noted that because mandamus petitions are "only granted in exceptional circumstances," there is no basis to stay a district court proceeding while a petition for a writ of mandamus is pending. *Id*. Similarly, here, there is no basis to stay the permanent injunction hearing pending resolution of the Petition.

Second, Petitioner's reliance on *Intellectual Ventures II LLC v. FedEx Corp.*, 2:16-CV-00980-JRG, 2017 WL 6559172 (E.D. Tex. Dec. 22, 2017) also misses the point. There, the Court denied the defendants' motion to stay all deadlines pending their interlocutory appeal because defendants "have failed to make a 'strong showing' of a likelihood of success on the merits," and have "also failed to demonstrate their pending mandamus petition raises the sort of novel legal questions that might demand an immediate stay." *Id.* at 2. Here, just as in *Intellectual*

Ventures, Petitioner fails to demonstrate that his Petition raises the sort of legal questions warranting a stay.

Finally, and most fundamentally, Petitioner's reliance on his own Petition as the basis for this Court's exercise of discretion is disingenuous. It bears emphasizing the extraordinary relief Petitioner seeks:

- The Petition seeks to force the District Court to exercise its discretion to hear an appeal of an ***interlocutory order***; or

- Alternatively, Petitioner seeks to have this Court simply overturn the entire preliminary injunction without ever (a) identifying with specificity any provision that he alleges is "vague" or "ambiguous," or (b) challenging any of the evidence upon which the PI Order was based.[12]

For the reasons set forth in the Debtor's opposition to the Petition, all of which are incorporated by reference, and for the reasons set forth above, there is no factual, legal, or equitable basis to grant a stay of the trial on the Debtor's claim for a permanent injunction. This Court should permit that trial to proceed to a final judgment for reasons of judicial economy and to prevent the parties from being ensnared in the very quagmire Petitioner seeks to create.

[12] For the reasons set forth in the Debtor's opposition to the Petition and incorporated herein by reference, this Court does not possess appellate jurisdiction over either (i) the Bankruptcy Court's interlocutory PI Order, or (ii) the District Court's Order denying Petitioner's Motion for leave to appeal [App. Ct. Docket No. 515783702 at 30-31], and Petitioner's attempt to have the Fifth Circuit overturn the PI Order under the guise of "mandamus" relief must be rejected.

C. The Fifth Circuit Does Not Need To "Protect" Its Jurisdiction

Finally, Petitioner's argument that a stay of the permanent injunction proceeding is needed to "protect" the Fifth Circuit's jurisdiction is frivolous and should be summarily rejected by the Court. Second Motion for Stay at 6-7.

The Fifth Circuit is not under attack from the Bankruptcy Court nor is there any need to prevent "frustration of its orders," particularly since none have been issued. Notably, this Court was informed of the timing of the hearing on the Contempt Motion but took no steps to intervene. *See* Petition at 13 (the Petition was filed on March 8, 2021, and noted that the "Contempt Motion has been continued or delayed several times and is set to occur on March 22, 2021."). The Fifth Circuit should take the same approach here.

The fictitious "turf battle" that Petitioner alludes to does not exist.[13] The Fifth Circuit should allow the Bankruptcy Court to hear and determine the Debtor's claim for a permanent injunction because (a) if Petitioner prevails, all of the Appeals will be moot, and (b) if the Debtor prevails, Petitioner can appeal the final order without burdening the parties and the courts with litigating the District Court's exercise of discretion over an interlocutory order.

[13] Even if a "turf battle" existed (which it does not), Petitioner should not be the beneficiary since he is the one who would be deemed to have created it by filing the meritless Petition.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Petitioner's Second Motion to Stay and grant such other and further relief as the Court deems just and proper.

Dated: May 10, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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/s/ Zachery Z. Annable
Zachery Z. Annable

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2021, I electronically transmitted the Response. I further certify that the following counsel of record for Petitioner are being served with a copy of the Response by USPS First Class Mail and electronic means as indicated below:

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I further certify that a copy of the foregoing document is being provided to The Honorable Ada Brown.

/s/ Zachery Z. Annable
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